No. 21-8047 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES



Santiago Esquivel — PETITIONER
(Your Name)

vs.

Gary Miniard — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Sixth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

(Your Name)

(Address)

(City, State, Zip Code)

(Phone Number)

## QUESTION PRESENTED FOR REVIEW

I. DID THE SIXTH CIRCUIT ERR, WHEN IT FAILED TO FIND AS DEBATABLE OR WRONG THE DISTRICT COURT'S DECISION THAT THE PROSECUTOR'S REFERENCE TO PETITIONER'S POST-ARREST, POST-*MIRANDA* SILENCE WAS NOT AN AFFRONT TO FUNDAMENTAL FAIRNESS?

II. DID THE SIXTH CIRCUIT COURT OF APPEALS CLEARLY ERR IN ITS DENIAL OF PETITIONER'S REQUEST FOR A CERTIFICATE OF APPEALABILITY, WHEN IT DETERMINED THAT PETITIONER WAS NOT ENTITLED TO HABEAS RELIEF ON HIS CLAIM THAT HIS SENTENCE WAS BASED ON INACCURATE INFORMATION?

LIST OF PARTIES IN COURT BELOW

The caption set out above contains the names of all the parties.

TABLE OF AUTHORITIES CITED

Constitution, Statutes, Regulations, and Rules:

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## OPINIONS BELOW

The order of the federal court of appeals for the Sixth Circuit denying Petitioner's motion for a certificate of appealability was not reported, but is set forth at Appendix A

The judgment of the United States District Court for the Western District of Michigan denying Petitioner's petition for a writ of habeas corpus was not reported, but is set forth in Appendix B

## JURISDICTION

The order for the federal court of appeals for the Sixth Circuit was entered on November 30, 2021. Rehearing was not sought in that court. However, due to a COVID-19 outbreak at the prison, Justice Kagan granted Petitioner an extension until April 19, 2022. Therefore, the jurisdiction of this Court is invoked under 28 USC §1254(1)

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment, United States Constitution, provides

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

2. The Sixth Amendment, United States Constitution, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have Assistance of Counsel for his defense.

3. The Fourteenth Amendment, United States Constitution, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. Statutory Provisions:

28 U.S.C. §2254(d) (1)-(2):

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law; as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2253(c):

> Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or;
>
> (B) the final order in a proceeding under section 2255;
>
> A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2)

4. 28 U.S.C. §1291 provides:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of district courts of the United States, the United States District Court of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this Title [28 U.S.C. §§1292(c) and (d) and 1295]

5. Michigan Compiled Laws 777.37 provides:

> (1) Offense variable 7 is aggravated physical abuse. Score offense variable 7 by determining which of the following apply and by assigning the number of points attributable to the 1 that has the highest number of points:
>
> (a) A victim was treated with sadism, torture, excessive brutality, or similar egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense. . 50 points
>
> (b) No victim was treated with sadism, torture, excessive brutality, or similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.....0 points

(2) Count each person who was placed in danger of injury or loss of life as a victim.

(3) As used in this section, "sadism" means conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification.

6. Michigan Compiled Laws 777.40 provides:

(1) Offense variable 10 is exploitation of a vulnerable victim. Score offense variable 10 by determining which of the following apply by assigning the number of points attributable to the one that has the highest number of points:

(a) Predatory conduct was involved ..... 15 points

(b) The offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status ..... 10 points

(c) The offender exploited the victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious..... 5 points

(d) The offender did not exploit a victim's vulnerability..... 0 points

(2) The mere existence of 1 or more factors described in subsection (1) does not automatically equate with victim vulnerability.

(3) As used in this section:

(a) "Predatory conduct" means preoffense conducted directed at a victim, or a low enforcement officer posing as a potential victim, for the primary purpose of victimization.

(b) "Exploit" means to manipulate a victim for selfish or unethical purposes. Exploit also means to violate section 50b of the Michigan penal code, 1931 PA 328, MCL 750.50b, for the purpose of manipulating a victim for selfish or unethical purposes.

(c) "Vulnerability" means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation.

(d) "Abuse of authority status" means a victim was exploited out of fear or deference to an authority figure, including, but not limited to, a parent, physician, or teacher.

## Statement of the Case

On May 30, 2018, a Calhoun County jury in Michigan convicted Petitioner, following a five-day trial, of three counts of first degree criminal sexual conduct (CSC-I), in violation of Mich. Comp. Laws §750.520(2)(b)(Count 1); one count of assault with intent to commit sexual penetration, in violation of Mich. Comp. Laws §750.520g(1); and one count of second degree criminal sexual conduct, Mich. Comp. Laws §750.520c(1)(b).

Detective Coons, an investigating officer in the case, testified at trial. (T I, p. 151). Prior to and during the detective's testimony, defense counsel attempted to prevent presentation to the jury of any reference to Petitioner's post-arrest, post-*Miranda* silence. Before Detective Coons testified, defense counsel cautioned the prosecution and reminded the court that the detective was not to mention any attempt to interview. (T I, p. 150). The court responded, "Yeah, Can't even do that." (T I, p. 150).

Again, as Detective Coons began testifying about the investigative process, defense counsel requested a bench conference. (T I, p. 153).

Despite defense counsel's efforts, Detective Coons testified that, at a certain point, he believed there was probable cause to arrest Petitioner: "We felt we had it, or I, certainly, felt we had it, and the prosecutor said, yes, if you can find him. Arrest him and interview him." (T I, p. 167).

Defense counsel moved for a mistrial based on a violation of Petitioner's right to remain silent during Detective Coons' testimony referencing the intent to interview his client. (T II, p. 5). In that motion, Defense counsel argued, "The fact

that they are not going to get the results of an interview in this trial, the obvious conclusion, then, is that the defendant asserted his right to an attorney, or his right not to talk." (T II, p. 5). Moreover, Defense counsel mentioned how the detective brought in "through a back door by obvious implication" the very testimony the court had already ruled admissible. (T II, p. 5).The trial court, however, denied the motion because there was no mention that Petition invoked his right to remain silent or requested an attorney, and at any rate, there was previous testimony by Detective Coons that he had contacted Petitioner and obtained a search warrant for his phone. (T II, p. 6). There was nothing inappropriate about the testimony, the trial court reasoned, and error, if any, was harmless. (T II, p. 6).

After the close of proofs, the trial court instructed the jury, properly, that:

> Facts can also be proved by indirect or circumstantial evidence. Circumstantial evidence is evidence that normally or reasonably leads to other facts. So, for example, if you see a person come in from outside, wearing a raincoat, covered with small drops of water, that would be circumstantial evidence that it was raining.

(T III, pp. 95-96).

At sentencing, and over defense counsel's objection, the trial court scored OV 7 at 50 points because it found that Petitioner's "behavior [rose] to the level of excessive sadism in the form of humiliation of the victim." (ST, p. 10)

In reaching this conclusion, the trial court relied on the following findings:

> I had an opportunity to listen to the victim testify at trial and she indicated that the abuse had been going on for years. Not only had the abuse been going on for years, it was done in all parts of the home, including places where she deserved privacy.
>
> When she tried to go into the bathroom, to be by herself, he

> followed her in there. You followed her into the kitchen where you assaulted her. You assaulted her in the bedroom. You assaulted her constantly, according to trial testimony, oftentimes more than once a day.
>
> Further, she felt like you treated her differently. This affected her to the point where she contemplated suicide. And, given the fact that you would pull up her skirt in the kitchen, while she was trying to do things, you followed her into the bathroom, and you assaulted her on a nearly daily basis for so many years, I do find that your behavior rises to the level of excessive sadism in the form of humiliation of the victim and I will allow that score to stand at 50 points.

(ST., pp. 9-10).

The trial court also scored OV 10 at 15 points without comment.

On July 16, 2018, the state trial court sentenced Petitioner as a second habitual offender, Mich. Comp. Laws §769.10, to concurrent prison terms of 29 years, 8 months to 59 years, 4 months on each CSC-I conviction, 6 years, 11 months to 15 years on the assault conviction, and 10 years, 5 months to 22 years, 6 months on the CSC-II conviction.

Petitioner appealed by right, raising the following as his grounds for relief:

> The trial court violated Petitioner's due process right to be free from punishment for exercising his Fifth Amendment right to remain silent. Petitioner is entitled to a new trial. US Const Ams X, XIV; Const. 1963, art 1, §17.
>
> The trial court violated Petitioner's due process right to be sentenced based on accurate information when it incorrectly scored OV 7 at 50 points and OV 10 at 15 points without sufficient support. Petitioner is entitled to resentencing. U.S. Const Ams. V, XIV; Const 1963, art 1, §17.

However, the Court of Appeals issued an unpublished *per curiam* opinion denying Petitioner relief on December 12, 2019.

Subsequently, Petitioner applied for leave to appeal to the Michigan Supreme Court, which entered an order of denial on May 26, 2020. Petitioner then took his case to the United States District Court for the Western District of Michigan, presenting the same claims to that court that he had exhausted throughout the state courts. On April 23, 2021, a couple of weeks after Petitioner filed, the district court dismissed Petitioner's habeas corpus petition with prejudice, concluding, "the petition must be dismissed because it fails to raise a meritorious federal claim," and finding that "reasonable jurists could not conclude that this Court's dismissal of Petitioner's claims was debatable or wrong." (See pages 1 & 9 of the Dist. Ct. Op.).

Remarkably, the district court never sent Petitioner his official copy of that opinion. Petitioner only discovered the district court had summarily dismissed his habeas petition while conducting research in the prison law library one day. Nevertheless, Petitioner disagreed with the district court's determination, and on May 13, 2021, he filed a timely notice of appeal and motion for leave to appeal in forma pauperis with the district court.

On May 25, 2021, Patricia J. Elder, the Senior Case Manager for the sixth circuit federal court of appeals, mailed Petitioner a letter informing him that his case had been docketed as case number 21-1525 and offering him the choice submit one signed motion to grant a certificate of appealability pursuant to 6th Cir. R. 22(a). In the meantime, on May 27, 2021, the district court sent Petitioner an order granting him permission to proceed on appeal *in forma pauperis*. Petitioner filed his motion to grant a certificate of appealability in the sixth circuit court of appeals

challenging the district court's determination, which the Court denied in an unpublished order on November 30, 2021.

Relevant to this writ is the fact that Petitioner is currently a state prisoner housed at the Saginaw Correctional Facility (SRF) in Freeland, Michigan. He is unable to assist himself effectively due to his illiteracy. He lacks either a GED or a high school diploma. Therefore, the Michigan Department of Corrections (M.D.O.C.) offers a program that assists prisoners, without payment or fee, with certain legal correspondences and court documents, as per M.D.O.C Policy Directive 05.03.118, which states:

> The Legal Writer Program provides eligible prisoners in Correctional Facility Administration (CFA) institutions with legal assistance on matters relating to their criminal conviction or conditions of confinement. Only prisoners not represented by counsel who are unable to effectively help themselves by using the law library or other available legal resources are eligible to receive Legal Writer Program services.

