APPENDIX A

EXHIBIT:

Rehearing (Sixth Cir.)

No. 21-1428

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Sep 15, 2022
DEBORAH S. HUNT, Clerk

DWAYNE EDMOND WILSON,

Petitioner-Appellant,

v.

RANDEE REWERTS, WARDEN,

Respondent-Appellee.

ORDER

BEFORE: CLAY, ROGERS, and STRANCH, Circuit Judges.

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

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

*Judges Griffin, Larsen, and Davis recused themselves from participation in this ruling.

APPENDIX B

EXHIBIT

Opinion (Sixth Cir.) Order

NOT RECOMMENDED FOR PUBLICATION

No. 21-1428

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

ORDER

Before: CLAY, ROGERS, and STRANCH, Circuit Judges.

Dwayne Edmond Wilson, a Michigan prisoner proceeding pro se, appeals from a district court judgment dismissing his petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. Wilson also requests oral argument and moves for the appointment of counsel. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In 2009, a Macomb County jury found Wilson guilty of felony murder, in violation of Michigan Compiled Laws § 750.316(1)(b), second-degree murder, in violation of § 750.317, possession of a firearm during the commission of a felony, in violation of § 750.227b, assault with intent to do great bodily harm less than murder, in violation of § 750.84, and two counts of unlawful imprisonment, in violation of § 750.349b. *See People v. Wilson*, No. 296693, 2011 WL 1778729, at *1 (Mich. Ct. App. May 10, 2011) (per curiam). The jury acquitted Wilson of first-degree murder and first-degree home invasion. *See People v. Wilson*, No. 311253, 2012 WL 5854885, at *1 (Mich. Ct. App. Nov. 15, 2012) (per curiam). The trial court sentenced Wilson to

life in prison without the possibility of parole for the felony-murder conviction, 36 to 60 years' imprisonment for the second-degree murder conviction, 5 to 15 years' imprisonment for the false-imprisonment convictions, and five years' imprisonment for the felony-firearm conviction. *See Wilson*, 2011 WL 1778729, at *1. Wilson appealed to the Michigan Court of Appeals, which vacated his convictions and sentences and remanded because the trial court erred in summarily denying Wilson's request to represent himself. *Id.* at *2.

On remand, the State filed an amended information, again charging Wilson with felony murder, in addition to the other charges on which he was previously found guilty. *See Wilson*, 2012 WL 5854885, at *1. The amended information identified first-degree home invasion as the predicate felony for the felony-murder charge. *See id.* Wilson argued that his constitutional protection against double jeopardy barred the amended felony-murder charge because the jury had acquitted him of the first-degree home-invasion charge. *See id.* The trial court agreed and dismissed the felony-murder charge. *See id.*

The State appealed, arguing that protections against double jeopardy do not bar a retrial for felony murder. The Michigan Court of Appeals found that the double jeopardy collateral-estoppel principle did not apply, reversed the trial court's decision, reinstated the felony-murder charge, and remanded the case again. *Id.* at *2. Wilson then appealed to the Michigan Supreme Court, which held that the Fifth Amendment's Double Jeopardy Clause collaterally estopped a new prosecution for felony murder. *People v. Wilson*, 852 N.W.2d 134, 143 (Mich. 2014). Shortly before the Michigan Supreme Court ruled in Wilson's favor, he filed a § 2254 petition, claiming that the State was holding him in violation of his Sixth Amendment right to a speedy trial. The district court dismissed Wilson's petition without prejudice, finding no extraordinary circumstances that would warrant an intrusion into state proceedings already underway. *Wilson v. Michigan*, No. 14-12490, 2014 WL 3543305, at *3 (E.D. Mich. July 17, 2014).

Wilson sought unsuccessfully to have his case dismissed on speedy-trial grounds, and his second trial began in September 2014. *See People v. Wilson*, No. 324856, 2016 WL 2731096, at *2 (Mich. Ct. App. May 10, 2016) (per curiam). The jury found him guilty of two counts of

unlawful imprisonment and one count of possession of a firearm during the commission of a felony, but it acquitted him on the more serious charges of second-degree murder and assault with intent to do great bodily harm less than murder. *See id.* at *1. The trial court sentenced Wilson to 10 years' imprisonment for the felony-firearm conviction and 100 to 180 months' imprisonment for each unlawful-imprisonment conviction, with the unlawful-imprisonment sentences to run concurrently with one another and consecutively to the felony-firearm conviction. *See id.* The trial court also credited Wilson with 1,997 days of time served against his felony-firearm sentence.

On appeal before the Michigan Court of Appeals, Wilson argued that (1) he was denied the right to a speedy trial, (2) the trial court erred when it sentenced him as a third-time felony-firearm offender and imposed a sentence of 10 years' imprisonment, and (3) he was entitled to resentencing for the unlawful-imprisonment convictions, or his case should be remanded because the trial court used judicial fact-finding to score two offense variables. *Id.* at *1, *8, *11. The court rejected Wilson's speedy-trial claim and affirmed his convictions, but it concluded that the proper sentence for Wilson's felony-firearm conviction was five years and that he was also entitled to reconsideration of his unlawful-imprisonment sentences. *Id.* at *14.

Both Wilson and the State applied for leave to appeal to the Michigan Supreme Court, with Wilson appealing the speedy-trial ruling and the State appealing the felony-firearm sentencing ruling. The Michigan Supreme Court denied Wilson's application, *People v. Wilson*, 886 N.W.2d 710 (Mich. 2016) (mem.), and later found that Wilson had been properly classified and sentenced as a third-time felony-firearm offender, *People v. Wilson*, 902 N.W.2d 378, 383 (Mich. 2017). Because the State's application for leave to appeal did not challenge the Michigan Court of Appeals's conclusion that Wilson was entitled to remand on the judicial-factfinding claim, the Michigan Supreme Court remanded the case to the trial court with instructions "to determine whether it would have imposed a materially different sentence" in light of *People v. Lockridge*, 870 N.W.2d 502 (Mich. 2015). *Id.*

On remand, the trial court conducted a hearing and declined to resentence Wilson. Wilson appealed but shortly thereafter stipulated to a dismissal. The underlying § 2254 petition followed in 2018.

After a series of delays due, in part, to Wilson's motions for release on bond, for a hearing before the chief district judge, and for leave to file a supplemental brief in support of his motion for release on bond, the district court ruled in 2021 that the state court's rejection of Wilson's speedy-trial claim did not entitle him to federal habeas relief. The district court did, however, grant Wilson a certificate of appealability, and this appeal followed.

"In a habeas appeal, we review questions of law *de novo*, including the ultimate decision to grant or deny the petition," as we do "factual findings based solely on the state court record." *Stermer v. Warren*, 959 F.3d 704, 720 (6th Cir. 2020). The Antiterrorism and Effective Death Penalty Act ("AEDPA") provides that an application for a 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). The AEDPA standard is "intentionally 'difficult to meet.'" *Woods v. Donald*, 575 U.S. 312, 316 (2015) (per curiam) (quoting *White v. Woodall*, 572 U.S. 415, 419 (2014)). "Section 2254(d) reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 562 U.S. 86, 102-03 (2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979)). To obtain habeas relief from a federal court, a petitioner must show that the state court's ruling on a claim "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103.

The Supreme Court has established four factors for evaluating a speedy-trial claim: (1) whether the delay was uncommonly long; (2) the reason for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) whether prejudice to the defendant resulted. *Barker v. Wingo*, 407 U.S. 514, 530-32 (1972). "No one factor is dispositive. Rather, they are related factors that must be considered together with any other relevant circumstances." *United States v. Sutton*, 862 F.3d 547, 559 (6th Cir. 2017). "[P]retrial delay is often both inevitable and wholly justifiable," *Doggett v. United States*, 505 U.S. 647, 656 (1992), and "[w]hen the government prosecutes a case with reasonable diligence, a defendant who cannot demonstrate how his defense was prejudiced with specificity will not make out a speedy trial claim no matter how great the ensuing delay," *United States v. Howard*, 218 F.3d 556, 564 (6th Cir. 2000).

As a preliminary matter in relation to the first *Barker* factor, Wilson now argues that the delay began when he was first arraigned in 2009 and ended over five years later with the commencement of his second trial. The State, however, maintains that the delay began at the conclusion of Wilson's direct appeal in 2011 and points to the fact that Wilson already conceded the matter before the Michigan Court of Appeals. *See Wilson*, 2016 WL 2731096, at *3. The right to a speedy trial "attaches only when a formal criminal charge is instituted and a criminal prosecution begins." *United States v. Macdonald*, 456 U.S. 1, 6 (1982). Here, the Michigan Court of Appeals vacated Wilson's initial convictions and sentences and remanded the case to the trial court for further proceedings. When the Michigan Supreme Court denied the State's appeal, Wilson's right to a speedy trial attached once again because he became subject to prosecution. *See United States v. Ewell*, 383 U.S. 116, 121 (1966) (noting that "when a defendant obtains a reversal of a prior, unsatisfied conviction, he may be retried in the normal course of events").

In any event, both parties agree that the delay lasted in excess of one year, and "[a] delay approaching one year is presumptively prejudicial and triggers application of the remaining three factors." *Maples v. Stegall*, 427 F.3d 1020, 1026 (6th Cir. 2005) (citing another source); *but see United States v. Bass*, 460 F.3d 830, 838 (6th Cir. 2006) (noting that "'presumptive prejudice cannot alone carry a Sixth Amendment claim,' but rather must be considered in the context of the

other factors, particularly the reason for the delay." (quoting *Doggett*, 505 U.S. at 656)). Accordingly, the district court continued on to a reasoned analysis, looking in part at Wilson's various pretrial motions, including (1) oral motions for discovery and for the appointment of an independent medical examiner, a crime reconstructionist, and a private investigator; (2) a motion for adjournment of the trial date based on a lack of preparedness; and (3) a motion to disqualify the trial court judge.[1] "When a party makes motions, it cannot use the delay caused by those motions as a basis for a speedy-trial claim." *United States v. Young*, 657 F.3d 408, 415 (6th Cir. 2011) (citing another source); *see United States v. Loud Hawk*, 474 U.S. 302, 316-17 (1986).

Significantly, nearly two-thirds of the delay was due to an interlocutory appeal, which, as the district court permissibly concluded, did not weigh in Wilson's favor because:

> (i) the prosecutor's interlocutory appeal on the double jeopardy issue was not frivolous; (ii) [Wilson] failed to show bad faith or dilatory purpose on the part of the prosecution; (iii) the double jeopardy issue was important; (iv) the crime was serious; and (v) much of delay before and after the interlocutory appeal was due to [Wilson's] motions or requests.

Wilson v. Parish, No. 2:18-CV-10906, 2021 WL 1212409, at *7 (E.D. Mich. Mar. 31, 2021); *see generally Brown v. Romanowski*, 845 F.3d 703, 714 (6th Cir. 2017) (noting that we "consider[] who is most at fault [for the delay]—the government or the defendant"); *Maples*, 427 F.3d at 1026.

Wilson argues that the State's interlocutory appeal was frivolous because the Michigan Supreme Court eventually overruled the Michigan Court of Appeals and found in his favor. But "an interlocutory appeal by the Government ordinarily is a valid reason that justifies delay," and the ultimate outcome of the appeal alone did not render the State's appeal frivolous. *Loud Hawk*, 474 U.S. at 315. And the Michigan Court of Appeals did rule in the State's favor. Wilson otherwise fails to show that the State's interlocutory appeal was "[a] deliberate attempt to delay the trial in order to hamper the defense," *Barker*, 407 U.S. at 531, and because the remainder of

[1] In its reply brief, the State looks to the trial court record in noting that Wilson filed no fewer than 11 additional pretrial motions. The trial court also offered Wilson an earlier trial date after he asserted his right to a speedy trial, but Wilson declined the offer after stating that he intended to file an interlocutory appeal.

the delay was largely attributable to Wilson's own motions and request for adjournment, the second factor weighs against him, *see Doggett*, 505 U.S. at 656.

As to the third factor, the record reflects that Wilson fulfilled his "responsibility to assert a speedy trial claim." *Barker*, 407 U.S. at 529. Although the State argues that Wilson primarily asserted his right to a speedy trial because he hoped that the charges against him would later be dismissed for failure to grant him a speedy trial, the State nevertheless concedes that Wilson did repeatedly raise a speedy trial claim. Therefore, the third factor weighs in Wilson's favor.

Finally, the district court considered whether the delay resulted in prejudice to Wilson. "'[P]resumptively prejudicial' for purposes of triggering the *Barker* four-factor inquiry is different from 'presumptively prejudicial' for purposes of assessing the prejudice prong. The first only requires that the delay has approached one year. The latter concerns whether the delay was excessive." *Maples*, 427 F.3d at 1030. "We assess prejudice 'in the light of the interests of defendants which the speedy trial right was designed to protect . . . : (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.'" *United States v. Felix*, 850 F. App'x 374, 383 (6th Cir. 2021) (quoting *Barker*, 407 U.S. at 532). The Michigan Court of Appeals concluded that the delay did not result in prejudice after finding that Wilson received credit for time served during the delay, his anxiety alone was insufficient to establish the necessary degree of prejudice, and he conceded on appeal that no witnesses became unavailable and that no documents were lost in the course of the delay. *Wilson*, 2016 WL 2731096, at *6.

Although the district court acknowledged that Wilson likely "was prejudiced to some extent by living . . . under a cloud of suspicion and anxiety," *Barker*, 407 U.S. at 534, the court also noted that Wilson had actively sought delays, at one point even saying, "I know how this Court likes to zoom things along, and get me in trial, so I'm trying to slow it down now." Wilson ultimately produced 16 witnesses in support of his defense and was also able to cross-examine the unlawful imprisonment victims. Despite his claim that he "was oppressively incarcerated throughout the delays," Wilson does not explain how his incarceration rose to the level of

"oppressive pretrial incarceration," *id.* at 521, and his failure to otherwise show prejudice therefore dooms his claim, *see Howard*, 218 F.3d at 564.

