A P P E N D I X

APPENDIX

No. 20-1059

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 25, 2021
DEBORAH S. HUNT, Clerk

SAMUEL LEE DANTZLER,

Petitioner-Appellant,

v.

RANDEE REWERTS, WARDEN,

Respondent-Appellee.

O R D E R

BEFORE: MOORE, ROGERS, and READLER, Circuit Judges.

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

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

*Judges White and Larsen recused themselves from participation in this ruling.

NOT RECOMMENDED FOR PUBLICATION
File Name: 21a0399n.06

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Aug 25, 2021
DEBORAH S. HUNT, Clerk

SAMUEL LEE DANTZLER, Petitioner-Appellant, v. RANDEE REWERTS, Warden, Respondent-Appellee.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

BEFORE: MOORE, ROGERS, and READLER, Circuit Judges.

ROGERS, Circuit Judge.

In January 2006, Bernard Hill was murdered in his girlfriend's apartment when a group of men broke into the apartment and attacked him. Left behind in the apartment was a black knit cap worn by one of the perpetrators. The case went cold until the Detroit Police Department obtained a grant allowing them to test DNA in the cap more than three years later. That DNA evidence led officers to Samuel Dantzler, whom they arrested in connection with the murder. Dantzler's trial counsel understood that the DNA evidence would be crucial and sought to retain an independent DNA expert. The trial court appointed an expert but later decided her fee schedule was exorbitant and did not approve her compensation. When Dantzler's case eventually went to trial, Dantzler's defense counsel had not found another expert to advise on proper cross-examination of the prosecution's DNA experts or to rebut their testimony. Dantzler was ultimately convicted of first-degree felony murder. He appealed his conviction and later sought postconviction relief in the

Michigan courts, to no avail. Dantzler petitioned for habeas relief in federal court, which the district court denied. There are three issues on this appeal: (1) whether the Michigan trial court violated Dantzler's due process rights when it denied funding for a DNA expert; (2) whether Dantzler's trial counsel was ineffective for not securing a DNA expert to assist with Dantzler's defense; and (3) whether appellate counsel was ineffective for not raising a claim that trial counsel was ineffective. Because the Michigan Court of Appeals' conclusion that the trial court did not deny Dantzler funding for an expert witness is not an unreasonable application of clearly established law or an unreasonable determination of the facts, the district court properly dismissed the due process claim. Dantzler's ineffective-assistance-of-counsel claims also fail because Dantzler does not articulate how the lack of an independent DNA expert prejudiced him, and he is therefore not entitled to habeas relief.

I. The Murder and Investigation

In the early hours of January 16, 2006, Bernard Hill was shot and killed in his apartment. Just a few hours earlier, Hill had assaulted Quiana Turner, his ex-girlfriend and the mother of his daughter. News of the assault spread to Turner's family members, including Samuel Dantzler, who is Turner's uncle. After Hill attacked Turner, he went to the apartment of his girlfriend at the time, Nikitta McKenzie. At around 12:45 AM, a group of about six men dressed in all black broke down the door of McKenzie's apartment. One of the men held a gun to McKenzie's face, demanding to know whether Hill was in the apartment. Hill entered the room, and as the men began to fight, McKenzie ran into the bathroom with her cell phone and stood quietly. While she was in the bathroom, one of the attackers shot Hill in the head, killing him. Left behind at the scene of the murder was a black skull cap worn by one of the perpetrators. The police were unable to identify the assailants, however, and the case went cold.

Years later, in September 2009, the Detroit Police Department received a grant that allowed the Department to test the cap for residual DNA. The test results matched Dantzler's DNA profile, and he and his son were tried on the theory that they were part of a "posse" that attacked Hill in retaliation for assaulting Turner. Dantzler's son, Samuel Lamare Dantzler (who eventually pleaded guilty), admitted that he had pointed the attackers to Hill's location, knowing that they had golf clubs and were planning to beat Hill up, although he did not testify at his father's trial.

II. Pre-Trial Proceedings and the Murder Trial

In the months before the trial, Dantzler's counsel, Robert Kinney, sought approval for an independent DNA expert. In July 2010, the trial court approved the request and ordered that the expert make the results available at least ten days before trial, which was scheduled for that October. As the trial date neared, the prosecution still had not turned over the DNA evidence, complicating Kinney's efforts to secure an independent expert. The trial court judge indicated that if the government did not turn over its report to the defense by August 20, he would consider suppressing that evidence. At a pretrial hearing on September 9—approximately one month before the scheduled trial date—Dantzler's counsel still had not received the government's DNA report, likely due to an "overwhelming" backlog. Kinney had contacted the Specklin lab to obtain an expert, but the lab wanted to review the prosecutor's report before committing to assisting Dantzler. Based on discussions of the lab's timeline, it became clear that it was unlikely that the government's report would be completed early enough to give the defense's DNA expert enough time to review it. Although the trial court expressed its reluctance to postpone trial, the court ultimately agreed to move trial to December once Dantzler's counsel made clear that "[w]e need our expert" and Dantzler had waived any speedy trial claims.

On November 24, the trial court entered another order, this time specifically naming Ann Chamberlain as Dantzler's independent DNA expert. The order specified that Chamberlain would be compensated according to her fee schedule. But shortly before trial, an issue arose with Chamberlain's requested fees. Chamberlain demanded a $1,500 retainer fee, a $250 hourly rate, and $2,500 for each day of depositions or court testimony. The judge found the retainer to be excessive and denied funding for it.

Before the trial began in December, Kinney recounted his attempts to secure an independent DNA expert. Making no mention of the Specklin lab he had previously contacted, Kinney informed the court that he had attempted to secure Cathy Carr as an expert but that she had a conflict because she had worked with the prosecution on Dantzler's case. On Carr's recommendation, Kinney then reached out to Chamberlain, the expert who was appointed by the trial court just the month before. In a discussion about Chamberlain's rates, the court noted that it had been willing to approve the hourly rate but found her $2,500 daily fee for depositions or testimony to be "extraordinary" and the retainer to be "exorbitant." The judge explained that he had also consulted with the court's chief judge, who agreed that the requested fees were extraordinarily high. Defense counsel said he "wanted to put that on the [r]ecord because Ms. Chamberlain—well, she wants the retainer or she won't be here." Kinney asserted at one point that his client "is just making sure that Ms. Chamberlain was ready to do her own test, to determine whether his DNA was on the cap." The judge said he did not "preclude" Chamberlain as a witness, to which Kinney responded, "[S]he was supposed to be an expert, she never brought any results, never indicated to our office that she did anything." This discussion between the trial court and defense counsel often veered into other issues, and it was finally cut off when the court called in the jury.

The trial lasted approximately four days. The prosecution called Deputy Chief Medical Examiner Cheryl Loewe. Although Dr. Loewe did not perform Hill's autopsy herself, she had reviewed the autopsy report and testified that Hill's death was the result of "the presence of a single gunshot entrance wound to the back of his head." Loewe also testified that Hill endured blunt force injuries and that there was evidence of a struggle or defensive wounds. The prosecution then called William Niarhos, an evidence technician with the Detroit police, who was responsible for documenting the scene in Hill's apartment. Niarhos said he found the black skull cap on the floor of the apartment, next to a broken television. He testified that the door to Hill's apartment had been forced inward. There was broken furniture, including a dining room table and chairs, in certain areas of the apartment and a trail of blood from the front door to Hill's body.

Janet Burt, Hill's mother, also testified. Burt stated that hours after Hill had attacked Quiana Turner, early in the morning, Samuel Dantzler's son and Turner's brother Rodney banged on the door of her house. Burt did not answer the door, but she saw through the door's peephole the younger Dantzler and Rodney walk to a "gold, long car" outside her home. When they opened the door, Burt could see other individuals in the car but could not identify them. Burt initially stated that she recognized the car to be Dantzler's, but later admitted during cross-examination that it had been months since she had seen Dantzler driving the gold car. Burt also testified about another "strange" incident that day. She said that that she was watching her granddaughter—Turner and Hill's daughter—who was supposed to spend the weekend with her. But that evening, Turner's mother and cousin stopped by to pick up Burt's granddaughter. Shortly after Turner's relatives left, Burt got a call from Hill's girlfriend, McKenzie, who was screaming that Hill had been murdered.

The prosecution also called Nikitta McKenzie, Bernard Hill's former girlfriend, who recounted the events on January 15 and 16. She testified that she had learned from Hill that something had happened between Hill and Turner, that Hill was at her apartment, and that he was acting pretty nervously. At around 12:45 A.M., the door to her apartment was "kicked in." According to McKenzie, a group of about six Black men, one of whom was wearing a black cap, entered McKenzie's apartment, with at least one of the men carrying a golf club. One man held a gun to McKenzie's face and asked if Hill lived at that apartment. Hill appeared in the room, at which point a fight broke out and McKenzie ran out of the room. She heard a scream and gunshots. Because she was hiding in the bathroom and it was dark, she could not identify any of the intruders.

The government also relied on the testimony of three DNA experts. First, Christopher Steary, a forensic biologist for the Detroit Police Department, testified that he did a "cursory examination" of the cap and cut a piece from the inside rim opposite the tag, where he could "expect the person to be wearing [it at] the front of the head." Steary also collected DNA from Hill and another suspect, and sent everything to Bode Technology, an outside vendor laboratory.[1]

At a point after Steary had testified, Dantzler was permitted to raise the issue of an independent expert to the court. Dantzler expressed his frustration and dismay at the fact that he had been requesting a DNA expert since he was first "locked up" and that the cap had still not been independently tested. The court responded that it had appointed an expert and "tried to assist the defense wherever possible" but explained that it would not "get involved in [defense counsel's] trial strategy" and would "defer to Mr. Kinney." The court indicated it would "deal with the issue again . . . at an appropriate time" because the issue was not immediately relevant at that point.

[1] During his direct examination of Steary, the prosecutor removed the cap from its bag and touched it. As a result, Steary explained, no more DNA testing could be conducted.

The prosecution proceeded to call its other DNA expert witnesses. Rebecca Preston, a DNA analyst from Bode Technology, explained her examination of the DNA from Steary's cuttings of the inner rim of the cap and from three additional cuttings she had made. The Steary cutting contained a mixture of two people's DNA and included a major male contributor. Preston testified that the DNA contained in the Steary cutting was consistent with Dantzler's and that the "probability of randomly selecting an unrelated individual with this DNA profile at 13 of the 13 blocks [she] tested is one in 90 quadrillion in the U.S. Caucasian population, one in two quadrillion in the U.S. African American population, and one in 20 quadrillion in the U.S. Hispanic population." (During his opening and closing statements and throughout the trial, the prosecutor mistakenly repeated the one-in-two-quadrillion statistic as "one in 2.3 quadrillion.") The DNA evidence from the additional three cuts was inconclusive with respect to whether it was Dantzler's.

The government's third DNA expert, Nicole Kaye, who was also an analyst for Bode, testified that she extracted DNA from the initial cutting of the cap and found that alleles from Bernard Hill's sample matched the DNA profile in the cap. She also testified that Patrick Grunewald, another suspect, could be excluded as a contributor

After the prosecution's case-in-chief, the defense called Marie Simpson, Dantzler's friend and the mother of his daughter. She testified that on the night of the murder, she had picked Dantzler up after work, and he went home with her as part of an agreement to watch their daughter. According to Simpson, Dantzler spent the night in the same room as their daughter and was still at the house at the next morning. Simpson denied ever seeing Dantzler driving a gold-colored car (like the one Burt spotted outside her home) and also asserted she had never seen Dantzler wear a black cap like the one found at the scene of the murder. On cross-examination, Simpson had difficulty explaining why she never reported to the police the fact that Dantzler stayed with her on

the night of the murder. At one point during cross-examination, she testified that she had informed the investigator who arrested Dantzler that Dantzler had been with her. When pressed as to why she never went down to the police station to give a statement to that effect, she said she didn't think to and had "stayed in the background" during this period. During the prosecution's rebuttal, the investigator testified that although he "had a conversation with [Simpson]" and told her that Dantzler was being arrested for a homicide, he did not discuss the details of the homicide, and Simpson never said to him that Dantzler could not have committed the crime because he was with her.

Dantzler testified and denied that he was involved with the murder, claiming he did not even know that Hill was killed until two days after the fact. He admitted that he knew that Hill had attacked Turner and was aware of the previous assaults but testified that he had never confronted Hill about those attacks. Dantzler's defense counsel asked Dantzler whether he had owned a "long, gold-colored Chrysler" like the gold car Burt had seen outside her house. Dantzler said, "Yes, I did," and then explained that he sold this car to his brother-in-law approximately a year before Hill's murder. But on cross-examination, Dantzler denied ever having a gold car and said he had admitted owning an *old*, not gold, car. Dantzler also admitted the possibility that he had previously worn a black skull cap like the one found in Hill's apartment. When the prosecution asked Dantzler how his DNA could have ended up inside the hat, Dantzler theorized that "either it was put there or [he] had worn that hat before." Defense counsel did not present any expert testimony.

Dantzler was convicted of first-degree felony murder and was sentenced to life imprisonment without the possibility of parole.

III. The Appeal

Dantzler appealed his conviction and was appointed counsel. His appellate counsel, Neil Leithauser, raised three challenges.[2] The only one directly relevant to this appeal was the claim that the "trial court's denial of necessary funds for an independent expert to review the DNA evidence denied Mr. Dantzler due process guarantees under the Fourteenth Amendment and [the Michigan Constitution]." Leithauser did not assert a claim that trial counsel was ineffective. The Michigan Court of Appeals rejected each of Dantzler's claims and affirmed the conviction. *People v. Dantzler*, No. 303252, 2012 WL 2335913 (Mich. Ct. App. June 19, 2012) (per curiam). The court found that the trial court had agreed to pay for an expert on defendant's behalf, thus satisfying the state's obligations. *Id.* at *4. It concluded that "[d]efendant's unilateral decision not to take advantage of the opportunity did not amount to a violation of his right to equal protection. And the trial court did not abuse its discretion in refusing to pay the expert's retainer fee." *Id.* The Michigan Supreme Court denied Dantzler's application for leave to appeal the Court of Appeals' Order.[3]

IV. State Postconviction Proceedings

Dantzler, acting pro se, filed a motion for relief from judgment seeking postconviction relief in Michigan under Mich. Comp. Laws Ann. § 6.500. The motion raised numerous claims, including an ineffective-assistance-of-trial-counsel (IATC) claim based on trial counsel's failure to hire a DNA expert "after the funds were granted," among other things. Dantzler also raised an

[2] Two challenges related to the trial court's "*sua sponte* modification to a requested adverse-inference instruction" and the sufficiency of the evidence presented at trial. These are not directly related to this appeal.

[3] During the appeal, Dantzler had complained to the Michigan Appellate Assigned Counsel System (MAACS) administrator about Leithauser's representation. The MAACS deputy administrator found one claim in particular to be meritorious: that Leithauser's appellate brief was not timely, and, as a result, Leithauser did not preserve the right to oral argument. Leithauser claimed he had decided to forgo oral argument to devote more time to developing the brief, but the deputy administrator explained that the "Minimum Standards do not provide for the choice [he] described." The deputy administrator found that "Mr. Dantzler's rights went unprotected" and concluded that the violation was "serious and of concern."

ineffective-assistance-of-appellate-counsel (IAAC) claim, based in part on appellate counsel's failure to recognize that the trial court had not denied funds for an independent DNA expert and by making an unsupported argument that the trial court had denied such funding. As described below in more detail, the Michigan court denied Dantzler's motion for post-conviction relief. Dantzler petitioned both the Michigan Court of Appeals and the Michigan Supreme Court for review, and was denied by form orders stating that Dantzler failed to meet the requirements of Michigan Court Rule 6.508(D).

