No. 21-1347

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEVONNE JOMARRIO GREER,

Petitioner-Appellant,

v.

KRISTOPHER TASKILA,

Respondent-Appellee.

ORDER

Before: NALBANDIAN, Circuit Judge.

Levonne Jomarrio Greer, a Michigan prisoner proceeding through counsel, appeals the district court's judgment denying his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. Greer moves this court for a certificate of appealability as to his involuntary confession claim. *See* Fed. R. App. P. 22(b). Greer also moves this court for leave to proceed in forma pauperis on appeal. *See* Fed. R. App. P. 24(a)(5).

In 2013, a jury in the Saginaw County Circuit Court convicted Greer of one count of first-degree premeditated murder, one count of conspiracy to commit first-degree premeditated murder, eight counts of possession of a firearm when committing a felony, five counts of assault with intent to commit murder, one count of carrying a concealed weapon, one count of carrying a dangerous weapon with unlawful intent, and one count of discharging a firearm from a vehicle. These charges arose out of a drive-by shooting, during which a six-year-old girl was shot and killed. The trial court sentenced Greer to life imprisonment without the possibility of parole for the murder and conspiracy counts. On direct appeal, the Michigan Court of Appeals remanded for correction of Greer's sentence for the conspiracy count to indicate the possibility of parole and otherwise affirmed. *People v. Greer*, No. 318286, 2015 WL 302684 (Mich. Ct. App. Jan. 22, 2015), *perm. app. denied*, 864 N.W.2d 576 (Mich. 2015) (mem.).

Greer subsequently filed a motion for relief from judgment, which the trial court denied. The Michigan appellate courts denied Greer leave to appeal. *People v. Greer*, No. 339442 (Mich. Ct. App. Jan. 25, 2018), *perm. app. denied*, 919 N.W.2d 250 (Mich. 2018) (mem.).

Greer filed a pro se habeas petition. Counsel later made an appearance on Greer's behalf and filed a brief raising five grounds for habeas relief. The district court denied Greer's habeas petition and declined to issue a certificate of appealability. This timely appeal followed.

Greer moves this court for a certificate of appealability as to his involuntary confession claim, expressly abandoning his other claims. *See Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002) (per curiam); *Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000). To obtain a certificate of appealability, Greer must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Greer "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).

Greer claimed that the trial court's admission of his statements to Detective Andrew Carlson violated his right to due process because his statements were involuntary. Greer asserted that he relied on Detective Carlson's unfulfilled promises of leniency before he cooperated.

In determining whether a confession was voluntary or coerced, "the question . . . is whether the defendant's will was overborne at the time he confessed." *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963). "In determining whether a defendant's will was overborne," courts assess "the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). "[P]romises of leniency may be coercive if they are broken or illusory." *United States v. Johnson*, 351 F.3d 254, 262 (6th Cir. 2003). But "promises to recommend leniency and speculation that cooperation will have a positive effect do not make subsequent statements involuntary." *United States v. Binford*, 818 F.3d 261, 271 (6th Cir. 2016) (quoting *United States v. Delaney*, 443 F. App'x 122, 129 (6th Cir. 2011)).

The Michigan Court of Appeals determined that, after reviewing the totality of the circumstances, Greer's confession was voluntary:

> At the time he made the challenged statements, defendant was 22 years old, of at least average intelligence, and, by his own admission, experienced with the police. After being apprised of his *Miranda* rights, defendant voluntarily waived them, and although the interview lasted over three hours, the length was not per se unreasonable. There is no evidence he was injured, intoxicated, drugged, or in ill health. He had something to eat at the police station prior to the interview, was not denied sleep or medical attention, and at no time was he physically abused or threatened with abuse. The record simply does not support the conclusion that defendant's will was overborne or his capacity for self-determination critically impaired.
>
> It is true that some of the statements Detective Carlson made could be interpreted as promises of leniency, suggesting defendant would achieve a more favorable outcome if he cooperated than otherwise. That defendant hoped for the detective's help is indisputable; that he confessed in reliance on it is not. Detective Carlson made no specific promises regarding charges or sentencing. For these reasons, we conclude that defendant's confession was voluntary, and affirm the trial court's admission of the taped confession into evidence.

Greer, 2015 WL 302684, at *3 (internal citation and footnote omitted). On habeas review, the district court concluded that the Michigan appellate court reasonably determined from the totality of the circumstances that Greer's confession was voluntary and admissible.

In support of his motion for a certificate of appealability, Greer argues that his confession was involuntary because Detective Carlson "guaranteed" him a substantially reduced sentence. The one time that Detective Carlson used the word "guarantee" came in the context of how long Greer would be detained in jail, and the detective avoided making any specific promise. The interview transcript demonstrates that Detective Carlson did not otherwise "guarantee" Greer a substantially reduced sentence. As the Michigan Court of Appeals correctly noted, Detective Carlson made no specific promises when Greer asked about prison time:

> A I won't have to do no years?
>
> Q Yeah. I told you I'd help you. I told you I'd help you, and all I can say is examples for you. You got to make a decision. What happened?
>
> . . . .

A I'm just saying could you get me out of prison for sure, Andy?

Q If you're honest with me and you help me, all I can do is tell you that I can help you and cite you examples, and I think that you're smart enough to take it from there.

Jurists of reason would not debate the district court's conclusion that the Michigan Court of Appeals reasonably determined that Detective Carlson's vague statements about helping Greer did not render the confession involuntary. *See United States v. Charlton*, 737 F. App'x 257, 261 (6th Cir. 2018) (holding that non-committal offers to help were not objectively coercive).

Greer also argues in his motion for a certificate of appealability that the district court failed to analyze the totality of the circumstances. But federal habeas courts do not apply de novo review to a claim adjudicated on the merits by a state court, as was Greer's involuntary confession claim. *See English v. Berghuis*, 900 F.3d 804, 811 (6th Cir. 2018). The federal habeas court instead defers to the state court decision: "[T]he central inquiry is whether the state court decision was objectively unreasonable and not simply erroneous or incorrect." *Ayers v. Hudson*, 623 F.3d 301, 308 (6th Cir. 2010) (quoting *Harris v. Haeberlin*, 526 F.3d 903, 910 (6th Cir. 2008)). Here, the district court concluded that the Michigan Court of Appeals reasonably determined from the totality of the circumstances that Greer's confession was voluntary and admissible. Jurists of reason could not disagree with that conclusion.