The district court properly denied habeas relief on Wilson's speedy trial claim because the Michigan Court of Appeals adjudicated it in compliance with clearly established federal law and its conclusions were not based on an unreasonable application of the facts. Accordingly, we **AFFIRM** the district court's judgment, **DENY** as moot the motion for appointment of counsel, and **DENY** Wilson's request for oral argument.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX C

EXHIBIT

(District Court)
Order

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DWAYNE EDMOND WILSON,

Petitioner,

v.

CASE NO. 2:18-cv-10906
HONORABLE LINDA V. PARKER

LES PARISH,

Respondent.
_____/

OPINION AND ORDER (1) DENYING HABEAS CORPUS PETITION (ECF NO. 1); (2) DENYING MOTION FOR BOND (ECF NO. 15); (3) DENYING MOTION FOR HEARING (ECF NO. 22); (4) GRANTING THE MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF (ECF NO. 23); (5) DENYING MOTION TO EXPEDITE BOND DUE TO PETITIONER'S MEDICAL CONDITION (ECF NO. 28); AND (6) DENYING MOTION FOR LEAVE TO BE HEARD ON PENDING BOND MOTION (ECF NO. 29)

Petitioner Dwayne Edmond Wilson, a state prisoner in the custody of the Michigan Department of Corrections, filed an application for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (ECF No. 1.) The pleading challenges Petitioner's convictions for possession of a firearm during the commission of a felony, Mich. Comp. Laws § 750.227b, and two counts of unlawful imprisonment, Mich. Comp. Laws § 750.349b. The sole ground for relief alleges that Petitioner's Sixth Amendment right to a speedy trial was violated.

Also pending before the Court are Petitioner's motion for release on bond pending a decision on his habeas petition (ECF No. 15), his motion for a hearing before the Chief Judge of this District as to why the judge formerly assigned to this case recused herself (ECF No. 22), and Petitioner's motion for leave to file a supplemental brief supporting his motion for bond (ECF No. 23). Respondent Les Parish opposes Petitioner's habeas corpus petition and motion for bond. (ECF Nos. 5, 18.) Having reviewed the pleadings and record, the Court concludes that the state appellate court's rejection of Petitioner's claim on the merits was objectively reasonable. Accordingly, the habeas petition will be denied. Additionally, the motion for bond pending a decision in this case will be denied as moot, the motion for a hearing likewise will be denied, and the motion to file a supplemental brief will be granted.

I. Background

A. The Charges, First Trial, First Sentence, and First Direct Appeal

On June 12, 2009, Petitioner was arraigned in state district court and bound over for trial in Macomb County Circuit Court. (*See* ECF No. 6-1 at Pg. ID 161.) The felony information (charging document) listed the following crimes: (i) first-degree, premeditated murder; (ii) felony-murder (murder committed during commission of, or attempt to commit, a felony); (iii) possession of a firearm during the commission of, or attempt to commit, a felony ("felony-firearm"), second

offense; (iv) two counts of unlawful imprisonment; (v) first-degree home invasion; (vi) assault with intent to do great bodily harm less than murder; (vii) carrying a dangerous weapon with unlawful intent; and (viii) second-degree murder. (ECF No. 6-14 at Pg. ID 490-91.) On June 22, 2009, Petitioner was arraigned in state circuit court (ECF No. 6-3), and on December 8, 2009, his first trial began (ECF No. 10-1). Before jury selection, the prosecutor dismissed the counts charging Petitioner with second-degree murder and carrying a dangerous weapon with unlawful intent, and the trial court denied Petitioner's motion to represent himself. (ECF No. 10-1 at Pg. ID 3874, 3884-88.)

On December 10, 2009, the jury found Petitioner guilty of (i) second-degree murder, Mich. Comp. Laws § 750.317, as a lesser offense to premeditated murder; (ii) felony-murder, Mich. Comp. Laws § 750.316(1)(b); (iii) felony-firearm, Mich. Comp. Laws § 750.227b; (iv) assault with intent to do great bodily harm less than murder, Mich. Comp. Laws § 750.84; and (v) two counts of unlawful imprisonment, Mich. Comp. Laws § 750.349b. (ECF No. 10-3 at Pg. ID 4190.) The jury acquitted Petitioner of first-degree, premeditated murder and home invasion. (*Id.*)

On January 20, 2010, the trial court sentenced Petitioner to a term of (i) 36 to 60 years in prison for the second-degree murder conviction; (ii) life imprisonment without the possibility of parole for the felony-murder conviction;

(iii) five years in prison for the felony-firearm count, with 239 days credit; (iv) five to 10 years in prison for the assault conviction; and (v) five to 15 years for the two unlawful-imprisonment convictions. (ECF No. 6-7 at Pg. ID 344-45.) The court ordered the felony-firearm sentence to be served before the other sentences, which ran concurrently with each other. (*Id.* at Pg. ID 344.)

Petitioner appealed his convictions and sentence through counsel. Among other things, he argued that the trial court violated his right to represent himself at his trial. The Michigan Court of Appeals agreed with Petitioner's argument on that issue. Accordingly, the Court of Appeals vacated Petitioner's convictions and sentences and remanded the case to the trial court for further proceedings. *People v. Wilson*, No. 296693, 2011 WL 1778729 (Mich. Ct. App. May 10, 2011) (unpublished). The prosecutor appealed the Court of Appeals' decision, but on September 6, 2011, the Michigan Supreme Court denied leave to appeal because it was not persuaded to review the issue. *People v. Wilson*, 490 Mich. 861; 801 N.W.2d 882 (2011).

B. The Interlocutory Appeals Before the Second Trial

The prosecutor re-charged Petitioner with (i) felony-murder; (ii) felony-firearm, second offense; (iii) two counts of unlawful imprisonment; (iv) assault with intent to do great bodily harm less than murder; (v) carrying a dangerous weapon with unlawful intent; and (vi) second-degree murder. (ECF No. 6-23 at

Pg. ID 1338-39.) On December 13, 2011, Petitioner moved to dismiss the felony-murder charge on double jeopardy grounds because the jury had acquitted him of home invasion, which was the only underlying felony for the felony-murder charge. (*See* ECF No. 6-9 at Pg. ID 357-58.)

On July 6, 2012, the trial court granted Petitioner's motion and dismissed the felony-murder charge on double jeopardy grounds. The court stated that Petitioner could not "be tried on Felony Murder when the only predicate available is that for which he has already been acquitted." *People v. Wilson*, No. 09-2637 FC (Macomb Cty. Cir. Ct. July 6, 2012); (ECF No. 6-18 at Pg. ID 671).

Meanwhile, Petitioner argued at a pretrial conference on February 16, 2012, that his right to a speedy trial was being violated. (ECF No. 6-11 at Pg. ID 383-86.) The trial court rejected Petitioner's argument (*id.* at Pg. ID 403) and, on April 6, 2012, Petitioner filed a *pro se* interlocutory appeal from the trial court's decision. (ECF No. 6-16 at Pg. ID 539-50.) On April 18, 2012, the Michigan Court of Appeals denied Petitioner's application for leave to appeal "for failure to persuade the Court of the need for immediate appellate review." *People v. Wilson*, No. 309493 (Mich. Ct. App. Apr. 18, 2012); (ECF 6-16 at Pg. ID 537). Petitioner appealed that ruling to the Michigan Supreme Court but, on May 24, 2013, the state supreme court denied leave to appeal because it was not persuaded to review the issue. *People v. Wilson*, 494 Mich. 853; 830 N.W.2d 383 (2013).

The double jeopardy issue continued to progress on a different track. On July 12, 2012, the prosecutor filed an interlocutory appeal from the trial court's decision that Petitioner could not be retried on a charge of felony-murder. On July 16, 2012, the Michigan Court of Appeals stayed the case pending the appeal, and on November 15, 2012, the Court of Appeals reversed the trial court's decision on the double jeopardy issue and reinstated the felony-murder charge. *People v. Wilson*, No. 311253, 2012 WL 5854885 (Mich. Ct. App. Nov. 15, 2012).

Petitioner appealed that decision to the Michigan Supreme Court. (ECF No. 6-21 at Pg. ID 1068-96.) About a year and a half later, on June 18, 2014, the Michigan Supreme Court reversed the Michigan Court of Appeals, dismissed the felony-murder charge, and remanded the case to trial court. *People v. Wilson*, 496 Mich. 91; 852 N.W.2d 134 (2014).[1]

C. The Initial Habeas Petition

On June 25, 2014, Petitioner filed a *pro se* habeas corpus petition in this District. He argued that he was denied his state and federal rights to a speedy trial and his right to present a defense due to the prosecution's suppression or destruction of evidence. Former United States District Judge Lawrence P. Zatkoff summarily dismissed the petition without prejudice on July 17, 2014. Judge

[1] Justice Stephen J. Markman filed a dissenting opinion, which Justices Brian K. Zahra and David F. Viviano joined.

Zatkoff stated that the delay in bringing Petitioner to trial was largely due to interlocutory appeals and that the case was expected to be set for trial promptly. Judge Zatkoff also stated that prejudice could not be accurately ascertained until after the trial and that no extraordinary circumstances warranted intrusion into state proceedings already underway. *See Wilson v. Michigan*, No. 14-12490 (E.D. Mich. July 17, 2014).

D. The Second Trial and Second Sentence

Petitioner subsequently asked the trial court to dismiss his case on speedy grounds. The trial court denied his motion on September 8, 2014 (ECF 6-1 at Pg. ID 202) and, on September 24, 2014, Petitioner's second trial began, with Petitioner representing himself. (ECF No. 7-14 at Pg. ID 1922.)[2] At that point, the charges against Petitioner were (i) second-degree murder, (ii) felony-firearm, (iii) assault with intent to do great bodily harm less than murder, and (iv) two counts of unlawful imprisonment. (*Id.* at Pg. ID 2020-21.)

In one of his previous briefs, Petitioner described the trial testimony and the parties' theories of the case as follows:

> The prosecution alleged that on May 26, 2009, Mr. Wilson entered the home of Katherine Horton. Mr. Wilson and Ms. Horton had been in a romantic relationship for around eight years, with Mr. Wilson living at that residence with Ms. Horton, her two daughters from a prior relationship, . . . and the young son he had with Katherine Horton. Ms. Horton alleged that she and Mr. Wilson had recently ended their

[2] An attorney was available to assist Petitioner, if he needed help.

relationship, and that Mr. Wilson no longer lived at the house, but Mr. Wilson disputed that he had been kicked out of the house and asserted he entered the house using his own key.

According to the prosecution, once inside the house Mr. Wilson tied up [Ms. Horton's daughters], asking them where their mother was. He then waited inside the house for a period of time until Ms. Horton and Kenyatta Williams returned to the house. Mr. Williams was a man Ms. Horton met on the Internet, and had invited to come live with her from his home in Florida. An altercation ensued when Ms. Horton and Mr. Williams entered the house, with Mr. Williams sustaining fatal gunshot wounds and Ms. Horton alleging that Mr. Wilson assaulted her by striking her with a handgun.

The defense theory in the case was that the handgun went off accidentally during a struggle between Mr. Wilson, Mr. Williams, and Ms. Horton, that Ms. Horton was lying about being assaulted, and lying about the circumstances of the altercation . . . .

Both [girls] testified that around 8:00 am on May 26, they were asleep in their house when they were awakened by Mr. Wilson yelling at them, and pointing guns at them. (T, 9/26/14, 135-136; 218-219). He then tied them up with duct tape, and took them up to the ground floor of the house and sat them on a couch. They testified he paced around the house, looking out of the windows, for around 20 minutes or so until their mother and Mr. Williams arrived at the house. (T, 9/26/14, 159-160; 225-227). They could hear the altercation as it occurred, but were blocked from seeing it by a wall of the house. Neither girl suffered any physical injury during the incident. (T, 9/26/14, 179; 239). Both girls acknowledged that Mr. Wilson told them he would not harm or touch them. (T, 9/26/14, 179, 239-240).

Katherine Horton testified at length as to the incident, and alleged where the respective persons were located at the time Mr. Williams was shot. (T, 9/30/14, 65-75). She stated she and Mr. Williams returned to the house, after dropping off her and Mr. Wilson's young son, who was still living with her, at school sometime between 8:30 am and 9:00 am. (T, 9/30, 63-64). She denied that Mr. Williams was armed with any handgun on that date. Ms. Horton alleged Mr. Wilson hit her with a gun several times on her face and on the back of

> her head, and was later told at a hospital that she suffered a "slight concussion" and some abrasions. (T, 9/30/14, 71-72, 89-90).
>
> The medical examiner who did the autopsy on Mr. Williams testified he died from three gunshot wounds, one to his back and two to the back of his shoulder. (T, 10/1/14, 63-64). When questioned by Mr. Wilson on cross-examination, the doctor acknowledged that . . . given the location and trajectory of the wounds, the version of the events provided by Ms. Horton in her testimony was physically impossible. (T, 10/1/14, 92-95, 102-107, 113). The doctor admitted the wounds were consistent with the gun being pointed downward during a struggle. (T, 10/1/14, 97-98, 112-113).

Def. Brief on Appeal, Mich. Ct. App. No. 324856 (ECF No. 6-19 at Pg. ID 777-79).

On October 8, 2014, the jury found Petitioner guilty of two counts of unlawful imprisonment and felony-firearm. (ECF No. 7-23 at Pg. ID 3729-30.) The jury acquitted Petitioner of the more serious charges of second-degree murder and assault with intent to do great bodily harm less than murder. (*Id.*)

On November 19, 2014, the trial court sentenced Petitioner to 10 years in prison for the felony-firearm conviction, with credit for 1997 days already served, and 100 to 180 months for each conviction of unlawful imprisonment. The court ordered the sentences for unlawful imprisonment to run concurrently, but consecutive to the felony-firearm sentence. (ECF No. 6-19 at Pg. ID 762; ECF No. 7-24 at Pg. ID 3834.)