V. Federal Habeas Claim

Dantzler filed for habeas relief in federal court, asserting numerous claims raised in his state motion for postconviction relief, including the ineffective-assistance-of-trial counsel and ineffective-assistance-of-appellate-counsel claims, a claim that the trial court's denial of funding for a DNA expert violated his due process rights, and a challenge to the sufficiency of the evidence.[4] The district court denied each claim but granted a certificate of appealability on both ineffective-assistance-of-counsel claims.

In rejecting a sufficiency-of-the-evidence argument (a claim not before us today), the district court reasoned:

> At the end of the trial, the jury was left to consider the physical and circumstantial evidence tying Dantzler to the crime. This included testimony that the general motive for the killing was retribution against Hill for beating Turner, and that the murder was therefore committed by people related to or associated with Turner. It included Burt's testimony that she saw Dantzler's car outside her residence. And it included Dantzler's DNA that was found on a hat left at the scene of the murder. The jury also heard testimony from Dantzler's alibi witness, as well as Dantzler himself. The jury made judgments about these witnesses' credibility to which the Michigan Court of Appeals could reasonably defer.

[4] Dantzler had initially filed his federal habeas petition before he moved for postconviction relief in Michigan, but he sought and was granted a stay to exhaust his state claims.

The district court rejected Dantzler's claim that the trial court erroneously denied Dantzler funds to retain an independent DNA expert in violation of his due process rights. It reviewed Dantzler's arguments based on *Ake v. Oklahoma*, in which the Supreme Court held that when an indigent defendant's mental state is seriously in question, he or she is entitled to "access to a competent psychiatrist who will conduct an appropriate examination" and assist in the defense. 470 U.S. 68, 83 (1985). Because the Supreme Court has "not extended *Ake*'s rule to non-psychiatric experts," the district court explained, "Dantzler's claim [was] not supported by clearly established Supreme Court law." The district court also found that, as a factual matter, the trial court had in fact granted Dantzler funds to retain an independent DNA expert.

The district court then analyzed Dantzler's claims that his trial and appellate counsel were ineffective. It acknowledged that the state court opinion was ambiguous as to whether it was denying Dantzler's IATC claim on procedural grounds or on the merits. Although the district court noted that citations to "the procedural bar [(MCR 6.508(D))] seems to suggest this was the rationale for the [state court's] opinion," the district court recognized that the state court addressed the merits of the IATC claim in its procedural-default ruling. Accordingly, the district court considered the IATC claim on the merits and applied deference under the Antiterrorism and Effective Death Penalty Act (AEDPA). It acknowledged "there is a chance that additional testing might have shown there was DNA on the hat belonging to one of the other suspects" or could have "revealed the DNA of one of the other suspects," which would have "supported Dantzler's assertion that he was not the person who brought the hat to the crime scene." But the court also reasoned that, "given that the results of additional DNA testing may not have been helpful to Dantzler," it may have been a "reasonable strategic decision" to "la[y] the groundwork for the jury to question whether someone other than Dantzler left the hat at the crime scene" by just "argu[ing]

to the jury the deficiencies with the testing done by the State's experts." Even if counsel was deficient, the district court went on, Dantzler could not establish prejudice because:

> The benefits an independent DNA expert could have provided are speculative. There is no suggestion that an independent expert would have refuted the findings of the state's expert. An independent expert could have attempted to do additional DNA testing on the hat to try to identify another suspect, but it is impossible to know whether additional samples could have been obtained. And even if the expert did obtain additional samples, there is no way to know who, if anyone, the samples would have identified. It is possible that additional samples could have been matched to another family member. But even if someone else's DNA was connected to the hat, that would not eliminate the fact that Dantzler's was as well. He would still be connected to the crime scene. Because the untested DNA creates such a high degree of speculation, prejudice cannot be established under *Strickland*.

The district court accordingly dismissed Dantzler's IATC claim. The district court also concluded that the state court's rejection of the IAAC claim (on the ground that appellate counsel had discretion to "winnow out weaker arguments") was a reasonable application of federal law because Dantzler's other postconviction claims failed.

The district court denied relief but granted a certificate of appealability limited to the IATC and IAAC claims. Dantzler, still pro se, moved for reconsideration, and he petitioned to expand the certificate of appealability and to be appointed counsel for his appeal. The district court denied the motions for reconsideration and to expand the certificate, but appointed counsel for this appeal. Counsel then filed a motion before this court to expand the certificate, which was granted in part to permit consideration of the claim that the trial court violated Dantzler's due process rights by failing to provide adequate funding for a DNA expert.

VI. Due Process Claim

The Michigan Court of Appeals' conclusion that the trial court did not violate Dantzler's due process rights when it declined to fund the appointed DNA expert according to her fee schedule

was not "contrary to, or involve[] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; nor was it "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Because this claim was adjudicated on the merits as part of Dantzler's direct appeal and rejected by the Michigan Court of Appeals, it is subject to AEDPA deference. *See Thompson v. Skipper*, 981 F.3d 476, 479 (6th Cir. 2020). "AEDPA imposes a 'highly deferential standard for evaluating state-court rulings,' and 'demands that state-court decisions be given the benefit of the doubt.'" *Miles v. Jordan*, 988 F.3d 916, 924 (6th Cir. 2021) (quoting *Renico v. Lett*, 559 U.S. 766, 773 (2010)).

Dantzler cannot show that the Michigan court's finding that the trial court never denied Dantzler's request for an expert was an unreasonable determination of the facts. To prove a state court's decision was based on an unreasonable determination of the facts, a petitioner must demonstrate "that the state court's presumptively correct factual findings are rebutted by 'clear and convincing' evidence and do not have support in the record." *Pollini v. Robey*, 981 F.3d 486, 497 (6th Cir. 2020) (quoting *Matthews v. Ishee*, 486 F.3d 883, 889 (6th Cir. 2007)). The Court of Appeals concluded that because the trial court agreed to pay for an expert for Dantzler, "the state satisfied its obligation to provide [Dantzler] with the means to prepare his defense" and that Dantzler had failed to "take advantage of the opportunity." *Dantzler*, 2012 WL 2335913, at *4. The court explained that the requirement that the defendant be provided access to a competent expert does not mean that Dantzler was "entitled to an expert of his choosing" and found that Dantzler had failed to "establish that other experts were unavailable." *Id.* at *3. Such a conclusion is firmly supported by the record.

In July 2010, the trial court entered an order approving an independent DNA expert and later approved Chamberlain specifically. The court later indicated it was willing to honor the hourly rate but found either the $1,500 retainer fee or the $2,500 deposition or testimony fee to be exorbitant and denied Chamberlain's specific fee schedule.[5] The judge noted that neither he, nor the chief judge, with whom he had consulted, had seen requests for such fees. Dantzler does not explain what else the trial court should have done, short of approving Chamberlain's specific fee schedule. Dantzler indicates that counsel's discussion of Chamberlain's fee demands immediately before trial should have alerted the court that counsel had no strategic reason not to retain an expert and that he had simply been unable to do so because of the limited funds provided by the court. But trial counsel never claimed that he tried to secure other DNA experts and was unable to do so because of the compensation schedule. Dantzler does not argue that his attorney sought a continuance to find an expert and was denied. Given such a record, the Michigan court's finding that the trial court did not deny Dantzler funding for an expert is a far cry from an unreasonable determination of the facts.

Nor can Dantzler succeed on his argument that the Michigan Court of Appeals unreasonably applied federal law. As the Supreme Court has repeatedly reminded us, this standard "is difficult to meet," *White v. Woodall*, 572 U.S. 415, 419 (2014) (internal quotation marks and citation omitted), and Dantzler has not met it here.

Dantzler's primary argument is that the denial of a DNA expert violated his right to provide a meaningful defense, which he contends has long been established by federal law, as reflected in

[5] It is not entirely clear whether the trial court found the retainer or the deposition/testimony fee to be problematic. Initially, it appears the court was responding to trial counsel's discussion of Chamberlain's request for $2,500 a day. The court suggested that the testimony fee was what caused it to consult with the presiding judge, but in later discussions, the trial court's concerns appeared to center on the retainer fee. Dantzler contends that the Michigan Court of Appeals and the district court erroneously referred to $2,500 as a "retainer fee," and the warden agrees but suggests that the court was troubled by both the retainer fee and deposition fee.

Ake v. Oklahoma, 470 U.S. 68, 83 (1985), *Britt v. North Carolina*, 404 U.S. 226, 227 (1971), and *Griffin v. Illinois*, 351 U.S. 12, 17 (1956). The parties dispute how broadly *Ake* and its predecessor cases can be read: Dantzler contends that the court below read *Ake* too narrowly in concluding that it required only the appointment of a psychiatric expert. The warden counters that "under AEDPA, the district court was not permitted to expand the Supreme Court's holding" in *Ake* to find that the state is required to fund a DNA expert, and his brief is dedicated to arguing why that right is not clearly established by the Supreme Court. Lost in this dispute, however, is that the Michigan Court of Appeals, without citing *Ake*, *agreed* with Dantzler's argument that equal protection "requires that the state afford an indigent defendant an expert witness when the witness remains important to the defendant's preparation of a defense." *Dantzler*, 2012 WL 2335913, at *3. But, as noted above, that court found that the state had indeed provided Dantzler with the means to secure an expert witness, even if it was not his preferred expert, and thus there was no equal protection violation.

Dantzler does not grapple with this holding, and he does not appear to argue that the Michigan court's conclusion that equal protection does not require Dantzler to be afforded an expert of his choosing was contrary to clearly established federal law. Nor could he. *Ake*, the key case on which he relies, makes clear that a state need not "purchase for the indigent defendant all the assistance that his wealthier counterpart might buy" and that an indigent defendant does not have "a constitutional right to choose a[n expert] of his personal liking or to receive funds to hire his own." *Ake*, 470 U.S. at 77 (citing *Ross v. Moffitt*, 417 U.S. 600 (1974)). Rather, the Court explained, the crucial feature of "fundamental fairness" is that it "entitles indigent defendants to 'an adequate opportunity to present their claims fairly within the adversary system.'" *Id.* (quoting *Ross*, 417 U.S. at 612). Dantzler's suggestion that the district court's refusal to approve

Chamberlain's particular fee schedule given the prosecution's own expenditures amounts to the denial of a competent expert is belied by the record. Dantzler points to the court's "refus[al] to approve funding for a $1500 retainer" even as the prosecution "spen[t] upwards of $4,000" on its DNA testing. But Dantzler does not present evidence that the trial court had imposed a cap on the defense expert's compensation. Dantzler cannot meaningfully advance such an argument, as the record indicates that the trial court was troubled by the rate methodology, not necessarily the final cost that would be incurred. The trial court explained that it "had no problems with [Chamberlain's] hourly fee, and it may well have been that the hourly fee would have probably paralleled . . . what [Chamberlain] was entitled to had [her testimony] taken as long as the projection was." What the court did find troubling, however, was the possibility that Chamberlain could "testify for an hour and . . . bill for a full day." On this record, we are not convinced that the Michigan court unreasonably applied federal law. Accordingly, Dantzler is not entitled to habeas relief on his due process claim. To obtain habeas relief, "a state prisoner must show that the state court's ruling . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

VII. Ineffective-Assistance-of-Counsel Claims

Dantzler's IATC claim is a closer call, but it still falls short. Dantzler contends that his trial attorney rendered deficient performance by failing to secure and consult with a DNA expert, and that he was prejudiced because the defense was not equipped to rebut the prosecution's evidence. The warden disputes each point, arguing first that the IATC claim is procedurally defaulted and cannot be considered by a federal court. The warden then argues that, with respect to the merits, Dantzler has not overcome the strong presumption that trial counsel was competent

and that Dantzler's speculative assertions about the usefulness of a DNA expert are not enough to show prejudice. We disagree with the warden's claim that we are barred from considering the IATC claim but agree that it fails on the merits because Dantzler has not shown prejudice.

We do not rely upon the argument that Dantzler procedurally defaulted his IATC claim when he failed to raise it on direct appeal because the state court's opinion does not unambiguously rest on that default in rejecting the claim. The state postconviction trial court's opinion is the operative opinion for this purpose because that decision was upheld by form orders of the Court of Appeals and Supreme Court of Michigan, meaning the trial court's opinion was the "last reasoned decision" to reject Dantzler's claim. *See Guilmette v. Howes*, 624 F.3d 286, 291 (6th Cir. 2010) (en banc). Although that opinion referred at the outset and at the conclusion to the standard for evaluating procedural default under MCR 6.508(D)(3), the court's analysis addressed only the merits of the three claims that Dantzler raised. There was never an explicit statement that Dantzler failed to raise any particular claim on direct appeal.[6]

Even if a habeas petitioner has failed to comply with a procedural rule that is adequate and independent, this does not foreclose review of a federal constitutional claim unless the rule was enforced by the state courts. *See Taylor v. McKee*, 649 F.3d 446, 450 (6th Cir. 2011). Moreover, when a state court's judgment does not "'clearly and expressly' state[] that it[] . . . rests on a state procedural bar," then "procedural default does not bar consideration of a federal claim on . . . habeas review." *Harris v. Reed*, 489 U.S. 255, 263 (1989) (citation omitted). That is the case here.

[6] Indeed, one of the three claims addressed on the merits by the state trial court (ineffectiveness of appellate counsel) obviously could not have been raised on direct appeal in the first place. There also was no discussion by the postconviction court of the prejudice requirement under MCR 6.508(D)(3)(b).

Dantzler's IATC claim ultimately fails on the merits, however. We assume for purposes of argument, without deciding, that trial counsel performed inadequately in not obtaining an independent DNA expert. But Dantzler has not met the burden of showing that "the deficient performance prejudiced the defense" by essentially "depriv[ing] the defendant of a fair trial," thus "render[ing] the result unreliable." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Dantzler argues that an expert could have conducted additional testing and provided context and responses to the prosecution's DNA experts to undermine their methodologies and conclusions. Such arguments are too generalized and speculative and Dantzler is therefore unable to meet the *Strickland* prong requiring him to show that "there is a reasonable probability that . . . the result of the proceeding would have been different," *id.* at 694; that is, that the likelihood of a different outcome is "substantial, not just conceivable," *Richter*, 562 U.S. at 112.

We review this question without applying AEDPA deference because the state court on collateral review did not reach the prejudice prong. *Hodges v. Colson*, 727 F.3d 517, 537 (6th Cir. 2013) (citing *Morales v. Mitchell*, 507 F.3d 916, 935 (6th Cir. 2007); *Rayner v. Mills*, 685 F.3d 631, 636–639 (6th Cir. 2012)).