The Petitioner relies on the Program to assist him with complying with this Court's rules, guided by a sample petition that the Clerk has provided in the past to other inmates who have prepared their writs through this Program.

Before Petitioner could be preparations on this writ of certiorari, SRF had a COVID-19 outbreak and went into an immediate lockdown, which included the law library, where the Legal Writer Program is located. The ninety-day filing deadline established in Rule 13.1 of the Supreme Court Rules was set to expire before the indefinite facility-wide quarantine would end. Meanwhile, Petitioner, on his own behalf, sent a letter to this requesting an extension, which Justice Kavanaugh's

office granted until April 19, 2022.

## REASONS FOR GRANTING THE WRIT

Here, when assessing Petitioner's claim in his request for a certificate of appealability, the United States Court of Appeals for the Sixth Circuit did exactly what this Court in *Miller-El v Cockrell*, 537 US 322, 341 (2003), and *Tennard v Dretke*, 542 US 274, 287 (2004), warned the lower courts against doing when assessing requests for a certificate of appealability under 28 USC 2253(c). Petitioner raised two claims for relief in his habeas petition. For each claim, the Sixth Circuit (1) addressed the merits, (2) applied the wrong legal standard, or (3) disregarded the debatability of the district court's resolution of them. Action from this Court is necessary in order to reaffirm its position regarding the role of United States courts of appeals when reviewing requests for a certificate of appealability.

## ARGUMENT

### I. THE SIXTH CIRCUIT ERRED, WHEN IT FAILED TO FIND AS DEBATABLE OR WRONG THE DISTRICT COURT'S DECISION THAT THE PROSECUTOR'S REFERENCE TO PETITIONER'S POST-ARREST, POST-*MIRANDA* SILENCE WAS NOT AN AFFRONT TO FUNDAMENTAL FAIRNESS?

Petitioner charged the state trial court with violating his due process right to be free from punishment for exercising his Fifth Amendment right to remain silent and his right not to be compelled to be a witness against himself. Specifically, Detective Coons testified that, at a certain point, he believed there was probable cause to arrest Petitioner "and interview him." (T I, p. 167). This testimony from Detective Coons, in Petitioner's view, amounted to an improper reference to his post-arrest, post-*Miranda* silence. Petitioner further argued that this testimony

gave rise to the implication that either he had asserted his right to counsel or his right to remain silent, and that presenting the jury with this implication violated his due process rights, entitling him to a mistrial.

The Michigan Court of Appeals, however, denied Petitioner relief on the issue, concluding:

> On these facts, the trial court properly denied defendant's motion for mistrial. The single reference to the detective's instructions to arrest and interview defendant did not amount to a reference to defendant's silence. Even if it had, it did not amount to a due process violation because the reference was so minimal that the silence was not submitted to the jury as evidence from which it was allowed to draw any permissible inference. The trial court did not abuse its discretion when it denied defendant's motion for a mistrial and defendant was not denied a fair trial.

See page 3 of that decision.

Petitioner applied for federal habeas relief, contending that the decision of the Michigan Court of Appeals was an unreasonable application of Supreme Court precedent for three primary reasons: (1) because it relied on precedence which negates a due process violation only where a specific, strong, or repeated curative instruction has been given to the jury, and no curative instruction had been given to Petitioner's jury, let alone a strong, specific, or repeated one; (2) because it unreasonably upheld the trial court's ruling that Detective Coons' reference to Petitioner's post-arrest, post-*Miranda* silence was harmless; and (3) because it overlooked the fact that Petitioner was convicted chiefly on the testimony of the complainant, whose credibility was subject to question. The district court, however, dismissed Petitioner's habeas petition with prejudice, concluding that Petitioner's

arguments were "entirely misdirected" and that "Petitioner failed to demonstrate that the court of appeals' rejection of his *Doyle* claim is contrary to, or an unreasonable application of, clearly established federal law." See page 7 of Dist. Ct. Op.

Then, the Sixth Circuit concluded that, "Esquivel has failed to demonstrate that reasonable jurists could debate the district court's determination that the Michigan appellate court's rejection of his *Doyle* claim was neither contrary to, nor an unreasonable application of, clearly established federal law." See page 3 of 6th Cir. Op. The Sixth Circuit, however, lacked jurisdiction to examine the merits of Petitioner's claim. See e.g., *Miller-El*, 537 US at 342 ("Before the issuance of a COA, the Court of Appeals had no jurisdiction to resolve the merits of petitioner's constitutional claims").

The Supreme Court has declared that any use of a defendant's silence when questioned by the police whether for substantive or impeachment purposes violates the Fourteenth Amendment's mandate of due process if the silence follows the administration of *Miranda* warnings. *Doyle v Ohio,* 426 U.S. 610, 619 (1976); *Anderson v Charles*, 447 U.S. 404, 407 (1980). In fact, by simply posing a question to a witness, even when the witness does not answer, the government might improperly "use" a defendant's post-*Miranda* silence. *Ellen v Brady*, 475 F3d 5, 12-14 (1st Cir. 2007). In addition, "[a] prosecutor's persistence in referring to the defendant's post-*Miranda* silence . . . may result in a [constitutional] violation even when no evidence of the defendant's silence is submitted to the jury." *Id*, at 14.

Here, the district court erred in this case because it extended deference to the Michigan Court of Appeals' factual findings at the expense of abdicating judicial review, which this Court bade it ought not to do. *Cash v Maxwell*, 2012 U.S. LEXIS 410, 132 S Ct 611, 612, 181 L Ed 2d 785 (2012)(SOTOMAYOR, J., statement respecting the denial of *certiorari*)("The Antiterrorism and Effective Death Penalty Act of 1996 requires that federal habeas courts extend deference to the factual findings of state court;") *Miller-El*, 537 U.S. at 340 ("deference does not imply abandonment or abdication of judicial review.") Indeed, the Court made it abundantly clear in *Miller-El* that:

> Deference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence.

537 US at 340, 123 S Ct 1029.

Contrary to the district court's determination, the Michigan Court of Appeals' factual determinations were "unreasonable," since the process it used to decide Petitioner's case itself was unreasonable. Section 2254(d)(2) authorizes federal habeas relief when the state court decision was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Such unreasonable determinations "come in several flavors" one of them being "where the fact-finding process itself is defective." *Taylor v Maddox*, 366 F 3d 992, 1000 (9th Cir. 2004).

In this case, the Michigan Court of Appeals mischaracterized the detective's reference to his arrest and interview of Petitioner as "single reference." However, Petitioner, in his brief on appeal, detailed the manner in which the reference to his post-arrest, post-Miranda silence was presented to the jury. More specifically, Petitioner established how his defense counsel went to great length to avoid this reference.

The reference occurred in more than one instance. For instance, before Detective Coons testified, defense counsel cautioned the prosecution and reminded the court that the detective was not to mention any attempt to interview Petitioner, (T I, p. 150), to which the court responded unequivocally, "Yeah. Can't even do that." (T I, p. 150). Again, when Detective Coons began testifying about the investigative process, defense counsel requested a bench conference, protesting, "I just want to make sure that when the-this summarizes what goes into an investigation, that that doesn't include an interview with the defendant or an attempt to interview with a defendant because that will imply that . . ." The Court asked the prosecutor, "Did you talk to him?" meaning, Detective Coons, to which the prosecution responded "I told him not to—not to mention it." The Court expressed its satisfaction after that with "He should be okay." (T I, p. 153). Despite defense counsel's efforts, Detective Coons testified that, at a certain point, he believed there was probable cause to arrest Petitioner, "We felt we had it, or I, certainly, felt we had it, and the prosecutor said, yes, if you can find him. Arrest him and interview him." (T I, p. 167).

Worse, Detective Coons' testimony implicating Petitioner's post-arrest, post-*Miranda* silence was not limited to that single reference during the prosecution's case in chief, as the Michigan Court of Appeals had determined. The prosecution actually elicited testimony from the complainant's mother to highlight Petitioner's apparent silence to the jury, as the only other substantial evidence aside from the complainant's testimony. For example, when the prosecutor questioned the complainant's mother about her texting Petitioner to ask him about the complainant's story, the complainant's mother stated, "I basically, was just asking—or telling him that I couldn't believe he would do something that sickening, and he didn't deny it or say that he did it. So, that just, kind of, made me think he did it." (T I, p. 179). On another occasion, the following exchange took place:

> Q: And when you confronted him about whether or not he did do this, he did not deny it, is that correct?
>
> A: No, he didn't deny it.
>
> Q: So, how did that leave you feeling?
>
> A: Like he did it.

(T I, p. 180).

The prosecutor even stressed this point to the jury during closing argument:

> I said to [the complainant's mother], "When you confronted him, did he deny it?" And she said, "No. No, he didn't deny it." There was, in fact, I think if you look at the times, like a 30-minute break before there actually was another text in that regard. You have the ability to look at the text messages. You have the evidence. This is evidence. You can take that back to the jury room with you and I suggest that you do.

(T III, pp. 70-71).

Petitioner's challenge to the Michigan Court of Appeals' harmless error analysis and rendered no decision on that aspect of Petitioner's claim. *Vincent v Seabold*, 226 F 3d 681, 684 (6th Cir. 2000)(This Court reviews a district court's legal conclusions in a habeas proceeding *de novo*, and its factual findings for clear error)

The Michigan Court of Appeals upheld the trial court's ruling that Detective Coons' reference to Petitioner's post-arrest, post-*Miranda* silence was harmless. Yet, consistent with *Brecht v Abrahamson*, 507 U.S. 619 (1993), the due process violation in this case was not harmless, especially in this instance where the prejudice to Petitioner was amplified by counsel's extensive efforts to prevent reference to any police interview. The trial court initially agreed that the detective "can't do that" concerning referencing an interview. Then, the trial court repeatedly advised the prosecutor not to elicit any reference to an interview. In response, the prosecutor advised that she had cautioned the detective not to mention or reference an interview at trial. So the detective's reference to Petitioner's silence after that should have been ruled as a violation that was not harmless.

In *Brecht*, the Court specifically refrained from inquiring whether the evidence untainted by constitutional violation was sufficient to sustain the verdict. The central question in *Brecht* was whether the constitutional violation "substantially influenced" the fact finder. There, the Court concluded that the error was harmless because the prosecutor's unconstitutional references to petitioner's post-*Miranda* silence were not minimal but "in effect, cumulative" of constitutional evidence, given the state's "extensive and permissible references to petitioner's pre-

*Miranda* silence." *Id* at 639.