E. The Appeal after the Second Trial and the Subsequent Remand

Petitioner appealed his new convictions and sentences. He argued through counsel that (i) he was denied his constitutional right to a speedy trial; (ii) the trial

court erred in sentencing him to 10 years in prison as a third felony-firearm offender; and (3) he was entitled to re-resentencing on the scoring of the sentencing guidelines for unlawful imprisonment, or the case should be remanded pursuant to *People v. Lockridge,* 498 Mich. 358; 870 N.W.2d 502 (2015), because the trial court used judicial fact-finding to score two offense variables. (ECF No. 6-19 at Pg. ID 766.)

On May 10, 2016, the Michigan Court of Appeals rejected Petitioner's speedy trial claim on the merits and affirmed his convictions. The Court of Appeals, nevertheless, agreed with Petitioner that his sentence for the felony-firearm conviction should be five years, not 10 years, and that Petitioner was entitled to reconsideration of his sentence for unlawful imprisonment under *Lockridge,* because there was judicial fact-finding at sentencing. Accordingly, the Court of Appeals remanded Petitioner's case for correction of the judgment of sentence to reflect a term of five years for the felony-firearm and for reconsideration of Petitioner's sentence for unlawful imprisonment. *People v. Wilson*, No. 324856, 2016 WL 2731096 (Mich. Ct. App. May 10, 2016) (unpublished).

Both the prosecutor and Petitioner appealed the appellate court's decision. The prosecutor appealed the ruling on the sentence for the felony-firearm conviction, and Petitioner appealed the ruling on the speedy trial issue. On

November 17, 2016, the Michigan Supreme Court denied Petitioner's application to appeal the speedy trial issue because it was not persuaded to review the issue. See *People v. Wilson*, 500 Mich. 890; 886 N.W.2d 710 (2016).

On July 25, 2017, the Michigan Supreme Court issued its decision on Petitioner's sentence. The state supreme court held that Petitioner could be sentenced as a third felony-firearm offender and, therefore, the proper sentence for his felony-firearm conviction was 10 years, not five years. As for the scoring of the sentencing guidelines, the Michigan Supreme Court remanded the case to the trial court for possible re-sentencing under the procedures set forth in *Lockridge*. *See People v. Wilson*, 500 Mich. 521; 902 N.W.2d 378 (2017).

On remand, the trial court held a hearing and declined to re-sentence Petitioner. (ECF No. 7-25 at Pg. ID 3843-44.) Petitioner initially appealed the trial court's decision not to re-sentence him, but he subsequently agreed to dismiss the appeal. (ECF No. 6-20 at Pg. ID 1019.) Thus, on November 15, 2017, the Michigan Court of Appeals dismissed the appeal on stipulation of the parties. *See People v. Wilson*, No. 340322 (Mich. Ct. App. Nov. 15, 2017); (ECF 6-20 at Pg. ID 950). That concluded Petitioner's state case. On March 19, 2018, he filed his current petition for the writ of habeas corpus through counsel.

II. Standard of Review

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") requires prisoners who challenge "a matter 'adjudicated on the merits in State court' to show that the relevant state court 'decision' (1) 'was contrary to, or involved an unreasonable application of, clearly established Federal law,' or (2) 'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Wilson v. Sellers*, 138 S. Ct. 1188, 1191 (2018) (quoting 28 U.S.C. § 2254(d)). The Supreme Court has explained that

> a state court decision is "contrary to [the Supreme Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [Supreme Court] precedent."

Lockyer v. Andrade, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor,* 529 U.S. 362, 405-406 (2000) (alterations added)).

> "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.,* at 413, 120 S.Ct. 1495. The "unreasonable application" clause requires the state court decision to be more than incorrect or erroneous. *Id.,* at 410, 412, 120 S.Ct. 1495. The state court's application of clearly established law must be objectively unreasonable. *Id.,* at 409, 120 S.Ct. 1495.

Id. at 75.

"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) (internal and end citations omitted). "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) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). Thus, "[o]nly an 'objectively unreasonable' mistake, . . . , one 'so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement,' slips through the needle's eye of § 2254." *Saulsberry v. Lee*, 937 F.3d 644, 648 (6th Cir.) (quoting *Richter*, 562 U.S. at 103), *cert. denied*, 140 S. Ct. 445 (2019).

III. Analysis

Petitioner's sole claim is that he was denied his right to a speedy trial under the Sixth and Fourteenth Amendments to the United States Constitution and that he suffered prejudice as a result. (Pet., ECF No. 1 at Pg. ID 5.) The Michigan Court of Appeals was the last state court to adjudicate this claim on the merits. The Court of Appeals determined that the delay was three years. (ECF No. 6-23 at Pg. ID 1285.) The Court of Appeals then analyzed the other relevant factors and concluded that Petitioner's right to a speedy trial was not violated. In reaching this

conclusion, the Court of Appeals stated that: (i) prejudice was presumed because the delay exceeded eighteen months; (ii) the majority of the delay, approximately two years, was attributable to the interlocutory appeal arising from the trial court's dismissal of the felony-murder charge, and the delay did not weigh in Petitioner's favor; (iii) Petitioner asserted his right to a speedy trial; and (iv) he suffered no prejudice from the delay. *Wilson*, 2016 WL 2731096, at *3-6; (ECF No. 6-23 at Pg. ID 1285-88).

A. Clearly Established Supreme Court Precedent

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." U.S. CONST. amend. VI. This right "is 'fundamental' and is imposed by the Due Process Clause of the Fourteenth Amendment on the States." *Barker v. Wingo*, 407 U.S. 514, 515 (1972).

When analyzing a speedy trial claim, courts must weigh the conduct of both the prosecution and the defendant and then apply a balancing test. *Id.* at 530. Some of the factors which courts should assess in determining whether a defendant was deprived of the right to a speedy trial are the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* Stated differently, there are four relevant inquiries: "whether delay before trial was uncommonly long, whether the government or the criminal defendant is more

to blame for that delay, whether, in due course, the defendant asserted his right to a speedy trial, and whether he suffered prejudice as the delay's result." *Doggett v. United States*, 505 U.S. 647, 651-52 (1992).

None of these four factors is "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant." *Barker*, 407 U.S. at 533.

"[P]retrial delay is often both inevitable and wholly justifiable." *Doggett*, 505 U.S. at 656. Accordingly, "[w]hen the government prosecutes a case with reasonable diligence, a defendant who cannot demonstrate how his defense was prejudiced with specificity will not make out a speedy trial claim no matter how great the ensuing delay." *United States v. Howard*, 218 F.3d 556, 564 (6th Cir. 2000) (citing *Doggett*, 505 U.S. at 656).

B. Application of the Four *Barker* Factors

1. Length of the Delay

"The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Barker*, 407 U.S. at 530. "[T]he length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case." *Id.* at 530-31.

In this Circuit, "[a] one-year delay is presumptively prejudicial and triggers analysis of the remaining *Barker* factors." *Brown v. Romanowski*, 845 F.3d 703, 714 (6th Cir. 2017) (citing *Doggett*, 505 U.S. at 652 n.1); *accord United States v. Young*, 657 F.3d 408, 414 (6th Cir. 2011) (stating that "[a] court need only consider the other *Barker* factors if there has been 'uncommonly long' delay" and that "a delay of more than one year is presumptively prejudicial and triggers application of the remaining three factors"); *Maples v. Stegall*, 427 F.3d 1020, 1026 (6th Cir. 2005) ("A delay approaching one year is presumptively prejudicial and triggers application of the remaining three factors.").

Ordinarily, "[t]he length of the delay is measured from the date of the indictment or the date of the arrest, whichever is earlier." *Maples*, 427 F.3d at 1026 (citing *United States v. Marion*, 404 U.S. 307, 320 (1971), and *Redd v. Sowders*, 809 F.2d 1266, 1269 (6th Cir. 1987)). Petitioner, therefore, contends that the delay began in June 2009, when he was arraigned, and that the delay ended five years, three months later, on September 24, 2014, when his second trial began. (Pet., ECF No. 1 at Pg. ID 19.)

According to the Michigan Court of Appeals, however, the delay was three years: from September 6, 2011, when Petitioner's first direct appeal ended, to September 24, 2014, the date that Petitioner's second trial began. *See Wilson*, 2016 WL 2731096, at *3. Using September 2011, as opposed to June 2009, as the

start of the delay makes sense because the interval between Petitioner's arraignment in 2009 and the amended charging document did not in itself violate the speedy trial provision of the Constitution. *See United States v. Ewell*, 383 U.S. 116, 121 (1966) (stating that the substantial interval between the defendants' original and subsequent indictments did not in itself violate the speedy trial provision of the Constitution).

Here, during the first appeal of right, the Michigan Court of Appeals vacated Petitioner's initial convictions and sentences, and remanded the case to the trial court for further proceedings. The prosecutor's appeal from that order was denied by the Michigan Supreme Court on September 6, 2011. At that point, Petitioner once again became subject to prosecution, and his right to a speedy trial attached. *See United States v. MacDonald*, 456 U.S. 1, 6 (1982) ("A literal reading of the [Sixth] Amendment suggests that th[e] right [to a speedy and public trial] attaches only when a formal criminal charge is instituted and a criminal prosecution begins."); *Marion*, 404 U.S. at 313 (stating that "the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution"); *see also Harvey v. Shillinger*, 76 F.3d 1528, 1533–34 (10th Cir. 1996) (concluding that the speedy trial clock for the petitioner's second trial began to run after his original convictions were vacated and he was charged with a new offense).

Petitioner, in fact, agreed with the prosecution during the state appellate proceedings that, for purposes of a speedy trial, the clock began to run on September 6, 2011, when the Michigan Supreme Court rejected the prosecution's application for leave to appeal on direct appeal. He stated that,

> [w]hile normally the length of delay for speedy trial purposes is calculated from the date of arrest to the date of trial, in this matter the relevant period, given the initial appellate reversal of the convictions, runs from the date the Michigan Supreme Court denied leave to appeal to the prosecution from the Court of Appeals' opinion which reversed those convictions and remanded for a new trial (September 6, 2011 – see Appendix B) to the date of the beginning of the re-trial (September 24, 2014). *See People v Bennett*, 84 Mich. App. 408; 269 N.W.2d 618 (1978). That delay was in excess of three years.

Def. Brief on Appeal, Mich. Ct. App. No. 324856 (ECF 6-19 at Pg. ID 782).

Petitioner alleges in his habeas petition that he did not authorize his appellate attorney to use September 6, 2011, as the start of the delay period. (ECF No. 1 at Pg. ID 18). However, his appellate attorney's argument is consistent with Petitioner's *pro se* motion in state court that the clock should start running in 2011 when his convictions were vacated. *See* 2/16/12 Pretrial Conference, ECF No. 6-11 at Pg. ID 383-86.) The Michigan Court of Appeals, therefore, did not unreasonably apply the law or unreasonably determine the facts when it concluded that the pretrial delay began on September 6, 2011.

Nevertheless, because the parties agree that the delay ended on September 24, 2014, the delay was more than one year, and it is presumptively prejudicial. The first factor weighs in Petitioner's favor.

2. Reasons for the Delay

The second speedy-trial factor requires an assessment of the reasons for the delay. Petitioner alleges that the delay was entirely attributable to the prosecution and to some of the appeals in his case. He claims that he was "railroaded" by the state court of appeals and by the appearance of impropriety. He also contends that the prosecution and courts acted in bad faith or were negligent. (Pet., ECF No. 1 at Pg. ID 19.)

The Michigan Court of Appeals, however, ruled that the reasons for the delay factor did not weigh in Petitioner's favor because (i) the prosecutor's interlocutory appeal on the double jeopardy issue was not frivolous; (ii) Petitioner failed to show bad faith or dilatory purpose on the part of the prosecution; (iii) the double jeopardy issue was important; (iv) the crime was serious; and (v) much of delay before and after the interlocutory appeal was due to Petitioner's motions or requests. *Wilson*, 2016 WL 2731096, at *3-*5.

In *Barker*, the Supreme Court stated that

> different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily

> but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Barker, 407 U.S. at 531 (footnote omitted); *see also Brown*, 845 F.3d at 714 (explaining that governmental delays motivated by bad faith, harassment, attempts to seek a tactical advantage, negligence, and a lack of explanation weigh against the government, but in varying degrees). "[T]he court considers who is most at fault—the government or the defendant." *Brown*, 845 F .3d at 714.

a. September 6, 2011 to July 16, 2012

As noted above, the delay in retrying Petitioner started on September 6, 2011, when the Michigan Supreme Court denied the prosecution's application for leave to appeal the lower court's order vacating Petitioner's initial convictions and remanding the case to the trial court. At a pretrial conference about three months later, Petitioner objected to being re-tried on a charge of felony-murder because he was acquitted of home invasion, which was the felony underlying the felony-murder charge. (12/13/11 Pretrial Conference, ECF No. 6-9 at Pg. ID 358.)

At another pretrial conference a month later, Petitioner stated that he was firing his appointed attorney. (1/19/12 Pretrial Conference, ECF 6-10 at Pg. ID 363-64.) Petitioner also objected to being moved from a nearby prison to the county jail because he was trying to defend himself, and the prison law library was better than the library at the jail. (*Id.* at Pg. ID 368-69.) Petitioner's attorney

(Jeffery Cojocar) explained the things that he had done on Petitioner's behalf, and he described Petitioner as "confrontational." (*Id.* at Pg. ID 365-68.) The trial court allowed Cojocar to withdraw from the case, and it warned Petitioner that he would be "stuck" with the next appointed attorney. (*Id.* at Pg. ID 371.)