First, Dantzler argued below that if an independent expert had tested the DNA, the expert could have generated complete DNA profiles of the other contributors, and "[t]hese other people could have been shown to have links to the crime." He does not appear to advance this argument on appeal, and in any event, this argument is speculative. It also neglects the evidence available to the jury that multiple individuals (including at least one related to Dantzler) were present at the scene and that the cap included multiple DNA sources (including the victim). Yet, that evidence did not sway the jury. Dantzler perhaps unwittingly illustrated just how hypothetical his argument is when he asserted that "[t]he unidentified, partial profile donors could have been *anyone*, and . .

. [f]urther testimony most probably would have identified someone else as wearing the hat." (Emphasis added.) Even if a DNA expert could have generated additional profiles and identified whom they belonged to, and assuming those individuals had a connection to Bernard Hill or "the posse," the DNA tests still could not determine the identity of the individual who wore the hat on the night of the murder and could not discount the probability that Dantzler's DNA was on the cap. Given the numerous variables, any possible benefit of additional testing is unknowable. The district court reasonably rejected this prejudice argument on the ground that "if someone else's DNA was connected to the hat, that would not eliminate the fact that Dantzler's was as well."

Although Dantzler's argument below in this regard focused on the DNA of persons other than Dantzler, on appeal Dantzler shifts the focus to whether Dantzler's DNA was on the hat. Dantzler argues that because his DNA was taken from a multi-source touch sample (i.e., taken from a surface that more than one person had touched) that included the DNA of other people, the government witness's testimony regarding the DNA profiles it had generated was questionable. In support, Dantzler relies upon the "PCAST" report (President's Counsel of Advisors on Science and Technology, Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods (2016), https://perma.cc/CP88-JRCQ), which discusses how the interpretation of DNA profiles depends on subjective choices made by DNA analysts and concludes that "[i]t is often impossible to tell with certainty which alleles are present in the mixture or how many separate individuals contributed to the mixture, let alone accurately to infer the DNA profile of each individual." Dantzler also questions the way in which the prosecuting attorney stated the huge "1-in-2.3-quadrillion" unlikelihood as technically fallacious.

These two specific arguments were not made below, which supports the state's argument to us that Dantzler has forfeited the prejudice arguments made by him on this appeal. Generally

we do not address arguments raised for the first time on appeal. *Frazier v. Jenkins*, 770 F.3d 485, 497 (6th Cir. 2014) (citing cases). Indeed, Dantzler appears not to have more than implicitly contended that a DNA expert could have undermined the idea that Dantzler's DNA was on the hat. He did point out that he had argued to the state judge, "I'm just going by the word of the prosecution that my DNA is inside this hat and also it could be more people inside this hat other than me and I wanted the hat tested." But in the section of his habeas brief arguing prejudice, he argued at some length that the "[p]robable findings if the hat were tested by defense experts" were that "[c]omplete DNA profiles could have been generated for at least two other people who wore the hat" and that "[t]hese other people could have been shown to have links to the crime," without suggesting that an expert could have undermined the conclusion that Dantzler's DNA was on the hat. To be sure, Dantzler has consistently maintained that without an independent DNA expert, his counsel was ineffective because he "could not meet the prosecutor's case which relied solely on DNA" and that Dantzler was "just going by the word of the prosecution that [his] DNA is inside this hat." But such general statements only assert prejudice without articulating what the prejudice was and that is not sufficient to meet Dantzler's burden. That burden is one of "affirmatively prov[ing] prejudice." *See Hodge v. Haeberlin*, 579 F.3d 627, 640 (6th Cir. 2009) (quoting *Strickland*, 466 U.S. at 693).

We recognize that appellants may cite legal authority not cited below for arguments that have been made below, *see Reeser v. Henry Ford Hosp.*, 695 F. App'x 876, 882 (6th Cir. 2017), point out logical or policy-driven fallacies in the district court's opinion, or generally reason in ways that are more compelling than what was presented below, without running into the rule that arguments not raised below are forfeited. We may also take into account that defendant proceeded pro se below, *see McCormick v. Butler*, 977 F.3d 521, 528 (6th Cir. 2020), although his filing was

considerably more lawyerlike than some briefs by counsel that we see. But the new arguments regarding what amounts to prejudice in this case present a difference of kind rather than of degree. Dantzler, in short, argues a different kind of prejudice than the ones he argued below—evidence going to whether his DNA was on the hat, rather than evidence regarding the DNA of others.

In any event, Dantzler's new arguments that with the help of an independent expert he could have undermined the state's contention that his DNA was on the hat, while ably presented, are similarly speculative. He asserts that an expert could have shown why the prosecution's analysis of the cap's "multi-source mixtures of touch DNA is a fundamentally flawed science" and could have rebutted the prosecution's misuse of probability statistics. These arguments fall short because they require us to engage in impermissible conjecture.

Dantzler contends that an independent expert could have explained that the government experts' conclusions that Dantzler's DNA was in the sample were unreliable. The government's probability calculations, Dantzler argues, are unreliable because they depend on "subjective choices made by examiners." But Dantzler does not identify which "subjective choices," if any, an independent DNA expert would have attacked—let alone the extent to which those choices would have affected the probability calculations and whether the testimony would have been compelling enough to sway the jury. Dantzler does not offer any evidence, let alone a particular expert's testimony, identifying "the pitfalls [of] multi-source touch DNA analysis" or explaining how those "pitfalls" applied to his case specifically. Such speculation about how a hypothetical expert might have testified is not enough to establish prejudice. *See, e.g.*, *Keith v. Mitchell*, 455 F.3d 662, 672 (6th Cir. 2006); *Clark v. Waller*, 490 F.3d 551, 557 (6th Cir. 2007); *accord Duran v. Walker*, 223 F. App'x 865, 875 (11th Cir. 2007); *Wildman v. Johnson*, 261 F.3d 832, 839 (9th Cir. 2001); *United States v. Ashimi*, 932 F.2d 643, 650 (7th Cir. 1991).

Dantzler also argues that an independent expert could have equipped defense counsel to challenge the prosecutor's repeated misapplication of the 1-in-2-quadrillion ratio from the government's expert. The error here, Dantzler contends, is that the prosecution took Preston's statistic that "the probability of randomly selecting an unrelated individual with this DNA profile . . . is . . . one in two quadrillion in the U.S. African American population" to mean that there is a one in two quadrillion likelihood[7] that the DNA on the cap did not belong to Dantzler. As the Supreme Court has explained, this "assumption that the random match probability is the same as the probability that the defendant was not the source of the DNA sample" is known as the "prosecutor's fallacy." *McDaniel v. Brown*, 558 U.S. 120, 128 (2010) (per curiam). The Court has also warned that

> [it] is further error to equate source probability with probability of guilt, unless there is no explanation other than guilt for a person to be the source of crime-scene DNA. This faulty reasoning may result in an erroneous statement that, based on a random match probability of 1 in 10,000, there is a 0.01% chance the defendant is innocent or a 99.99% chance the defendant is guilty.

Id. at 128. The prosecutor here did not go so far as to argue that a DNA match equated with guilt. No fair reading of the transcript would support such an inference. Indeed, the prosecutor made clear that its theory rested on the DNA evidence, Dantzler's motive, and the testimony of Burt, Bernard Hill's mother.

Even if the prosecutor succumbed to the prosecutor's fallacy and trial counsel was unable to rebut the flawed presentation of evidence, Dantzler still cannot show how he was prejudiced because he offers no evidence as to the true actual-match probability. As one of our sister circuits expressed, even where probability data may be exaggerated, the actual match may still be "so

[7] Or, as the prosecutor incorrectly repeated, "one in 2.3 quadrillion."

improbable that an . . . inappropriate data base does not prejudice a defendant because the true probability would have been more than enough to persuade a jury that the defendant was the source of the evidence sample." *United States v. Chischilly*, 30 F.3d 1144, 1158 n.31 (9th Cir. 1994) (citation omitted), *overruled on other grounds by United States v. Preston*, 751 F.3d 1008 (9th Cir. 2014). The Supreme Court's opinion in *Brown*, while not directly on point, is also instructive here. In that case, the petitioner challenged the sufficiency of the evidence supporting his conviction for rape, based in part on his DNA profile, with an expert report that identified trial errors that included the prosecutor's fallacy. *See Brown*, 558 U.S. at 123–24, 129–30. While the Court ultimately held that this report from outside the trial record could not be considered as part of a sufficiency-of-the-evidence habeas claim, it opined, in dictum, that even if the court of appeals could have considered the report, it did not undermine the DNA evidence presented at trial. *Id.* at 132. Namely, though the state had conceded that its expert "overstated [the] probative value [of DNA evidence] by failing to dispel the prosecutor's fallacy," the petitioner's report still did not dispute that DNA evidence had matched the petitioner. *Id.* Here, too, there is nothing to dispute the prosecutor's conclusion that the DNA evidence matched Dantzler's. Dantzler himself does not contend that an independent expert could have meaningfully challenged the probability that Dantzler's DNA was in the cap. Indeed, Dantzler admitted the possibility that he had worn a cap like that one in the past. With no alternative probability data to cast doubt on the actual match, Dantzler's argument that he was prejudiced is, again, speculative. Accordingly, because Dantzler has not shown a "substantial" likelihood that the result of his trial would have been different but for his counsel's performance, he is not entitled to habeas relief based on his IATC claim. *Richter*, 562 U.S. at 112.

To the extent that Dantzler raises a free-standing claim that his appellate counsel was ineffective for failing to raise an IATC claim, this too must fail for lack of prejudice. Both Dantzler

and the warden agree "that the prejudice analysis for appellate counsel's ineffectiveness 'effectively merge[s] with the merits of the [trial-counsel] claim.'" Because Dantzler fails to show his trial counsel was ineffective, his claim that his appellate counsel was ineffective for failing to raise an IATC claim necessarily fails. *See Kelly v. Lazaroff*, 846 F.3d 819, 830–31 (6th Cir. 2017); *Powell v. Berghuis*, 560 F. App'x 442, 452 (6th Cir. 2013). Even if appellate counsel was deficient for not raising an IATC claim and seeking a *Ginther* hearing under Michigan law to develop the record for the IATC claim, without any indication of what such a hearing would reveal, we cannot say Dantzler was prejudiced by appellate counsel's performance.

We affirm the judgment of the district court.

KAREN NELSON MOORE, Circuit Judge, dissenting in part. I would conclude that Samuel Lee Dantzler merits federal habeas relief for his claims that his trial counsel and appellate counsel were constitutionally ineffective. I thus respectfully dissent.

Under *Strickland v. Washington*'s familiar two-prong ineffective-assistance-of-counsel (IAC) test, a defendant must show constitutional deficiency—"that counsel's representation fell below an objective standard of reasonableness"—and prejudice—"that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. 668, 688, 694 (1984). Dantzler first raised his claims of ineffective assistance of trial counsel (IATC) and appellate counsel (IAAC) in state postconviction proceedings.

As the majority points out, Maj. Op. at 17, we review the Michigan trial court decision in state postconviction proceedings because that is the last reasoned state-court opinion that addressed Dantzler's two IAC claims, *see Guilmette v. Howes*, 624 F.3d 286, 288 (6th Cir. 2010) (en banc). The Michigan trial court addressed both IAC claims on the merits, R. 20-4 (Mich. Trial Ct. Op. at 3–4) (Page ID #1812–13), excusing any procedural default, *see Perreault v. Smith*, 874 F.3d 516, 522 (6th Cir. 2017). The state court, however, discussed the merits of only the deficiency prong of *Strickland* for the IATC claim. For the IAAC claim, on the other hand, the state court reasoned that Dantzler showed no deficiency and then summarily found that Dantzler "cannot show any possible prejudice from appellate counsel's decisions." R. 20-4 (Mich. Trial Ct. Op. at 4) (Page ID #1813); *see also* Maj. Op. at 17 & n.6. This solitary sentence constitutes a merits decision. *See Harrington v. Richter*, 562 U.S. 86, 98 (2011). So we must apply 28 U.S.C. § 2254(d) deference to the deficiency prong but review de novo the prejudice prong for the IATC

claim, and we must accord § 2254(d) deference to both *Strickland* prongs for the IAAC claim. *See Rayner v. Mills*, 685 F.3d 631, 638 (6th Cir. 2012); *see also* Maj. Op. at 17–19.

Doubtless, Dantzler's trial lawyer's failure to consult with, hire, or call a DNA expert was constitutionally deficient. *Cf.* Maj. Op. at 18 ("We assume for purposes of argument, without deciding, that trial counsel performed inadequately in not obtaining an independent DNA expert."). Counsel's dereliction was not trial strategy. *Cf. Strickland*, 466 U.S. at 689. The DNA in the hat was the sole physical evidence linking Dantzler to the crime scene. The "only reasonable and available defense strategy require[d] consultation with experts or introduction of expert evidence." *Richter*, 562 U.S. at 106; *see also Woolley v. Rednour*, 702 F.3d 411, 424–25 (7th Cir. 2012) ("[W]e can perceive no strategic reason why the importance of expert testimony would not have been apparent at the time of trial. . . . Here, defense counsel could not adequately represent his client simply by cross-examining the State's expert.").

I acknowledge that IATC claim's prejudice prong presents a close question. Dantzler presents compelling data about the unreliability of forensic analyses of touch DNA, *see* Appellant's Br. at 26–30, but we do not know what a defense DNA expert would have attested at Dantzler's trial, *cf. Stermer v. Warren*, 959 F.3d 704, 741(6th Cir. 2020); Maj. Op. at 21–22. Nor will we ever know, as one of the State's experts rendered the hat untestable. *See* Appellant's Br. at 15. Yet expert rebuttal testimony could have seriously undermined the reliability of touch DNA—the core of the prosecution's case. *See Hinton v. Alabama*, 571 U.S. 263, 273 (2014); *Showers v. Beard*, 635 F.3d 625, 634 (3d Cir. 2011). I reiterate that we review de novo the prejudice issue; we are not constrained by § 2254(d) deference. *Cf. Stermer*, 959 F.3d at 739–41; *Dugas v. Coplan*, 428 F.3d 317, 334–43 (1st Cir. 2005); *Woolley*, 702 F.3d at 425–29. I thus part

ways with the majority's conclusion that Dantzler has not shown prejudice for his IATC claim. *See* Maj. Op. at 18.

Dantzler's appellate counsel also failed *Strickland*'s guarantees. *See Mapes v. Tate*, 388 F.3d 187, 191 (6th Cir. 2004) (listing nonexhaustive factors used to determine whether counsel on direct appeal was constitutionally ineffective). At bottom, Dantzler's trial counsel's failure to obtain a DNA expert was a "significant and obvious" issue that Dantzler's appellate counsel should have raised on appeal. *Id.* We cannot write off as strategy Dantzler's appellate counsel's decision to litigate the due-process claim and not the IATC claim. The Supreme Court precedent undergirding IAC claims based on a trial counsel's failure to call an expert is robust compared with the feebler caselaw that addresses trial courts' obligations to provide resources to criminal defendants under the Due Process clause. *Compare Hinton*, 571 U.S. at 274 ("The trial attorney's failure to request additional funding in order to replace an expert he knew to be inadequate because he mistakenly believed that he had received all he could get under [state] law constituted deficient performance."), *with Ake v. Oklahoma*, 470 U.S. 68, 76–77 (1985) ("[T]he Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy . . . ."). "[T]he omitted issue"—here, the IATC claim—"was clearly stronger than those presented"—here, the due-process claim. *Mapes*, 388 F.3d at 192; *see also* Maj. Op. at 16 ("Dantzler's IATC claim is a closer call [than Dantzler's due-process claim is.]"). Dantzler's counsel did not simply eschew a weaker claim to focus on a stronger one. I would thus conclude that Dantzler's appellate counsel's constitutionally deficient and prejudicial performance also merits habeas relief.