Accordingly, this court **DENIES** Greer's motion for a certificate of appealability and **DENIES** as moot his motion for leave to proceed in forma pauperis on appeal.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEVONNE JOMARIO GREER,

Petitioner,

v.

Civil No. 4:18-CV-12143
Stephanie Dawkins Davis
United States District Judge

DANIEL LESATZ,

Respondent.
_____/

OPINION AND ORDER DENYING MOTION FOR RECONSIDERATION (ECF No. 24)

Petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, through counsel Dana B. Carron. This court denied the petition, declined to issue a certificate of appealability and denied leave to appeal *in forma pauperis*. *Greer v. Lesatz*, No. 4:18-CV-12143, 2021 WL 1056628 (E.D. Mich. Mar. 18, 2021). Petitioner has now filed a motion for reconsideration. Respondent filed a response in accordance with the court's directive. (ECF No. 28). The court held a hearing on November 1, 2021. (ECF No. 27). For the reasons that follow, the motion for reconsideration is **DENIED**.

U.S. Dist. Ct. Rules, E.D. Mich. 7.1(h) allows a party to file a motion for reconsideration. However, a motion for reconsideration which presents the same issues already ruled on by the court, either expressly or by reasonable implication, will not be granted. *Michigan Regional Council of Carpenters v. Holcroft L.L.C.*

195 F. Supp. 2d 908, 911 (E.D. Mich. 2002) (citing to U.S. Dist. Ct. Rules, E.D. Mich. 7.1(g)(3)). A motion for reconsideration should be granted if the movant demonstrates a palpable defect by which the court and the parties have been misled and that a different disposition of the case must result from a correction thereof. *Id.* A palpable defect is a defect that is obvious, clear, unmistakable, manifest, or plain. *Witzke v. Hiller*, 972 F. Supp. 426, 427 (E.D. Mich. 1997).

Petitioner argues that the court erred in rejecting his claim that his confession should have been suppressed because it was induced by the interrogating detective's promises of leniency. Petitioner also claims that the court inappropriately relied on *United States v. LeBrun*, 363 F.3d 715 (8th Cir. 2004) and *United States v. Charlton*, 737 Fed. Appx. 257 (6th Cir. 2018). In evaluating Petitioner's assertions of error, the court must first bear in mind the applicable standard of review for habeas petitions under 28 U.S.C. § 2254(d), which requires the court to assess whether the state court decision is contrary to or involved an unreasonable application of clearly established Supreme Court precedent or is based on an unreasonable determination of the facts in light of evidence presented in the state court proceeding. *Id.* A decision of a state court is "contrary to" clearly established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially

indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). An "unreasonable application" occurs when "a state court decision unreasonably applies the law of [the Supreme Court] to the facts of a prisoner's case." *Id.* at 409. A federal habeas court may not "issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 410-11.

"[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." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). A habeas petitioner should be denied relief as long as it is within the "realm of possibility" that fairminded jurists could find the state court decision to be reasonable. *See Woods v. Etherton,* 136 S. Ct. 1149, 1152 (2016).

In assessing whether a defendant's will was overborne in a particular case, the Supreme Court requires the court to evaluate the totality of all the surrounding circumstances, which includes both the characteristics of the accused and the details of the interrogation. *Schneckloth v. Bustamonte*, 412 U.S. 219, 266 (1973). Supreme Court precedent commands an examination of a multitude of factors, including, but not limited to: the youth of the accused; his lack of education or his low intelligence; the lack of any advice to the accused of his constitutional rights;

the length of detention; the repeated and prolonged nature of the questioning; and the use of physical punishment such as the deprivation of food or sleep. "In all of these cases, the Court determined the factual circumstances surrounding the confession, assessed the psychological impact on the accused, and evaluated the legal significance of how the accused reacted." *Id.* (citations omitted).

In applying the totality of the circumstances mandated by the Supreme Court, the Sixth Circuit has concluded a promise of leniency renders a confession involuntary only where fair-minded jurists could conclude that the promise was broken or illusory. *Robinson v. Skipper*, 2020 WL 4728087, at *2 (6th Cir. July 13, 2020) (citing *United States v. Binford*, 818 F.3d 261, 271-72 (6th Cir. 2016) (explaining that although broken or illusory promises may be coercive, "promises to recommend leniency and speculation that cooperation will have a positive effect do not make subsequent statements involuntary" (quoting *United States v. Delaney*, 443 Fed. Appx. 122, 129 (6th Cir. 2011)). Here, the Michigan Court of Appeals addressed the totality of the circumstances, including the alleged promises made by Detective Carlson, as follows:

> We conclude from our review of the totality of the circumstances, in light of the *Cipriano* factors, that defendant's confession was voluntary. At the time he made the challenged statements, defendant was 22 years old, of at least average intelligence, and, by his own admission, experienced with the police. After being apprised of his *Miranda* rights, defendant voluntarily

> waived them, and although the interview lasted over three hours, the length was not per se unreasonable. There is no evidence he was injured, intoxicated, drugged, or in ill health. He had something to eat at the police station prior to the interview, was not denied sleep or medical attention, and at no time was he physically abused or threatened with abuse. The record simply does not support the conclusion that defendant's will was overborne or his capacity for self-determination critically impaired. *See id.*
>
> It is true that some of the statements Detective Carlson made could be interpreted as promises of leniency, suggesting defendant would achieve a more favorable outcome if he cooperated than otherwise. That defendant hoped for the detective's help is indisputable; that he confessed in reliance on it is not. Detective Carlson made no specific promises regarding charges or sentencing. For these reasons, we conclude that defendant's confession was voluntary, and affirm the trial court's admission of the taped confession into evidence.