At the next pretrial conference on February 16, 2012, the trial court announced that the newly appointed attorney (Mark Swanson) had declined to represent Petitioner. Although Swanson cited personal family matters for his decision, he also informed the trial court by letter that Petitioner had failed to have a couple of his witnesses call Swanson and that, during a two-hour interview with Petitioner, Petitioner could not give Swanson a straight answer as to whether he wanted to represent himself. (2/16/12 Pretrial Conference, ECF No. 6-11 at Pg. ID 380-81.) The trial court set a trial date of April 24, 2012, and it agreed to appoint one more attorney for Petitioner. (*Id.* at Pg. ID 381-82, 394, 396.) Petitioner then made oral motions for discovery and for appointment of an independent medical examiner, a crime reconstructionist, and a private investigator. The trial court agreed to give Petitioner the available discovery materials, and it took the other motions under advisement. (*Id.* at Pg. ID 396-402.)

At a subsequent pretrial conference, Petitioner asserted his right to a speedy trial. However, when the trial court offered Petitioner an earlier trial date,

Petitioner declined the offer and stated that he wanted to file an interlocutory appeal. (3/1/12 Pretrial Conference, ECF No. 6-12 at Pg. ID 418-22.)

On April 18, 2012, Petitioner asked for a 90-day adjournment of the trial date because he was not prepared for trial. He acknowledged that the speedy-trial clock would stop running if an adjournment were granted. (4/18/12 Pretrial Hr'g, ECF No. 7-2 at Pg. ID 1539-41.) The trial court then adjourned the trial date to July 17, 2012, so that Petitioner could prepare for trial. (*Id.* at Pg. ID 1542, 1544-45.)

Finally, on July 6, 2012, the trial court granted Petitioner's motion to dismiss the felony-murder count. *See People v. Wilson*, No. 09-2637 FC (Macomb Cty. Cir. Ct. July 6, 2012); (ECF No. 6-18 at Pg. ID 671). The trial was set to start on July 17, 2012, but on July 12, 2012, the prosecution applied for leave to appeal the trial court's dismissal of the felony-murder charge. On July 16, 2012, the presiding judge of the Michigan Court of Appeals granted the application for leave to appeal, ordered an expedited appeal, and granted a stay. (ECF No. 6-18 at Pg. ID 698.)[3]

At that point in the proceedings, approximately ten months had run on the speedy trial clock: from September 6, 2011, to July 16, 2012. However, at least

[3] Appellate Judges Pat M. Donofrio and Deborah A. Servitto voted to grant the motion for immediate consideration and to peremptorily reverse the trial court's ruling. (ECF No. 6-18 at Pg. ID 698.)

three months of that ten-month period is attributable to Petitioner because he asked to have his appointed attorneys removed from the case and then he requested a ninety-day adjournment of the trial date to prepare for trial. "When a party makes motions, it cannot use the delay caused by those motions as a basis for a speedy-trial claim." *Young*, 657 F.3d at 415 (citing *United States v. Loud Hawk*, 474 U.S. 302, 316-17 (1986) (quoting *United States v. Auerbach*, 420 F.2d 921, 924 (5th Cir. 1969)).

b. July 16, 2012 to June 18, 2014

A substantial amount of the pretrial delay was the result of the interlocutory appeal regarding the felony-murder charge and the related double jeopardy issue. As explained above, Petitioner prevailed on the issue in the trial court, but the prosecution appealed the trial court's decision to the Michigan Court of Appeals.

Petitioner claims that the prosecution's appeal of the trial court's dismissal of the felony-murder charge was frivolous and tainted by impropriety because one of the judges that sat on the panel which granted the prosecution leave to appeal was the prosecutor's former stepmother. In addition, according to Petitioner, it is hornbook law that a person cannot be recharged for a crime of which the person has been acquitted by a jury, and he was acquitted of home invasion, the predicate felony for the felony-murder count.

"[T]he interests served by appellate review . . . sometimes stand in opposition to the right to a speedy trial." *Loud Hawk*, 474 U.S. at 313. Thus, "[u]nder *Barker,* delays in bringing the case to trial caused by the Government's interlocutory appeal may be weighed in determining whether a defendant has suffered a violation of his rights to a speedy trial. *Id.* at 316. But "an interlocutory appeal by the Government ordinarily is a valid reason that justifies delay." *Id.* at 315.

> In assessing the purpose and reasonableness of such an appeal, courts may consider several factors. These include the strength of the Government's position on the appealed issue, the importance of the issue in the posture of the case, and—in some cases—the seriousness of the crime. *United States v. Herman,* 576 F.2d 1139, 1146 (CA5 1978) (Wisdom, J.). For example, a delay resulting from an appeal would weigh heavily against the Government if the issue were clearly tangential or frivolous. *Ibid.* Moreover, the charged offense usually must be sufficiently serious to justify restraints that may be imposed on the defendant pending the outcome of the appeal. *Ibid.*

Id. at 315-316.

Here, the prosecution's position on the double jeopardy issue was far from frivolous. At the trial court level, the parties agreed that the jury could return a verdict of guilty of felony-murder and not guilty of home invasion and that the prosecution did not have to charge the predicate felony to obtain a conviction. The issue, however, was whether the prosecution could retry Petitioner on a charge of felony-murder, with home invasion as the predicate felony, even though Petitioner had been acquitted of the predicate felony at his first trial. The trial court and the

parties were unable to find any Michigan law squarely on point. *People v. Wilson*, No. 09-2637 FC (Macomb Cty. Cir. Ct. July 6, 2012); (ECF No. 6-18 at Pg. ID 671).

Furthermore, the Michigan Court of Appeals ruled in the prosecution's favor on the issue, *see Wilson* 2012 WL 5854885, and when Petitioner appealed to the Michigan Supreme Court, the state supreme court stated that the case "implicate[d] more than one somewhat complex legal doctrine[s]." *Wilson*, 496 Mich. at 95; 852 N.W.2d at136. Three justices of the Michigan Supreme Court agreed with the prosecution's position, *see id.*, 496 Mich. at 108-32; 852 N.W.2d at 142-55, and the United States Supreme Court has since held that the issue-preclusion component of the Double Jeopardy Clause does not bar prosecutors from retrying defendants after a jury has returned irreconcilably inconsistent verdicts of conviction and acquittal, and the convictions are later vacated for legal error unrelated to the inconsistency. *See Bravo-Fernandez v. United States*, 137 S. Ct. 352, 362-63 (2016).

Not only was the prosecution's position on the appealed issue strong, the issue was important to the posture of the case. The prosecution could not proceed with a second trial until there was a determination on whether Petitioner could be charged with felony-murder. Finally, felony-murder was a serious crime, for it is punishable by life imprisonment without the possibility of parole. The Court

concludes that the prosecution was justified in appealing the trial court's ruling on the double jeopardy issue.

Petitioner contends that the prosecutor's interlocutory appeal was tainted because one of the judges on the panel that granted leave to file the interlocutory appeal was the former stepmother of the prosecutor who tried Petitioner the second time. But the prosecutor who re-tried Petitioner was not involved in Petitioner's case at the time of the interlocutory appeal. And the judge in question did not sit on the appellate panel that issued the decision overturning the trial court's dismissal of the felony-murder charge.

Petitioner, nevertheless, asserts that the Michigan Supreme Court took an unreasonable amount of time in deciding his subsequent appeal to the Michigan Supreme Court after the Court of Appeals reinstated the felony-murder charge. Petitioner's appeal was meritorious in that he ultimately prevailed on the issue in the Michigan Supreme Court. But to prevail on a speedy trial claim, a defendant who files a meritorious appeal bears the burden of showing that the prosecution caused an unreasonable delay in that appeal or that the appellate court's delay was "wholly unjustifiable." *Loud Hawk*, 474 U.S. at 316.

The Michigan Supreme Court took almost eighteen months to decide the double jeopardy issue. Nevertheless,

> because of the many procedural safeguards provided an accused, the ordinary procedures for criminal prosecution are designed to move at a

> deliberate pace. A requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself.

Ewell, 383 U.S. at 120. Therefore, "[t]he right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice." *Beavers v. Haubert*, 198 U.S. 77, 87 (1905).

In the present case, the Michigan Supreme Court invited the Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan to file briefs amicus curiae in the case. *See People v. Wilson*, 494 Mich. 853; 830 N.W.2d 384 (2013). The court's dispositive opinion followed eight months after all the briefs were submitted, and the majority opinion was accompanied by a lengthy dissenting opinion.

Furthermore, "[t]he opinion in *Loud Hawk* . . . makes it clear that the question is not whether the appellate court's delay was reasonable or unreasonable. The issue is whether the review taken by the appellate court constituted a 'wholly unjustifiable' delay." *Deblase v. Roth*, No. CIV. A.95-5473, 1996 WL 11303, at *6 (E.D. Pa. Jan. 10, 1996) (unpublished). Additionally,

> the public has a strong interest in thorough and comprehensive appellate reviews. Thus, appellate courts, particularly State Supreme Courts, employ a slower and more deliberate process due to the nature of the legal issues brought before the court and the impact that its decision will have on the entire State and not just the current case at bar.

Id. at *7.

It is not lost upon the Court that *Loud Hawk* does not provide guidance on what "wholly unjustifiable" means and, in the 34 years since that case issued, neither the United States Supreme Court nor any circuit court has provided any instruction to fill in the gap. *See generally Loud Hawk*, 474 U.S. at 316. Nor has the Court ignored the fact that the Michigan Supreme Court underwent a very lengthy consideration of his interlocutory appeal and, in reality, Petitioner "is not privy to the inner workings or the deliberative processes" of the Michigan Supreme Court. *See Com. v. DeBlase*, 542 Pa. 22, 35, 665 A.2d 427, 434 (1995). Still, Petitioner is not absolved of the burden of showing a "wholly unjustifiable" delay by the appellate court. Absent guidance from the Supreme Court, the Court cannot conclude that the state court's finding that Petitioner failed to clear this high hurdle was contrary to Supreme Court precedent, an unreasonable application of Supreme Court precedent, or an unreasonable application of the facts.

c. June 18, 2014 to September 24, 2014

The remaining portion of the pretrial delay consisted of the three-month period following the interlocutory appeal: from June 18, 2014, when the Michigan Supreme Court issued its decision on the double jeopardy issue, until September 24, 2014, when Petitioner's second trial commenced. During that time, Petitioner filed more motions, including a motion to disqualify the trial court. He contends

that the motions were necessary because the prosecution withheld or destroyed discovery materials, but there is no indication in the record that the delay in producing discovery was the result of bad faith by the prosecution.

Even if the prosecution was negligent in producing discovery and the three-month delay following the interlocutory appeal were weighed against the Government, the total time attributed to the prosecution was, at most, ten months (seven months before the interlocutory appeal and three months after the interlocutory appeal). The remaining portion of the three-year delay was due to the interlocutory appeal on the double jeopardy issue (23 months), which was not frivolous, and Petitioner's request for an adjournment of the trial (three months), which was attributable to Petitioner. As such, the reasons for the delay weigh against Petitioner and in favor of the Government.

3. Assertion of the Right

The third *Barker* factor requires asking whether the defendant asserted his right to a speedy trial, because "a defendant has some responsibility to assert a speedy trial claim[.]" *Barker*, 407 U.S. at 529. The parties in this case do not dispute that Petitioner requested a speedy trial. (*See* Pet. for Writ of Habeas Corpus, ECF No.1 at Pg. ID 25-27; Resp. Answer in Opp'n to Pet., ECF No. 5 at Pg. ID 146.) The record, moreover, demonstrates that Petitioner repeatedly moved

for a speedy trial. (*See, e.g.*, 2/16/12 Pretrial Conference, ECF No. 6-11 at Pg. ID 383-89; 3/1/12 Pretrial Hr'g, ECF No. 6-12 at Pg. ID 408, 417; 4/17/12 Proceeding, ECF No. 7-1 at Pg. ID 1490-91; 2/13/13 Pretrial Conference, ECF No. 7-4 at Pg. ID 1617, 1621-22; 8/4/14 Proceeding, ECF No. 7-11 at Pg. ID 1705-06.) The third factor weighs in Petitioner's favor.

4. Prejudice

The fourth *Barker* factor is prejudice to the defendant. The Michigan Court of Appeals evaluated this factor and concluded that Petitioner was not prejudiced by the delay in trying him. The Court of Appeals stated that (i) Petitioner received credit for the time he was incarcerated before trial, (ii) his anxiety alone was insufficient to establish a speedy trial claim, and (iii) Petitioner conceded on appeal that no witnesses became unavailable, and no documents were lost. (ECF No. 6-23 at Pg. ID 1288.)

Petitioner, nevertheless, points out that he remained incarcerated during the entire pretrial delay. In addition, he was not able to groom himself properly during his incarceration, and he suffered constant anxiety and concern about his family, his financial status, and his career. (Pet., ECF No.1 at Pg. ID 27-28.) Petitioner also contends that he suffered prejudice to his defense because witnesses during his second trial experienced loss of memory. (*Id.* at Pg. ID 28.)

There are "societal disadvantages" to a lengthy pretrial incarceration. As explained in *Barker*:

> The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. . . . Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense.

Barker, 407 U.S. at 532-33; *see also Marion*, 404 U.S. at 320 (stating that "[i]nordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective defense," and that an arrest may "disrupt [a defendant's] employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends").

But "deprivation of the right to speedy trial does not per se prejudice the accused's ability to defend himself." *Barker*, 407 U.S. at 521. Instead,

> [p]rejudice . . . should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. [The Supreme] Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past.

Id. at 532 (footnote omitted).

Petitioner likely "was prejudiced to some extent by living . . . under a cloud of suspicion and anxiety." *Id.* at 534; *but see Miles v. Jordan*, No. 19-5340, 2021 WL 710955, at *6-7 (6th Cir. Feb. 24, 2021) (affirming district court's determination that 21-month delay between indictment and delay did not prejudice the petitioner, where there was no indication that his anxiety was "beyond that which is inevitable in a criminal case"). But there is some basis in the record for concluding that he did not want a speedy second trial and that he asserted his right to a speedy trial because he hoped that the charges against him would be dismissed for failure to grant him a speedy trial. For example, at a court proceeding that followed the dismissal of the original charges, Petitioner stated, "I know how this Court likes to zoom things along, and get me in trial, so I'm trying to slow it down now. . . ." (1/19/12 Proceeding, ECF No. 6-10 at Pg. ID 364.)