To conclude, I would grant Dantzler habeas relief on his two ineffective-assistance-of-counsel claims. I thus respectfully dissent in part.

No. 20-1059

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
May 28, 2020
DEBORAH S. HUNT, Clerk

SAMUEL DANTZLER,)
)
Petitioner-Appellant,)
)
v.) O R D E R
)
RANDEE REWERTS, Warden,)
)
Respondent-Appellee.)

Before: CLAY, Circuit Judge.

Samuel Dantzler, a Michigan prisoner represented by counsel, applies to expand the certificate of appealability ("COA") granted by the district court following the denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. *See* 28 U.S.C. § 2253(c)(1)(A).

In 2010, a jury convicted Dantzler of first-degree felony murder. As recounted by the Michigan Court of Appeals, Dantzler was convicted in the "savage beating and murder of Bernard Hill." *People v. Dantzler*, No. 303252, 2012 WL 2335913, at *1 (Mich. Ct. App. June 19, 2012). On the night he was murdered, Hill had assaulted his ex-girlfriend, Quiana Turner, who is Dantzler's niece. *Id.*; *Dantzler v. Rewerts*, No. 13-14764, 2019 WL 5597019, at *6 (E.D. Mich. Oct. 30, 2019). Afterward, Hill went to the apartment of his then-current girlfriend, Nikitta McKenzie. Later in the evening, Hill saw people outside the window, and he hid in the closet. Someone kicked in the front door and six men wearing black clothing and hats stormed into the apartment. One intruder "shoved a gun in McKenzie's face and demanded to know if Hill lived there." *Dantzler*, 2012 WL 2335913, at *1. Hill eventually came out of the closet, and McKenzie retreated to the bathroom. "She heard loud crashes, furniture falling, and the men fighting. Finally, she heard Hill scream, followed by gunshots. The room fell silent. She discovered Hill's body nearby; he died from a single gunshot wound to the back of his head." *Id.* The state jury convicted

Dantzler "of first-degree felony murder on the theory that he either killed Hill or aided and abetted in Hill's murder while participating in breaking and entering McKenzie's apartment." *Id*. The "[m]ost telling" evidence against Dantzler was "DNA evidence from the black knit cap found at the scene of the murder, showing that [Dantzler] wore the hat. The hat also contained DNA from Hill." *Id*. at *3. The trial court sentenced Dantzler to the mandatory term of life imprisonment without the possibility of parole.

Dantzler's conviction was affirmed on direct appeal, *Dantzler*, 2012 WL 2335913, *perm. app. denied*, 823 N.W.2d 595 (Mich. 2012), and his motion for state post-conviction relief failed at all three levels of Michigan's judicial review.

Dantzler filed an amended § 2254 petition raising ten claims. The district court denied his petition but granted Dantzler a COA on two of his claims: that his trial counsel was ineffective for failing to retain a DNA expert, and that his appellate counsel was ineffective for failing to raise that argument on direct appeal. *Dantzler*, 2019 WL 5597019, at *13.

Dantzler now seeks to expand the COA to include two of his other habeas claims: that the trial court violated his due process rights by failing to provide adequate funding for a DNA defense expert, and that the State presented insufficient evidence to support his conviction. By failing to request an expansion of the COA to include his other habeas claims, Dantzler has abandoned them. *See Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000).

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

Reasonable jurists could debate the district court's denial of Dantzler's claim that the trial court violated his due process rights by failing to provide adequate funding for a DNA expert. Thus, a COA shall issue on that claim.

Dantzler also seeks a COA on his claim that the State presented insufficient evidence to support his conviction. When reviewing an insufficient-evidence claim, a federal habeas court must determine "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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

To support a felony-murder conviction, the State had to prove that Dantzler either killed Hill with malicious intent while committing the breaking and entering, or that he aided and abetted someone else in committing those acts. *Dantzler*, 2012 WL 2335913, at *2. Dantzler argued on appeal that there was insufficient evidence that he participated in the breaking and entering and the murder. The Michigan Court of Appeals disagreed, noting that the State presented circumstantial evidence of his participation. *Id.* at *3. The court cited the hat found at the crime scene that contained his and Hill's DNA. The state court also referenced testimony from Hill's mother, who stated that two of Dantzler's relatives had been to her house looking for Hill, that they arrived in Dantzler's car, and that they left in his car, which contained a group of men. Evidence also showed that Hill had assaulted Dantzler's niece on the same day he was killed, supplying a motive for Dantzler's participation. *Id.* at *1. No reasonable jurist could debate the district court's determination that, viewing the evidence in the light most favorable to the prosecution, a rational jury could have found Dantzler guilty of felony murder.

Accordingly, Dantzler's application to expand the COA is **GRANTED in part** and **DENIED in part**. The Clerk's office is directed to issue a briefing schedule on Dantzler's claims that the trial court violated his due process rights by failing to provide adequate funding for a DNA defense expert, that his trial counsel was ineffective for failing to retain a DNA expert, and that his appellate counsel was ineffective for failing to raise that ineffective-assistance-of-trial-counsel claim.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SAMUEL DANTZLER, Petitioner, v. RANDEE REWERTS,[1] Respondent.	Case No. 13-14764 Honorable Laurie J. Michelson

OPINION AND ORDER DENYING PETITIONER'S MOTION FOR RECONSIDERATION [29] AND MOTION TO EXPAND THE CERTIFICATE OF APPEALABILITY [30] AND GRANTING PETITION FOR APPOINTMENT OF COUNSEL [31]

Samuel Dantzler came before this Court seeking habeas corpus relief from his Michigan state court conviction for first-degree murder. The Court carefully considered each of Dantzler's 10 claims, but ultimately denied habeas corpus relief. (*See* ECF No. 27.) The Court did grant a certificate of appealability for Dantzler's fifth and eighth habeas claims relating to ineffective assistance of counsel for failure to secure independent DNA testing or a DNA expert to testify at trial. (ECF No. 27, PageID.2242–2243.) Dantzler now asks the Court to reconsider its denial of his fifth and eighth habeas claims. (ECF No. 29.) Separately, Dantzler also asks the Court to expand the certificate of appealability to include claims two and seven (ECF No. 30) and to appoint appellate counsel (ECF No. 31). For the reasons that follow, the Court will deny Dantzler's motion

[1] The proper respondent in a habeas case is the warden of the facility where the petitioner is incarcerated. See *Edwards v. Johns*, 450 F. Supp. 2d 755, 757 (E.D. Mich. 2006). Thus, the Court substitutes Warden Randee Rewerts, the current warden at the Carson City Correctional Facility, in the caption.

for reconsideration and motion to expand the certificate of appealability. The Court will grant Dantzler's petition for appointment of counsel.

I.

Dantzler was convicted of first-degree murder by a jury in Michigan state court.

During the trial, the key piece of evidence against Dantzler was a black knit cap found at the crime scene. Testing identified Dantzler's DNA on the hat, as well as additional DNA samples that could not be positively identified. (ECF No. 7-14, PageID.772–773, 775–778, 785.) Dantzler's trial counsel requested and was granted funds to hire an independent expert to analyze the DNA evidence, but he failed to actually obtain additional testing or an expert for trial. (ECF No. 7-18, PageID.1159.) There was some other limited evidence linking Dantzler to the crime, including testimony from the victim's mother, Janet Burt, that a gold car seen outside her home before the murder was Dantzler's car and speculation that Dantzler had a motive to commit the crime because the woman beaten by the victim was his niece. (ECF No. 7-13, PageID.598–599; ECF No. 7-15, PageID.969.) Additionally, the jury heard testimony from Dantzler himself as well as Dantzler's alibi witness. (ECF No. 7-15, PageID.977–980, 930–932.)

Dantzler appealed his conviction and later filed a motion for relief from judgment in state court. All were denied.

Dantzler filed a petition for writ of habeas corpus in this Court. (ECF No. 1.) The Court stayed the case so that Dantzler could return to state court to exhaust his ineffective assistance of counsel claims. (ECF No. 10.) After those claims were denied, Dantzler returned to this Court and filed a supplemental brief raising a total of 10 claims for relief. (ECF No. 11.) Ultimately, the Court denied Dantzler's habeas petition on the merits, but granted him a certificate of appealability on two claims. (ECF No. 27.) Dantzler now seeks reconsideration of the Court's denial of his

habeas petition. In the alternative, Dantzler requests that the Court expand the certificate of appealability to include two additional claims and appoint counsel for his appeal.

II.

A.

Local Rule 7.1 permits a party to move for "rehearing or reconsideration . . . within 14 days after entry of the judgment or order." E.D. Mich. L.R. 7.1(h)(1). The moving party must "demonstrate a palpable defect by which the court and the parties and other persons entitled to be heard on the motion have been misled" and then "show that correcting the defect will result in a different disposition of the case." E.D. Mich. L.R. 7.1(h)(3).

B.

To try to demonstrate there was a palpable defect that affected the Court's opinion, Dantzler points to a portion of his trial transcript in which a forensic biologist for the Detroit Police Department testified that the hat could not be retested because it had been handled. (ECF No. 29, PageID.2256.) Dantzler suggests that this fact was overlooked by the Court and led to a palpable defect in the Court's analysis of his ineffective assistance of counsel claim. But whether the hat can ever be retested does not—and cannot—change the Court's conclusion.

The Court denied Dantzler's claim of ineffective assistance of counsel related to DNA testing of the hat for multiple reasons. First, the Court held that the state court's rejection of the claim, which held that the trial counsel's performance was not deficient, was not unreasonable under 28 U.S.C. § 2254(d), the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Second, the Court found that even if counsel's performance were found to be deficient, Dantzler could not establish prejudice, as required under *Strickland v. Washington*, 466

U.S. 668, 694 (1984). The Court found that the benefits an independent DNA expert could have provided were too speculative to establish prejudice.

Dantzler argues here that he is forever prejudiced because the hat was tainted during the trial and it can never be retested for other DNA matches. But this unfortunate truth is not enough to meet the legal definition of prejudice: "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

The fact that the hat may never be able to be retested does not change the speculative nature of Dantzler's prejudice claim and does not establish a reasonable probability of a different outcome. Thus, the Court's analysis of Dantzler's ineffective assistance of counsel claims remains unchanged.

Dantzler also argues that because the hat cannot be retested, any speculation should be in his favor. (ECF No. 29, PageID.2250.) But the law regarding due process says otherwise. When the state fails to preserve evidence "of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant," a defendant must show "(1) that the government acted in bad faith in failing to preserve the evidence; (2) that the exculpatory value of the evidence was apparent before its destruction; and (3) that the nature of the evidence was such that the defendant would be unable to obtain comparable evidence by other means." *Monzo v. Edwards*, 281 F.3d 568, 580 (6th Cir. 2002) (citing *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988)).

Dantzler has not made any allegation of bad faith on the part of the prosecution in failing to preserve the DNA evidence on the hat. And any such allegation would constitute a separate habeas claim not before this Court.

Thus, Dantzler cannot establish a palpable defect in the Court's opinion denying his habeas petition which would lead to a different outcome.

III.

Dantzler separately asks the Court to expand the certificate of appealability it granted to include two additional claims: his second habeas claim, that constitutionally insufficient evidence was presented at trial to prove his guilt beyond a reasonable doubt, and his seventh claim, that trial counsel was ineffective for failing to investigate and present evidence that Dantzler had sold his gold car before the murder. (ECF No. 30.)

In its opinion denying Dantzler habeas relief, the Court found that § 2254(d) applied to both Dantzler's second and seventh habeas claims.

For Dantzler's second claim, the Court found that the state court's rejection of the sufficiency of the evidence claim was not objectively unreasonable and thus was entitled to deference under AEDPA.

In light of the substantial deference required under § 2254(d), the Court finds that reasonable jurists would not debate the resolution of this claim and so a certificate of appealability on the second habeas claim is not warranted.

For Dantzler's seventh claim, regarding ineffective assistance of counsel related to the investigation of a car allegedly owned by Dantzler, the Court also applied § 2254(d) and held that it was reasonable for the state trial court to find that trial counsel's conduct related to investigation of the car was not ineffective.

Dantzler attempts to introduce new evidence relating to this claim by including a photograph of the car in question and declaring unequivocally that he did not own either a "gold" or "old" car at the time of the murder. But this motion is not the appropriate place to introduce new

evidence. Nor would new evidence be able to change the conclusion that the state court's analysis was reasonable based on the evidence it had before it.

For the reasons outlined in its prior opinion, the Court finds that reasonable jurists would not debate the resolution of the seventh claim and so a certificate of appealability is not warranted.

IV.

Dantzler has also petitioned the Court for appointment of counsel. (ECF No. 31.)

District courts have the discretion to appoint counsel for a habeas petitioner seeking relief under § 2254 "when the interests of justice so require." *See* 18 U.S.C. § 3006A(a)(2). When evaluating a request for appointment of counsel, courts should consider the petitioner's "financial resources, the efforts of plaintiff to obtain counsel, and whether plaintiff's claim appears to have any merit." *Henry v. City of Detroit Manpower Dep't*, 763 F.2d 757, 760 (6th Cir. 1985). Other factors the court may consider include "the nature and complexity of the case" and "the indigent's ability to present the case." *Burns v. Brewer*, No. 2:18-CV-10937, 2019 WL 5653252, at *2 (E.D. Mich. Oct. 31, 2019) (quoting *Sellers v. United States*, 316 F. Supp. 2d 516, 522 (E.D. Mich. 2004)).

In the case of Dantzler, these factors weigh in favor of appointment of counsel. Dantzler is currently incarcerated with limited financial resources. And Dantzler has been unable to secure an attorney on his own. The Court has granted Dantzler a certificate of appealability on two issues in his habeas petition because the Court believes that reasonable jurists could disagree with the Court's conclusion and it is possible that Dantzler's case has merit. Dantzler also points out that the question on appeal will involve complicated and technical issues of DNA analysis, which would be particularly difficult for Dantzler to research and brief without legal representation.

V.

For the reasons outlined above, Dantzler's motion for reconsideration (ECF No. 29) and motion to expand the certificate of appealability (ECF No. 30) are DENIED.

Dantzler's petition for appointment of counsel (ECF No. 31) is GRANTED. Pursuant to Dantzler's request, the Court hereby orders the appointment of the Federal Defender's Office to represent Dantzler in his appeal to the Sixth Circuit.

SO ORDERED.

Dated: January 13, 2020

s/Laurie J. Michelson
LAURIE J. MICHELSON
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document was served on the attorneys and/or parties of record by electronic means or U.S. Mail on January 13, 2020.

s/Erica Karhoff
Case Manager to
Honorable Laurie J. Michelson

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SAMUEL DANTZLER, Petitioner, v. RANDEE REWERTS,[1] Respondent.	Case No. 13-14764 Honorable Laurie J. Michelson

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS [1] AND GRANTING LIMITED CERTIFICATE OF APPEALABILITY AND DENYING MOTION FOR RECONSIDERATION [26]

Following a jury trial in state court, Samuel Dantzler was convicted of first degree murder. His appeals were unsuccessful. He now seeks a writ of habeas corpus in federal court under 28 U.S.C. § 2254. His petition raises 10 claims for relief.