People v. Greer, No. 318286, 2015 WL 302684, at *2-3 (Mich. Ct. App. Jan. 22, 2015) (internal footnote omitted). Petitioner points to excerpts of the interrogation transcript suggesting that he was promised he would serve no prison time. A fair-minded jurist could conclude from a review of the entire transcript, however, that this is not the case. Instead, while Detective Carlson said he would help him in response to petitioner's question that "I won't have to do no years," it was also apparent that Petitioner understood that he was going to have to serve a prison sentence. (ECF No. 18-19, PageID.1120, pp. 99-100; PageID.1127, p. 122 ("You know I'm gonna end up doing some time to be honest."); PageID.1128, pp. 128-

129 ("A: Ending up going to prison. Right? Q: ...there's a good chance...there's got to some type of consequence...")). Additionally, it is reasonable to conclude from the context of the conversation between Petitioner and Carlson that when they were talking about not going to "prison," they were actually referencing Petitioner being taken to jail. (ECF No. 18-19, PageID.1125, pp. 120-121) ("Andy, can you get me out of prison tomorrow?"). They discussed this further when Carlson indicated that he could have Petitioner housed at the Bay County jail, instead of Saginaw County jail, where Petitioner feared retribution. (ECF No. 19-19, PageID.1131, pp. 139-140). The discrete instances of "promises" cited by Petitioner are surrounded by repeated discussions of a probable prison sentence. Thus, considering the interrogation as a whole, fairminded jurists could find the state court's determinations that (1) Petitioner did not rely on any promises about sentencing or charges, and (2) Petitioner's will was not overborne by the representations made by Carlson to have been reasonable. *See Woods v. Etherton,* 136 S. Ct. 1149, 1152 (2016).

As to Petitioner's claim that the court erred in relying on *LeBrun* and *Charlton, supra*, the court concludes that no error occurred. While there are distinguishing facts in both cases, it was not inappropriate for the court to point to these cases as examples of circumstances where a confession was found to be voluntary despite promises or perceived promises made by officers. *See e.g.,*

Phelps v. Berghuis, 2011 WL 2693353, at *4 (E.D. Mich. July 12, 2011), aff'd sub nom. *Phelps v. Smith*, 517 Fed. Appx 379 (6th Cir. 2013) ("While it is true that section 2254(d)(1) requires federal courts to limit its review to a determination of whether a state court's decision was contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court, this does not mean that circuit court decisions are never relevant to a habeas case."). The factual differences present in the challenged cases do not render them useless in evaluating application of the totality of the circumstances test, which is an appropriate use for them. Furthermore, Petitioner has not demonstrated how a different outcome would have resulted had the court not looked to these two cases. Importantly, the framework and principal cases upon which the court relied in weighing the state court's voluntariness evaluation was the Supreme Court's decision in *Miller v. Fenton*, 474 U.S. 104, 109 (1985) and its progeny. (ECF No. 22, PageID.1429-30).

Moreover, even if the confession were deemed to have been coerced, there remains additional, overwhelming evidence supporting Petitioner's conviction, which renders any error in its admission harmless. *Arizona v. Fulminante*, 499 U.S. 279, 295 (1991) (The harmless-error analysis applies to coerced confessions.). Petitioner ignores this additional evidence, instead advancing in his motion for reconsideration that the only evidence against him, other than the confession, was

testimony from his co-defendant, who was allowed to plead to lesser charges. But this claim is not accurate. Petitioner neither addresses nor acknowledges the considerable additional evidence discussed in the court's opinion. As indicated therein, physical evidence, witness testimony, and recordings of several telephone calls that petitioner made to relatives in which he admitted his involvement in the shooting supported Petitioner's convictions. (ECF No. 22, PageID.1432-1434). More specifically, Julian Ruiz, who was seated in the back seat of the car next to Petitioner when the shooting occurred, testified against Petitioner at trial, identifying him as one of the shooters. (ECF No. 18-11, PageID.848-849, 6/28/13 Trial Tr. at 77-79). The police also located both 40- and 45-caliber fired cartridges at the scene of the crime (ECF No. 18-10, PageID.800-01, 6/27/13 Trial Tr. at 161–64), corroborating Ruiz's testimony that petitioner was armed with a 40-caliber semiautomatic and the other shooter had a 44- or 45-caliber weapon. (ECF No. 18-11, PageID.855, 6/28/13 Trial Tr. at 101). And Petitioner also confessed to several of his family members in recorded calls, which he never challenged. (ECF No. 18-19, PageID.1132-35, pp. 143-155; ECF No. 18-13, PageID.944–46, pp. 20-29 (playing recorded interview and providing transcript to jury); ECF No. 18-14, PageID.959, p. 17 (admitting recordings and transcript into evidence)). As such, any error in finding the confession voluntary and admissible was, at most, harmless error.

Accordingly, the court concludes that Petitioner has failed to demonstrate any palpable error and is merely presenting issues which were already ruled on by this court, either expressly or by reasonable implication, when the court denied the petition for a writ of habeas corpus. *Hence v. Smith*, 49 F. Supp. 2d 549, 553 (E.D. Mich. 1999). The motion for reconsideration is, therefore, **DENIED**.

Dated: November 9, 2021

s/Stephanie Dawkins Davis
Stephanie Dawkins Davis
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Levonne Jomario Greer,

Petitioner,

v.

Civil No. 4:18-CV-12143
STEPHANIE DAWKINS DAVIS
UNITED STATES DISTRICT JUDGE

Daniel Lesatz,

Respondent.
_____/

JUDGMENT

The above entitled matter having come before the Court on a Petition for a Writ of Habeas Corpus, Honorable Stephanie Dawkins Davis, a United States District Court Judge, presiding, and in accordance with the Opinion and Order entered on March 18, 2021,

IT IS ORDERED AND ADJUDGED that the Petition for a Writ of Habeas Corpus is DENIED WITH PREJUDICE.

IT IS FURTHER ORDERED AND ADJUDGED that a Certificate of Appealability and Leave to Appeal *In Forma Pauperis* are DENIED.

Dated at Flint, Michigan, this 18th day of March, 2021.

DAVID J. WEAVER
CLERK OF THE COURT

BY: s/Tammy Hallwood
DEPUTY CLERK

APPROVED:

s/Stephanie Dawkins Davis
STEPHANIE DAWKINS DAVIS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Levonne Jomario Greer,

Petitioner,

v.