So long as Petitioner can satisfy the *Brecht* standard, "he will surely have demonstrated that the state court's finding that the error was harmless beyond a reasonable doubt . . . . resulted in an unreasonable application of *Chapman*." *Nevers v. Killinger*, 169 F.3d 352, 371-372 (6th Cir.), *cert den* 527 U.S. 1004 (1999). *Brecht's* standard requires that a habeas petitioner demonstrate that the trial error resulted in "actual prejudice." *Id.* Thus, contrary to the finding of the district court, habeas relief was warranted to Petitioner because he can show that the prosecutor's references to his post-arrest, post-*Miranda* silence did have a substantial and injurious effect or influence in determining the fact finder's verdict. *Brecht,* at 637. The prosecutor's unconstitutional references to Petitioner's post-*Miranda* silence in this case were not minimal either.

To the extent that the Michigan Court of Appeals found that the error was harmless, Petitioner asserts, as he did before the district court, as well as in the Sixth Circuit, that that Michigan Court of Appeals' decision was an unreasonable application of *Chapman v California*, 386 US 18 (1967). Apparently, the Sixth Circuit upheld the district court's determination because "the Michigan Court of Appeals did not conduct a harmless-error analysis, having concluded that there was no due-process violation." See page 3 of 6th Cir. Op. In that instance, the Sixth Circuit erred by ignoring the debatability of the district court's decision.

Moreover, the very terms by which the Sixth Circuit endorses the Michigan Court of Appeals' adjudication indicates that the Michigan Court of Appeals did not

carry out its obligation to apply *Chapman* to the facts of Petitioner's case. That omission alone renders the decision of the Michigan Court of Appeals unreasonable and the decision of the Sixth Circuit, who refused to enforce the proper legal standard, thereby, in violation of its *Miller-El* obligation. See *Miller-El*, supra, 537 US at 341 (found on certiorari review from the denial of COA that the Fifth Circuit had applied the wrong legal standard by improperly merging the requirements of two statutory sections).

The Sixth Circuit also erred when it failed to find, as this Court has, that a state appellate court's adjudication §2254(d)(1) is unreasonable application when the state court "merely assumes," as the Michigan Court of Appeals did in Petitioner's case, that a certain factual conclusion is correct rather than systematically scrutinizing the relevant facts. See *Wiggins v Smith*, 539 US 510, 527-28 (2003)("The Maryland Court of Appeals' application of *Strickland's* governing legal principles was objectively unreasonable. Though the state court acknowledged petitioner's claim that counsel's failure to prepare a social history 'did not meet the minimum standards of the professions,' the court did not conduct an assessment of whether the decision to cease all investigation upon obtaining the records actually demonstrated reasonable professional judgment. . . . The court merely assumed that the investigation was adequate.")

Bound by the consistency of its previous rulings, the Sixth Circuit, when it found itself confronted by another instance of the Michigan Court of Appeals' misapplication of the harmless error analysis, should have readily found that

misapplication to be unreasonable under the AEDPA. See, e.g., *Bulls v. Jones*, 274 F.3d 329 (6th Cir. 2001)(finding unreasonable Michigan Court of Appeals' conclusion that Confrontation Clause violation was harmless); *Tucker v. Prelesnik*, 181 F.3d 747 (6th Cir. 1999) overruled in part on other grds, *Washington v. Hofbauer*, 228 F.3d 689 (6th Cir. 2000)(finding unreasonable Michigan Court of Appeals' conclusion that ineffective assistance of counsel was harmless); *Nevers, supra,* (finding unreasonable Michigan Supreme Court's conclusion that various trial errors were harmless). The case presents another situation were such a finding is warranted.

It bears repeating that the jury convicted Petitioner chiefly on the testimony of the complainant. However, the complainant's credibility was subject to question. First, the complainant had testified at trial that she did not tell anyone about an inappropriate touching from Petitioner because she did not want to "break the [her mom and Petitioner] up" and because she did not want to stress her mom out. (T I, p. 81). However, she told an interviewer at the Child Advocacy Center that she hated Petitioner, he was always putting stress on her mom, he was ruining the family's life, and she told her mom "all the time to leave him," but her mom wouldn't do it. (TI, pp. 97-98).

Second, the complainant testified that the only person she told about Petitioner's alleged inappropriate touching was Emily, a classmate. (T I, p. 88). However, she had testified at the preliminary examination that the only person she told was Cheyanne Coolidge, a classmate. (T I, p. 117).

Third, the complainant testified at trial that Petitioner did not touch her

breasts with his mouth. However, she had told a sexual assault nurse examiner that he did touch her breasts with his mouth. (T I, pp. 122-123).

Fourth, Zachary, Soledad, Michael James, and Lucino Esquivel, the complainant's siblings, all testified to the complainant's character for untruthfulness. All of them also provided reasons to support their judgment. Zachary based his conclusion on that "nine times out of ten, every time she got in trouble it would be over her lying or she got caught up lying about something." (T II, p. 100). Soledad testified that the complainant was untruthful "because she's lied multiple times on having a boyfriend." (T II, p. 124). Lucino testified that he had seen the complainant being disciplined for untruthfulness on more than one occasion. (T II, 153).

Given the direct and opinion evidence of the complainant's lack of candor, any additional evidence against Petitioner, such as his post-arrest, post-*Miranda* silence, could have swayed the jury against Petitioner. Thus, the error in admitting a reference to Petitioner's silence could not have been harmless. Placing Petitioner's post-arrest, post-*Miranda* silence before the jury violated Petitioner's right to due process, entitling him to a new trial.

## II. THE SIXTH CIRCUIT COURT OF APPEALS CLEARLY ERR IN ITS DENIAL OF PETITIONER'S REQUEST FOR A CERTIFICATE OF APPEALABILITY, WHEN IT DETERMINED THAT PETITIONER WAS NOT ENTITLED TO HABEAS RELIEF ON HIS CLAIM THAT HIS SENTENCE WAS BASED ON INACCURATE INFORMATION.

At sentencing, and over defense counsel's objection, the state trial court scored OV 7 at 50 points because it found that Petitioner's "behavior [rose] to the level of excessive sadism in the form of humiliation of the victim." (ST, p. 10)

In reaching this conclusion, the trial court relied on the following findings:

> I had an opportunity to listen to the victim testify at trial and she indicated that the abuse had been going on for years. Not only had the abuse been going on for years, it was done in all parts of the home, including places where she deserved privacy.
>
> When she tried to go into the bathroom, to be by herself, he followed her in there. You followed her into the kitchen where you assaulted her. You assaulted her in the bedroom. You assaulted her constantly, according to trial testimony, oftentimes more than once a day.
>
> Further, she felt like you treated her differently. This affected her to the point where she contemplated suicide. And, given the fact that you would pull up her skirt in the kitchen, while she was trying to do things, you followed her into the bathroom, and you assaulted her on a nearly daily basis for so many years, I do find that your behavior rises to the level of excessive sadism in the form of humiliation of the victim and I will allow that score to stand at 50 points.

(ST., pp. 9-10).

The trial court also scored OV 10 at 15 points without comment.

On appeal before the Michigan Court of Appeals, Petitioner contended that his due process right to be sentenced based on accurate information was violated when the trial court incorrectly scored OV 7 at 50 points and OV 10 at 15 points without sufficient evidence. A trial court must assess 50 points for OV 7 if "a victim was treated with sadism, torture, excessive brutality, or similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). The term "sadism" is defined in the statute to mean "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37(3). Before the court may assess 50 points for OV 7, it must determine "whether the

defendant engaged in conduct beyond the minimum required to commit the offense."

Here, the state trial court assigned 50 points to OV 7 because it found that Petitioner's "behavior [rose] to the level of excessive sadism in the form of humiliation of the victim." (S.T., p. 10). In reaching this conclusion, the trial court relied on the following inaccurate findings:

1. The complainant indicated that the abuse had been going on for years.

2. The abuse took place in all parts of the home, including places where the complainant deserved privacy.

3. Petitioner assaulted the complainant "constantly," often more than once a day.

4. The complainant felt that Petitioner treated her differently from the other children in the household, which "affected her to the point where she contemplated suicide."

5. Petitioner pulled up the complainant's skirt in the kitchen.

(S.T. pp. 9-10).

On state appeal, Petitioner argued that the state trial court violated his due process right to be sentenced based on accurate information when it incorrectly scored OV 7 at 50 points and OV 10 at 15 points without sufficient evidence. The Michigan Court of Appeals, when it adjudicated this claim, decided:

> Based on our review of the record, the trial court did not err in concluding that defendant went beyond the minimum conduct required to commit the offenses. Defendant followed the victim around the home and abused her in every area of the house, both while she was asleep and awake; manipulated and controlled her by governing her whereabouts and made her feel the abuse was her fault; forced her to watch pornography; and treated her differently than her siblings. This went beyond the minimum needed to commit the offenses and cumulatively qualified as sadistic behavior. The trial court did not err in

assigning 50 points to OV 7.

See pages 4-5 of that decision. This adjudication resulted in an unreasonable application of clearly established Supreme Court precedent or resulted in an unreasonable determination of the facts in light of the evidence.

Petitioner presented this claim to the district court in his habeas action. On page 8 of its opinion the district court held, in pertinent part:

> Petitioner makes passing reference to such a claim when he states his habeas sentencing challenge: "The trial court violated Petitioner's due process right to be sentenced based on accurate information . . . ." Petitioner, however, quickly veers away from the limited confines of habeas cognizability when he articulated his argument. He does not identify a single fact upon which the trial court relied that was materially false or inaccurate. Thus, he has not supported, with facts or argument, the due process claim he hints at when he identifies his habeas conclusions—the judge's actual applications of the guidelines are accurate." The argument that the trial court erred when it applied the guidelines or that the court of appeals erred when it affirmed the trial court's application, does not state a federal constitutional claim.

In this instant, the district court erred.

The district court failed to realize that any claim from a state prisoner alleging that the information the state court relied upon when imposing the sentence was inaccurate necessarily must make reference to the guidelines because the judge applies those challenged facts only in within the context of scoring the guidelines. No judge, state or federal, relies on facts when imposing a sentence on a defendant in a vacuum. Every sentence a judge craft, nowadays, is accomplished within the framework of the sentencing guidelines. Therefore, for the district court to suggest Petitioner must articulate his argument without "veering" it towards any

reference of the sentencing guidelines is both erroneous and unreasonable.

In its decision denying Petitioner a certificate of appealability, the Sixth Circuit, assessed Petitioner's claim then concluded:

> Esquivel did not assert that he lacked an opportunity to correct his allegedly inaccurate information. *Stewart v Erwin*, 503 F 3d 488, 495 (6th Cir. 2007). Nor did Esquivel identify any other inaccurate facts among the many facts cited by the trial court to support its findings that he engaged in sadistic behavior and in predatory conduct. Esquivel has failed to demonstrate that reasonable jurists could debate the district court's rejection of his sentencing claim.

See page 4 of 6th Cir. Op. Here, the Sixth Circuit clearly erred on several grounds.