Because the Michigan state courts' findings are not contrary to, or an unreasonable application of, clearly established Federal law, or based on an unreasonable determination of the facts, the Court cannot grant Dantzler's application for a writ. *See* 28 U.S.C. § 2254(d). The Court will, however, grant Dantzler a certificate of appealability for his fifth and eighth claims.

I.

The Michigan Court of Appeals found, presumably correctly, *Wagner v. Smith*, 581 F.3d 410, 413 (6th Cir. 2009), the following facts:

> This case arises from the January 2006, savage beating and murder of Bernard Hill. That night, Hill "jumped on" his ex-girlfriend, Quiana Turner, with whom he had

[1]The proper respondent in a habeas case is the warden of the facility where the petitioner is incarcerated. See *Edwards v. Johns*, 450 F. Supp. 2d 755, 757 (E.D. Mich. 2006). Thus, the Court substitutes Warden Randee Rewerts, the current Warden at the Carson City Correctional Facility, in the caption.

> a child. After assaulting Turner, Hill went to Nikitta McKenzie's apartment; McKenzie was Hill's current girlfriend. Sometime after 12:45 a.m., Hill looked out a window and saw shadows moving about. He hid in the living room closet and someone kicked in the front door. Six black men wearing black clothing, including black hats, rushed into McKenzie's apartment. One of the men shoved a gun in McKenzie's face and demanded to know if Hill lived there. McKenzie told the men that Hill lived in the apartment, but was not home. The man with the gun again demanded to know if Hill lived there and she repeated her response. Hill then emerged from the closet. McKenzie retreated to the bathroom and waited for the men to leave. She heard loud crashes, furniture falling, and the men fighting. Finally, she heard Hill scream, followed by gunshots. The room fell silent. She discovered Hill's body nearby; he died from a single gunshot wound to the back of his head. A jury convicted defendant of first-degree felony murder on the theory that he either killed Hill or aided and abetted in Hill's murder while participating in breaking and entering McKenzie's apartment.

People v. Dantzler, No. 303252, 2012 WL 2335913, at *1 (Mich. Ct. App. June 19, 2012).

During the trial, the crucial piece of evidence against Dantzler was a black knit cap left at the crime scene. Testing on the hat showed that Dantzler's DNA profile matched a DNA profile found on the interior rim of that hat. (ECF No. 7-13, PageID.638; ECF No. 7-14, PageID.772–773.) The state's DNA expert found multiple additional DNA samples on the hat that could not be positively identified. (ECF No. 7-14, PageID.775–778, 785.) The state's expert did not compare these profiles to the DNA of the other suspects charged in the murder. (ECF No. 7-14, PageID.826–831.) Before trial, the trial judge awarded funds for the defense to hire an independent expert to analyze the DNA evidence. (ECF 7-18, PageID.1159.) Defense counsel attempted to hire two experts. The first had a conflict of interest and the second had a retainer fee of $2,500, which the court refused to authorize. (*Id.*) Defense counsel "did not seek another expert and did not enter any evidence to establish that other experts were unavailable." (*Id.*) At trial, the defense did not call an expert witness to address the DNA evidence.

Following his conviction, Dantzler filed an appeal of right. His appellate counsel raised three claims: (1) the trial court's modification of a requested adverse-inference jury instruction

violated Dantzler's constitutional rights, (2) the evidence presented at trial was so insufficient as to render Dantzler's conviction a violation of due process, and (3) the trial court's denial of necessary funds for a DNA expert denied Dantzler due process. (ECF No. 7-18, PageID.1169–1206.)

The Michigan Court of Appeals affirmed Dantzler's conviction (ECF No. 7-18, PageID.1156–1159) and the Michigan Supreme Court denied his application for leave to appeal because it was "not persuaded that the questions presented should be reviewed." *People v. Dantzler*, 823 N.W.2d 595 (Mich. 2012) (mem.).

Dantzler then filed a petition for writ of habeas corpus in this Court. (ECF No. 1.) He raised the claims he presented on direct appeal as well as a claim that his appellate counsel was ineffective for failing to raise claims of ineffective assistance of trial counsel.

Dantzler subsequently filed a motion to stay the case so that he could return to state court and pursue relief with respect to his ineffective assistance of counsel claims. This Court granted the motion. (ECF No. 10.)[2]

Dantzler's motion for relief from judgment raised seven claims, including that trial counsel was ineffective for failing to hire an independent DNA expert after funds were granted by the court, and appellate counsel was ineffective for failing to raise this issue on direct appeal. (ECF No. 20-3, PageID.1672–1673.)

[2] Warden Rewerts asserts that Dantzler did not file his motion for relief from judgment within the 30-day time limit set by the Court's order. (ECF No. 19, PageID.1622.) The motion for relief from judgment was signed and dated September 14, 2014, but it was not filed in the trial court until September 25, 2014. (ECF No. 20-3, PageID.1675.) For purposes of complying with the Court's order, the motion was deemed filed when Dantzler timely placed it in his facility's mail system. Rules Governing Section 2254 Cases in the United States District Courts, Rule 3(b) ("A paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing.")

Dantzler's motion for relief from judgment was denied by the state trial court. (ECF No. 20-4.) Dantzler filed an application for leave to appeal the denial in both the Michigan Court of Appeals and the Michigan Supreme Court. Both were denied.

Dantzler then returned to this Court and filed a supplemental brief raising 10 claims for relief. These claims include the three claims raised on direct appeal, five of the claims raised in the motion for relief from judgment, and two additional claims. (ECF No. 11, PageID.1556–1561.) Warden Rewerts has filed a response. (ECF No. 19.)

II.

The Antiterrorism and Effective Death Penalty Act ("AEDPA") (and 28 U.S.C. §2254 in particular) "confirm[s] that state courts are the principal forum for asserting constitutional challenges to state convictions." *Harrington v. Richter*, 562 U.S. 86, 103 (2011), *see also Cullen v. Pinholster*, 563 U.S. 170, 182 (2011). If a claim was "adjudicated on the merits in State court proceedings," this Court cannot grant habeas corpus relief on the basis of that claim "unless the adjudication of the claim . . . resulted in a decision" (1) "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) "that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *See* 28 U.S.C. § 2254(d). A state court's application of federal law is unreasonable only if the petitioner can demonstrate that it is "objectively unreasonable, not merely wrong[.]" *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015). The court's reasoning must be "so lacking in justification" that the error is "beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). The standard is "intentionally difficult to meet." *Woods*, 135 S. Ct. at 1376 (citation and internal quotations marks omitted).

III.

Dantzler's first three habeas claims were raised on direct appeal and adjudicated on the merits by the Michigan Court of Appeals. *See Dantzler*, 2012 WL 2335913. Thus, when evaluating these claims the Court must apply the framework of § 2254(d).

A.

Dantzler's first habeas claim asserts that the jury was erroneously instructed regarding the destruction of the victim's fingernail clippings by the Wayne County Medical Examiner's Office. Defense counsel argued at trial that because there was evidence that the victim fought with his attackers, DNA could have been recovered from his nail clippings proving that someone other than Dantzler murdered the victim. Defense counsel requested an adverse inference instruction, directing the jury to assume that analysis of the clippings would have been unfavorable to the prosecution's case. Dantzler asserts that the trial court instead erroneously instructed the jury that they "may consider"—rather than "may infer"—"whether this evidence would have been unfavorable to the prosecutor's case and favorable to the defendant's case." (ECF No. 11, PageID.1511–1514.)

The Warden asserts that review of the claim is barred by Dantzler's approval of the instruction as read to the jury and that the claim is nevertheless without merit.

The Michigan Court of Appeals denied the claim during Dantzler's appeal of right as follows:

> By affirmatively approving the instruction, defendant's lawyer waived any claim that the instruction was erroneous. *People v. Carter*, 462 Mich. 206, 215-216; 612 N.W.2d 144 (2000). Hence, there is no error to review. *Id*. at 216.
>
> Even if defendant's trial lawyer had not waived this claim of error, we would nevertheless conclude that the trial court did not plainly err in giving this instruction. *See People v. Carines*, 460 Mich. 750, 763; 597 N.W.2d 130 (1999). . . .

> In general, a defendant is not entitled to an adverse jury instruction unless he can demonstrate that the police destroyed evidence in bad faith. *People v. Davis*, 199 Mich. App. 502, 515; 503 N.W.2d 457 (1993). Defendant failed to introduce any evidence of bad faith, and the prosecution offered evidence indicating that the destruction resulted from a mishap or standard procedures for discarding evidence in unsolved cases, rather than bad faith. The medical examiner maintained the evidence for over three years before its inadvertent destruction, and defendant failed to show any indication that the medical examiner colluded with police to destroy the evidence. The law did not require the trial court to grant defendant any instruction regarding the fingernails, and because defendant benefited from the instruction, the trial court's refusal to include the defendant's preferred language did not amount to error, let alone error that affected the outcome. *Carines*, 460 Mich. at 763.

Dantzler, 2012 WL 2335913 at *2.

The Warden first contends that review of this claim is barred because Dantzler's counsel approved of the jury instructions after they were read to the jury. Under the procedural default doctrine, a federal habeas court will not review a question of federal law if a state court's decision rests on a substantive or procedural state law ground that is independent of the federal question and is adequate to support the judgment. *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991). However, "federal courts are not required to address a procedural-default issue before deciding against the petitioner on the merits." *Hudson v. Jones*, 351 F. 3d 212, 215 (6th Cir. 2003) (citing *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997)). It may be more economical for the habeas court to simply review the merits of the Dantzler's claims, "for example, if it were easily resolvable against the habeas petitioner, whereas the procedural-bar issue involved complicated issues of state law." *Lambrix*, 520 U.S. at 525. In the present case, the Court deems it more efficient to proceed directly to the merits, especially because the claim can be easily resolved based on the record.

The Michigan Court of Appeals' analysis of the claim under plain-error review must be given deference under § 2254(d). *See Stewart v. Trierweiler*, 867 F.3d 633, 638 (6th Cir. 2017). That means that Dantzler must show the state appellate court's decision "was contrary to, or

involved an unreasonable application of, clearly established Federal law" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). "To warrant habeas relief, jury instructions must not only have been erroneous, but also, taken as a whole, so infirm that they rendered the entire trial fundamentally unfair." *Doan v. Carter*, 548 F.3d 449, 455 (6th Cir. 2008) (quoting *Austin v. Bell*, 126 F.3d 843, 846-47 (6th Cir. 1997) (internal quotation marks omitted)). Further, an instruction "may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Id*. at 147.

In *Arizona v. Youngblood*, 488 U.S. 51 (1988), the Supreme Court articulated the test for analyzing the constitutionality of police destruction of "evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." 488 U.S. at 57. This "potentially useful evidence" only violates due process when a defendant "show[s] bad faith on the part of the police." *Id*. at 58. "The presence or absence of bad faith by the [government] for purposes of the Due Process Clause must necessarily turn on the [government's] knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Id*. at 56 n.*. Further, "where the government is negligent, even grossly negligent, in failing to preserve potential exculpatory evidence, the bad faith requirement is not satisfied." *United States v. Wright*, 260 F.3d 568, 570 (6th Cir. 2001) (internal citations omitted).

Dantzler has not shown that the Michigan Court of Appeals' finding that the police did not act in bad faith was unreasonable. *See* 28 U.S.C. § 2254(d). During trial it was revealed that the Wayne County Medical Examiner initially preserved clippings taken from the victim's fingernails. (ECF No. 7-12, PageID.474.). The clippings were collected because of the possibility that DNA from one or more of the attackers may have transferred to the victim if he scratched his attacker.

(*Id*.) Police officers retrieved a sample of the victim's blood for analysis, but they failed to retrieve the clippings, and they remained at the Medical Examiner's Office until they were destroyed in 2009. (*Id.* at PageID.498.) Given the fact that the clippings were initially retained in order to aid the identification of the victim's attackers, and in the absence of any indication that the police or prosecution thought that an analysis of the clippings would have aided Dantzler's defense, it was reasonable for the Michigan Court of Appeals to find that the destruction was not a product of bad faith. *See* 28 U.S.C. § 2254(d)(2). Dantzler was therefore not entitled to an adverse inference instruction under state law, nor was he entitled to relief under *Youngblood*. Accordingly, Dantzler has failed to demonstrate that the adjudication of his first claim was contrary to, or involved an unreasonable application of, clearly established Supreme Court law. 28 U.S.C. § 2254(d).

B.

Dantzler's second habeas claim asserts that constitutionally insufficient evidence was presented at trial to prove (beyond a reasonable doubt) that he was one of the perpetrators of the crime. Dantzler asserts that the only evidence tending to prove his involvement consisted of: (1) testimony from the victim's mother, Janet Burt, that a gold-colored car seen outside her home before the murder was Dantzler's car, (2) speculation that Dantzler had a motive to commit the crime because the woman beaten by the victim, Quiana Turner, was his niece, and (3) the presence of his DNA on the black hat found at the crime scene.

Dantzler argues that this evidence was insufficient to prove that he participated in the murder. He points out that neither Burt nor anyone else identified him as being at Burt's residence prior to the murder or at the victim's apartment during the crime. (ECF No. 11, PageID.1515.) He further asserts that while the presence of his DNA on the hat may indicate that he wore that hat at

some point in time, it does not prove beyond a reasonable doubt that he wore the hat at the time of the murder. (*Id.* at PageID.1516.)

After reciting the controlling constitutional standard for determining whether constitutionally sufficient evidence was presented at trial to sustain Dantzler's conviction, the Michigan Court of Appeals rejected the claim as follows:

> The prosecution presented sufficient circumstantial evidence for a reasonable jury to conclude that defendant participated in the breaking and entering and Hill's murder. Most telling, the prosecution presented DNA evidence from the black knit cap found at the scene of the murder, showing that defendant wore the hat. The hat also contained DNA from Hill. From this evidence, a jury could rationally find that defendant was present at McKenzie's apartment on the night in question and that he physically participated in the attack on Hill, which ultimately ended with Hill's murder. Defendant's explanation that another person placed his DNA in the hat was implausible and the jury was free to reject that testimony as incredible. See *Roper*, 286 Mich. App. at 88.
>
> The prosecution also presented other strong circumstantial evidence that defendant participated in Hill's murder. The prosecution established that Hill had beaten Turner the night of his murder. Hill's mother testified that two of defendant's relatives visited her house looking for Hill, and that they arrived in defendant's car. When she did not answer the door, the men left in defendant's car, which was full of men. Thereafter, a group of men broke down McKenzie's front door before beating and murdering Hill. Although Hill's mother and Turner had agreed that Hill's mother would watch Turner's baby for the remainder of the weekend, Turner's cousin picked her up later that morning after Hill's murder but before Hill's mother learned of her son's death. Based on these facts, the jury could rationally infer that Turner's relatives, including defendant, were the men that killed Hill. In his defense, defendant stated that he and Hill remained friendly despite the fact that Hill had beaten Turner several times in the past. But the jury was free to disregard that testimony.
>
> The prosecution presented sufficient evidence to sustain defendant's conviction.

Dantzler, 2012 WL 2335913 at *3.