At a hearing about a month and a half later, Petitioner said that he was not trying to help everyone hurry up and try him. (3/1/12 Proceeding ECF No. 6-12 at Pg. ID 418.) And when the trial court offered Petitioner an earlier trial date, Petitioner declined the offer, stated that he was not ready for trial, and indicated that he planned to file an interlocutory appeal. (*Id.* at Pg. ID 418-26.) He subsequently filed an interlocutory appeal based on the speedy-trial issue. (ECF No. 6-16 at Pg. ID 539-40.)

The delay in trying Petitioner a second time also does not appear to have hindered his defense. He produced sixteen witnesses in his own defense. (*See* 10/2/14 Trial Tr., ECF No. 7-20 at Pg. ID 3132; 10/3/14 Trial Tr., ECF No. 7-21 at Pg. ID 3316-17; 10/6/14 Trial Tr., ECF No. 10-6 at Pg. ID 4300; 10/7/14 Trial Tr., ECF No. 7-22 at Pg. ID 3526.)

Petitioner cites to numerous places in the transcript of the trial where witnesses indicated that they did not remember some aspect of the case. (*See* Pet., Ex. F, ECF No. 1-1 at Pg. ID 107.) Katherine Horton, the alleged victim of the assault, stated over and over that she did not recall certain details about the incident, but Petitioner's cross-examination of her focused mainly on the most serious charges against him (second-degree murder and assault with intent to do great bodily harm less than murder), crimes for which he was acquitted. In addition, he was able to cross-examine the unlawful imprisonment victims. And because the unlawful imprisonment victims were government witnesses, contrary to Petitioner's assertion, their "inability . . . to remember particular facts . . . did not undermine his defense; rather, it weakened the prosecution's case." *Brown*, 845 F.3d at 719 (quoting *United States v. Schreane*, 331 F.3d 548, 558 (6th Cir. 2003) ("If the witnesses support the prosecution, its case will be weakened . . . [as] it is the prosecution which carries the burden of proof." (quoting *Barker*, 407 U.S. at 521))). Therefore, "the partial memory lapses" of these two witnesses, "which

minor, insignificant details about the case.[4] *Cf. Brown*, 845 F .3d at 714 (describing the memories of two witnesses as "not so dim" because they "recall[ed] many *salient* details" (emphasis added)). In the end, the witnesses' "lapses of memory . . . were in no way significant to the outcome" of the Petitioner's trial. *Barker*, 407 U.S. at 534. Factor four weighs in the Government's favor because Petitioner has not shown that he was prejudiced by the pretrial delay.

Even if one were to assume that the prosecution was more to blame, Petitioner was responsible for some of the delay, and he has not shown that his defense was impaired. Moreover, the Court recognizes that "[t]he time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. . . ." *Barker*, 407 U.S. at 532-33. Indeed, "[t]he time spent in jail is simply dead time." *Id.* In this case, however, the "anxiety and concern" Petitioner experienced was not "beyond that which is inevitable in a criminal case." *Miles*, 2021 WL 710955, at *6-7. And even though Petitioner at one point states in his habeas petition that "[he] was oppressively incarcerated throughout the delays," Petitioner makes no attempt to

[4] (*See* Pet., Ex. F, ECF No. 1-1 at Pg. ID 107 (citing 10/1/14 Trial Tr., ECF No. 7-19 at Pg. ID 3006, 3010-11; 10/2/14 Trial Tr., ECF No. 7-20 at Pg. ID 3227, 3230, 3235, 3241, 3244; 10/3/14 Trial Tr., ECF No. 7-21 at Pg. ID 3432; 3434-35, 3446, 3451-52).)

explain *how* he experienced "oppressive pretrial incarceration" as defined by the Supreme Court. *See also McPherson v. Kelsey*, 125 F. 3d 989, 995-96 (6th Cir. 1997) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to . . . put flesh on its bones."); *see also United States v. Felix*, No. 20-3201, 2021 WL 1102304, at *6 (6th Cir. Mar. 23, 2021) (emphasis in original) (quoting *Young*, 657 F.3d at 418)) (concluding that, where "[t]he only prejudice advanced by [the petitioner] [] is his pretrial incarceration," the petitioner has not demonstrated prejudice "with specificity" sufficient to demonstrate oppressive pretrial incarceration).

IV. Conclusion

Factors one and three (length of the delay and assertion of the right) weigh in Petitioner's favor, but factors two and four (reasons for the delay and prejudice) favor the Government. Therefore, the state appellate court reasonably determined that the delay in bringing Petitioner to trial did not violate the Constitution. *See Brown v. Bobby*, 656 F.3d 325, 337 (6th Cir. 2011) (reaching the same conclusion in similar circumstances where factors one and three favored the petitioner, but factors two and four weighed in the state's favor).

The state appellate court's adjudication of Petitioner's claim on the merits was not so lacking in justification that there was an error beyond any possibility for fairminded disagreement. Further, the state court's decision was not contrary to Supreme Court precedent, an unreasonable application of Supreme Court precedent, or an unreasonable application of the facts. Accordingly, Petitioner is not entitled to relief on his claim.

ORDER

IT IS ORDERED that the petition for a writ of habeas corpus is **DENIED**. Nevertheless, because reasonable jurists could find the Court's assessment of Petitioner's constitutional claim debatable,

IT IS FURTHER ORDERED that a certificate of appealability may issue.

IT IS FURTHER ORDERED that Petitioner's motion for bond pending a decision on the habeas petition (ECF No. 15) is **DENIED** as moot.

IT IS FURTHER ORDERED that Petitioner's motion for a hearing on the previous judge's recusal (ECF No. 22) is **DENIED** as unnecessary and irrelevant.

IT IF FURTHER ORDERED that Petitioner's motion for permission to file a supplemental brief related to his motion for bond (ECF No. 23) is **GRANTED**. No further action is necessary because Petitioner already filed two supplemental briefs (ECF Nos. 24, 26) and the Court has reviewed them.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DWAYNE EDMOND WILSON,

Petitioner,

v.

CASE NO. 2:18-cv-10906
HONORABLE LINDA V. PARKER

LES PARISH,

Respondent.
_____/

This matter came before the Court on a habeas corpus petition under 28 U.S.C. § 2254. For reasons given in an Opinion and Order entered on this date,

IT IS ORDERED that the petition for a writ of habeas corpus is **DENIED**.

IT IS FURTHER ORDERED that a certificate of appealability may issue.

s/ Linda V. Parker
LINDA V. PARKER
U.S. DISTRICT JUDGE

Dated: March 31, 2021

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DWAYNE EDMOND WILSON,

Petitioner,

v.

CASE NO. 2:18-cv-10906
HONORABLE LINDA V. PARKER

LES PARISH,

Respondent.
_____/

ORDER GRANTING PETITIONER'S REQUEST TO PROCEED *IN FORMA PAUPERIS* ON APPEAL [ECF No. 37]

Petitioner Dwayne Edmond Wilson, a state prisoner in the custody of the Michigan Department of Corrections, filed an application for the writ of habeas corpus pursuant to 28 U.S.C. § 2254. (ECF No. 1.) On March 31, 2021, the Court denied the petition in an opinion and judgment. (ECF Nos. 30 and 31.) On April 5, 2021, and again on April 25, 2021, Petitioner filed a notice of appeal from the Court's decision. (ECF Nos. 32 and 34.)

Now before the Court is Petitioner's recent letter which states that the Court of Appeals informed him and his family that, if he wanted to have the appellate filing fee waived, he should ask the District Court for permission to proceed *in forma pauperis* on appeal. (ECF No. 37.) Petitioner alleges that he filed a motion to proceed *in forma pauperis* on May 7, 2021, but the Court's docket does not

reflect a motion to proceed *in forma pauperis* on appeal or any motions filed on May 7, 2021. The Court, therefore, will treat Petitioner's recent letter as a request to proceed *in forma pauperis* on appeal.

Petitioner was represented by counsel in this Court, but he is acting as his own attorney on appeal, and the Court granted him a certificate of appealability in its dispositive opinion and judgment. (ECF No. 30, PageID.4511; ECF No. 31, PageID.4513.) The Court concludes that the appeal is taken in good faith and that Petitioner should be permitted to proceed *in forma pauperis* on appeal.

Accordingly,

IT IS ORDERED that Petitioner's request to proceed *in forma pauperis* on appeal (ECF No. 37) is **GRANTED**.

IT IS SO ORDERED.

s/ Linda V. Parker
LINDA V. PARKER
U.S. DISTRICT JUDGE

Dated: May 28, 2021

I hereby certify that a copy of the foregoing document was mailed to counsel of record and/or pro se parties on this date, May 28, 2021, by electronic and/or U.S. First Class mail.

s/Aaron Flanigan
Case Manager

APPEDIX

D

EXHIBIT

Michigan Appeals Court

Opinion (May 10, 2016)

People v. Wilson

Court of Appeals of Michigan

May 10, 2016, Decided

No. 324856

Reporter
2016 Mich. App. LEXIS 941 *; 2016 WL 2731096

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v DWAYNE EDMUND WILSON, Defendant-Appellant.

Subsequent History: Leave to appeal denied by *People v. Wilson, 500 Mich. 890, 886 N.W.2d 710, 2016 Mich. LEXIS 2304 (Nov. 17, 2016)*

Later proceeding at *People v. Wilson, 500 Mich. 889, 886 N.W.2d 710, 2016 Mich. LEXIS 2305 (Nov. 17, 2016)*

Reversed by, in part *People v. Wilson, 500 Mich. 521, 902 N.W.2d 378, 2017 Mich. LEXIS 1398 (July 25, 2017)*

Prior History: **[*1]** Macomb Circuit Court. LC No. 2009-002637-FC.

People v. Wilson, 496 Mich. 91, 852 N.W.2d 134, 2014 Mich. LEXIS 1081 (June 18, 2014)

Core Terms

sentencing, trial court, score, felony-firearm, unlawful imprisonment, convictions, offenses, pretrial, assess, speedy trial right, offender, felony, interlocutory appeal, imprisonment, motions, fear and anxiety, speedy, girls, sentencing guidelines, fact-finding, adjournment, proceedings, guidelines, Appeals, murder, application for leave, felony murder charge, minimum sentence, variables, delays

Judges: Before: MURPHY, P.J., and CAVANAGH and RONAYNE KRAUSE, JJ.

Opinion

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession of a firearm during the commission of a felony (felony-firearm), *MCL 750.227b*, and two counts of unlawful imprisonment, *MCL 750.349b*. Defendant was sentenced to 10 years' imprisonment for the felony-firearm conviction as a third felony-firearm offender, and 100 to 180 months' imprisonment for the unlawful imprisonment convictions.[1] We affirm defendant's convictions but remand for correction of the judgment of sentence to reflect a term of five years' imprisonment for defendant's felony-firearm conviction and for reconsideration of defendant's unlawful imprisonment sentences.

Defendant first argues that he was denied his right to a speedy trial. We disagree. "The determination whether a defendant was denied a speedy trial is a mixed question of fact and law. The factual findings are reviewed for clear error, while the constitutional issue is a question of law subject to review de novo." *People v Waclawski, 286 Mich App 634, 664; 780 NW2d 321 (2009)* (citations **[*2]** omitted).

"[A] defendant's right to a speedy trial is guaranteed by the United States and Michigan Constitutions." *People v Rivera, 301 Mich App 188, 193; 835 NW2d 464 (2013)*, citing *US Const, Am VI*; *Const 1963, art 1, § 20*. See also *MCL 768.1* (codifying the right to a speedy trial). No fixed number of days of delay exists after which the right to a speedy trial is violated. *People v Williams, 475 Mich*

[1] The jury found defendant not guilty of the additional charges of second-degree murder, *MCL 750.317*, and assault with intent to do great bodily harm, *MCL 750.84*.

245, 261; 716 NW2d 208 (2006). "Whether an accused's right to a speedy trial is violated depends on consideration of four factors: (1) the length of delay, (2) the reason for delay, (3) the defendant's assertion of the right, and (4) the prejudice to the defendant." Rivera, 301 Mich App at 193 (quotation marks omitted). "Following a delay of eighteen months or more, prejudice is presumed, and the burden shifts to the prosecution to show that there was no injury." Williams, 475 Mich at 262. "[A] presumptively prejudicial delay triggers an inquiry into the other factors to be considered in the balancing of the competing interests to determine whether a defendant has been deprived of the right to a speedy trial." *Id.* (quotation marks omitted). "In assessing the reasons for delay, this Court must examine whether each period of delay is attributable to the defendant or the prosecution." Waclawski, 286 Mich App at 666. Delays that inhere in the court system, such as docket congestion, are technically attributable to **[*3]** the prosecution but are given a neutral tint and assigned only minimal weight in determining whether a speedy trial violation occurred. Williams, 475 Mich at 263.

We note that, before trial, defendant filed in federal district court a habeas corpus petition raising his speedy trial claim. See *Wilson v Michigan*, unpublished order of the United States District Court for the Eastern District of Michigan, entered July 17, 2014 (Docket No. 14-12490), 2014 U.S. Dist. LEXIS 96905, 2014 WL 3543305. On July 17, 2014, the federal district court dismissed defendant's petition and reasoned, in relevant part, that much of the delay was due to interlocutory appeals and that defendant's case had been steadily progressing in state court. *Id.* at 2-3.