Daniel Lesatz,

Respondent.
_____/

Civil No. 18-12143

Stephanie Dawkins Davis
United States District Judge

OPINION AND ORDER DENYING THE PETITION FOR A WRIT OF HABEAS CORPUS, DECLINING TO ISSUE A CERTIFICATE OF APPEALABILITY, DENYING PETITIONER LEAVE TO APPEAL *IN FORMA PAUPERIS* AND DENYING MOTION FOR ORAL ARGUMENT (ECF No. 21)

Levonne Jomario Greer, ("Petitioner"), confined at the Baraga Correctional Facility in Baraga, Michigan, through his attorney Dana B. Carron, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his convictions for first-degree premeditated murder, Mich. Comp. Laws § 750.316a, conspiracy to commit first-degree premeditated murder, Mich. Comp. Laws § 750.157a, eight counts of felony-firearm, Mich. Comp. Laws § 750.227b, five counts of assault with intent to commit murder, Mich.

Comp. Laws § 750.83, and one count each of carrying a concealed weapon (CCW), Mich. Comp. Laws § 750.227, carrying a dangerous weapon with unlawful intent, Mich. Comp. Laws § 750.226, and discharging a firearm from a vehicle, Mich. Comp. Laws § 750.23a.

For the reasons that follow, the petition for a writ of habeas corpus is **DENIED WITH PREJUDICE**. Further, the court finds that oral argument is not necessary in this matter and **DENIES** petitioner's motion for oral argument. (ECF No. 21); *see* Local Rule 7.1(f)(1) ("The court will not hold a hearing on a motion for rehearing or reconsideration, a motion for reduction of sentence, or a motion in a civil case where a person is in custody unless the judge orders a hearing.").

I. BACKGROUND

Petitioner was convicted following a jury trial in the Saginaw County Circuit Court. This Court recites verbatim the relevant facts regarding petitioner's conviction from the Michigan Court of Appeals' opinion affirming his conviction, which are presumed correct on habeas review pursuant to 28 U.S.C. § 2254(e)(1). *See Wagner v. Smith,* 581 F.3d 410, 413 (6th Cir. 2009):

This case arises out of a shooting that resulted in the death of six-year-old Layla Jones. Jones was shot as she prepared to get into the back seat of her grandmother's car after spending the evening with friends and family at her aunt's house at 1115 Essling Street in Saginaw. She died shortly thereafter at a local hospital emergency room.

Defendant, Rico Saldana, Julian Ruiz, and Michael Lawrence spent the day of August 29, 2012 drinking rum and smoking marijuana at Saldana's house on Harold Street in Saginaw. At some point, they learned that Bobby Bailey, one of defendant's childhood friends, had been murdered earlier that day. Apparently another of defendant's friends, Chris Diggs, had been killed two years earlier. Saldana asked Ruiz to see if he could borrow his sister's Buick Skylark. After Ruiz picked up the car, he followed Saldana and defendant to a house on 19th Street, where Saldana parked the Dodge Avenger he was driving. The four men then got into the Skylark, with Saldana driving, defendant in the seat behind him, Ruiz next to defendant in the backseat, and Lawrence next to Saldana in the front passenger's seat. Defendant had a .40 caliber gun and Lawrence a .45 caliber gun.

After turning onto Essling Street, when one of the men in the car said, "there go somebody" Lawrence then reached across Saldana, who slowed the car to a roll as it approached the bottom of the driveway at 1115 Essling Street, and began firing out of the driver's side front window. Defendant fired out of the driver's side back window. The two men fired approximately 12 shots before Saldana accelerated down Essling. Ruiz testified that the Skylark was shot

at. Although he was not certain if Lawrence and defendant shot before the Skylark was fired upon, he thought the latter was return fire as the Skylark accelerated down the street. Layla Jones was fatally injured.

After leaving the scene of the shooting, Saldana drove back to 19th Street, where he and defendant got back into the Avenger, and Ruiz and Lawrence drove the Skylark back to Saldana's house. Ruiz and Lawrence collected three shell casings from inside the Skylark and threw them into the sewer in front of Saldana's house. Later that evening, after Ruiz had returned the Skylark to his sister, defendant spoke with him on the telephone to make sure he had cleaned the car; when he said that he had not, defendant told him to clean the car with baby wipes. The next day, Saldana gave Ruiz a can of disinfectant and told him to use it to clean the car. Ruiz hid the disinfectant and towel he used in a doghouse behind his house.

Two days after the shooting, police arrested defendant and Saldana at a motel. Later that night, in a videotaped interview with Saginaw Police Department Detective Andrew Carlson, defendant confessed to his involvement in the shooting. The videotape of defendant's interview was played for the jury. The videotape also included several telephone conversations between defendant and his girlfriend and family members during which he admitted that he shot Layla Jones.

People v. Greer, No. 318286, 2015 WL 302684, at *1-2 (Mich. Ct. App. Jan. 22, 2015). The Michigan Supreme Court denied petitioner leave to appeal. *People v. Greer* 498 Mich. 855, 864 N.W.2d 576 (2015).

Petitioner filed a motion for relief from judgment which was denied. *People v. Greer*, 12-037967-FC-5 (Saginaw Circuit Court March 21, 2017). The Michigan appellate courts denied petitioner leave to appeal. *People v. Greer,* No. 339442 (Mich. Ct. App. Jan. 25, 2018); *lv. den.* 503 Mich. 885, 919 N.W. 2d 250 (2018).

Petitioner seeks a writ of habeas corpus on the following grounds:

I. Petitioner Greer was denied his Constitutional right to due process when the trial court abused its discretion when it denied trial counsel's request for a voluntary manslaughter instruction, where the evidence at trial was insufficient to convict of greater than voluntary manslaughter.

II. Admission of Levonne Greer's statement to Detective Carlson violated his Fourteenth Amendment right to due process because it was involuntary.

III. Petitioner Greer received ineffective assistance of appellate counsel on his direct appeal of right and therefore has good cause for failure to raise issues IV and V below, on his direct appeal of right, excusing procedural default.

IV. Petitioner Greer was deprived of his right to be tried before a neutral and impartial decision-maker where the trial court judge at the direction of the prosecution endorsed and validated the purported witness identification of defendant-petitioner.

V. Petitioner Greer was constructively deprived of the Sixth Amendment right to counsel by counsel's complete failure to investigate and interview a single prosecution witness before trial.

II. STANDARD OF REVIEW

Title 28 U.S.C. § 2254(d), as amended by The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), imposes the following standard of review for habeas cases:

> 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.