First, it exceeded its jurisdiction by examining the merits of Petitioner's claim. See e.g., *Miller-El*, 537 US at 342 ("Before the issuance of a COA, the Court of Appeals had no jurisdiction to resolve the merits of petitioner's constitutional claims").

Secondly, it disregarded the debatability of the district court decision. "[R]easonable jurists would find the district court's assessment of the constitutional claim[]debatable or wrong." *Slack v McDaniel*, 529 US 473, 484 (2000), because reasonable jurists could conclude that Petitioner's claim was cognizable for habeas review. *Hudson v Scott*, 2012 U.S. Dist. LEXIS 10180' (relief is available for sentences imposed on the basis of "misinformation of constitutional magnitude")). Reasonable jurists also could conclude that the Michigan Court of Appeals' adjudication that the sentencing judge did not abuse its discretion when he based Petitioner's sentence at least in part on misinformation, or on the basis of matters the sentencing judge just assumed, was unreasonable. See *Townsend v Burke*, 334

U.S. 736, 68 S Ct 1252, 92 L Ed 2d 1690 (1948); *Tucker v United States*, 404 US 443, 446-47 (1972). For that reason, the Sixth Circuit applied the wrong legal standard to Petitioner's claim. See e.g., *Miller-El*, 537 US at 337 ("a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail").

Thirdly, the Sixth Circuit's misinterpretation of *Townsend* warrants review. *United Gas Pipe Line Co. v Memphis Light, Gas, and Water Division*, 358 US 103 (1958)(A claim that a court of appeals misinterpreted prior Supreme Court decision warrants review). On one hand, the Sixth Circuit interpreted *Townsend* in manner that was too extreme. It makes it appear as though a petitioner cannot prove that the trial court unconstitutionally based his sentence on inaccurate information, in violation of *Townsend*, and its progeny, unless he can also prove that the trial court, during the sentencing process, deprived him of an opportunity to correct the court's error. However, this Court, in *Roberts v United States*, 445 U.S. 552, 556 (1980), a progeny of *Townsend*, determined that a due process violation arises where a sentence is based on "misinformation of constitutional magnitude." The Court did not condition the violation on proof of any deprival of opportunity to correct.

On the other hand, the Sixth Circuit makes it appear as though there has to be extensive reliance on material false information in order for a due process violation to have occurred. But, in *Tucker v United States*, this Court made it clear that relief is available on due process grounds if "[a] sentence [is] founded at least in

part upon misinformation." (Emphasis added). Likewise, in *Townsend*, this Court found error in the sentencing process because the "prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially false." (Emphasis added). *Id* at 741. Thus, a habeas petitioner, contrary to what the Sixth Circuit's interpretation, can establish a *Townsend* due process claim on more than proving a sentencing court's extensive reliance. As the Seventh Circuit, in *Ben-Yisrayl v Buss*, 540 F 3d 542, 554 (7th Cir. 2008), explained, *Townsend* stands for "the *general proposition* that a criminal defendant has the due process right to be sentenced on the basis of accurate information." (Emphasis added).

Fourthly, the Sixth Circuit, as did the district court, misconstrued Petitioner's sentence challenge as a mere state-law claim, devoid of any federal constitutional implication. Reasonable jurists could debate whether Petitioner's habeas petition should have been resolved in a different manner, or that his claim deserved encouragement to proceed further. *Slack v McDaniel*, 529 US at 484, quoting *Barefoot v Estelle*, 463 US 880, 893 n. 4; 103 S Ct 3383, 77 L E 2d 1090 (1983). A closer look at Petitioner's claim reveals that he relied upon the federal constitutional aspect of his sentencing claim. Even the district court acknowledges that Petitioner framed his habeas claim in those terms.

To prevail on such a claim, a petitioner must show (1) that the information before the sentencing court was materially false, and (2) that the court relied on the false information in imposing the sentence. *Tucker v United States*, 404 U.S. at 447. Petitioner can satisfy those conditions. In fact, he did as much in his habeas

petition, but he will restate to this court for consideration.

As Petitioner detailed in his brief on appeal, there was no evidence that he engaged in conduct beyond the minimum required to commit the sentencing offenses. The complainant never identified any activity beyond the "fingering" and Petitioner's alleged attempt to penetrate her with his penis, which was the basis for Count 4, assault with intent to commit criminal sexual conduct involving sexual penetration. Rather, the complainant testified that she would "pretend to sleep and until he was done fingering me, and—until he left." (T I, p. 67). The complainant testified that there were occasions when she was showering where Petitioner would come into the bathroom and "start to finger me from behind and hold on to my breasts and after he did that for a little bit, he would just leave the room." (T I, p. 74). And the complainant testified that, when Petitioner attempted to put his penis into her vagina he couldn't because it was too large, that he "just stopped." (T I, pp. 83-84).

Moreover, there was no evidence to support a finding that Petitioner engaged in conduct intended to make a victim's fear or anxiety greater by a considerable amount. Such an inquiry would only be relevant if a defendant has engaged in conduct beyond the minimum required to commit the sentencing offenses, which Petitioner did not. Although the complainant testified that Petitioner digitally penetrated her "everywhere in my house," (T I, p. 69), there was no indication that the penetrations in different parts of the house intended to increase the complainant's fear or anxiety or to humiliate the complainant. Rather, the evidence

showed that the various locations were merely a matter of opportunity—locations where Petitioner allegedly would unlikely be discovered.

The state trial court finding that the complainant felt like she was treated differently than her siblings to the point of contemplating suicide, likewise, is contradicted by the complainant testimony at trial:

> [THE COMPLAINANT] A: He treated me different from his own kids.
>
> [THE PROSECUTOR] Q: And different in what way?
>
> A: He would buy me things and take me out to eat and treat me more special than any of his kids or my own brother.
>
> Q. And how did that make you feel?
>
> A: It made me feel good, like I was doing fine.

(T I, p. 81).

As such, the state trial court, contrary to the Court of Appeals' ruling, should have scored OV 7 at 0 points. There was no evidence to support a finding of sadism. For the state trial to find there was when imposing the sentence resulted in a sentence based on false information. There was no other conduct in the record to form a sufficient basis for assessing OV 7 at 50 points. Hence, the trial court committed a federal constitutional violation when it scored OV 7 at 50 points. The correct score for OV 7 is zero—one that does not rely on false information.

With regard to the trial court's scoring of OV 10 at 15 points, Petitioner assumed that the trial court relied on the presentence report, since the court did not state its reasons for the scoring. The presentence report stated, "The defendant showed predatory conduct as he was [sic] wait for times when her mother was gone

or when he could get her alone to assault this victim, further when the victim would try to seek safety in the bathroom the defendant would make excuses to enter and assault her." PSIR, p. 3. Then the Michigan Court of Appeals honed in on the fact that the complainant was a minor. However, the Michigan Court of Appeals erred unreasonably in that instance as well.

As Petitioner argued on appeal, relying on this basis would allow scoring OV 10 at 15 for every case of first-degree criminal sexual conduct involving a minor, would eviscerate MCL 777.40(1)(b), which provides for a score of 10 points for OV 10 when the "offender . . . abused his or her authority status." Again, it is self-evident that an offender who abuses his or her authority status to commit the offense of first-degree criminal sexual conduct against a minor would do so only when he or she would "get the victim alone." Because there is no pre-offense conduct for the primary purpose of victimization, only opportunity, there was no predation. The state trial court's scoring of OV 10 is another instance where the court relied on inaccurate information when imposing the sentence against Petitioner. *Tucker*, 404 U.S. at 447.

## CONCLUSION

Because the claims contained in his federal habeas petition are not only debatable, but also implicate his constitutional rights, Petitioner, SANTIAGO ESQUIVEL, asks that this Court to reverse the Sixth Circuit's denial of his motion for certificate of appealability and to grant this petition for certiorari as to all of his appellate issues because he, just like the petitioner in *Miller-El*, has proven "'something more than the absence of frivolity,' or 'the existence of mere good faith on his or her part.'"

Dated: 5-20-22

Respectfully submitted,

SANTIAGO ESQUIVEL #383681
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NOTICE

THIS DOCUMENT WAS PREPARED WITH THE ASSISTANCE OF A PRISONER LEGAL WRITER ASSIGNED BY THE LEGAL WRITER PROGRAM OF THE DEPARTMENT OF CORRECTIONS.

APPENDIX A

# THE MAY 3, 2021, JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN DENYING PETITIONER'S PETITION FOR A WRIT OF HABEAS CORPUS

Neutral
As of: April 18, 2022 11:34 PM Z

# Esquivel v. Miniard

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

April 22, 2021, Decided; April 22, 2021, Filed

Case No. 1:21-cv-290

**Reporter**
2021 U.S. Dist. LEXIS 77229 *; 2021 WL 1572832

SANTIAGO **ESQUIVEL**, Petitioner, v. GARY MINIARD, Respondent.

**Subsequent History:** Certificate of appealability denied, Habeas corpus proceeding at Esquivel v. Miniard, 2021 U.S. App. LEXIS 35403 (6th Cir., Nov. 30, 2021)

**Prior History:** People v. Esquivel, 2019 Mich. App. LEXIS 7900, 2019 WL 6799712 (Mich. Ct. App., Dec. 12, 2019)

## Core Terms

sentencing, interview, silence, court of appeals, arrest, trial court, Michigan, post-arrest, state court, warnings, cautionary instruction, post miranda silence, federal court, remain silent, certificate, rights, clearly established federal law, invoked, right to remain silent, habeas corpus, references, convicted, responded, mistrial, custody, courts, merits, preponderance of evidence, due process right, right to counsel

**Counsel:** **[*1]** Santiago Esquivel #383681, petitioner, Pro se, Freeland, MI.

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

**Opinion by:** Paul L. Maloney

## Opinion

This is a habeas corpus action brought by a state prisoner under 28 U.S.C. § 2254. Promptly after the filing of a petition for habeas corpus, the Court must undertake a preliminary review of the petition to determine whether "it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court." Rule 4, Rules Governing § 2254 Cases; see 28 U.S.C. § 2243. If so, the petition must be summarily dismissed. Rule 4; see Allen v. Perini, 424 F.2d 134, 141 (6th Cir. 1970) (district court has the duty to "screen out" petitions that lack merit on their face). A dismissal under Rule 4 includes those petitions which raise legally frivolous claims, as well as those containing factual allegations that are palpably incredible or false. Carson v. Burke, 178 F.3d 434, 436-37 (6th Cir. 1999). After undertaking the review required by Rule 4, the Court concludes that the petition must be dismissed because it fails to raise a meritorious federal claim.