On September 8, 2014, the trial court in the present case denied defendant's motion to dismiss for violation of his right to a speedy trial. In addressing the reasons for the delay, the trial court summarized the relevant proceedings as follows:

> On September 6, 2011, the Supreme Court denied the prosecutor's application for leave to appeal the Court of Appeals's May 10, 2011 decision [reversing defendant's earlier convictions in this case from a 2009 trial]. Moreover, on September 9, 2011, the Circuit Court file was returned **[*4]** from the Supreme Court. A pre-trial conference was held in November 2011. The Circuit Court denied defendant's prior motions to dismiss for violation of the 180-day trial rule on February 16, 2012 and March 1, 2012. Defendant filed a delayed application for leave to appeal the denial of his original motion to dismiss, which was denied by the Court of Appeals on April 18, 2012. On July 6, 2012, the Circuit Court granted defendant's motion to dismiss the felony murder charge. Thereafter, on July 16, 2012, the Court of Appeals stayed this matter pending appeal. On August 13, 2012, the trial court entered an order placing this matter on the inactive docket due to the stay. That order stated that "[i]t appears that no further progress in this cause will be possible because of [the stay]."
>
> Prior to the stay, defendant filed numerous motions, including, but not limited [to], the motions to dismiss for violation of the 180-day trial rule, a motion for [sic] dismiss for failure to arraign, discovery motions, a motion for bond reduction, a request for an investigator, for additional scientific experts, and to dismiss the felony murder charge. Further, on April 18, 2012, the Court granted defendant's **[*5]** motion to adjourn the April 24, 2012 trial date to July 17, 2012 to allow defendant time for trial preparation.
>
> On November 15, 2012, the Court of Appeals reversed the Circuit Court's decision. The Supreme Court issued its decision on June 18, 2014 and its corresponding order reversing the Court of Appeals's decision and remanding the matter to this Court for further proceedings was entered on July 16, 2014. Further, on July 24, 2014, these proceedings were removed from the Circuit Court's inactive docket. On July 30, 2014, the Circuit Court received the Supreme Court's order and the file was returned from the Supreme Court. Shortly thereafter, on August 4, 2014, the Court took defendant's pending motions under advisement. On August 21, 2014, a pre-trial conference was held. A pre-trial conference/hearing is set for September 8, 2014.
>
> Thus, this Court was precluded from proceeding with this matter pending appeal and acted promptly after the Supreme Court's decision was entered. It should be noted that the federal court's decision, as discussed above, primarily attributed the delay to interlocutory appeals and noted that this case has been steadily progressing in state court. Further, **[*6]** some of the delay can be attributed to defendant inasmuch as he filed numerous motions and requested that the trial date be adjourned prior to the stay. Under the totality of circumstances, this Court sees no evidence that the prosecution is substantially to blame for the delays in this case or that they were unwarranted. [Quotation marks and

citation omitted; alterations in original.]

The trial court noted that the prosecutor did not dispute that defendant had asserted his right to a speedy trial numerous times throughout the proceedings. The trial court found that defendant's general allegations of prejudice were insufficient to establish that he was denied his right to a speedy trial. Balancing the factors, the trial court concluded that defendant's speedy trial right was not violated.

We agree with the trial court's analysis. First, with respect to the length of delay, the parties agree that the relevant period of delay began on September 6, 2011, which was the date that our Supreme Court denied leave to appeal, see *People v Wilson, 490 Mich 861; 801 N.W.2d 882 (2011)* (*Wilson II*), from this Court's reversal of defendant's earlier convictions, see *People v Wilson*, unpublished opinion per curiam of the Court of Appeals, issued *May 10, 2011 (Docket No. 296693), 2011 Mich. App. LEXIS 861* **[*7]** , pp 1-3 (*Wilson I*), and ended on September 24, 2014, the date that defendant's second trial began. Because the delay exceeded 18 months, prejudice is presumed and an inquiry must be made into the other factors in order to determine whether a speedy trial violation occurred. See *Williams, 475 Mich at 262*.

Regarding the reasons for delay, it is undisputed that the vast majority of delay, approximately two years, is attributable to an interlocutory appeal arising from the dismissal of a charge of first-degree felony murder, *MCL 750.316(1)(b)*. The trial court dismissed the felony murder charge on July 6, 2012. On July 12, 2012, the prosecutor filed an interlocutory application for leave to appeal in this Court. On July 16, 2012, this Court granted the prosecutor's application for leave to appeal and stayed further proceedings in the trial court pending the resolution of the appeal. *People v Wilson*, unpublished order of the Court of Appeals, entered July 16, 2012 (Docket No. 311253). On November 15, 2012, this Court issued an opinion reversing the trial court's order, reinstating the felony murder charge, and remanding the case to the trial court for further proceedings. *People v Wilson*, unpublished opinion **[*8]** per curiam of the Court of Appeals, issued *November 15, 2012 (Docket No. 311253), 2012 Mich. App. LEXIS 2273, *1-3* (*Wilson III*), reversed *496 Mich 91; 852 N.W.2d 134 (2014)*. On January 9, 2013, defendant filed an application for leave to appeal in our Supreme Court. On May 24, 2013, our Supreme Court granted defendant's application for leave to appeal. *People v Wilson, 494 Mich. 853, 830 N.W.2d 383 (2013)*. On June 18, 2014, our Supreme Court issued an opinion holding that double jeopardy precluded recharging defendant with felony murder because he had previously been acquitted of the predicate felony; the Supreme Court therefore reversed this Court's decision and remanded the case to the trial court for further proceedings. *People v Wilson, 496 Mich 91, 108; 852 NW2d 134 (2014)* (*Wilson IV*). Our Supreme Court entered its corresponding order returning the matter to the trial court on July 16, 2014.

The two-year period of delay related to the interlocutory appeal is not weighed in favor of defendant's speedy trial claim.

> Given the important public interests in appellate review, it hardly need be said that an interlocutory appeal by the Government ordinarily is a valid reason that justifies delay. In assessing the purpose and reasonableness of such an appeal, courts may consider several factors. These include the strength of the Government's position **[*9]** on the appealed issue, the importance of the issue in the posture of the case, and — in some cases — the seriousness of the crime. For example, a delay resulting from an appeal would weigh heavily against the Government if the issue were clearly tangential or frivolous. Moreover, the charged offense usually must be sufficiently serious to justify restraints that may be imposed on the defendant pending the outcome of the appeal. [*United States v Loud Hawk, 474 U.S. 302, 315-316; 106 S Ct 648; 88 L Ed 2d 640 (1986)* (citations omitted).]

Although the prosecutor did not ultimately prevail in our Supreme Court on the appealed issue concerning whether double jeopardy barred retrial on the felony murder charge, the prosecutor's position was not clearly tangential or frivolous. Indeed, the prosecutor's argument was sufficiently strong that this Court ruled in favor of the prosecutor, see *Wilson III*, unpub op *2012 Mich. App. LEXIS 2273 at *1-3*, and three dissenting justices of our Supreme Court also agreed with the prosecutor's position, see *Wilson IV, 496 Mich at 132* (MARKMAN, J., dissenting). Defendant has not demonstrated that the prosecutor acted in bad faith or had a dilatory purpose in pursuing the interlocutory appeal. See *Loud Hawk, 474 U.S. at 316* (noting that the defendant had made no showing of bad faith or dilatory purpose on the part of the **[*10]** prosecutor). The issue whether double jeopardy barred retrial on the felony murder charge was an important issue in the posture of the case given that it was the most serious charge being pursued and the trial court's ruling

prevented prosecution on that charge. Likewise, the seriousness of the crime of felony murder is beyond dispute.

It is also notable that the appellate delay during the period from this Court's issuance of its opinion on November 15, 2012, until the case returned to the trial court in July of 2014, is due to defendant's decision to pursue in our Supreme Court an interlocutory appeal of this Court's decision.

> In that limited class of cases where a pretrial appeal by the defendant is appropriate, delays from such an appeal ordinarily will not weigh in favor of a defendant's speedy trial claims. A defendant with a meritorious appeal would bear the heavy burden of showing an unreasonable delay caused by the prosecution in that appeal, or a wholly unjustifiable delay by the appellate court. [*Loud Hawk, 474 U.S. at 316* (citation omitted).]

Defendant has not shown that the prosecutor caused an unreasonable delay or that there was a wholly unjustifiable delay by our Supreme Court. Accordingly, the **[*11]** delay attributable to the interlocutory appeal is not weighed in favor of defendant's speedy trial claim.

Moreover, most of the period of delay that preceded and followed the interlocutory appeal is either attributable to defendant or given only minimal weight because of delays inherent in the court system. The prosecutor concedes that there was a two-week adjournment at the prosecutor's request and a one-month delay attributable to the trial court's unavailability and the reassignment of the initial trial judge to the Family Division of the Macomb Circuit Court. But by far most of the delays appear to be attributable to motions or requests by defendant.

In particular, at a November 15, 2011 pretrial conference, defendant, who was then represented by an attorney, requested through defense counsel a new pretrial conference in order to have more time to review discovery material and to prepare defense motions. At a December 13, 2011 pretrial conference, defense counsel again said that he was in the process of reviewing discovery items and would need to review some transcripts that the prosecutor was supposed to provide; defense counsel indicated that defendant wanted counsel to look into **[*12]** a legal issue and suggested coming back in January to set a trial date and address any pretrial motions. At a January 19, 2012 hearing, defendant asked the trial court to appoint him a new attorney and indicated that otherwise defendant might represent himself; the trial court agreed to appoint a new lawyer for defendant. At a February 16, 2012 pretrial conference, it was revealed that defendant was unhappy with the new attorney that the court had appointed for him, and defendant indicated that he wished to represent himself; defendant also indicated that he wanted to file a motion for further discovery and requested appointments of a private investigator, an independent medical examiner, and a crime reconstructionist to assist in the defense. At a March 1, 2012 pretrial hearing, the trial court asked defendant if he would be ready for trial the following week or the week after that, and defendant indicated that he was not ready for trial at those times; defendant also indicated that he planned to file a motion to remove the trial judge. At an April 18, 2012 pretrial hearing, defendant requested an adjournment of at least 90 days so he could have more time to prepare for trial. At **[*13]** defendant's request, on April 18, 2012, the trial court adjourned the trial from April 24, 2012 to July 17, 2012. At a May 4, 2012 pretrial hearing, defendant again pursued a motion regarding further discovery and requested bond. Defendant also pursued various motions at hearings held on July 9, 2012; July 12, 2012; July 21, 2014; August 21, 2014; and September 8, 2014.

In short, the record reflects that the bulk of the delay before and after the interlocutory appeal is attributable to defendant given his numerous motions, requests for adjournment, and requests for new appointed counsel. Any remaining adjournments appear to be inherent to the court system and thus, while technically attributable to the prosecution, are assigned only minimal weight. *Williams, 475 Mich at 263*.

Next, as the trial court noted, it is undisputed that defendant made numerous assertions of his speedy trial right.

Defendant did not suffer any prejudice to his defense. "Prejudice to the defense is the more serious concern [than prejudice to the person], because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Williams, 475 Mich at 264* (quotation marks removed). Defendant concedes on appeal that there are no **[*14]** specific witnesses that have become unavailable and no specific documents that have been lost as a result of the delay. See *Waclawski, 286 Mich App at 669* (concluding that the defendant's defense was not prejudiced where there was "no indication that a potential defense witness was lost or that other exculpatory evidence was misplaced

during the delay."). Defendant contends that he has suffered prejudice to his person because he endured anxiety from facing a murder charge of which, defendant claims, he has now been cleared. The mere fact that defendant was not ultimately convicted of murder does not establish that his incarceration pending trial on murder and other charges comprised unfair prejudice to his person. Anxiety alone is insufficient to establish a speedy trial violation. *People v Gilmore, 222 Mich App 442, 462; 564 NW2d 158 (1997)*. Defendant was ultimately convicted of three felonies and has received credit for the time that he was incarcerated before trial.[2]

We conclude that, although the three-year delay is presumptively prejudicial and defendant asserted his speedy trial right, the reasons for delay do not weigh in favor of his claim, and his ability to prepare a defense was not prejudiced. Therefore, defendant's right to a speedy trial was not violated. See *Waclawski, 286 Mich App at 669* (finding no speedy trial violation where, although the length of the delay was presumptively **[*16]** prejudicial and the defendant asserted his speedy trial right, the defendant's ability to prepare a defense was not prejudiced and the reasons for delay weighed against the defendant).

Defendant next argues that the trial court erred in sentencing him to 10 years' imprisonment as a third felony-firearm offender. We agree. This issue presents a question of statutory interpretation, which is reviewed de novo. *People v Gardner, 482 Mich 41, 46; 753 NW2d 78 (2008)*.

MCL 750.227b(1) provides:

> A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony, except a violation of *section 223*, *227*, *227a*, or *230*, is guilty of a felony and shall be punished by imprisonment for 2 years. Upon a second conviction under this subsection, the person shall be punished by imprisonment for 5 years. Upon a third or subsequent conviction under this subsection, the person shall be punished by imprisonment for 10 years.

In *People v Stewart, 441 Mich 89, 95; 490 NW2d 327 (1992)*, our Supreme Court held "that a defendant may be convicted of felony-firearm (third offense) if the third offense is preceded by two convictions of felony-firearm, and both prior felony-firearm convictions have arisen from separate criminal incidents." In requiring that the two prior felony-firearm convictions **[*17]** arise from separate criminal incidents, the Supreme Court in *Stewart* relied in relevant part on its earlier opinion in *People v Preuss, 436 Mich 714; 461 NW2d 703 (1990)*, overruled by *People v Gardner, 482 Mich 41; 753 N.W.2d 78 (2008)*, which had interpreted the general habitual offender statutes. See *Stewart, 441 Mich at 93-95*. The Supreme Court noted in *Stewart*: "We said in *Preuss* that the habitual offender statute 'requires only that the fourth offense be preceded by three convictions of felony offenses, and that each of those three predicate felonies arise from separate criminal incidents.'" *Stewart, 441 Mich at 94*, quoting *Preuss, 436 Mich at 717*.