Under clearly established federal law, the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction is, "whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318

(1979). "Sufficiency of the evidence is determined from the totality of the evidence presented, including circumstantial evidence and inference." *United States, v. Lewis*, No. 18-6157, 2019 WL 5304487, at *4 (6th Cir. 2019). *See also United States v. Garcia*, 758 F.3d 714, 718–19 (6th Cir. 2014). A reviewing court is not required to "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt. Instead, the question 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." *Id*. at 318–19 (internal citations omitted) (emphasis in original). Furthermore, a reviewing court "faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Id*. at 326.

Federal courts reviewing state court decisions are limited by another layer of deference. When reviewing a state court decision that rejects a sufficiency of the evidence claim a federal court may grant habeas relief only if the state court decision was an objectively unreasonable application of the *Jackson* standard. *See Cavazos v. Smith*, 565 U.S. 1, 2 (2011). For a federal habeas court reviewing a state court determination that sufficient evidence was presented, "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 (2012). A state court's determination that the evidence does not fall below that threshold is entitled to "considerable deference under AEDPA." *Id*.

The Court finds that the Michigan Court of Appeals did not unreasonably apply the *Jackson* standard in denying Dantzler's sufficiency of the evidence claim.

First, there was evidence suggesting that Dantzler knew that Turner had been attacked by Hill. At trial, evidence was presented that Turner told her mother that Hill assaulted her and news of the assault traveled to members of Turner's family. Dantzler was Turner's uncle, and he admitted during his own testimony that he had heard about the assault. (ECF No. 7-15, PageID.969.)

The jury also heard evidence that Dantzler's vehicle was seen at Hill's mother's house soon after the attack. In particular, Janet Burt, Hill's mother, testified that after Hill assaulted Turner, at around 12:30 or 1:00 a.m., someone loudly banged on Burt's door. (ECF No. 7-13, PageID.595–596.) She looked out of her peephole and saw Turner's brother and Dantzler's son standing on her porch. (ECF No. 7-13, PageID.596–598.) She assumed they were looking for Hill. (*Id*.) She did not open the door, but she also saw what she identified as Dantzler's gold car in the street. (ECF No. 7-13, PageID.598–599.) The two men went back to the car, and Burt saw that there were other people inside the vehicle. (ECF No. 7-13, PageID.599.) It then drove away. (*Id*.)

There was also physical evidence that tied Dantzler to the murder—a black knit hat left at the scene of the crime. About three years after the murder, DNA taken from the hat found at the crime scene was entered into the CODIS database and was determined to match Dantzler's DNA profile. (ECF No. 7-13, PageID.669.) The hat was tested for wearer-DNA by scraping the inside rim for genetic material. (ECF No. 7-14, PageID.804, 809.) The prosecutor's expert opined that in a random sample of the population, only 1 in 2 quadrillion people would match the DNA sample found in the hat. (ECF No. 7-14, PageID.772–774, 783.) Yet, the DNA expert also identified a number of other DNA samples in the hat that could not be identified. One sample was consistent with the victim's DNA but could not be confirmed. (ECF No. 7-14, PageID.775–776, 785.) Other samples could not be matched with any of the subjects tested. (ECF No. 7-14, PageID.776–778.)

No comparison was made to known samples taken from Dantzler's son or from another one of his relatives.[3] (ECF No. 7-14, PageID.826–831.)

In Dantzler's defense, the mother of his child, Marie Simpson, testified that Dantzler was with her at her residence the entire night of the murder. (ECF No. 7-15, PageID.930–932.) Dantzler, who took the stand in his own defense, also testified that he was with Simpson that night. (ECF No. 7-15, PageID.977–980.) He further testified that he knew Turner was beaten, but he denied going with his son or Rodney Turner to Burt's or the victim's home that night. (ECF No. 7-15, PageID.972.) And while Dantzler initially testified that he had a gold-colored Chrysler for two years but sold it around 2005 (ECF No. 7-15, PageID.979), he later testified that he never owned a gold car, and that his prior testimony concerning a "gold" car was actually about an "old" car (ECF No. 7-15, PageID.1029). Dantzler guessed that his DNA was found on the hat because he had worn it on a previous occasion. (ECF No. 7-15, PageID.987–988, 1032–1033.)

At the end of the trial, the jury was left to consider the physical and circumstantial evidence tying Dantzler to the crime. This included testimony that the general motive for the killing was retribution against Hill for beating Turner, and that the murder was therefore committed by people related to or associated with Turner. It included Burt's testimony that she saw Dantzler's car outside her residence. And it included Dantzler's DNA that was found on a hat left at the scene of the murder. The jury also heard testimony from Dantzler's alibi witness, as well as Dantzler himself. The jury made judgments about these witnesses' credibility to which the Michigan Court of Appeals could reasonably defer. *See Coleman*, 566 U.S. at 655 ("*Jackson* leaves juries broad discretion in deciding what inferences to draw from the evidence presented at trial, requiring only

[3] The Defendants describe the murder as committed by Dantzler and "several other relatives." (ECF No. 19, PageID.1591.) The trial record reveals that Petitioner's son pled guilty to a lesser charge in relation to the murder. (*See* ECF No. 7-10.)

that jurors 'draw reasonable inferences from basic facts to ultimate facts.'"). It does not fall below the threshold of bare rationality for the jury to have determined beyond a reasonable doubt that Dantzler participated in the murder. Therefore, affording the jury's determination of guilt the deference it is owed under federal law, and affording the Michigan Court of Appeals the deference it is owed under AEDPA, Dantzler has failed to demonstrate that a writ of habeas corpus should issue based on his claim of constitutionally insufficient evidence

C.

Dantzler's third habeas claim asserts that the trial court erroneously denied him funds to retain an independent expert regarding the DNA testing performed on the hat. Dantzler notes that the prosecutor paid significant sums to have the hat tested by an independent examiner, Bode Technology, but that the court would not authorize funds to pay their expert, Ann E. Chamberlain, who was at the time accepting court-appointed cases.

The Michigan Court of Appeals denied relief with respect to this claim as follows:

> Defendant finally argues that the trial court denied him his due process rights by refusing to pay an expert to independently analyze the DNA evidence. "This Court reviews a trial court's decision whether to grant an indigent defendant's motion for the appointment of an expert for an abuse of discretion." *People v. Tanner*, 469 Mich. 437, 442; 671 N.W.2d 728 (2003). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Roper*, 286 Mich. App. at 84.
>
> Generally, equal protection requires that the state afford an indigent defendant an expert witness when the witness remains important to the defendant's preparation of a defense. *People v. Stone*, 195 Mich. App. 600, 605; 491 N.W.2d 628 (1992). However, this requirement does not allow the defendant to hire an expert of his choosing, and the state may satisfy this requirement by providing defendant access to any competent expert. *Id*. at 606.
>
> The trial court entered an order in which it agreed to pay for an expert to analyze the DNA evidence on defendant's behalf. The trial court agreed to pay the expert's hourly fee and expenses. Defendant then attempted to hire two experts. The first could not work for defendant because he previously worked on this case for the prosecution. The second would not work on the case without a retainer fee, which

> the trial court refused to authorize, because it deemed the $2,500 fee exorbitant. The trial court consulted the court's chief judge, who agreed that the fee amounted to an extraordinary cost that the court should not pay. Defendant did not seek another expert and did not enter any evidence to establish that other experts were unavailable. Because the trial court agreed to pay for an expert on defendant's behalf, the state satisfied its obligation to provide defendant with the means to prepare his defense. Defendant's unilateral decision not to take advantage of the opportunity did not amount to a violation of his right to equal protection. And the trial court did not abuse its discretion in refusing to pay the expert's retainer fee.

Dantzler, 2012 WL 2335913 at *3–4.

In *Ake v. Oklahoma*, the Supreme Court held that when an indigent defendant demonstrates in state court that his sanity at the time of the offense presents a significant issue, the state must assure him access to a competent psychiatrist, who will conduct an appropriate examination and assist in the defense. 470 U.S. 68, 83 (1985). The Supreme Court, however, has never extended *Ake's* rule to non-psychiatric experts. And the Sixth Circuit has noted that *Ake* "emphasized that its ruling was limited to cases in which the defendant's mental condition was seriously in question upon the defendant's threshold showing." *See Smith v. Mitchell*, 348 F. 3d 177, 207 (6th Cir. 2003) (internal quotation marks omitted). Lower courts have also held that a habeas petitioner cannot demonstrate entitlement to relief under AEDPA for the failure of the state court to appoint non-psychiatric expert witnesses for the defense because such a claim cannot be supported by clearly established Supreme Court law. *See, e.g.*, *Morva v. Zook*, 821 F.3d 517, 524–25 (4th Cir. 2016) (holding that the Virginia Supreme Court's decision that a capital murder defendant had no due-process right to appointment of a prison-risk assessment expert was not contrary to clearly established federal law; there was no clearly established federal law requiring the appointment of a state-funded non-psychiatric expert); *McKenzie v. Jones*, 2003 WL 345835, *3 (E.D. Mich. Jan. 29, 2003) (holding that the Supreme Court had not yet extended *Ake* to require the appointment of non-psychiatric experts to indigent criminal defendants; therefore, the habeas

petitioner was not entitled to a certificate of appealability); *Jackson v. Ylst*, 921 F.2d 882, 886 (9th Cir. 1990) (finding a habeas petitioner's claim that his due process rights violated when he denied the appointment of an expert on eyewitness identification could not serve as a basis for federal habeas relief). Accordingly, Dantzler's claim is not supported by clearly established Supreme Court law.

Nor is it factually accurate. The record shows that Dantzler was not denied funds to hire his own DNA expert. To the contrary, prior to trial, the trial court issued an order appointing defendant an expert witness. (ECF No. 7-11, PageID.254.) Dantzler's first attempt to retain the services of an expert was rejected because the expert had already done work on the case for the prosecution. (*Id*.) Counsel then obtained a second order appointing Ann E. Chamberlain as an expert. (*Id*.) Chamberlain informed the defense that she was willing to accept the appointment, and the court approved her quoted hourly rate. (ECF No. 7-11, PageID.255–256.) But Chamberlain also insisted on an initial retainer fee of $2,500, which the trial court rejected as excessive. (ECF No. 7-11, PageID.255.) The matter was referred to the chief judge, but he too found that the retainer fee was extraordinary. (*Id*.) Nevertheless, the trial court made it clear that it was willing to reimburse the expert for the time she actually worked on the case and her time for testifying at the hourly rate she requested, in addition to reimbursing her for her costs associated with this case, but it would not pay the $2,500 retainer. (ECF No. 7-11, PageID.255–257.) Chamberlain refused to take the appointment under those conditions. (ECF No. 7-11, PageID.256.) Dantzler's attorney did not seek the appointment of another expert. Accordingly, the record shows that the trial court did not deny Dantzler an independent DNA expert. The Michigan Court of Appeal's rejection of this claim was reasonable and does not provide a basis for granting habeas relief.

IV.

Dantzler's fourth, fifth, sixth, seventh, and eighth habeas claims were presented to the state courts in Dantzler's motion for relief from judgment and the appeal that followed it. When reviewing claims raised in post-conviction proceedings, the court must first determine whether the claims were adjudicated on the merits and thus, are entitled to AEDPA deference. To answer this question, the Court must "look to the last reasoned state court opinion." *See Guilmette v. Howes*, 624 F.3d 286, 291 (6th Cir. 2010) (en banc). Here, that comes from the state trial court. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018).

But unfortunately, that opinion does not make entirely clear whether it is denying the motion on procedural grounds or on the merits. The opinion begins by citing MCR 6.508(D)(3), which precludes review of an issue raised in a post-conviction motion if that issue could have been raised on direct appeal unless the petitioner shows good cause and prejudice or actual innocence—i.e., the procedural bar. *See* Mich. Ct. R. § 6.508; *Howard v. Bouchard*, 405 F.3d 459, 477 (6th Cir. 2005). The opinion notes that federal courts have recognized ineffective assistance of appellate counsel as "sufficient, if adequately supported, to satisfy the good cause prong." (ECF No. 20-4, PageID.1811.) The opinion then analyzes the three underlying grounds for relief raised by Dantzler: prosecutorial misconduct, ineffective assistance of trial counsel, and ineffective assistance of appellate counsel. (*Id.*at PageID.1811–1813.) Each claim is found to be "without merit." The opinion then concludes by finding that "Defendant has not shown 'good cause' under **MCR 6.508(D)(3)**, nor has he proven actual prejudice. Therefore, for all the aforementioned reasons stated, defendant's motion for relief from judgment and motion for evidentiary hearing are denied." (ECF No. 20-4, PageID.1814) (emphasis in original). The bolded citation to the procedural bar seems to suggest this was the rationale for the opinion.

But the Sixth Circuit has addressed precisely this issue before, finding that "although the state court rejected the *Strickland* claim through a procedural-default ruling, the court addressed the alleged deficiency on the merits as part of its ruling, meaning AEDPA deference applies to the *Strickland* claim." *Perreault v. Smith*, 874 F.3d 516, 522 (6th Cir. 2017); *see also Moritz v. Lafler*, 525 F. App'x 277, 284 (6th Cir. 2013) ("The court's express statement that '[t]his argument is without merit' is enough to satisfy AEDPA's merits-adjudication requirement."); *Hoffner v. Bradshaw*, 622 F.3d 487, 505 (6th Cir. 2010) (applying AEDPA deference when the state court addresses the merits of the claims as an alternative to application of the procedural bar).

Thus, this Court feels compelled to apply § 2254(d) and consider only whether the state court opinion was contrary to, or involved an unreasonable application of, clearly established federal law, or was based on an unreasonable determination of the facts.

A.

Dantzler's fourth habeas claim alleges prosecutorial misconduct. Dantzler asserts that the prosecutor suppressed evidence that there were problems within the Detroit Police Crime Lab at the time of Dantzler's trial and that the Lab handled the hat prior to Dantzler's trial, calling into question the integrity of the DNA evidence. (ECF No.11, PageID.1526.)

The state trial court reasoned:

> In examining the entire record, the Court finds the prosecutor's conduct grounded on reasonable inference based on the evidence presented at trial, which is proper. Because defendant did not object at trial to the alleged misconduct, review is precluded absent a showing of plain error. Further, the Court Appeals ruled in its Opinion pursuant to defendant's direct appeal that the prosecution presented other strong evidence that defendant participated in the victim's murder. Therefore, defendant's contention that the DNA evidence was the only evidence linking him to the murder is incorrect. As such, this Court finds neither prosecutorial impropriety nor prejudicial effect and that defendant's claims of error in this regard are without merit.

(ECF No. 20-4, PageID.1811–1812.)

Although the Court finds this reasoning wanting, it does not rise to the level of an unreasonable application of law or determination of facts. Dantzler alleges that problems in the Detroit Police Crime Lab affected the integrity of his trial. But, in fact, the only part of the Detroit Police Department Crime Lab that was affected was the Firearms Unit, which was suspended from analyzing firearms evidence in April 2008, after it was discovered that the crime lab was producing results that were potentially unreliable. *See People v. Williams*, 2011 Mich. App. LEXIS 2131 (Mich. Ct. App. Dec. 1, 2011). The problems with the Firearms Unit, however, had no bearing on Dantzler's case. It was not involved in the retention or testing of the hat. While the Crime Lab may have initially stored the hat, it was sent out to an independent facility in Virginia for testing. (ECF No. 7-13, PageID.633.) Dantzler proffers no evidence that the problems with the Detroit Police Department Crime Lab had any impact on his case. Thus, to the extent the state court was relying on that fact, its finding that this claim has no merit is reasonable. And for the same reason, the argument would not warrant habeas relief even on *de novo* review.