### Discussion

#### I. Factual allegations

Petitioner Santiago Esquivel is incarcerated with the Michigan Department of Corrections at the Saginaw County Correctional Facility (SRF) in Freeland, Saginaw County, Michigan. On May 30, 2018, following **[*2]** a five-day jury trial in the Calhoun County Circuit Court, Petitioner was convicted of three counts of first-degree criminal sexual conduct (CSC-I), in violation of Mich. Comp. Laws § 750.520b, one count of second-degree criminal sexual conduct (CSC-II), in violation of Mich. Comp. Laws § 750.520c, and one count of assault with intent to commit sexual penetration, in violation of Mich. Comp. Laws § 750.520g. On July 16, 2018, the court sentenced Petitioner as a second habitual offender, Mich. Comp. Laws § 769.10, to concurrent prison terms of 29 years, 8 months to 59 years, 4 months on each CSC-I conviction, 10 years, 5 months to 22 years, 6 months on the CSC-II conviction, and 6 years, 11 months to 15 years on the assault conviction.

The Michigan Court of Appeals described the facts underlying Petitioner's prosecution and the testimony elicited at trial as follows:

This case arises from defendant's repeated sexual assaults of his girlfriend's minor child. Defendant helped raised the victim from the time she was four years old. He began sexually abusing her when she was 10 or 11 years old, and the abuse continued until the victim was 15 years old. The assaults escalated from defendant penetrating the victim with his fingers while she was asleep to defendant attempting to penetrate the victim **[*3]** with his penis, kissing her, touching her breasts and thighs, forcing her to watch pornography, forcing her to touch his penis, and following her around the house to abuse her in various locations. Defendant abused the victim in the kitchen, bathroom, living room, and bedrooms. Defendant sometimes accosted the victim several times a day. Defendant also manipulated and controlled the victim, making her feel that the abuse was her fault, and treating her differently than her siblings by buying her gifts, paying her special attention, not allowing her to leave the house, and acting like they were in a romantic relationship.

During the trial, the victim's mother testified that she texted defendant and asked him if he had touched her daughter. She testified that defendant did not deny touching her daughter, but responded by texting "WTF?" and "What do you want me to say?" She further testified that defendant's failure to deny the accusation made her think "that he did it."

During the prosecutor's case-in-chief, a police detective testified on direct examination that he set up an interview with the victim after speaking with her mother to coordinate a date and time. After he interviewed the **[*4]** victim, the detective had contact with defendant, and then he obtained a search warrant for defendant's cell phone. Therefore, during the testimony elicited by the prosecutor, the detective made no mention of any attempt to interview defendant and made no reference to defendant invoking his right to counsel or to remain silent.

A juror then submitted a question inquiring about the grounds on which police arrested defendant. In response to the juror's inquiry, the trial court questioned the detective about the victim's interview. The detective responded that, after he interviewed the victim, he believed he had probable cause to arrest defendant. The detective further responded that the prosecutor instructed him to arrest and interview defendant. Therefore, during the testimony elicited by the trial court, the detective stated that he received instructions to arrest and interview defendant, but he made no mention of an attempt to interview defendant or defendant invoking his right to counsel or to remain silent.

Based on the detective's response to the trial court's questions, defendant moved for a mistrial, arguing that the detective's testimony violated his due-process rights by referring **[*5]** to his postarrest, post-Miranda silence. Defendant asserted that the detective revealed that the police intended to interview defendant. Coupled with the fact that no interview was presented to the jury, defendant argued that the detective's testimony created an implication that defendant either asserted his right to counsel or his right to remain silent. The trial court denied the motion for a mistrial, holding that the witness did not mention that defendant had invoked his right to counsel or to remain silent. The trial court concluded that there was nothing improper about the detective's testimony, and even if any error had occurred, it was harmless.

(Mich. Ct. App. Op., ECF No. 1-5, PageID.29-30.) "The facts as recited by the Michigan Court of Appeals are presumed correct on habeas review pursuant to *28 U.S.C. § 2254(e)(1)*." *Shimel v. Warren, 838 F.3d 685, 688 (6th Cir. 2016)*. Although Petitioner denies that the events described by the other witnesses occurred, his habeas challenges do not call into question the accuracy of the appellate court's description of the testimony.

The jury convicted Petitioner of the five offenses and the court sentenced Petitioner as described above. Petitioner, with the assistance of counsel, directly appealed his convictions **[*6]** and sentences to the Michigan Court of Appeals, raising two issues: the same two issues he raises in his habeas petition. By unpublished opinion issued December 12, 2019, the Michigan Court of Appeals rejected Petitioner's challenges and affirmed the trial court.

Petitioner then filed a *pro per* application for leave to appeal to the Michigan Supreme Court raising the same issues he raised in the court of appeals. By order entered May 26, 2020, the supreme court denied leave to appeal. (Mich. Order, ECF No. 1-6, PageID.36.)

On March 26, 2021, Petitioner timely filed his habeas corpus petition raising two grounds for relief, as follows:

I. The trial court violated Petitioner's due process right to be free from punishment for exercising his

Fifth Amendment right to remain silent. Petitioner is entitled to a new trial. US Const Ams X, XIV.

II. The trial court violated Petitioner's due process right to be sentenced based on accurate information when it incorrectly scored OV 7 at 50 points and OV 10 at 15 points without sufficient support. Petitioner is entitled to resentencing. U.S. Const Ams. V, XIV.

(Pet., ECF No. 1, PageID.21, 25.)

**II. AEDPA standard**

The AEDPA "prevent[s] federal habeas 'retrials'" and ensures that state court convictions are **[*7]** given effect to the extent possible under the law. Bell v. Cone, 535 U.S. 685, 693-94, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002). An application for writ of habeas corpus on behalf of a person who is incarcerated pursuant to a state conviction cannot be granted with respect to any claim that was adjudicated on the merits in state court unless the adjudication: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d). "Under these rules, [a] state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." Stermer v. Warren, 959 F.3d 704, 721 (6th Cir. 2020) (quoting Harrington v. Richter, 562 U.S. 86, 101, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) (quoting Yarborough v. Alvarado, 541 U.S. 652, 664, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004)) (internal quotation marks omitted)). This standard is "intentionally difficult to meet." Woods v. Donald, 575 U.S. 312, 316, 135 S. Ct. 1372, 191 L. Ed. 2d 464 (2015) (internal quotation omitted).

The AEDPA limits the source of law to cases decided by the United States Supreme Court. 28 U.S.C. § 2254(d). In determining whether federal law is clearly established, the Court may not consider the decisions of lower federal courts. Williams v. Taylor, 529 U.S. 362, 381-82, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000); Miller v. Straub, 299 F.3d 570, 578-79 (6th Cir. 2002). Moreover, **[*8]** "clearly established Federal law" does not include decisions of the Supreme Court announced after the last adjudication of the merits in state court. Greene v. Fisher, 565 U.S. 34, 37-38, 132 S. Ct. 38, 181 L. Ed. 2d 336 (2011). Thus, the inquiry is limited to an examination of the legal landscape as it would have appeared to the Michigan state courts in light of Supreme Court precedent at the time of the state-court adjudication on the merits. Miller v. Stovall, 742 F.3d 642, 644 (6th Cir. 2014) (citing Greene, 565 U.S. at 38).

A federal habeas court may issue the writ under the "contrary to" clause if the state court applies a rule different from the governing law set forth in the Supreme Court's cases, or if it decides a case differently than the Supreme Court has done on a set of materially indistinguishable facts. Bell, 535 U.S. at 694 (citing Williams, 529 U.S. at 405-06). "To satisfy this high bar, a habeas petitioner is required to 'show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" Woods, 575 U.S. at 316 (quoting Harrington, 562 U.S. at 103).

Determining whether a rule application was unreasonable depends on the rule's specificity. Stermer, 959 F.3d at 721. "The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." **[*9]** Yarborough, 541 U.S. at 664. "[W]here the precise contours of the right remain unclear, state courts enjoy broad discretion in their adjudication of a prisoner's claims." White v. Woodall, 572 U.S. 415, 424, 134 S. Ct. 1697, 188 L. Ed. 2d 698 (2014) (internal quotations omitted).

The AEDPA requires heightened respect for state factual findings. Herbert v. Billy, 160 F.3d 1131, 1134 (6th Cir. 1998). A determination of a factual issue made by a state court is presumed to be correct, and the petitioner has the burden of rebutting the presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); Davis v. Lafler, 658 F.3d 525, 531 (6th Cir. 2011) (en banc); Lancaster v. Adams, 324 F.3d 423, 429 (6th Cir. 2003); Bailey v. Mitchell, 271 F.3d 652, 656 (6th Cir. 2001). This presumption of correctness is accorded to findings of state appellate courts, as well as the trial court. See Sumner v. Mata, 449 U.S. 539, 546-547, 101 S. Ct. 764, 66 L. Ed. 2d 722 (1981); Smith v. Jago, 888 F.2d 399, 407 n.4 (6th Cir. 1989).

Section 2254(d) limits the facts a court may consider on habeas review. The federal court is not free to consider any possible factual source. The reviewing court "is limited to the record that was before the state court that

adjudicated the claim on the merits." Cullen v. Pinholster, 563 U.S. 170, 180, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011). "If a review of the state court record shows that additional fact-finding was required under clearly established federal law or that the state court's factual determination was unreasonable, the requirements of § 2254(d) are satisfied and the federal court can review the underlying claim on its merits. Stermer, 959 F.3d at 721 (citing, *inter alia*, Brumfield v. Cain, 576 U.S. 305, 135 S. Ct. 2269, 192 L. Ed. 2d 356 (2015), and Panetti v. Quarterman, 551 U.S. 930, 954, 127 S. Ct. 2842, 168 L. Ed. 2d 662 (2007)).

If the petitioner "satisfies the heightened requirements of § 2254(d), or **[*10]** if the petitioner's claim was never 'adjudicated on the merits' by a state court, 28 U.S.C. § 2254(d)"—for example, if he procedurally defaulted the claim—"AEDPA deference no longer applies." Stermer, 959 F.3d at 721. Then, the petitioner's claim is reviewed *de novo*. *Id.* (citing Maples v. Stegall, 340 F.3d 433, 436 (6th Cir. 2003)).

## III. Discussion

### A. Comment on Petitioner's silence

The Fifth Amendment of the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." In Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the Supreme Court held that, in order to protect an individual's Fifth Amendment privilege against self-incrimination, when an individual is in custody, law enforcement officials must warn the suspect before his interrogation begins of his right to remain silent, that any statement may be used against him, and that he has the right to retained or appointed counsel. *Id.* at 478-79; *see also* Dickerson v. United States, 530 U.S. 428, 435, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000); Stansbury v. California, 511 U.S. 318, 322, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994). Even so, "the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good . . . . Admissions of guilt resulting from valid *Miranda* waivers are more than merely desirable; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." Texas v. Cobb, 532 U.S. 162, 172, 121 S. Ct. 1335, 149 L. Ed. 2d 321 (2001) (quotation and citation omitted).

Upon Petitioner's arrest, he was advised of his Miranda rights. Petitioner invoked his **[*11]** right to remain silent and his right to counsel.