In *Gardner, 482 Mich at 44*, our Supreme Court overruled *Preuss* because the holding in *Preuss* contradicted the language of the general habitual offender statutes. Summarizing its decision, the Supreme Court stated in *Gardner*:

> Michigan's habitual offender laws clearly contemplate counting *each* prior felony conviction separately. The text of those laws does not include a sameincident test. This Court erred by judicially engrafting such a test onto the unambiguous statutory language. Accordingly, we overrule *Preuss* . . . . [*Gardner, 482 Mich at 68*.]

Our Supreme Court in *Gardner* did not interpret the felony-firearm statute or overrule *Stewart*.

In deciding to sentence defendant to 10 years' imprisonment as a third felony-firearm offender, the trial court reasoned **[*18]** that, because *Stewart* relied on *Preuss*, and because *Preuss* was overruled in *Gardner*,

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[2] Defendant alludes to the fact that, after this Court reversed his earlier convictions in 2011, he remained incarcerated with the Department of Corrections and was not transferred to the Macomb County Jail until March of 2014. If defendant is suggesting that this fact somehow weighs in favor of his speedy trial **[*15]** claim by showing prejudice to his person, then his argument is disingenuous. At pretrial hearings in 2012, the prosecutor repeatedly urged that defendant be transferred from the Department of Corrections to the Macomb County Jail, and defendant emphatically resisted this suggestion, insisting that he wished to remain in a Department of Corrections facility because it had a better law library than the Macomb County Jail. Defendant repeatedly opposed any efforts to move him from the Department of Corrections facility to the Macomb County Jail. In any event, defendant cites no authority indicating that his incarceration in the Department of Corrections rather than in the Macomb County Jail affects the determination whether he suffered prejudice to his person for the purpose of a speedy trial claim.

the separate criminal incident requirement in *Stewart* is no longer controlling. But the trial court and this Court are bound to follow *Stewart* unless and until it is overruled by our Supreme Court. "[O]nly [our Supreme] Court has the authority to overrule one of its prior decisions. Until [our Supreme] Court does so, all lower courts and tribunals are bound by that prior decision and must follow it even if they believe that it was wrongly decided or has become obsolete." *Paige v Sterling Hts, 476 Mich 495, 524; 720 NW2d 219 (2006)*. Although the rationale for the holding in *Stewart* has arguably been called into question by *Gardner*, the fact remains that *Gardner* did not overrule *Stewart* or interpret the felony-firearm statute that was addressed in *Stewart*. Therefore, only the Supreme Court can decide whether *Stewart* should, like *Preuss*, be overruled. *Paige, 476 Mich at 524*.

In this case, it is undisputed that defendant's two prior felony-firearm convictions arose from the same criminal incident, which occurred on January 4, 1997. Because defendant's two prior felony-firearm convictions did not arise from separate criminal incidents, *Stewart* precludes sentencing him as a third felony-firearm **[*19]** offender. See *Stewart, 441 Mich at 95*.

We conclude that the proper remedy is to remand the case to the trial court for correction of the judgment of sentence to reflect a lesser five-year term for defendant's felony-firearm conviction as a second offender. See *MCL 750.227b(1)* (providing for a five-year term of imprisonment upon a second felony-firearm conviction). A full resentencing hearing is not necessary because the required modification is ministerial. The trial court's error was not a product of inaccurate information but was due to a misunderstanding of the law; the appropriate sentence for this offense is not discretionary; and no due process concerns are implicated. Cf., generally, *People v Miles, 454 Mich 90, 100-101; 559 NW2d 299 (1997)*. Indeed, defendant does not request a full resentencing but instead asks for a remand with instructions to the trial court to amend the judgment of sentence to correct the felony-firearm sentence. Nonetheless, if the trial court on remand determines that resentencing is required for the unlawful imprisonment convictions, as discussed later in this opinion, then the trial court may include the felony-firearm resentencing in that hearing, even though, as discussed, the appropriate sentence for felony-firearm is not discretionary.

Defendant **[*20]** next argues that the trial court made a scoring error in assessing points for Offense Variables (OVs) 3 and 7. We disagree. "Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *People v Hardy, 494 Mich 430, 438; 835 NW2d 340 (2013)* (citations omitted). "When calculating the sentencing guidelines, a court may consider all record evidence, including the contents of a [presentence investigation report]." *People v Thompson, 314 Mich. App. 703, 708; 887 N.W.2d 650 (2016)*.

OV 3 addresses physical injury to the victim. *MCL 777.33(1)*; *People v Laidler, 491 Mich 339, 343; 817 NW2d 517 (2012)*. A trial court must assess 100 points under OV 3 "if death results from the commission of a crime and homicide is not the sentencing offense." *MCL 777.33(2)(b)*; *Laidler, 491 Mich at 343*. For the purpose of OV 3, a victim includes any person harmed by the defendant's criminal actions, *id. at 349 n 6*; a victim is not limited to the victim of the charged offense, *People v Albers, 258 Mich App 578, 593; 672 NW2d 336 (2003)*. To assess points under OV 3, factual causation is required, in that the victim would not have died but for the defendant's **[*21]** criminal conduct. *Laidler, 491 Mich at 345*. The defendant's actions need not constitute the only cause of the death. *Id. at 346*.

"Offense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable." *People v McGraw, 484 Mich 120, 133; 771 NW2d 655 (2009)*. OV 3 does not provide for consideration of conduct that occurs after completion of the sentencing offense. See *MCL 777.33*. Therefore, the scoring of OV 3 must be limited to the circumstances of the sentencing offenses, i.e., unlawful imprisonment. Unlawful imprisonment is an ongoing offense; all of a defendant's actions during the time that the victim is restrained constitute conduct that occurred during the offense of unlawful imprisonment. See *People v Chelmicki, 305 Mich App 58, 70-72; 850 NW2d 612 (2014)*. A trial court may properly consider all of a defendant's conduct during the sentencing offense. *Id. at 72*. In sentencing a defendant, a trial court is permitted to consider facts underlying an acquittal, *People v Parr, 197 Mich App 41, 46; 494 NW2d 768 (1992)*, and need only find facts to support its scoring decisions by a preponderance of the evidence, *People v Osantowski, 481 Mich 103, 111; 748 NW2d 799 (2008)*.

In recommending a 100-point score for OV 3, the presentence investigation report noted: "Although the defendant was found not guilty in the murder of Kenyetta Williams, he created the circumstances that ultimately led to the death **[*22]** of Mr. Williams." In assessing 100 points for OV 3, the trial court stated:

> I'm ready to rule on OV3. OV3 is scored correctly in the court's opinion. No question that the, even though the Defendant was not -
>
> He was found not guilty of the murder of Kenyetta Williams, the Court after hearing all the testimony does think that he created the circumstances that led to the death of Mr. Williams. So OV3 is properly scored. Let's move on.

The trial court properly assessed 100 points for OV 3. The sentencing offenses were two counts of unlawful imprisonment. The victims of those offenses, Justina Horton and Jasmine Horton, remained bound by duct tape in another room of the house when defendant confronted Katherine Horton and Williams in the front of the house and Williams was shot and killed. The unlawful imprisonment offenses thus remained ongoing when Williams was shot, and defendant's actions in the front of the house may be considered in scoring the offense variables. See *Chelmicki, 305 Mich App at 70-72*. Although Williams was not the victim of the sentencing offenses of unlawful imprisonment, he nonetheless was a victim for the purpose of OV 3 because he was harmed by defendant's criminal acts. See *Laidler, 491 Mich at 349 n 6*; *Albers, 258 Mich App at 593*. Even if Williams **[*23]** was shot in a struggle or in self-defense, defendant's criminal acts were a factual cause of Williams's death. Defendant used the firearms to commit the sentencing offenses by pointing the weapons at Justina and Jasmine, and he then pointed and used the same weapons when he confronted Katherine and Williams while Justina and Jasmine remained restrained. If defendant had not used these weapons in committing the crimes, Williams would not have been killed. Hence, the trial court did not err in scoring OV 3.

OV 7 addresses aggravated physical abuse. *MCL 777.37(1)*; *Hardy, 494 Mich at 439*. On the date of the crimes in this case, OV 7 required a score of 50 points if "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense[.]" *MCL 777.37(1)(a)*.[3] In scoring OV 7, a court must count as a victim each person who was placed in danger of injury or loss of life. *MCL 777.37(2)*; *People v Hunt, 290 Mich App 317, 323; 810 NW2d 588 (2010)*. For the purpose of OV 7, "'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." *MCL 777.37(3)*. OV 7 may be scored on the basis of emotional or psychological abuse; physical **[*24]** abuse is not required. *People v Mattoon, 271 Mich App 275, 276; 721 NW2d 269 (2006)*.

In *Hardy, 494 Mich at 440*, our Supreme Court addressed the fourth category for which 50 points may be assessed under OV 7, i.e., "conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." *MCL 777.37(1)(a)*. The *Hardy* Court "conclude[d] that it is proper to assess points under OV 7 for conduct that was intended to make a victim's fear or anxiety greater by a considerable amount." *Hardy, 494 Mich at 441*. "The relevant inquiries are (1) whether the defendant engaged in conduct beyond the minimum required to commit the offense; and, if so, (2) whether the conduct was intended to make a victim's fear or anxiety greater by a considerable amount." *Id. at 443-444*. The Court found that racking a shotgun during a carjacking to make the victim fear an imminent violent death supported an assessment of 50 points for OV 7. *Id. at 445*. Also, threatening **[*25]** and striking victims with what appeared to be a sawed-off shotgun went beyond what was necessary to commit an armed robbery and was intended to increase the victims' fear by a considerable amount, thus supporting a 50-point assessment for OV 7. *Id. at 446-447*. In light of *McGraw*, a sentencing court may consider only conduct that occurred during the criminal offense for the purpose of scoring OV 7. *Thompson, 314 Mich App at 711*.

The presentence investigation report explained the recommendation of assessing 50 points for OV 7 as follows:

> OV7 notes the victim was treated with sadism, torture, excessive brutality or conduct to substantially increase the fear and anxiety the

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[3] Effective January 5, 2016, *MCL 777.37(1)(a)* was amended to require a 50 point score if "[a] victim was treated sadism, torture, excessive brutality or similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense[.]" See 2015 PA 137. A sentence must be imposed in accordance with the version of the guidelines in effect when the crime was committed. See *People v Buehler, 477 Mich 18, 24; 727 NW2d 127 (2007)*.

> victims suffered from the offense. Accordingly, the Probation Department scored 50 points. Justina and Jasmine Howard informed investigators they experienced fear and anxiety when the defendant held them at gunpoint and later duct-taped them. Jasmine Horton informed investigators that she believed the defendant would ultimately shoot her in the back of the head. The fear and anxiety of the victims was further increased when they heard the gunshots that killed Kenyetta Williams.

In addressing OV 7 at sentencing, the prosecutor noted that defendant went into the **[*26]** basement of the home, pointed guns at Justina and Jasmine, duct-taped them, and had them get on their stomachs. Jasmine thought she was going to be shot in the head. Defendant then escorted the girls to the main floor of the house and had them sit on a couch while he waited for Katherine and Williams to arrive; defendant then shot Williams in the girls' presence. The prosecutor also noted that Katherine and Williams could be counted as victims for the purpose of OV 7, and that Williams lost his life and Katherine sustained injuries to her face from fighting with defendant. The prosecutor continued:

> A big part of offense variable 7 is sadism, conduct as to subject a victim to extreme or prolonged pain or humiliation.
>
> This entire incident was to humiliate and to cause suffering to Katherine Horton and Kenyetta Williams for their perceived transgression against the Defendant.

The trial court asked the probation officer to comment on OV 7, and the probation officer stated:

> Your Honor, per the author of the [presentence investigation] report, OV-7 notes the victim was treated with sadism, torture, or excessive brutality based on the investigator's report. These two individuals experienced fear **[*27]** and anxiety when the defendant held them at gun point and later duct-aped [sic] their mouth and hand [sic].

The trial court then stated: "For the argument made by the people and the probation department, the Court is going, the Court finds OV-7 was properly scored."

The trial court properly assessed 50 points for OV 7. There was more than ample evidence that defendant engaged in conduct beyond the minimum necessary to commit the offense of unlawful imprisonment, and that the conduct was designed to make the victims' fear or anxiety greater by a considerable amount. Defendant went into the basement where Justina and Jasmine were sleeping, pointed guns at them, ordered them to lie on their stomachs, bound their hands with duct tape, and put duct tape on their mouths. Jasmine feared that she would be shot in the back of the head. He then ordered the girls upstairs, removed the duct tape from their mouths but not their hands, and had them sit in a back room while he waited for their mother, Katherine, and her boyfriend, Williams, to arrive home. The girls were later subjected to hearing defendant confront Katherine and Williams in the front of the house while the girls remained bound by **[*28]** duct tape in the back room. The girls heard the sounds of defendant striking Katherine and the gunshots that killed Williams, which increased their fear and anxiety. The girls screamed during the incident. In addition, Williams and Katherine may be counted as victims because they were placed in danger of injury or loss of life. See MCL 777.37(2); Hunt, 290 Mich App at 323. Williams was killed from gunshot wounds, and Katherine sustained injuries to her face from being struck by defendant with a gun. The unlawful imprisonment offense remained ongoing during this incident because the girls were still confined in the back room, and defendant's conduct thus occurred during the sentencing offenses. See Chelmicki, 305 Mich App at 70-72. Hence, the trial court did not err in assessing 50 points for OV 7.

Defendant next argues that a Sixth Amendment violation occurred because judicial factfinding in the scoring of OVs 3, 4, 7, and 10 increased his minimum sentencing guidelines range. We agree. A Sixth Amendment challenge presents a question of constitutional law that is reviewed de novo. People v Lockridge, 498 Mich 358, 373; 870 NW2d 502 (2015).