A decision of a state court is "contrary to" clearly established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court

decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). An "unreasonable application" occurs when "a state court decision unreasonably applies the law of [the Supreme Court] to the facts of a prisoner's case." *Id.* at 409. A federal habeas court may not "issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 410-11.

The Supreme Court explained that "[A] federal court's collateral review of a state-court decision must be consistent with the respect due state courts in our federal system." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). The "AEDPA thus imposes a 'highly deferential standard for evaluating state-court rulings,' and 'demands that state-court decisions be given the benefit of the doubt.'" *Renico v. Lett*, 559 U.S. 766, 773 (2010) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7 (1997); *Woodford v. Viscotti*, 537 U.S. 19, 24 (2002) (*per curiam*)). "[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." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). Therefore, in order to obtain habeas relief in federal court, a state prisoner is required to show that the state court's rejection of his claim "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103. A habeas petitioner should be denied relief as long as it is within the "realm of possibility" that fairminded jurists could find the state court decision to be reasonable. *See Woods v. Etherton,* 136 S. Ct. 1149, 1152 (2016).

III. DISCUSSION

A. The Lesser Included Instruction Claim

Petitioner contends that the trial court erred in refusing to instruct the jurors on the lesser included offense of voluntary manslaughter.

The United States Supreme Court has declined to determine whether the Due Process Clause requires that a state trial court instruct a jury on a lesser included offense in a non-capital case. *See Adams v. Smith,* 280 F. Supp. 2d 704, 717 (E.D. Mich. 2003) (citing to

Beck v. Alabama, 447 U.S. 625, 638, n. 4 (1980)); *see also Jackson v. Trierweiler*, 2021 WL 308112, at *13 (E.D. Mich. Jan. 29, 2021) ("The Sixth Circuit has also confirmed that first-degree murder is a non-capital offense in Michigan.") (citing *Scott v. Elo*, 302 F.3d 598, 606 (6th Cir. 2002); *Tegeler v. Renico*, 253 Fed. Appx. 521, 524-25 (6th Cir. 2007) (due process did not require jury instruction on lesser-included offense of voluntary manslaughter in first-degree premeditated murder case where petitioner received a non-parolable life sentence).

Thus, a state trial court's failure to give the jury an instruction on a lesser included offense in a non-capital case is not contrary to, or an unreasonable application of, clearly established federal law as required for federal habeas relief. *Id.*; *see also David v. Lavinge,* 190 F.Supp.2d 974, 986, n. 4 (E.D. Mich. 2002). *Beck* has been interpreted by the Sixth Circuit to mean that "the [federal] Constitution does not require a lesser-included offense instruction in non-capital cases." *Campbell v. Coyle,* 260 F.3d 531, 541 (6th Cir. 2001). The failure of a state trial court to instruct a jury on a lesser included offense in a non-capital case is not generally an error cognizable in federal habeas review. *Bagby v. Sowders*, 894 F.2d 792, 797 (6th Cir. 1990). Instead, Petitioner must

show that the erroneous instruction so infected the entire trial that the resulting conviction violates due process. *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977); *see also Estelle v. McGuire*, 502 U.S. 62, 75 (1991), (erroneous jury instructions may not serve as the basis for habeas relief unless they have so infused the trial with unfairness as to deny due process of law); *Rashad v. Lafler*, 675 F.3d 564, 569 (6th Cir. 2012) (same); *Sanders v. Freeman*, 221 F.3d 846, 860 (6th Cir. 2000). If Petitioner fails to meet this burden, he fails to show that the jury instructions were contrary to federal law. *Id.* Petitioner has not met this burden and therefore is not entitled to habeas relief on his claim that the trial court failed to give an instruction on the lesser included offense of manslaughter.

B. The Involuntary Confession Claim

Petitioner alleges that his confession to Detective Carlson should have been suppressed by the trial court. Petitioner argues that the statement was involuntary because he was induced into making the statement after the detective promised him leniency if he confessed.

The Michigan Court of Appeals rejected petitioner's claim:

> The test of voluntariness is whether, considering the totality of the circumstances, "the confession

is the product of an essentially free and unconstrained choice by its maker, or whether the accused's will has been overborne and his capacity for self-determination critically impaired" *People v. Cipriano,* 431 Mich. 315, 334; 429 NW2d 781 (1988) (internal quotation marks and citation omitted). Factors to be considered include:

> [T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Id.*]

We conclude from our review of the totality of the circumstances, in light of the *Cipriano* factors, that defendant's confession was voluntary. At the time he made the challenged statements, defendant was 22 years old, of at least average intelligence, and, by his own admission, experienced with the police. After being apprised of his *Miranda* rights, defendant voluntarily

> waived them, and although the interview lasted over three hours, the length was not per se unreasonable. There is no evidence he was injured, intoxicated, drugged, or in ill health. He had something to eat at the police station prior to the interview, was not denied sleep or medical attention, and at no time was he physically abused or threatened with abuse. The record simply does not support the conclusion that defendant's will was overborne or his capacity for self-determination critically impaired. See *id.*
>
> It is true that some of the statements Detective Carlson made could be interpreted as promises of leniency, suggesting defendant would achieve a more favorable outcome if he cooperated than otherwise. That defendant hoped for the detective's help is indisputable; that he confessed in reliance on it is not. Detective Carlson made no specific promises regarding charges or sentencing. For these reasons, we conclude that defendant's confession was voluntary, and affirm the trial court's admission of the taped confession into evidence.

People v. Greer, No. 318286, 2015 WL 302684, at *2-3 (Mich. Ct. App. Jan. 22, 2015) (internal footnote omitted).

The Fifth Amendment prohibits the prosecution's use of a criminal defendant's compelled testimony. *Oregon v. Elstad*, 470 U.S. 298, 306-307 (1985). The Due Process Clause of the Fourteenth Amendment likewise prohibits the admission at trial of coerced confessions obtained by means "so offensive to a civilized system of justice that they must be

condemned." *Miller v. Fenton*, 474 U.S. 104, 109 (1985). An admission is deemed to be coerced when the conduct of law enforcement officials is such as to overbear the accused's will to resist. *Ledbetter v. Edwards,* 35 F.3d 1062, 1067 (6th Cir. 1994) (citing *Beckwith v. United States*, 425 U.S. 341, 347-48 (1976)). An involuntary confession may result from psychological, no less than physical, coercion or pressure by the police. *Arizona v. Fulminante*, 499 U.S. 279, 285-89 (1991); *Miranda v. Arizona*, 384 U.S. 436, 448 (1966).