The prosecutor may not comment on the silence of a detained person who has asserted his or her *Miranda* rights. In Doyle v. Ohio, 426 U.S. 610, 619, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), the Supreme Court considered whether a defendant's silence during a custodial interrogation could be used, not as evidence of guilt, but to impeach the defendant's testimony at trial. The Court held "that the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment." The theory underlying *Doyle* is that, while *Miranda* warnings contain no express assurance that silence will carry no penalty, "such assurance is implicit to any person who receives the warnings." *Id.* at 618. On this reasoning, the Court concluded that it would be fundamentally unfair first to induce a defendant to remain silent through *Miranda* warnings and then to penalize the defendant who relies on those warnings by allowing the defendant's silence to be used to impeach an exculpatory explanation offered at trial. *Id.*

Petitioner contends he has been the victim of such fundamental unfairness. He was arrested and invoked his Miranda right to remain silent. He contends that the detective's reference to **[*12]** the prosecutor's direction that the detective arrest and interview Petitioner was tantamount to informing the jury that an interview occurred and that Petitioner remained silent.

It is important to keep in mind that the only thing the detective said was that the prosecutor instructed the detective to arrest and interview Petitioner. The detective did not mention an attempt to interview Petitioner nor did the detective state or even suggest that Petitioner had invoked his *Miranda* rights. The oral argument for Petitioner's appeal is available from the Michigan Court of Appeals. *See* https://courts.michigan.gov/opinions_orders/case_search/pages/default.aspx?SearchType=1&CaseNumber=344832&CourtType_CaseNumber=2 (visited Apr. 2, 2021). During oral argument, the court of appeals judges confirmed with Petitioner's counsel that the only statement which Petitioner found objectionable was the detective stating that the prosecutor instructed the detective to arrest and interview the Petitioner.

The court of appeals resolved Petitioner's challenge as follows:

> In *People v Shafier, 483 Mich 205, 224, 768 N.W.2d 305*; *483 Mich. 205, 768 NW2d 305(2009)*, our Supreme Court held that the prosecutor violated the defendant's due-process rights when he referred to the defendant's postarrest, **[*13]** post-Miranda silence. In that case, however, the prosecutor made repeated references to the defendant's silence in his opening statement; in the presentation of the case-in-chief by eliciting testimony from the arresting officer; on cross-examination of the defendant; and in closing argument. The Supreme Court stated that the issue was that the state gave defendant Miranda warnings, "which constituted an implicit promise that his choice to remain silent would not be used against him," and then "breached that promise by attempting to use defendant's silence as evidence" against him. *Id. at 218*. The Court concluded that there was "no question that this is the sort of error that compromises the fairness, integrity, and truth-seeking function of a jury trial," rendering the trial fundamentally unfair. *Id. at 224*.
>
> In this case, unlike in *Shafier*, the allegedly improper comment by the police detective was not grounds for a mistrial. The prosecutor did not refer to defendant's postarrest, post-Miranda silence in his opening statement, in his case-in-chief, during cross-examination of any witness, or in his closing statement. In fact, the comment to which defendant objects was not elicited by the prosecutor's **[*14]** questioning at all. The trial court asked the detective, after a juror raised the question, about his interview of the victim. The detective responded that he believed he had probable cause to arrest defendant following the interview of the victim and that the prosecutor instructed him to arrest and interview defendant. No follow-up questions were asked, no further references were made to an interview, and no references were made to defendant's silence or lack thereof. In fact, the challenged testimony did not refer to defendant's silence at all. Furthermore, the testimony was not repeated; it was an isolated and inadvertent comment in response to a juror's question.
>
> On these facts, the trial court properly denied defendant's motion for a mistrial. The single reference to the detective's instructions to arrest and interview defendant did not amount to a reference to defendant's silence.

(Mich. Ct. App. Op., ECF No. 1-5, PageID.31.) Although the Michigan Court of Appeals decided Petitioner's claim based upon state court authority—*Shafier*—there is no question that *Shafier* was decided based on clearly established federal law. The *Shafier* court acknowledged that the Michigan constitution **[*15]** provided at least coextensive protections, but the court made clear it was applying the United States constitution, not the state constitution. *Shafier, 768 N.W.2d at 309 n.6*.

In *Shafier*, the Michigan Supreme Court was applying *Doyle and Wainwright v. Greenfield, 474 U.S. 284, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986)*:

> The United States Constitution guarantees that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. Am. V. *Miranda v. Arizona, 384 US 436, 444-449, 467-468, 86 S Ct 1602, 16 L Ed 2d 694 (1966)*, established "guidelines for law enforcement agencies and courts to follow" in order to protect the privilege against compelled self-incrimination during custodial police interrogations. Thus, under *Miranda*, every person subject to interrogation while in police custody must be warned, among other things, that the person may choose to remain silent in response to police questioning. *Id. at 444-445, 86 S Ct 1602*. As a general rule, if a person remains silent after being arrested and given *Miranda* warnings, that silence may not be used as evidence against that person. *Wainwright v. Greenfield, 474 US 284, 290-291, 106 S Ct 634, 88 L Ed 2d 623 (1986)*. Therefore, in general, prosecutorial references to a defendant's post-arrest, post-*Miranda* silence violate a defendant's due process rights under the *Fourteenth Amendment of the United States Constitution*. See *Wainwright, 474 US at 290-291, 106 S Ct 634*; *Doyle, 426 US at 618-620, 96 S Ct 2240*.
>
> The United States Supreme Court has explained the rationales behind the constitutional prohibition against the use of a defendant's post-arrest, **[*16]** post-*Miranda* silence. To begin with, a defendant's silence may merely be the defendant's invocation of the right to remain silent, as opposed to a tacit acknowledgement of guilt. "[E]very post-arrest silence is insolubly ambiguous . . . ." *Doyle, 426 US at 617, 96 S Ct 2240*. Further, *Miranda* warnings provide an implicit promise that a defendant will not be punished for remaining silent. *Id. at 618, 96 S Ct 2240*. Once the government has assured a person of his right to remain silent, "breaching the implied assurance of the *Miranda* warnings is an affront to

the fundamental fairness that the Due Process Clause requires." Wainwright, 474 US at 291, 106 S Ct 634.

Consistent with these rationales, a defendant's post-arrest, post-*Miranda* silence cannot be used to impeach a defendant's exculpatory testimony, see *Doyle*, or as direct evidence of defendant's guilt in the prosecutor's case-in-chief, see Wainwright, 474 US at 292-294, 106 S Ct 634. "What is impermissible is the evidentiary use of an individual's exercise of his constitutional rights after the State's assurance that the invocation of those rights will not be penalized." Id. at 295, 106 S Ct 634. There are limited exceptions to this general rule, but none applies here. This Court has adopted this understanding of a defendant's due process rights and stated that post-arrest, post-*Miranda* silence "may not be used **[*17]** substantively or for impeachment purposes since there is no way to know after the fact whether it was due to the exercise of constitutional rights or to guilty knowledge." People v. McReavy, 436 Mich 197, 218, 462 NW2d 1 (1990).

In general, any reference to a defendant's post-arrest, post-*Miranda* silence is prohibited, but in some circumstances a single reference to a defendant's silence may not amount to a violation of *Doyle* if the reference is so minimal that "silence was not submitted to the jury as evidence from which it was allowed to draw any permissible inference . . . ." Greer v. Miller, 483 US 756, 764-765, 107 S Ct 3102, 97 L Ed 2d 618 (1987). See also People v. Dennis, 464 Mich 567, 577-580, 628 N.W.2d 502

NW2d 502 (2001). For example, in *Greer*, there was no *Doyle* violation where the defense counsel immediately objected to a question by the prosecution about defendant's post-arrest, post-*Miranda* silence, and the trial court twice gave a curative instruction to the jury. Greer, 483 US at 759, 764-765, 107 S Ct 3102.

Shafier, 768 N.W.2d at 310-11.

Petitioner challenges the appellate court's resolution of his claim on two levels. First, he argues that it depends on cases where a cautionary instruction was given to remedy any prejudice and no such instruction was given in his case. And second, he claims the court of appeals' determination ignores the additional prejudicial impact of the prosecution's comments on Petitioner's silence **[*18]** that were presented to the jurors by way of the testimony of the victim's mother.

**1. No cautionary instruction**

Petitioner contends that the court of appeals relied on authority that depended upon the giving of a cautionary instruction where no such instruction was given in his case. Put differently, Petitioner claims that it was wrong of the court of appeals to deny him relief based on authority where the defendant got the benefit of a cautionary instruction because Petitioner did not get the benefit of a cautionary instruction. The court of appeals cited three state court opinions in its analysis of this issue: Shafier, People v. Ortiz-Kehoe, 237 Mich. App. 508, 603 N.W.2d 802 (Mich. Ct. App. 1999); and People v. Haywood, 209 Mich. App. 217, 530 N.W.2d 497 (1995). *Shafier* was a case that involved comments regarding post-arrest, post-*Miranda* silence. *Haywood* and *Ortiz-Kehoe*, however, were cases that involved some other type of improper testimony. *Haywood* involved unsolicited testimony implying that the defendant may have previously given the murder victim a black eye. *Ortiz-Kehoe* involved an improper reference to a polygraph examination.

Neither Shafier nor Haywood involved giving a cautionary instruction. *Ortiz-Kehoe* involved a cautionary instruction, but the court did not conclude that the instruction augured against declaring **[*19]** a mistrial, but in favor of it. Ortiz-Kehoe, 237 Mich. App. 508, 603 N.W.2d 802, 806 (Mich. Ct. App. 1999) ("Defendant did object and receive a cautionary instruction, a fact that weighs in favor of granting a mistrial."). Petitioner's contention, therefore, is simply wrong.

Petitioner's challenge simply could not arise from the authority cited by the Michigan Court of Appeals in Petitioner's case, but it could arise from the authority cited in *Shafier*. The *Shafier* court mentioned Greer v. Miller, 483 U.S. 756, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987). In *Greer*, the Supreme Court concluded that a single reference to a defendant's post-arrest, post-*Miranda* silence was so minimal that "silence was not submitted to the jury as evidence from which it was allowed to draw any permissible inference" particularly where defense counsel immediately objected to the question and the trial court twice gave a curative instruction to the jury. Greer, 483 U.S. at 764-65.

The *Greer* holding involved a cautionary instruction and, therefore, can be distinguished from Petitioner's case. But Petitioner's appellate panel did not rely on or even mention *Greer*. Moreover, *Greer* had no impact on Petitioner's case because the trial court and the court of appeals determined that there was not even a single reference to Petitioner's post-arrest, post-*Miranda* silence. That factual **[*20]** determination is presumed correct. Petitioner has provided no evidence, much less clear and convincing evidence, to overcome the presumption. In fact, based on the information and argument Petitioner has provided, the state courts' determinations that there were no references to Petitioner's post-arrest, post-*Miranda* silence are eminently reasonable.