B.

In his motion for relief from judgment, Dantzler also claimed he was denied the effective assistance of counsel where counsel failed to (1) hire an independent DNA expert, (2) object to the trial court's adverse inference instruction, and (3) investigate evidence related to the sale of Dantzler's gold car. These claims make up Dantzler's fifth, sixth, and seventh habeas claims, respectively.

The state trial court addressed these three claims together, finding that:

> In this case, defendant has failed to overcome the heavy burden of proving that he received ineffective assistance of counsel. The record does not demonstrate that defense counsel's performance was unreasonable and his trial strategy and determinations will not be substituted with the judgment of this Court. This Court finds that defense counsel performed competently in his representation of defendant at his trial. Therefore, defendant's claims are found to be without merit.

(ECF No. 20-4, PageID.1813.)

This Court will address each of Dantzler's ineffective-assistance-of-counsel claims in turn.

1.

Dantzler's fifth habeas claim is that he was denied the effective assistance of trial counsel because his attorney failed to secure independent DNA testing or a DNA expert to testify at trial. This claim is Dantzler's strongest. Yet the state court did not delve into the merits of the claim in any detail.

The applicable federal law when assessing whether counsel was ineffective is the two-prong test from *Strickland v. Washington*. The petitioner must show that (1) "counsel's representation fell below an objective standard of reasonableness" and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). The state trial court concluded that trial counsel's performance was sufficient and did not address the prejudice prong. "When a state court relied only on one Strickland prong to adjudicate an ineffective assistance of counsel claim, AEDPA deference does not apply to review of the Strickland prong not relied upon by the state court. The unadjudicated prong is reviewed de novo." *Rayner v. Mills*, 685 F.3d 631, 638 (6th Cir. 2012)

DNA evidence was at the heart of the case against Dantzler. The State's expert identified Dantzler's DNA on a hat left at the scene of the crime. (ECF No. 7-13, PageID.638; ECF No. 7-14, PageID.772–773.) But the hat contained other DNA that was not tested to determine if it matched any of the other defendants. (ECF No. 7-14, PageID.775–778, 826–831.) Dantzler testified that he was not present during the crime and does not know how his DNA got on the hat, but he acknowledged that he had previously owned hats like the one found at the crime scene.

(ECF No. 7-15, PageID.987–988.) McKenzie, the victim's girlfriend, testified that approximately six men were present during the crime. (ECF No. 7-13, PageID.684.) And multiple members of Dantzler's family, including his son, were also indicted for the murder. (*See* ECF No. 19, PageID.1591.)

So there is a chance that additional testing might have shown there was DNA on the hat belonging to one of the other suspects. Yet, the prosecution's DNA expert did not compare the DNA found on the hat against the samples of Dantzler's son or any of the other suspects, which she had in her possession and used to compare to blood evidence found at the crime scene. (ECF No. 7-14, PageID.826–831.) The DNA expert also admitted that she could not determine when the DNA found on the hat was transferred there or who was wearing the hat on any particular date. (ECF No. 7-14, PageID.814, 839.) If Dantzler's trial counsel had obtained an independent DNA expert, he or she could have compared the DNA on the hat to that of the other suspects and could also have tested additional scrapings from the hat. If the testing of the hat had revealed the DNA of one of the other suspects, this could have supported Dantzler's assertion that he was not the person who brought the hat to the crime scene.

Indeed, Dantzler's trial counsel seemed to recognize the importance of DNA evidence, yet never explained why he gave up on trying to obtain an expert. But on the other hand, trial counsel argued to the jury the deficiencies with the testing done by the State's expert and that there were untested DNA samples that were not compared to Dantzler's relatives. He laid the groundwork for the jury to question whether someone other than Dantzler left the hat at the crime scene. And given that the results of additional DNA testing may not have been helpful to Dantzler, this could have been a reasonable strategic decision. And when considering whether counsel was ineffective, "the

defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689.

Moreover, even if trial counsel's performance could be considered deficient, Dantzler cannot establish prejudice, even under *de novo* review. The benefits an independent DNA expert could have provided are speculative. There is no suggestion that an independent expert would have refuted the findings of the state's expert. An independent expert could have attempted to do additional DNA testing on the hat to try to identify another suspect, but it is impossible to know whether additional samples could have been obtained. And even if the expert did obtain additional samples, there is no way to know who, if anyone, the samples would have identified. It is possible that additional samples could have been matched to another family member. But even if someone else's DNA was connected to the hat, that would not eliminate the fact that Dantzler's was as well. He would still be connected to the crime scene. Because the untested DNA creates such a high degree of speculation, prejudice cannot be established under *Strickland*. *See, e.g.*, *Gonzalez v. Knowles*, 515 F.3d 1006, 1015 (9th Cir. 2008) (finding no prejudice from counsel's alleged failure to investigate where petitioner "merely argues that if tests had been done, and if they had shown evidence of some brain damage or trauma, it might have resulted in a lower sentence"); *Racz v. Knipp*, No. CV 12-8270-JVS RNB, 2014 WL 4449791, at *32 (C.D. Cal. June 3, 2014) (finding that speculation about results of DNA testing is insufficient to satisfy petitioner's burden to show prejudice); *Mariano v. United States*, 2019 U.S. App. LEXIS 17340, *3 (11th Cir. 2019) (finding there was no prejudice because petitioner failed to establish that hiring an expert witness to testify about DNA would have resulted in the disclosure of facts that would have helped his case).

Despite misgivings about trial counsel's failure to obtain independent DNA testing and the state court's cursory analysis of the ineffective-assistance-of-counsel claim, the Court cannot find that the state trial court's rejection of Dantzler's ineffective assistance of counsel claim involved an unreasonable application of clearly established federal law or was based on an unreasonable determination of the facts. Even if the Court were to assume that trial counsel's performance was deficient, Dantzler cannot establish prejudice as required by *Strickland*.

2.

Dantzler's sixth habeas claim asserts that his trial counsel was ineffective for failing to object to the adverse-inference instruction regarding the destruction of the fingernail clippings. As indicated above, however, the Michigan Court of Appeals determined that as a matter of state law Dantzler was not entitled to the adverse inference instruction he proposed because he failed to demonstrate that the fingernail clippings were destroyed in bad faith. Thus, the state trial court's finding that trial counsel's failure to object to the jury instruction was not ineffective is reasonable.

3.

Dantzler's seventh habeas claim asserts that his trial counsel was ineffective for failing to investigate and present evidence that he sold his gold car to his brother-in-law, Stephen Jennings, before the crime. Dantzler supports this claim with an affidavit he presented to the trial court indicating that he informed his counsel that he sold his car to Jennings. (ECF No. 20-3, PageID.1809.) Then, in the Michigan Court of Appeals, Dantzler presented an affidavit from Jennings indicating that he "purchased from Samuel Dantzler Sr. a 1974 Chrysler Newport, 4 door, yellow gold AKA banana boat in September 2003." (ECF No. 20-5, PageID.1995.) But Dantzler testified at trial that he never owned a gold car, and that his previous testimony referred to an "old car" and not a "gold car." (ECF No. 7-15, PageID.979, 1029.) Dantzler's claim that he in fact

owned a gold car but sold it seems then to contradict part of his own trial testimony. In any event, while Burt's testimony that she saw Dantzler's car outside her residence while Dantzler's son banged on her door provided some evidence linking Dantzler to the crime, as indicated above, the key piece of evidence connecting Dantzler to the crime was the hat. And the Court cannot find that but for trial counsel's failure to investigate this car sale further, there is a reasonable probability of a different verdict. It appears counsel would have simply received conflicting information – that Dantzler never owned a gold car but that he sold a gold car to Jennings. And best-case scenario, the jury would have heard that Dantzler did own a gold car but now his brother in law had it in a case that involved numerous defendants from the same family. Thus, it was reasonable for the state trial court to find that counsel's conduct related to investigation of the car was not ineffective.

C.

Dantzler's eighth habeas claim is that his appellate counsel was deficient for failing to preserve the opportunity for oral arguments, failing to forward a response brief, and failing to raise a reversible issue on appeal. The state trial court found this claim to be "without merit because the appellate counsel's decision to winnow out weaker arguments and focus on those more likely to prevail is not evidence of ineffective assistance." (ECF No. 20-4, PageID.1813.) The trial court further states that "defendant cannot show any possible prejudice from appellate counsel's decisions." (*Id.*) The *Strickland* standard applies to claims of ineffective assistance of appellate counsel. *See Whiting v. Burt*, 395 F. 3d 602, 617 (6th Cir. 2005). In light of the finding that the state trial court was reasonable in rejecting Dantzler's other post-conviction claims, as discussed above, the Court finds the state trial court's rejection of his ineffective-assistance-of-appellate-counsel claim to be a reasonable application of federal law.

V.

Dantzler makes two final claims in his habeas petition. Neither of these claims state a basis for habeas relief.

Dantzler's ninth claim asserts that the trial court's decision denying his motion for relief from judgment was contrary to clearly established Supreme Court law and denied Dantzler his right to a full and fair hearing on his post-conviction claims.

This claim is not cognizable. "The Sixth Circuit has consistently held that errors in [state] post-conviction proceedings are outside the scope of federal habeas corpus review." *Cress v. Palmer*, 484 F. 3d 844, 853 (6th Cir. 2007). A federal habeas corpus petition cannot be used to mount a challenge to a state's scheme of post-conviction relief. *See Greer v. Mitchell*, 264 F. 3d 663, 681 (6th Cir. 2001). The "scope of the writ" does not encompass a "second tier of complaints about deficiencies in state post-conviction proceedings." *Cress*, 484 F. 3d at 853 (quoting *Kirby v. Dutton*, 794 F. 2d 245, 248 (6th Cir. 1986)).

Dantzler's tenth and final claim asserts that the cumulative effect of all the alleged errors denied him his right to a fundamentally fair trial. This claim likewise exceeds the scope of habeas review. "The Supreme Court has not held that distinct constitutional claims can be cumulated to grant habeas relief. Thus, it cannot be said that the judgment of the [Michigan] courts is contrary to . . . any . . . Supreme Court decision so as to warrant relief under the AEDPA." *Lorraine v. Coyle*, 291 F.3d 416, 447 (6th Cir. 2002). In short, post-AEDPA, a claim that the cumulative effect of errors rendered a habeas petitioner's trial fundamentally unfair is not cognizable. *Sheppard v. Bagley*, 657 F.3d 338, 348 (6th Cir. 2011) (citing *Moore v. Parker*, 425 F.3d 250, 256 (6th Cir. 2005)).

VI.

Before Dantzler may appeal this decision, the Court must determine whether to issue a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22(b). A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy § 2253(c)(2), Dantzler must show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citation and internal quotation marks omitted).

The Court finds that reasonable jurists could debate the resolution of Dantzler's ineffective-assistance-of-counsel claims for trial counsel's failure to obtain an independent DNA expert and for appellate counsel's failure to raise that issue on direct appeal. The prosecution's case rested in large measure on DNA evidence tying Dantzler to a hat found at the scene of the crime. Dantzler insisted that he was not present at the crime and repeatedly asked his attorney to retain an independent DNA expert. After the court awarded funds to hire an expert, Dantzler's attorney failed to secure such an expert. It is possible that further DNA testing of the hat could have revealed the DNA of another suspect in the crime, which could have corroborated Dantzler's story that his DNA was only on the hat because he had worn it on an earlier occasion. The Court found that Dantzler could not establish prejudice and thus the state court's rejection of this claim could not be considered unreasonable under § 2254(d). But another reasonable jurist might find that either the state court's decision on this issue was an unreasonable application of clearly established Supreme Court law or that § 2254(d) does not apply.

The Court will therefore grant a certificate of appealability with respect to Dantzler's fifth and eighth habeas claims related to ineffective assistance of trial and appellate counsel for failure to secure independent DNA testing or a DNA expert to testify at trial.

The Court will deny a certificate of appealability with respect to Dantzler's other claims because reasonable jurists would not debate the Court's resolution of those claims.

If Dantzler chooses to appeal the Court's decision, he may proceed in forma pauperis because an appeal could be taken in good faith. 28 U.S.C. § 1915(a)(3).

VII.

Finally, the court will deny Dantzler's pending motion for reconsideration (ECF No. 26) regarding this Court's order denying his motion to amend and motion to stay (ECF No. 25). The motion does not identify any palpable defect in the Court's order as required by E.D. Mich. Local Rule 7.1(h)(3).

VIII.

For the reasons given, the Court 1) DENIES WITH PREJUDICE the petition for a writ of habeas corpus, 2) GRANTS a certificate of appealability with respect to Dantzler's fifth and eighth claims; 3) DENIES a certificate of appealability with respect to his other claims, and 4) GRANTS permission to appeal in forma pauperis. The Court also DENIES the motion for reconsideration.

SO ORDERED.

Dated: October 30, 2019

s/Laurie J. Michelson
LAURIE J. MICHELSON
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document was served on the attorneys and/or parties of record by electronic means or U.S. Mail on October 30, 2019.

s/Erica Karhoff
Case Manager to
Honorable Laurie J. Michelson

STATE OF MICHIGAN
THIRD CIRCUIT COURT
CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

Case No. 10-003521
Hon. Gregory D. Bill

v

SAMUEL LEE DANTZLER,
Defendant.
_____/

OPINION

For the following reasons enumerated herein, defendant's motion for relief from judgment and motion for evidentiary hearing are denied.

Following a jury trial, defendant, Samuel Lee Dantzler, was convicted of one count of first-degree felony murder, **MCL 750.316(1)(a)**. Defendant was sentenced to life imprisonment without the possibility of parole.

On June 19, 2012, the Michigan Court of Appeals affirmed defendant's conviction and sentence. On December 26, 2012, the Michigan Supreme Court denied defendant's application for leave to appeal the order of the Court of Appeals. Defendant now files a motion for relief from judgment pursuant to **MCR 6.500 et seq.** The Prosecution has not filed a response.

In order to advance an allegation in a Motion for Relief from Judgment that could have been made in a prior appeal or motion, a defendant must demonstrate "good cause" for failure to raise the grounds on appeal and actual prejudice resulting from the alleged irregularities that support the claim of relief, pursuant to **MCR 6.508(D)(3)(b).** The cause and prejudice standards are based on precedent from the United States Supreme Court.[1]

A court may not grant relief, if the defendant alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction of the sentence or in a prior motion for relief from judgment; unless defendant demonstrates good cause for the failure to previously raise the grounds and actual

[1] *Wainwright v Sykes*, 433 US 72; 97 S Ct 2497; 53 LEd 2d 594 (1977)

prejudice from the alleged irregularities that support the claim.[2] The federal courts have recognized certain claims, which are sufficient for establishing good cause. Government interference, the inability to obtain a factual basis for the claim, and ineffective assistance of appellate counsel, are all sufficient, if adequately supported, to satisfy the good cause prong.