When determining whether a confession is voluntary, the pertinent question for a court is "whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution." *Miller v. Fenton,* 474 U.S. at 112. These circumstances include:

> 1. police coercion (a "crucial element");
> 2. the length of interrogation;
> 3. the location of interrogation;
> 4. the continuity of the interrogation;
> 5. the suspect's maturity;
> 6. the suspect's education;
> 7. the suspect's physical condition and mental health;
> 8. and whether the suspect was advised of his *Miranda* Rights.

Withrow v. Williams, 507 U.S. 680, 693-94 (1993).

All of the factors involved in a defendant making a statement to the police should be closely scrutinized. *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961). However, a confession should not be deemed involuntary in the absence of coercive police activity. *Colorado v. Connelly*, 479 U.S. 157, 167 (1986).

A confession, in order to be deemed voluntary, cannot be the result of any direct or implied promises, however slight. *See Shotwell Mfg. Co. v. U.S.*, 371 U.S. 341, 347 (1963). Police promises of leniency and threats of prosecution can be objectively coercive, as required for a finding that a confession was involuntary due to police coercion. *United States v. Johnson*, 351 F.3d 254, 261 (6th Cir. 2003). However, contrary to petitioner's argument, courts have applied a totality of circumstances test in determining whether a police officer's promises of leniency made the defendant's confession involuntary. *See Holland v. Rivard*, 800 F.3d 224, 241-42 (6th Cir. 2015); *Loza v. Mitchell*, 766 F.3d 466, 478-80 (6th Cir. 2014); *Simpson v. Jackson*, 615 F.3d 421, 433-34 (6th Cir. 2010), *judgment vacated sub nom. Sheets v. Simpson on other grds*, 565 U.S. 1232 (2012). A police officer's promise of leniency is but one factor.

The Michigan Court of Appeals reasonably determined from the totality of the circumstances that petitioner's statements were voluntary and admissible. There is no indication that petitioner was hungry, sick, tired, or under the influence of alcohol or drugs. Petitioner does not allege that he was threatened or intimidated by the police. Petitioner was advised of his *Miranda* rights, prior to the interview. When Detective Carlson indicated that he could assist petitioner in getting a favorable plea offer, he confessed to the murder. Under the circumstances, it was reasonable to conclude that the confession was voluntary. *See e.g.*, *United States v. LeBrun*, 363 F.3d 715, 724-26 (8th Cir. 2004) (confession was not compelled, even though officers used psychological pressure to facilitate a confession and defendant viewed their statements as a promise he would not be prosecuted, where defendant confessed after only 33 minutes of questioning, officers were not armed and never shouted at defendant or physically threatened him, defendant had a subjective understanding of his *Miranda* rights, and he was an educated individual with legal training). *See also United States v. Charlton*, 737 Fed. Appx. 257, 261 (6th Cir. 2018) (Police officers' conduct in offering to help defendant if

they could and to try to protect his family were not objectively coercive, and thus could not have rendered defendant's confession to numerous drug and firearms crimes involuntary, where officers' offers of help were non-committal and did not force him to confess nor threaten him if he did not confess).

Moreover, assuming that petitioner's confession to the police should have been suppressed, petitioner is unable to establish that he is entitled to habeas relief in light of the fact that admission of the statements against him at trial was harmless error at most.

Harmless-error analysis applies to coerced or involuntary confessions. *Arizona v. Fulminante*, 499 U.S. at 295. In *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993), the U.S. Supreme Court held that for purposes of determining whether federal habeas relief must be granted to a state prisoner on the ground of federal constitutional error, the appropriate harmless error standard to apply is whether the error had a substantial and injurious effect or influence in determining the jury's verdict.

The record reflects that petitioner and three other men drove to Essling Street after finding out that Bobby Bailey had been killed.

(ECF 15-9, PageID.411). Julian Ruiz testified that he borrowed his sister's car. (ECF 15-9, PageID.402). Ruiz, Rico Saldana, Michael Lawrence, and petitioner got into the car and then the men drove to the Essling location. (*Id.* at 403). Lawrence was armed with either a .44- or a .45-caliber semi-automatic pistol, and petitioner was armed with a .40-caliber semiautomatic. (*Id.* at 405, 410). Ruiz testified that he saw Lawrence and petitioner stick their guns out of the car windows and fire at the crowd. (*Id.* at 404). Afterwards, Ruiz took the shell casings found in the car and threw them in the sewer in front of Saldana's house. (*Id.* at 406). He was also told to wipe the car down with baby wipes. (*Id.* at 405). The next morning, Ruiz used a burgundy towel and disinfectant to wipe down the car's interior and hid the towel and disinfectant in a doghouse in his backyard. (*Id.* at 406). Ruiz's testimony was corroborated by other testimony and evidence. Marlena Ruiz testified her brother, Julian Ruiz, borrowed her car the night of the shooting and returned it with a bullet hole. (*Id.* at 395, 397). The fired cartridge cases found at the scene had been fired from .45 and .40-caliber firearms. (ECF 15-8, PageID.360). Detective Murphy testified that he saw Julian Ruiz wiping down the car with the burgundy towel.

(ECF 15-9, PageID.413-414). Finally, Detective Grigg testified that he recovered the shell casings from the sewer. (*Id.* at 432, 434).

Petitioner's actions both before and after the shooting, bringing a semi-automatic to the Essling location, as well as the use of a .40 caliber firearm, supports a finding of intent to kill. In addition to the videotaped interview, numerous witnesses, including another defendant in the car, testified at petitioner's trial. Finally, the prosecutor presented recordings of several telephone calls that petitioner made to relatives, in which he admitted to his involvement in the shooting.

In light of the overwhelming evidence of guilt, the admission of petitioner's confession did not have a substantial or injurious influence or effect on the verdict. Petitioner is not entitled to relief on his second claim.