Accordingly, Petitioner's arguments that it is unfair to rely on authority that involves cautionary instructions when no such instructions were given in his case, are entirely misdirected. Petitioner has failed to demonstrate that the court of appeals' rejection of his *Doyle* claim is contrary to, or an unreasonable application of, clearly established federal law.

**2. Testimony of the victim's mother**

Perhaps recognizing that the detective's statement, standing alone, does not implicate the protections of *Doyle*, Petitioner next invites the Court to consider the detective's statement regarding the instruction to interview Petitioner in combination with the victim's mother's testimony and the prosecutor's arguments regarding the mother's testimony. The court of appeals noted that the victim's mother testified that she had asked Petitioner if he **[*21]** had touched her daughter. The mother explained that Petitioner did not deny it and responded defensively. She testified that she interpreted his response as an indication "that he did it." (Mich. Ct. App. Op., ECF No. 1-5, PageID.29-30; Pet., ECF No. 1-3, PageID.22.)

It appears that the mother posed the question to Petitioner and he responded before his arrest and before he was given *Miranda* warnings and before he invoked the privilege. In that circumstance "no governmental action induced the defendant to remain silent before his arrest." *Fletcher v. Weir, 455 U.S. 603, 606, 102 S. Ct. 1309, 71 L. Ed. 2d 490 (1982)*; *see also Salinas v. Texas, 570 U.S. 178, 133 S. Ct. 2174, 186 L. Ed. 2d 376 (2013)*; *Abby v. Howe, 742 F.3d 221 (6th Cir. 2014)*. Thus, Petitioner has failed to show that the state court's acceptance of the victim's mother's testimony and the prosecutor's references to it are contrary to, or an unreasonable application of, clearly established federal law.

**B. Sentencing claims**

"[A] federal court may issue the writ to a state prisoner 'only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.'" *Wilson v. Corcoran, 562 U.S. 1, 5, 131 S. Ct. 13, 178 L. Ed. 2d 276 (2010)* (quoting *28 U.S.C. § 2254(a)*). A habeas petition must "state facts that point to a 'real possibility of constitutional error.'" *Blackledge v. Allison, 431 U.S. 63, 75 n.7, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977)* (quoting Advisory Committee Note to *Rule 4*, Rules Governing Habeas Corpus Cases). The federal courts have no power **[*22]** to intervene on the basis of a perceived error of state law. *Wilson, 562 U.S. at 5*; *Bradshaw v. Richey, 546 U.S. 74, 76, 126 S. Ct. 602, 163 L. Ed. 2d 407 (2005)*; *Estelle v. McGuire, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991)*; *Pulley v. Harris, 465 U.S. 37, 41, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984)*.

Claims concerning the improper application of, or departures from, sentencing guidelines are state-law claims and typically are not cognizable in habeas corpus proceedings. *See Hutto v. Davis, 454 U.S. 370, 373-74, 102 S. Ct. 703, 70 L. Ed. 2d 556 (1982)* (federal courts normally do not review a sentence for a term of years that falls within the limits prescribed by the state legislature); *Austin v. Jackson, 213 F.3d 298, 301-02 (6th Cir. 2000)* (alleged violation of state law with respect to sentencing is not subject to federal habeas relief). Nonetheless, it is well established that a court violates due process when it imposes a sentence based upon materially false information. *United States v. Tucker, 404 U.S. 443, 447, 92 S. Ct. 589, 30 L. Ed. 2d 592 (1972)*; *Townsend v. Burke, 334 U.S. 736, 740, 68 S. Ct. 1252, 92 L. Ed. 1690 (1948)* (citation omitted). To prevail on such a claim, the petitioner must show (1) that the information before the sentencing court was materially false, and (2) that the court relied on the false information in imposing the sentence. *Tucker, 404 U.S. at 447*.

Petitioner makes passing reference to such a claim when he states his habeas sentencing challenge: "The trial court violated Petitioner's due process right to be sentenced based on accurate information . . . ." (Pet., ECF No. 1-4, PageID.25.) Petitioner, however, quickly veers away from the limited confines of habeas

cognizability when he articulates **[*23]** his argument. He does not identify a single fact upon which the trial court relied that was materially false or inaccurate. Thus, he has not supported, with facts or argument, the due process claim he hints at when he identifies his habeas issues. Instead, Petitioner argues that the court's conclusions—the judge's actual applications of the guidelines—are inaccurate.

The argument that the trial court erred when it applied the guidelines or that the court of appeals erred when it affirmed the trial court's application, does not state a federal constitutional claim. The decision of the state courts on a state-law issue is binding on a federal court. *See* Johnson v. United States, 559 U.S. 133, 138, 130 S. Ct. 1265, 176 L. Ed. 2d 1 (2010); Wainwright v. Goode, 464 U.S. 78, 84, 104 S. Ct. 378, 78 L. Ed. 2d 187 (1983). The Sixth Circuit recognizes "'that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus.'" Stumpf v. Robinson, 722 F.3d 739, 746 n.6 (6th Cir. 2013) (quoting Bradshaw, 546 U.S. at 76); *see also* Thomas v. Stephenson, 898 F.3d 693, 700 n.1 (6th Cir. 2018) (same). Thus, this Court is bound by the state appellate court's determination that the offense variables are properly scored under state law.

As another alternative, Petitioner contends that he is entitled to resentencing because the prosecutor's proof with regard to the variables was insufficient, that the prosecutor **[*24]** failed to establish the underlying facts by a preponderance of the evidence. Whether or not the evidence preponderated or was "sufficient" to demonstrate Petitioner's sadistic or predatory conduct is not a constitutional issue.

The Sixth Circuit described the scope of constitutional protection at sentencing as follows:

> But the Due Process Clause does not offer convicted defendants at sentencing the same "constitutional protections afforded defendants at a criminal trial." United States v. Silverman, 976 F.2d 1502, 1511 (6th Cir. 1992) (en banc). "[B]oth before and since the American colonies became a nation," *Williams v. New York* explains, "courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law." 337 U.S. 241, 246, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949). That tradition has become more settled over time, because "possession of the fullest information possible concerning the defendant's life and characteristics" is "[h]ighly relevant—if not essential—to [the judge's] selection of an appropriate sentence." Id. at 247. An imperative of "evidentiary inclusiveness"—"a frame of reference as likely to facilitate leniency as to impede **[*25]** it," United States v. Graham-Wright, 715 F.3d 598, 601 (6th Cir. 2013)—explains why the Evidence Rules, the Confrontation Clause, and the beyond-a-reasonable-doubt standard of proof do not apply at sentencing. *See* United States v. O'Brien, 560 U.S. 218, 224, 130 S. Ct. 2169, 176 L. Ed. 2d 979 (2010) (beyond a reasonable doubt); Williams v. New York, 337 U.S. at 246-47, 252 (Evidence Rules); United States v. Katzopoulos, 437 F.3d 569, 576 (6th Cir.2006) (Confrontation Clause); *see generally* United States v. Tucker, 404 U.S. 443, 446, 92 S. Ct. 589, 30 L. Ed. 2d 592 (1972).

United States v. Alsante, 812 F.3d 544, 547 (6th Cir. 2016). In McMillan v. Pennsylvania, 477 U.S. 79, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986),[1] the Supreme Court acknowledged that "sentencing courts have always operated without constitutionally imposed burdens of

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[1] *McMillan* was overruled in Alleyne v. United States, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013). *See* United States v. Haymond, 139 S.Ct. 2369, 2378, 204 L. Ed. 2d 897 (2019) ("Finding no basis in the original understanding of the Fifth and Sixth Amendments for *McMillan* and *Harris* [*v.* United States, 536 U.S. 545, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002)], the [*Alleyne*] Court expressly overruled those decisions . . . ."). The *McMillan* holding that was overruled, however, was the principle that factors implicating mandatory minimum sentences did not require proof beyond a reasonable doubt. The underlying premise from *McMillan* quoted above—that there is no constitutionally required standard of proof to support discretionary sentencing decisions—survived *Alleyne* and, indeed, was effectively highlighted by *Alleyne* when the *Alleyne* Court distinguished mandatory from discretionary sentencing decisions. None of the cases in the line of authority that culminated in *Alleyne*—Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and United States v. Booker, 543 U.S. 220 (2005), 125 S. Ct. 738, 160 L. Ed. 2d 621—suggest that the constitutionally required burden of proof that applies to facts found in support of mandatory maximum or minimum sentences applies to discretionary sentences.

proof . . . ." *Id. at 92 n.8*.[2]

In *United States v. Watts, 519 U.S. 148, 156, 117 S. Ct. 633, 136 L. Ed. 2d 554 (1997)*, the Supreme Court noted that proof by a preponderance of the evidence at sentencing would satisfy due process, but the Court did not say that due process requires it. Rather, in *Watts*, it was the federal sentencing guidelines that required proof by a preponderance of the evidence and the Court only considered whether a higher standard—such as clear and convincing evidence—was constitutionally required. Thus, *Watts* was not an attempt to establish the bottom limit of constitutional propriety, it merely held that a preponderance of the evidence standard of persuasion was constitutionally acceptable, even for acquitted conduct.[3]

Even though the State of Michigan may require that facts supporting a sentence be proven by a preponderance of the evidence, that requirement is a matter of state **[*26]** law, not the constitution. Therefore, a sufficiency-of-the-evidence claim for sentencing, at least for a non-capital offense, is not cognizable on habeas review. Petitioner's challenges to the state court's offense variable scoring, and the resulting sentence, fail to show that his sentence is contrary to, or an unreasonable application of, clearly established federal law.

Petitioner is not entitled to habeas relief.

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[2] Even the term "burden of proof" can be misleading. As the Supreme Court noted in *Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975)*, "[c]ontemporary writers divide the general notion of 'burden of proof' into a burden of producing some probative evidence on a particular issue and a burden of persuading the factfinder with respect to that issue by a standard such as proof beyond a reasonable doubt or by a fair preponderance of the evidence." *Id. at 695 n. 20*. Generally, the constitution places the burden of production and persuasion on the prosecutor to prove the elements of a charged offense and the standard of persuasion is "beyond a reasonable doubt." There are times, however, where the constitution permits the placement of the burden of production and persuasion on the defendant, for example, with regard to affirmative defenses. It might be less confusing to refer to the required persuasive impact of the evidence as the standard of persuasion rather than the burden of proof.

[3] As a practical matter, the preponderance of the evidence standard might be the lowest acceptable standard of persuasion, not because of the *due process clause*, but because anything lower than "more likely than not" is not really persuasive at all.

**IV. Certificate of Appealability**

Under *28 U.S.C. § 2253(c)(2)*, the Court must determine whether a certificate of appealability should be granted. A certificate should issue if Petitioner has demonstrated a "substantial showing of a denial of a constitutional right." *28 U.S.C. § 2253(c)(2)*.