In Lockridge, 498 Mich at 364, our Supreme Court held that Michigan's sentencing guidelines are constitutionally deficient under the Sixth Amendment to the extent that "the guidelines *require* judicial fact-finding beyond facts admitted by the defendant **[*29]** or found by the jury to score offense variables (OVs) that *mandatorily* increase the floor of the guidelines minimum sentence range, i.e. the 'mandatory minimum' sentence under *Alleyne* [v United States, 570 U.S. ; 133 S Ct 2151; 186 L Ed 2d 314 (2013)]." As a remedy for this constitutional violation, our Supreme Court "sever[ed] MCL 769.34(2) to the extent that it makes the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt mandatory." Lockridge, 498 Mich at 364. The Court also struck "down the requirement in MCL 769.34(3) that a sentencing court that departs from the applicable guidelines range must articulate a substantial and

compelling reason for that departure." Id. at 364-365. The Court held "that a guidelines minimum sentence range calculated in violation of *Apprendi* [v New Jersey, 530 U.S. 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000),] and *Alleyne* is advisory only and that sentences that depart from that threshold are to be reviewed by appellate courts for reasonableness." Lockridge, 498 Mich at 365. Courts must continue to determine the applicable guidelines range and take it into account at sentencing. *Id.*

For cases that were held in abeyance for *Lockridge*, most of which involved challenges that were not preserved in the trial court, our Supreme Court held that a defendant's Sixth Amendment right is impaired if the "facts **[*30]** admitted by a defendant or found by the jury verdict were *insufficient* to assess the minimum number of OV points necessary for the defendant's score to fall in the cell of the sentencing grid under which he or she was sentenced." Lockridge, 498 Mich at 395. "[A]ll defendants (1) who can demonstrate that their guidelines minimum sentence range was actually constrained by the violation of the Sixth Amendment and (2) whose sentences were not subject to an upward departure can establish a threshold showing of the potential for plain error sufficient to warrant a remand to the trial court for further inquiry." *Id.* "[I]n cases in which a defendant's minimum sentence was established by application of the sentencing guidelines in a manner that violated the Sixth Amendment, the case should be remanded to the trial court to determine whether that court would have imposed a materially different sentence but for the constitutional error." Id. at 397. Such remands are warranted only in cases in which the defendant was sentenced on or before July 29, 2015, the date of the *Lockridge* decision. *Id.*[4] On remand,

> a trial court should first allow a defendant an opportunity to inform the court that he or she will not seek resentencing. If notification is not received in a timely **[*31]** manner, the court (1) should obtain the views of counsel in some form, (2) may but is not required to hold a hearing on the matter, and (3) need not have the defendant present when it decides whether to resentence the defendant, but (4) must have the defendant present, as required by law, if it decides to resentence the defendant. Further, in determining whether the court would have imposed a materially different sentence but for the unconstitutional constraint, the court should consider only the circumstances existing at the time of the original sentence. [Id. at 398 (quotation marks and citations omitted).]

In the present case, defendant preserved his *Lockridge* issue by raising it at sentencing. See People v Steanhouse, 313 Mich. App. 1, 42; 880 N.W.2d 297 (2015), lv pending. In People v Stokes, 312 Mich. App. 181, 198; 877 N.W.2d 75 (2015) beyond a reasonable doubt standard. This Court further held that in order to determine whether the preserved *Lockridge* error in *Stokes* was harmless, the remand procedure described in *Lockridge* must be followed. *Id.* ***[*32]*** at 10. That is, the remand procedure described in *Lockridge* applies to both preserved and unpreserved pre-*Lockridge* sentencing errors. *Id.* at 11.

Defendant argues that there was judicial fact-finding in the scoring of OVs 3, 4, 7, and 10. We agree. The prosecutor confesses error on this defense argument.

As discussed, OV 3 addresses physical injury to the victim. MCL 777.33(1); Laidler, 491 Mich at 343. A trial court must assess 100 points under OV 3 "if death results from the commission of a crime and homicide is not the sentencing offense." MCL 777.33(2)(b); Laidler, 491 Mich at 343. The jury made no finding and defendant made no admission concerning the facts necessary to score this OV. Neither of the offenses of which defendant was convicted, i.e., felony-firearm and unlawful imprisonment, contains an element concerning the death of a victim. See MCL 750.227b; MCL 750.349b. The trial court's assessment of 100 points for OV 3 was thus based on judicial fact-finding.

OV 4 addresses psychological injury to a victim. MCL 777.34(1); People v Lockett, 295 Mich App 165, 182; 814 NW2d 295 (2012). OV 4 requires a 10 point assessment if "[s]erious psychological injury requiring professional treatment occurred to a victim[.]" MCL 777.34(1)(a). The jury made no finding and defendant made no admission concerning the facts necessary to score this OV. Neither of the offenses of which defendant **[*33]** was convicted, i.e., felony-firearm and unlawful imprisonment, contains an element concerning a victim's psychological injury. See MCL 750.227b; MCL 750.349b. The trial court's assessment of 10 points for OV 4 was therefore based on judicial fact-finding.

As discussed, OV 7 addresses aggravated physical abuse. MCL 777.37(1); Hardy, 494 Mich at 439. On the

[4] For defendants sentenced after the *Lockridge* decision, traditional plain-error review will apply. Lockridge, 498 Mich at 397.

date of the crimes in this case, OV 7 required a score of 50 points if "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense[.]" *MCL 777.37(1)(a)*. The jury made no finding and defendant made no admission concerning the facts necessary to score this OV. Neither of the offenses of which defendant was convicted, i.e., felony-firearm and unlawful imprisonment, contains an element concerning the facts needed to score this OV. See *MCL 750.227b*; *MCL 750.349b*. The trial court's assessment of 50 points for OV 7 was therefore based on judicial fact-finding.

OV 10 addresses the exploitation of a vulnerable victim. *MCL 777.40(1)*. A 5 point score is required if "[t]he offender exploited a 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[.]" **[*34]** *MCL 777.40(1)(c)*. The jury made no finding and defendant made no admission concerning the facts necessary to score this OV. Neither of the offenses of which defendant was convicted, i.e., felony-firearm and unlawful imprisonment, contains an element concerning the facts needed to score this OV. See *MCL 750.227b*; *MCL 750.349b*. The trial court's assessment of 5 points for this OV was therefore based on judicial fact-finding.

Subtracting 100 points from the OV 3 score, 10 points from the OV 4 score, 50 points from the OV 7 score, and 5 points from the OV 10 score, reduces defendant's total OV score from 195 points to 30 points. This changes his OV level from VI to III, causing his sentencing cell to change from D-VI to D-III on the Class C grid. His sentencing guidelines range would then become 29 to 57 months, instead of the originally calculated range of 50 to 100 months. See *MCL 777.64*. It follows, then, that facts admitted by defendant or found by the jury beyond a reasonable doubt at trial were insufficient to assess the minimum number of OV points necessary for defendant's score to fall within the cell of the sentencing grid under which he was sentenced. Defendant's unlawful imprisonment sentences were not subject to an upward departure **[*35]** from the originally calculated range; his 100-month minimum sentences for unlawful imprisonment fell within the calculated guidelines range of 50 to 100 months. Therefore, an unconstitutional constraint on the trial court's sentencing discretion impaired defendant's constitutional rights. See *Lockridge, 498 Mich at 364*. Defendant was sentenced before July 29, 2015. It is therefore necessary to remand the case to the trial court in accordance with the remand procedure set forth in *Lockridge*, as described earlier in this opinion, to determine whether the court would have imposed a materially different sentence but for the constitutional error. See *id. at 395-399*.

We affirm defendant's convictions but remand for correction of the judgment of sentence to reflect a term of five years' imprisonment for defendant's felony-firearm conviction and for reconsideration of defendant's unlawful imprisonment sentences. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ Mark J. Cavanagh

/s/ Amy Ronayne Krause

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APPENDIX

E

EXHIBIT

Michigan Appeals Court

Opinion (May 10, 2011)

People v. Wilson

Court of Appeals of Michigan

May 10, 2011, Decided

No. 296693

Reporter
2011 Mich. App. LEXIS 861 *; 2011 WL 1778729

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v DWAYNE EDMUND WILSON, Defendant-Appellant.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Subsequent History: Leave to appeal denied by *People v. Wilson, 490 Mich. 861, 801 N.W.2d 882, 2011 Mich. LEXIS 1564 (Sept. 6, 2011)*

Appeal after remand at, Remanded by *People v. Wilson, 2012 Mich. App. LEXIS 2273 (Mich. Ct. App., Nov. 15, 2012)*

Habeas corpus proceeding at, Motion denied by, As moot *Wilson v. Les Parish, 2019 U.S. Dist. LEXIS 103215 (E.D. Mich., June 20, 2019)*

Prior History: **[*1]** Macomb Circuit Court. LC No. 2009-002637-FC.

Core Terms

circuit court, self-representation, sentences, prison, further proceedings, defense motion, intelligent, vacate, defendant's conviction, automatic reversal, defendant's right, structural error, circuit judge, murder, erroneous denial, felony murder, first day, felony-firearm, second-degree, imprisonment, convictions, unequivocal, disrupt, advise, wished

Judges: Before: SAAD, P.J., and JANSEN and K. F. KELLY, JJ.

Opinion

PER CURIAM.

Defendant appeals by right his jury-trial convictions of first-degree felony murder, *MCL 750.316(1)(b)*, second-degree murder, *MCL 750.317*, assault with intent to do great bodily harm less than murder, *MCL 750.84*, possession of a firearm during the commission of a felony (felony-firearm), *MCL 750.227b*, and two counts of unlawful imprisonment, *MCL 750.349b*. Defendant was sentenced to life in prison without parole for the felony murder conviction, 36 to 60 years in prison for the second-degree murder conviction, 5 to 15 years in prison for the false imprisonment convictions, 5 to 10 years in prison for the assault-with-intent conviction, and 5 years in prison for the felony-firearm conviction. We vacate defendant's convictions and sentences and remand for further proceedings.

On the first day of trial, prior to jury selection, defendant informed the circuit court that he and his attorney had experienced a breakdown in their relationship and that he wished to represent himself. After a very brief colloquy with defendant on the record, the circuit judge denied defendant's motion to represent **[*2]** himself, stating that he could "guarantee [defendant] a conviction to the max if you represent yourself." The circuit court did not otherwise make any findings or articulate any legal conclusions with regard to defendant's motion.

A criminal defendant's right to represent himself is implicitly guaranteed by the United States Constitution, US Const, Am VI, and explicitly guaranteed by the Michigan Constitution and Michigan statutory law, *Const 1963, art 1, § 13*; *MCL 763.1*. Several requirements must be met before a defendant may represent himself. First, the defendant's request to represent himself must be unequivocal. *People v Williams, 470 Mich 634, 642; 683 NW2d 597 (2004)*. Second, the court must determine that the defendant's assertion of his right is knowing, intelligent, and voluntary. *Id.* Third, the court must determine that the defendant's self-representation

would not disrupt, inconvenience, or burden the court. *Id.* In addition, the court must comply with *MCR 6.005(D)* by advising the defendant of the charge against him, the maximum possible prison sentence, any mandatory minimum sentence, and the risks of self-representation, and by offering defendant the opportunity to consult **[*3]** with an attorney. *Williams, 470 Mich at 642-643*. The circuit court's finding that a defendant's waiver of counsel is knowing and intelligent is reviewed for clear error, while the meaning of "knowing and intelligent" is reviewed de novo. *Id. at 640*.

The erroneous denial of a defendant's right to self-representation is a structural error requiring automatic reversal. *United States v Gonzales-Lopez, 548 U.S. 140, 148-150; 126 S Ct 2557; 165 L Ed 2d 409 (2006)*; see also *People v Duncan, 462 Mich 47, 52; 610 NW2d 551 (2000)*. Because the erroneous refusal to allow a defendant to represent himself constitutes structural error, it is not amenable to harmless error analysis. *Gonzales-Lopez, 548 U.S. at 150*; *McKaskle v Wiggins, 465 U.S. 168, 177-178 n 8; 104 S Ct 944; 79 L Ed 2d 122 (1984)*. As our Supreme Court has noted, "[s]tructural errors . . . are intrinsically harmful, without regard to their effect on the outcome, so as to require automatic reversal. Such an error necessarily renders unfair or unreliable the determining of guilt or innocence." *Duncan, 462 Mich at 51* (citation omitted).

We vacate defendant's convictions and sentences and remand this case for further proceedings. Defendant **[*4]** unequivocally asserted his right to represent himself on the first day of trial. Yet the circuit court failed to engage in anything remotely akin to the searching inquiry required under *Williams* and *MCR 6.005*. The circuit court did not assess whether defendant's assertion of his right to self-representation was knowing, intelligent, and voluntary. Nor did the court consider on the record whether defendant's self-representation would disrupt or burden the court. The court did not even mention the requirements of *Williams* and *MCR 6.005*; nor did it advise defendant of the charges against him or offer defendant the opportunity to consult with an attorney at the time. Instead, the circuit judge merely observed that defendant was "not schooled on the proper way to ask a question in court" and remarked that he would not allow defendant to "tr[y] to examine [witnesses] without a law degree[.]" As noted earlier, the circuit judge also informed defendant that he could "guarantee [defendant] a conviction to the max if you represent yourself."

Defendant made clear to the circuit court that he wished to proceed to trial without counsel. Nevertheless, the circuit court summarily denied defendant's **[*5]** motion to represent himself without engaging in any meaningful dialogue on the record and without ever attempting to determine whether defendant understood the fundamental consequences of his choice. This summary denial of defendant's motion to represent himself constituted structural error. *Gonzales-Lopez, 548 U.S. at 150*. [1]

For the foregoing reasons, we vacate defendant's convictions and sentences and remand this case for further proceedings. Given our determination that the circuit court's erroneous denial of defendant's right to self-representation requires automatic reversal, we need not consider the remaining arguments raised by defendant on appeal.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ Kathleen Jansen

/s/ Kirsten Frank Kelly

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[1] We concede that there appears to be overwhelming evidence of defendant's guilt in this case. However, as explained previously, the erroneous denial of a defendant's right to self-representation is not amenable to harmless error analysis. *McKaskle, 465 U.S. at 177-178 n 8*.