C. Claims ## 3, 4, and 5. The defaulted claims.

Petitioner brings three additional claims that were initially raised in his motion for relief from judgment. Respondent contends that the remaining claims are barred by the statute of limitations and are also procedurally defaulted for failing to raise these claims in his direct appeal.

Respondent says that petitioner's remaining claims are time-barred because petitioner filed his amended petition including these claims after the one-year limitations had expired. Petitioner, however, through his attorney, David Moffitt, filed a second habeas petition at the same time as he filed his initial petition in this case, in which he raised these additional claims. Judge Drain dismissed the petition as duplicative of this one. *See Greer v. LeSatz,* No. 2:18-CV-12165 (E.D. Mich. Jan. 17, 2019). It thus appears that petitioner did attempt to file these three claims in a timely manner. Regardless, the statute of limitations does not constitute a jurisdictional bar to habeas review. A federal court, can, in the interest of judicial economy, proceed to the merits of a habeas petition. *See Smith v. State of Ohio Dept. of Rehabilitation,* 463 F.3d 426, 429, n. 2 (6th Cir. 2006). Accordingly, the court will proceed to the merits of the parties' remaining arguments.

Respondent contends that petitioner's third through fifth claims are procedurally defaulted because petitioner raised these claims for the first time in his post-conviction motion and failed to show cause and prejudice for failing to raise these claims in his appeal of right, as required by Mich. Ct. R. 6.508(D)(3).

When the state courts clearly and expressly rely on a valid state procedural bar, federal habeas review is also barred unless petitioner can demonstrate "cause" for the default and actual prejudice as a result of the alleged constitutional violation, or can demonstrate that failure to consider the claim will result in a "fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750-51 (1991). If petitioner fails to show cause for his procedural default, it is unnecessary for the court to reach the prejudice issue. *Smith v. Murray*, 477 U.S. 527, 533 (1986). However, in an extraordinary case, where a constitutional error has probably resulted in the conviction of one who is actually innocent, a federal court may consider the constitutional claims presented even in the absence of a showing of cause for procedural default. *Murray v. Carrier*, 477 U.S. 478, 479-80 (1986). To be credible, such a claim of innocence requires a petitioner to support the allegations of constitutional error with new reliable evidence that was not presented at trial. *Schlup v. Delo*, 513 U.S. 298, 324 (1995).

The Michigan Supreme Court rejected petitioner's post-conviction appeal on the ground that "the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D)." *People v.*

Greer, 503 Mich. 885, 919 N.W.2d 250 (2018). The Michigan Court of Appeals denied petitioner's post-conviction appeal in a form order "because the defendant failed to establish that the trial court erred in denying the motion for relief from judgment." *People v. Greer*, No. 339442 (Mich. Ct. App. Jan. 25, 2018). These orders, however, did not refer to subsection (D)(3) nor did they mention petitioner's failure to raise his claims in his direct appeal as their rationale for rejecting his post-conviction appeals. Because the form orders in this case are ambiguous as to whether they refer to procedural default or a denial of post-conviction relief on the merits, the orders are unexplained. *See Guilmette v. Howes*, 624 F.3d 286, 291 (6th Cir. 2010). This Court must "therefore look to the last reasoned state court opinion to determine the basis for the state court's rejection" of petitioner's claims. *Id.*

The Saginaw County Circuit Court judge in rejecting petitioner's post-conviction claims, indicated that petitioner was not entitled to relief on his claims because he failed to show cause and prejudice for failing to raise the issues on his direct appeal. *See People v. Greer*, No. 12-037967-FC-5, *6.[1] Because the trial court judge denied petitioner

[1] The judge's opinion can be found at ECF 15-5, PageID.224-229.

post-conviction relief based on the procedural grounds stated in Mich. Ct. R. 6.508(D)(3), petitioner's claims are procedurally defaulted pursuant to Mich. Ct. R. 6.508(D)(3). *See Ivory v. Jackson,* 509 F.3d 284, 292-93 (6th Cir. 2007).[2]

With respect to his post-conviction claims, petitioner alleges ineffective assistance of appellate counsel as cause to excuse his procedural default. Petitioner, however, has not shown that appellate counsel was ineffective. It is well-established that a criminal defendant does not have a constitutional right to have appellate counsel raise every non-frivolous issue on appeal. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983). The United States Supreme Court has explained:

> "For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the ... goal of vigorous and effective advocacy.... Nothing in the Constitution or our interpretation of that document requires such a standard."

Id. at 463 U.S. at 754.

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[2] Petitioner could not have procedurally defaulted his ineffective assistance of appellate counsel claim, because state post-conviction review was the first opportunity that he had to raise this claim. *See Guilmette,* 624 F.3d at 291. However, for the reasons stated below, petitioner is not entitled to habeas relief on this claim.

Moreover, "[A] brief that raises every colorable issue runs the risk of burying good arguments-those that, in the words of the great advocate John W. Davis, 'go for the jugular,'-in a verbal mound made up of strong and weak contentions." *Id.* at 463 U.S. at 753 (citations omitted).

The Supreme Court has subsequently noted that:

> Notwithstanding *Barnes*, it is still possible to bring a *Strickland* [*v. Washington*, 466 U.S. 668 (1984] claim based on [appellate] counsel's failure to raise a particular claim[on appeal], but it is difficult to demonstrate that counsel was incompetent."

Smith v. Robbins, 528 U.S. 259, 288 (2000).

Strategic and tactical choices regarding which issues to pursue on appeal are "properly left to the sound professional judgment of counsel." *United States v. Perry*, 908 F.2d 56, 59 (6th Cir. 1990). In fact, "the hallmark of effective appellate advocacy" is the "process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail." *Smith v. Murray*, 477 U.S. at 536 (quoting *Barnes*, 463 U.S. at 751-52). "Generally, only when ignored issues are clearly stronger than those presented will the presumption of effective assistance of appellate counsel be overcome." *Monzo v. Edwards,* 281 F.3d 568, 579 (6th Cir. 2002). Appellate counsel may deliver deficient performance and

prejudice a defendant by omitting a "dead-bang winner," which is defined as an issue which was obvious from the trial record and would have resulted in a reversal on appeal. *See Meade v. Lavigne,* 265 F. Supp. 2d 849, 870 (E.D. Mich. 2003).