The Sixth Circuit Court of Appeals has disapproved issuance of blanket denials of a certificate of appealability. *Murphy v. Ohio, 263 F.3d 466, 467 (6th Cir. 2001)* (per curiam). Rather, the district court must "engage in a reasoned assessment of each claim" to determine whether a certificate is warranted. *Id.* Each issue must be considered under the standards set forth by the Supreme Court in *Slack v. McDaniel, 529 U.S. 473, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)*. *Murphy, 263 F.3d at 467*. Consequently, this Court has examined each of Petitioner's claims under the *Slack* standard. Under *Slack, 529 U.S. at 484*, to warrant a grant of the certificate, "[t]he petitioner must demonstrate that reasonable **[*27]** jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* "A petitioner satisfies this standard by demonstrating that . . . jurists of reason could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell, 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003)*. In applying this standard, the Court may not conduct a full merits review, but must limit its examination to a threshold inquiry into the underlying merit of Petitioner's claims. *Id.*

The Court finds that reasonable jurists could not conclude that this Court's dismissal of Petitioner's claims was debatable or wrong. Therefore, the Court will deny Petitioner a certificate of appealability. Moreover, although Petitioner has failed to demonstrate that he is in custody in violation of the Constitution and has failed to make a substantial showing of the denial of a constitutional right, the Court does not conclude that any issue Petitioner might raise on appeal would be frivolous. *Coppedge v. United States, 369 U.S. 438, 445, 82 S. Ct. 917, 8 L. Ed. 2d 21 (1962)*.

**Conclusion**

The Court will enter a judgment dismissing the petition and an order denying a certificate of appealability.

Dated: April 22, 2021

/s/ Paul L. Maloney

Paul L. Maloney

United States District Judge

**ORDER**

In accordance with the opinion **[*28]** entered this day:

**IT IS ORDERED** that a certificate of appealability is **DENIED**.

Dated: April 22, 2021

/s/ Paul L. Maloney

Paul L. Maloney

United States District Judge

**JUDGMENT**

In accordance with the opinion entered this day:

**IT IS ORDERED** that the petition for writ of habeas corpus is **DISMISSED WITH PREJUDICE** under *Rule 4 of the Rules Governing § 2254 Cases* for failure to raise a meritorious federal claim.

Dated: April 22, 2021

/s/ Paul L. Maloney

Paul L. Maloney

United States District Judge

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APPENDIX B

# THE NOVEMBER 30, 2022, ORDER OF THE SIXTH CIRCUIT COURT OF APPEALS DENYING PETITIONER'S MOTION FOR CERTIFICATE OF APPEALABILITY.

# *Esquivel v. Miniard*

United States Court of Appeals for the Sixth Circuit

November 30, 2021, Filed

No.21-1525

**Reporter**
2021 U.S. App. LEXIS 35403 *

SANTIAGO ESQUIVEL, Petitioner-Appellant, v. GARY MINIARD, Warden, Respondent-Appellee.



## Core Terms

sentence, silence, trial court, interview, Appeals, certificate, variable

## Opinion

**[*1]** ORDER

Before: GILMAN, Circuit Judge.

Santiago Esquivel, a Michigan prisoner proceeding pro se, appeals the district court's judgment dismissing his petition for a writ of habeas corpus filed under *28 U.S.C. § 2254*. Esquivel moves this court for a certificate of appealability. *See Fed. R. App. P. 22(b)*.

In 2018, a jury in the Calhoun County Circuit Court convicted Esquivel on three counts of first-degree criminal sexual conduct, one count of second-degree criminal sexual conduct, and one count of assault with intent to commit sexual penetration. The trial court sentenced Esquivel as a second habitual offender to an aggregate sentence of 356 to 712 months of imprisonment. The

Michigan Court of Appeals affirmed Esquivel's convictions and sentence. *People v. Esquivel, No. 344832, 2019 WL 6799712 (Mich. Ct. App. Dec. 12, 2019)* (per curiam), *appeal denied, 943 N.W.2d 127 (Mich. 2020)* (mem.).

Esquivel filed a timely habeas petition, raising the same two grounds that he raised on direct appeal: (1) the trial court violated his due process right to be free from punishment for exercising his right to remain silent, and (2) the trial court violated his due process right to be sentenced based on accurate information when it incorrectly scored offense variables under the sentencing guidelines without sufficient support. Upon preliminary **[*2]** review pursuant to *Rule 4* of



the Rules Governing *§ 2254* Cases, the district court dismissed Esquivel's habeas petition and denied him a certificate of appealability. This appeal followed.

Esquivel now moves this court for a certificate of appealability. *See Fed. R. App. P. 22(b)*. To obtain a certificate of appealability, Esquivel must make "a substantial showing of the denial of a constitutional right." *28 U.S.C. § 2253(c)(2)*. Esquivel "satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell, 537 U.S. 322, 327 (2003)*.

Esquivel first asserted that his post-arrest, post-*Miranda* silence was placed before the jury in violation of his right to due process. In *Doyle v. Ohio, 426 U.S. 610, 619 (1976)*, the Supreme Court held that, when a defendant invokes his right to remain silent after being taken into custody and receiving warnings pursuant to *Miranda v. Arizona, 384 U.S. 436 (1966)*, the Due Process Clause prohibits the use of that silence to impeach the defendant. *Doyle* therefore "bars the use against a criminal defendant of silence maintained after receipt of governmental assurances."

*Anderson v. Charles, 447 U.S. 404, 408 (1980)* (per curiam).

In response to a juror's question about the grounds for Esquivel's **[*3]** arrest, the trial court questioned a detective about the victim's interview. *Esquivel, 2019 WL 6799712, at *1*. The detective responded that, after he interviewed the victim, he believed that he had probable cause to arrest Esquivel and that the prosecutor instructed him to arrest and interview Esquivel. *Id.*

According to Esquivel, the detective's testimony gave rise to the implication that he exercised his right to remain silent and therefore amounted to an improper reference to his post-arrest, post-*Miranda* silence. The Michigan Court of Appeals rejected Esquivel's argument, pointing out:

> No follow-up questions were asked, no further references were made to an interview, and no references were made to [Esquivel's] silence or lack thereof. In fact, the challenged testimony did not refer to [Esquivel's] silence at all.
>
> Furthermore, the testimony was not repeated; it was an isolated and inadvertent comment in response to a juror's question.

*Id. at *3*. The Michigan Court of Appeals concluded that the "single reference to the detective's instructions to arrest and interview [Esquivel] did not amount to a reference to [Esquivel's]



silence." *Id.* Even if the detective's testimony did amount to a reference to Esquivel's silence, **[*4]** the Michigan appellate court determined, "it did not amount to a due-process violation because the reference was 'so minimal that the silence was not submitted to the jury as evidence from which it was allowed to draw any permissible inference.'" *Id.* (quoting *People v. Shafier, 768 N.W.2d 305, 311 (Mich. 2009)*).

In his habeas petition, Esquivel asserted that the Michigan Court of Appeals mischaracterized the detective's testimony as a "single reference." Although Esquivel cited several instances where the prosecution was cautioned that the detective was not to mention any interview attempt, Esquivel failed to point to any other reference to an interview that was presented to the jury. Esquivel also argued that, to highlight his silence, the prosecution elicited testimony from the victim's mother about his reaction when she confronted him. But Esquivel's voluntary statement to a private actor did not

implicate the *Fifth Amendment*. Esquivel further argued that the Michigan Court of Appeals overlooked the fact that he was convicted chiefly on the testimony of the victim, who made inconsistent statements and lacked candor, and that the error in admitting the reference to his silence could not have been harmless. But the Michigan Court of Appeals did not **[*5]** conduct a harmless-error analysis, having concluded that there was no due-process violation.

Esquivel has failed to demonstrate that reasonable jurists could debate the district court's determination that the Michigan appellate court's rejection of his *Doyle* claim was neither contrary to, nor an unreasonable application of, clearly established federal law.

Esquivel also asserted that the trial court violated his due process right to be sentenced based on accurate information when it incorrectly scored offense variables under the sentencing guidelines without sufficient support. According to Esquivel, the trial court erred in assessing 50 points for offense variable 7-"[a] victim was treated with sadism, torture, excessive brutality or similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense"-and 15 points for offense variable 10-exploitation of a vulnerable victim where "[p]redatory conduct was involved." *Mich. Comp. Laws §§ 777.37(1)(a)*, *777.40(1)(a)*.

No. 21-1525

- 4 -

Esquivel's argument that the trial court misapplied Michigan's sentencing guidelines is a matter of state law and not cognizable on federal habeas review. *See Kissner v. Palmer, 826 F.3d 898, 902 (6th Cir. 2016)* (order); *Howard v. White, 76 F. App'x 52, 53 (6th Cir. 2003)* (order). As for Esquivel's argument **[*6]** that the trial court based his sentence on inaccurate information, a sentence violates due process if it is based on "extensively and materially false" information that the defendant "had no opportunity to correct." *Townsend v. Burke, 334 U.S. 736, 741 (1948)*.

In assessing 50 points for offense variable 7, the trial court stated in part that "the victim felt that [Esquivel] treated her differently than her siblings, which 'affected her to the point where she contemplated suicide.'" *Esquivel, 2019 WL 6799712, at *3*. Esquivel argued that the trial court's statement was contradicted by the victim's trial testimony about how her special treatment made her feel: "It made me feel good, like I was doing fine." Esquivel did not assert that he lacked an opportunity to correct this allegedly inaccurate information. *See Stewart v. Erwin, 503 F.3d 488, 495 (6th Cir. 2007)*. Nor did Esquivel identify any other inaccurate facts among the many facts cited by the trial court to support its findings that he engaged in sadistic behavior and in predatory conduct. Esquivel has failed to demonstrate that reasonable jurists could debate the district court's rejection of his sentencing claim.

For these reasons, this court **DENIES** Esquivel's motion for a certificate of appealability.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk **[*7]**

End of Document

APPENDIX C

# THE MARCH 2, 2022 LETTER FROM SCOTT S. HARRIS, CLERK OF THIS COURT, NOTIFYING PETITIONER ABOUT JUSTICE KAVANAUGH'S EXTENSION OF THE FILING DEADLINE UNTIL APRIL 29, 2022

# Supreme Court of the United States
# Office of the Clerk
# Washington, DC 20543-0001

**Scott S. Harris**
Clerk of the Court
(202) 479-3011

March 2, 2022

Mr. Santiago Esquivel
Prisoner ID #383681
Saginaw Correctional Facility
9625 Pierce Road
Freeland, MI 48623

Re: Santiago Esquivel
v. Gary Miniard, Warden
Application No. 21A462

Dear Mr. Esquivel:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kavanaugh, who on March 2, 2022, extended the time to and including April 29, 2022.

This letter has been sent to those designated on the attached notification list.

Sincerely,

**Scott S. Harris**, Clerk

by

Claude Alde
Case Analyst