Specifically, defendant raises as grounds for relief 1) prosecutorial misconduct, 2) ineffective assistance of trial counsel; and 3) ineffective assistance of appellate counsel.

Prosecutorial Misconduct

Defendant alleges that the prosecutor engaged in misconduct, where the prosecutor failed to notify the defendant that the ONLY evidence linking him to the crime could have been tainted or otherwise compromised by the Detroit Police Crime Lab."[3] The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial.[4] Generally it is the duty of the prosecutor to see that a defendant receives a fair trial.[5] Likewise, it is the prosecutor's duty to use the best endeavor to convict persons guilty of a crime, and in the discharge of this duty "an active zeal is commendable."[6]

This Court reviews these issues on a case-by-case basis and must examine pertinent portions of the lower court record to evaluate the prosecutor's conduct and remarks in context. Prosecutorial misconduct relates to a miscarriage of justice only if the statements are so egregious that even with a cautionary instruction, a defendant has been denied a fair trial.[7] Defendant contends that the above stated action of the prosecutor denied him a fair trial. In examining the entire record, the Court finds the prosecutor's conduct grounded on reasonable inference based on the evidence presented at trial, which is proper.[8] Because defendant did not object at trial to the alleged misconduct, review is precluded absent a showing of plain error.[9] Further, the Court Appeals ruled in its Opinion pursuant to defendant's direct appeal that the prosecution presented other strong evidence that defendant participated in the victim's murder. Therefore, defendant's contention that the DNA evidence was the only evidence linking him to the murder is incorrect. As such, this Court finds neither

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[2] MCR 6.508(D)(3); *People v Brown*, 196, Mich App 153; 492 NW2d 770 (1992), *People v Watroba*, 193 Mich App 124; 483 NW2d 441 (1992)

[3] Defendant's, Motion for Relief from Judgment, Brief.

[4] *People v Daniel*, 207 Mich App 47; 523 NW2d 830 (1994); *People v Allen*, 201 Mich App 98; 505 NW2d 869 (1993)

[5] *People v Dane*, 59 Mich 550; 26 NW 781 (1986)

[6] *Id.*

[7] *People v Montevecchio*, 32 Mich App 163 (1971)

[8] *People v Vaughn*, 200 Mich App 39; 504 NW2d 2 (1993)

[9] *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999)

prosecutorial impropriety nor prejudicial effect and that defendant's claims of error in this regard are without merit.

Ineffective Assistance of Trial Counsel

Defendant next claims that he was denied the effective assistance of counsel where counsel failed to 1) hire an independent DNA expert, 2) failed to object to the Court's adverse inference instruction, and 3) failed to investigate evidence.

The United States and Michigan Constitution's guarantee the right to effective assistance of counsel.[10] For a defendant to establish a claim that he was denied his state or federal constitutional right to the effective assistance of counsel, he must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial.[11] As for deficient performance, a defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances.[12] As for prejudice, a defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[13]

Because strategy is a tactical decision on the part of counsel, this Court will indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. These standards require no special amplification in order to define counsel's duty to investigate. [14]

Ineffective assistance of counsel can take the form of a failure to call witnesses or present other evidence, only, if, the failure deprives the defendant of a substantial defense.[15] A defense is substantial, if it might have made a difference in the outcome of the trial.[16] Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy.[17] This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight.[18] In order to overcome the presumption of sound trial strategy, a defendant must show that his counsel's failure to

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[10] US Const, Am VI; Const 1963, art 1, § 20

[11] *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

[12] *People v Mitchell*, 454 Mich 145, 156; 560 NW 2d 600 (1997).

[13] *Id.* at 167.

[14] *Strickland v Washington*, 466 US 668; 104 S. Ct. 2052; 80 L.Ed 2d 674 (1984).

[15] *People v Hoyt*, 185 Mich App 531 (1990); *People v Julian*, 171 Mich App 153, 158-159 (1988).

[16] *People v Kelly*, 186 Mich App 524 (1990).

[17] *Mitchell, supra* at 163.

[18] *People v Barnett*, 163 Mich App 331 (1987).

prepare for trial resulted in counsel's ignorance of, and hence failure to present valuable evidence that would have substantially benefited the defendant.[19] The rule that a defendant is entitled to effective assistance of counsel does not mean the defendant is entitled to the effective assistance of counsel to the extent that he is assured of a successful defense and acquittal.[20] Finally, in making the testimonial record necessary to support a claim of ineffective assistance of counsel, the testimony of trial counsel is essential.[21] The absence of such testimony limits this Court's review to what is contained in the record.[22]

In this case, defendant has failed to overcome the heavy burden of proving that he received ineffective assistance of counsel. The record does not demonstrate that defense counsel's performance was unreasonable and his trial strategy and determinations will not be substituted with the judgment of this Court. This Court finds that defense counsel performed competently in his representation of defendant at his trial. Therefore, defendant's claims are found to be without merit.

Ineffective Assistance of Appellate Counsel

Defendant also cannot succeed on his related claim that appellate counsel was ineffective for not raising the issues claimed herein on direct appeal. Ineffective assistance of appellate counsel must be measured according to the same doctrine as trial counsel.[23] Moreover, it is well established that appellate counsel need not raise all possible claims of error on appeal.[24] Defendant contends his appellate counsel was ineffective for failing to raise the above issues on direct appeal. This contention is without merit because the appellate counsel's decision to winnow out weaker arguments and focus on those more likely to prevail is not evidence of ineffective assistance.[25]

This Court will not second-guess the strategies appellate counsel employed. The record clearly reflects that the constitutional rights afforded to defendant under the United States and Michigan Constitutions have been protected. Furthermore, defendant's argument fails because the defendant cannot show any possible prejudice from appellate counsel's decisions.[26] Defendant was afforded a fair trial and full appeal. Defendant's claim is without merit.

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[19] *People v Caballero*, 184 Mich App 636 1990).
[20] *People v Bohn*, 49 Mich App 244 (1973).
[21] *Mitchell, supra* at 168
[22] *People v Darden*, 230 Mich App 597 (1998).
[23] *Strickland v Washington*, 466 US 668; 104 S. Ct. 2052; 80 L.Ed 2d 674 (1984)
[24] *Jones v Barnes*, 463 US 745; 103 S. Ct. 3308; 72 L.Ed. 2d 987 (1983)
[25] *People v Pratt*, 254 Mich. App. 425, 430; 656 N.W. 2d 866 (2002)
[26] *Id.* at 430

Defendant has not shown "good cause" under **MCR 6.508(D)(3)**, nor has he proven actual prejudice. Therefore, for all the aforementioned reasons stated, defendant's motion for relief from judgment and motion for evidentiary hearing are hereby **DENIED**.

Dated: 3-4-15

Gregory O. Rey
CIRCUIT COURT JUDGE

STATE OF MICHIGAN
THIRD CIRCUIT COURT
CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

Case No. 10-003521
Hon. Gregory D. Bill

v

SAMUEL LEE DANTZLER.
Defendant.
_____/

ORDER

AT A SESSION OF SAID COURT HELD IN THE FRANK MURPHY HALL OF JUSTICE ON 03·04·18

PRESENT: HONORABLE HON. GREGORY D. BILL
CIRCUIT COURT JUDGE

For the reasons stated in the foregoing Opinion, **IT IS HEREBY ORDERED** that Defendant's motion for relief from judgment and motion for evidentiary hearing are **DENIED**.

Gregory D. Bill
CIRCUIT COURT JUDGE

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 19, 2012
v	No. 303252 Wayne Circuit Court
SAMUEL LEE DANTZLER, Defendant-Appellant.	LC No. 10-003521-FC

Before: GLEICHER, P.J., and M. J. KELLY and BOONSTRA, JJ.

PER CURIAM.

Defendant Samuel Lee Dantzler appeals by right his jury conviction of first-degree felony murder. MCL 750.316(1)(b). The trial court sentenced defendant to life imprisonment without the possibility of parole. Because we conclude that there were no errors warranting relief, we affirm.

This case arises from the January 2006, savage beating and murder of Bernard Hill. That night, Hill "jumped on" his ex-girlfriend, Quiana Turner, with whom he had a child. After assaulting Turner, Hill went to Nikitta McKenzie's apartment; McKenzie was Hill's current girlfriend. Sometime after 12:45 a.m., Hill looked out a window and saw shadows moving about. He hid in the living room closet and someone kicked in the front door. Six black men wearing black clothing, including black hats, rushed into McKenzie's apartment. One of the men shoved a gun in McKenzie's face and demanded to know if Hill lived there. McKenzie told the men that Hill lived in the apartment, but was not home. The man with the gun again demanded to know if Hill lived there and she repeated her response. Hill then emerged from the closet. McKenzie retreated to the bathroom and waited for the men to leave. She heard loud crashes, furniture falling, and the men fighting. Finally, she heard Hill scream, followed by gunshots. The room fell silent. She discovered Hill's body nearby; he died from a single gunshot wound to the back of his head. A jury convicted defendant of first-degree felony murder on the theory that he either killed Hill or aided and abetted in Hill's murder while participating in breaking and entering McKenzie's apartment.

Defendant first argues that the trial court denied him his due process rights by refusing to instruct the jury that is could infer that missing fingernail evidence would have exonerated him. At trial, defendant's lawyer successfully argued—over the prosecutor's objection—that the trial court should give the jury an adverse inference instruction with regard to missing fingernail evidence. The trial court agreed to give the instruction, but decided to alter the standard instruction by changing the word "infer" to "consider." Thus, the trial court instructed the jury that it could consider whether, rather than infer that, the evidence would have exonerated defendant. Defendant's trial lawyer thanked the court for the instruction and later expressed agreement with the instruction. By affirmatively approving the instruction, defendant's lawyer waived any claim that the instruction was erroneous. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Hence, there is no error to review. *Id.* at 216.

Even if defendant's trial lawyer had not waived this claim of error, we would nevertheless conclude that the trial court did not plainly err in giving this instruction. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Under the plain error rule, the defendant must show that (1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected defendant's substantial rights. *Id*. To establish the third element, the defendant must generally show that the error affected the outcome of the lower court proceeding. *Id*.

In general, a defendant is not entitled to an adverse jury instruction unless he can demonstrate that the police destroyed evidence in bad faith. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). Defendant failed to introduce any evidence of bad faith, and the prosecution offered evidence indicating that the destruction resulted from a mishap or standard procedures for discarding evidence in unsolved cases, rather than bad faith. The medical examiner maintained the evidence for over three years before its inadvertent destruction, and defendant failed to show any indication that the medical examiner colluded with police to destroy the evidence. The law did not require the trial court to grant defendant any instruction regarding the fingernails, and because defendant benefited from the instruction, the trial court's refusal to include the defendant's preferred language did not amount to error, let alone error that affected the outcome. *Carines*, 460 Mich at 763.

Defendant next argues that the prosecution presented insufficient evidence to sustain the jury's verdict. When reviewing a challenge to the sufficiency of the evidence, this Court "reviews the record evidence de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009).

In order to convict defendant of felony murder, the prosecution had to prove that defendant killed Hill, that when he did so he had the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], and did so while committing, attempting to commit, or assisting in the commission of (in relevant part) breaking and entering. See *People v Smith*, 478 Mich 292, 318-319; 733 NW2d 351 (2007) (stating the elements of felony murder); MCL 750.316(1)(b). The prosecution could also convict defendant under the theory that he aided and abetted another in committing felony-murder; to meet its burden under this theory, the prosecution had to present evidence that "(1) the crime charged was committed by the defendant

or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement." *Carines*, 460 Mich at 757 (quotation marks and citation omitted).

Defendant does not argue that the prosecution failed to present sufficient evidence establishing that the assailants committed a felony when they broke and entered into the apartment. Additionally, defendant does not dispute that the men intentionally killed Hill during the commission of that felony. Defendant's sole argument is that the prosecutor presented insufficient evidence for a reasonable jury to conclude, beyond a reasonable doubt, that he participated in the breaking and entering and murder.

Identity is an element of every crime. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). Thus, the prosecution must prove, beyond a reasonable doubt, that defendant committed or aided and abetted the acts in question. *Id*. However, the prosecution may meet its burden to prove identity by presenting either direct or circumstantial evidence. *Carines*, 460 Mich at 757.

The prosecution presented sufficient circumstantial evidence for a reasonable jury to conclude that defendant participated in the breaking and entering and Hill's murder. Most telling, the prosecution presented DNA evidence from the black knit cap found at the scene of the murder, showing that defendant wore the hat. The hat also contained DNA from Hill. From this evidence, a jury could rationally find that defendant was present at McKenzie's apartment on the night in question and that he physically participated in the attack on Hill, which ultimately ended with Hill's murder. Defendant's explanation that another person placed his DNA in the hat was implausible and the jury was free to reject that testimony as incredible. See *Roper*, 286 Mich App at 88.

The prosecution also presented other strong circumstantial evidence that defendant participated in Hill's murder. The prosecution established that Hill had beaten Turner the night of his murder. Hill's mother testified that two of defendant's relatives visited her house looking for Hill, and that they arrived in defendant's car. When she did not answer the door, the men left in defendant's car, which was full of men. Thereafter, a group of men broke down McKenzie's front door before beating and murdering Hill. Although Hill's mother and Turner had agreed that Hill's mother would watch Turner's baby for the remainder of the weekend, Turner's cousin picked her up later that morning after Hill's murder but before Hill's mother learned of her son's death. Based on these facts, the jury could rationally infer that Turner's relatives, including defendant, were the men that killed Hill. In his defense, defendant stated that he and Hill remained friendly despite the fact that Hill had beaten Turner several times in the past. But the jury was free to disregard that testimony.

The prosecution presented sufficient evidence to sustain defendant's conviction.

Defendant finally argues that the trial court denied him his due process rights by refusing to pay an expert to independently analyze the DNA evidence. "This Court reviews a trial court's decision whether to grant an indigent defendant's motion for the appointment of an expert for an abuse of discretion." *People v Tanner*, 469 Mich 437, 442; 671 NW2d 728 (2003). A trial court

abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Roper*, 286 Mich App at 84.

Generally, equal protection requires that the state afford an indigent defendant an expert witness when the witness remains important to the defendant's preparation of a defense. *People v Stone*, 195 Mich App 600, 605; 491 NW2d 628 (1992). However, this requirement does not allow the defendant to hire an expert of his choosing, and the state may satisfy this requirement by providing defendant access to any competent expert. *Id* at 606.

The trial court entered an order in which it agreed to pay for an expert to analyze the DNA evidence on defendant's behalf. The trial court agreed to pay the expert's hourly fee and expenses. Defendant then attempted to hire two experts. The first could not work for defendant because he previously worked on this case for the prosecution. The second would not work on the case without a retainer fee, which the trial court refused to authorize, because it deemed the $2,500 fee exorbitant. The trial court consulted the court's chief judge, who agreed that the fee amounted to an extraordinary cost that the court should not pay. Defendant did not seek another expert and did not enter any evidence to establish that other experts were unavailable. Because the trial court agreed to pay for an expert on defendant's behalf, the state satisfied its obligation to provide defendant with the means to prepare his defense. Defendant's unilateral decision not to take advantage of the opportunity did not amount to a violation of his right to equal protection. And the trial court did not abuse its discretion in refusing to pay the expert's retainer fee.

There were no errors warranting relief.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly
/s/ Mark T. Boonstra