Petitioner has failed to show that appellate counsel's performance fell outside the wide range of professionally competent assistance by omitting the claims that petitioner raised for the first time in his post-conviction motion for relief from judgment. Appellate counsel filed a 29-page appellate brief which raised three claims, including the involuntary confession claim that petitioner has presented as the second claim in his petition.[5] Petitioner has not shown that appellate counsel's strategy in presenting these three claims and not raising other claims was deficient or unreasonable. Moreover, for the reasons stated by the Assistant Michigan Attorney General in his answer to the petition for a writ of habeas corpus, none of the claims raised by petitioner in his post-conviction motion were "dead bang winners." Because the defaulted claims are not "dead bang winners," petitioner

[5] *See* Defendant-Appellant's Brief on Appeal, ECF 18-19 PageID.1066-1094.

has failed to establish cause for his procedural default of failing to raise these claims on direct review. *See McMeans v. Brigano,* 228 F.3d 674, 682-83 (6th Cir. 2000).

Moreover, because these post-conviction claims lack merit, this Court must reject any independent ineffective assistance of appellate counsel claim raised by petitioner. "[A]ppellate counsel cannot be found to be ineffective for 'failure to raise an issue that lacks merit.'" *Shaneberger v. Jones*, 615 F.3d 448, 452 (6th Cir. 2010) (quoting *Greer v. Mitchell*, 264 F.3d 663, 676 (6th Cir. 2001)).

More importantly, this Court notes that in addition to the appellate brief filed by appellate counsel, petitioner filed a supplemental Standard 4 *pro per* brief on his appeal of right before the Michigan Court of Appeals.[3] Although petitioner raised several claims, he did not present any of the issues that he would subsequently raise for the first time on his post-conviction motion for relief from judgment. Petitioner took advantage of the opportunity pursuant to the Michigan

[3] *See* Appellant's Supplemental Brief, ECF 18-19 PageID.1172-95. Standard 4 of Administrative Order 2004-6, 471 Mich. cii (2004), "explicitly provides that a *pro se* brief may be filed within 84 days of the filing of the brief by the appellant's counsel, and may be filed with accompanying motions." *Ware v. Harry,* 636 F. Supp. 2d 574, 594, n. 6 (E.D. Mich. 2008).

Court Rules to file a supplemental appellate brief to raise claims that had not been raised by his appellate counsel, yet failed to include what make up his third, fourth, or fifth claims in his supplemental brief.

Petitioner has offered this Court no explanation as to why he failed to raise these claims in his supplemental *pro per* brief that he filed as part of his direct appeal. Because petitioner has offered no reasons for his failure to include these claims in his supplemental *pro per* brief on his direct appeal, he has failed to establish cause to excuse the default of these claims. *See Rockwell v. Palmer,* 559 F. Supp. 2d 817, 834 (W.D. Mich. 2008) (habeas petitioner did not show any cause for his failure to raise on direct appeal his claim of ineffective assistance of trial counsel, where petitioner had filed two briefs on his own behalf raising other claims that had not been asserted by his appellate counsel, but he offered no explanation for his failure to raise the ineffective assistance claim at the same time).

In the present case, petitioner has failed to show cause to excuse his default. Because petitioner has not demonstrated any cause for his procedural default, it is unnecessary for this Court to reach the prejudice issue. *Smith v. Murray*, 477 U.S. at 533. Additionally,

petitioner has not presented any new reliable evidence to support any assertion of innocence which would allow this Court to consider these claims as a ground for a writ of habeas corpus in spite of the procedural default. Because petitioner has not presented any new reliable evidence that he is innocent of these crimes, a miscarriage of justice will not occur if the Court declined to review the procedurally defaulted claims on the merits. *See Welch v. Burke*, 49 F. Supp. 2d 992, 1007 (E.D. Mich. 1999).

Finally, assuming that petitioner had established cause for his default, he would be unable to satisfy the prejudice prong of the exception to the procedural default rule, because his claims would not entitle him to relief. The cause and prejudice exception is conjunctive, requiring proof of both cause and prejudice. *See Matthews v. Ishee,* 486 F.3d 883, 891 (6th Cir. 2007). For the reasons stated by the Assistant Michigan Attorney General in his answer to the petition for a writ of habeas corpus, petitioner has failed to show that his post-conviction claims have any merit. Petitioner is not entitled to habeas relief on his remaining claims.

IV. CONCLUSION

The Court will deny the petition for a writ of habeas corpus. The Court will also deny a certificate of appealability to petitioner. In order to obtain a certificate of appealability, a prisoner must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To demonstrate this denial, the applicant is required to show that reasonable jurists could debate whether, or agree that, the petition should have been resolved in a different manner, or that the issues presented were adequate to deserve encouragement to proceed further. *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). When a district court rejects a habeas petitioner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims to be debatable or wrong. *Id.* at 484.

Likewise, when a district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claims, a certificate of appealability should issue, and an appeal of the district court's order may be taken, if the petitioner shows that jurists of reason would find it debatable whether the petitioner

states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Slack,* 529 U.S. at 484. When a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petition should be allowed to proceed further. In such a circumstance, no appeal would be warranted. *Id.*

"The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rules Governing § 2254 Cases, Rule 11(a), 28 U.S.C. foll. § 2254; *see also Strayhorn v. Booker,* 718 F. Supp. 2d 846, 875 (E.D. Mich. 2010).

For the reasons stated in this opinion, the Court will deny petitioner a certificate of appealability because he has failed to make a substantial showing of the denial of a federal constitutional right. *See Dell v. Straub,* 194 F. Supp. 2d 629, 659 (E.D. Mich. 2002). The Court will also deny petitioner leave to appeal *in forma pauperis*, because the appeal would be frivolous. *Id.*

V. ORDER

Based on the foregoing, **IT IS ORDERED** that the Petition for a Writ of Habeas Corpus is **DENIED WITH PREJUDICE.**

IT IS FURTHER ORDERED that a Certificate of Appealability is **DENIED.**

IT IS FURTHER ORDERED that Petitioner will be **DENIED** leave to appeal *in forma pauperis.*

IT IS FURTHER ORDERED that Petitioner's motion for oral argument is **DENIED.**

Dated: March 18, 2021

s/Stephanie Dawkins Davis
Stephanie Dawkins Davis
United States District Judge