APPENDIX

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Pursuant to Sixth Circuit I.O.P. 32.1(b)

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LISA BERGMAN,

Petitioner-Appellant,

v.

JEREMY HOWARD, Warden,

Respondent-Appellee.

No. 21-2984

Appeal from the United States District Court for the Eastern District of Michigan at Flint.
No. 4:17-cv-13506—Matthew F. Leitman, District Judge.

Argued: July 21, 2022

Decided and Filed: December 12, 2022

Before: BATCHELDER, WHITE, and MURPHY, Circuit Judges.

COUNSEL

ARGUED: Benton C. Martin, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Detroit, Michigan, for Appellant. Jared D. Schultz, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee. **ON BRIEF:** Benton C. Martin, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Detroit, Michigan, for Appellant. Jared D. Schultz, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee.

OPINION

MURPHY, Circuit Judge. In *Ake v. Oklahoma*, 470 U.S. 68 (1985), the Supreme Court held that the Due Process Clause requires states to provide psychiatric experts to indigent defendants who have a credible insanity defense. *Id.* at 74. Lisa Bergman relies on *Ake* to claim that she should have been provided an expert toxicologist at her criminal trial. The trial evidence

showed that Bergman drove into an oncoming truck and killed its occupants. Scientists testified that she had prescription drugs in her system at the time of this crash (and at the time of several prior accidents), and the state's expert opined that these drugs impaired her driving. A state court held that *Ake* did not require the state to provide Bergman with a defense toxicologist because she failed to show a sufficient need for one notwithstanding the state's expert evidence. Bergman now argues that the state court misread *Ake* and misunderstood the record. In this federal case, however, she must meet the stringent standards for relief in the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254(d). Given the Supreme Court's lack of clarity over *Ake*'s scope, she has not done so. We affirm.

I

In the summer of 2013, Bergman lived with her mother in Port Huron, an eastern Michigan city that sits on the southernmost tip of Lake Huron. Around midnight on July 20, Bergman's ex-boyfriend, John Weis, visited her home to show his new puppy to her kids. Bergman had left some of her children's items at Weis's house and told him that she wanted to pick them up. Weis lived a few miles to the west in nearby Kimball Township.

It was a rainy and foggy night. Despite the inclement weather, Bergman decided to follow Weis to his home in her Ford F-350 sometime after 1:00 a.m. Although Weis could see Bergman's truck in his rearview mirror for part of the drive, he eventually lost sight of her and assumed that she had stopped at a gas station.

Bergman never made it to Weis's house. A concerned Weis went looking for her. He came upon the scene of a horrendous accident involving Bergman's F-350 and a much smaller truck. The two trucks had crashed into each other head-on and come to rest in a ditch. Their front ends had become entangled, and debris had flown everywhere. The impact killed the smaller truck's occupants, young men named Russell Ward and Koby Raymo. Bergman was awake but injured, and paramedics took her to the hospital.

After rendering aid, officers began to investigate the accident. While in the hospital, Bergman told an officer that she had accidentally driven past Weis's home and had turned around heading *eastbound* at the time of the accident. Other officers on the scene discovered

"gouge marks" "squarely" within the *westbound* side of the road. Bueche Tr., R.6-12, PageID 709, 710, 714. To the expert eye, these marks were "strong indicators" that the trucks had collided at this spot. Terpenning Tr., R.6-12, PageID 726. The impact would have caused the trucks to dip down and their parts to scratch the pavement. An accident-reconstruction expert thus had no doubt that Bergman's "big Ford pickup truck crossed the center line" at the time of the accident. *Id.*, PageID 727.

While searching Bergman's purse for her ID, an officer on the scene found a pint-size bottle of tequila that was a third full. The officer at the hospital obtained a blood sample from Bergman just before 5:00 a.m. Her blood-alcohol concentration came back under the legal limit at .04, which suggested that she might have had a "drink to a drink and a half in her system at the time of the blood draw." Glinn Tr., R.6-12, PageID 737, 746.

Yet other blood tests revealed prescription drugs in Bergman's system. She had taken oxycodone, an opiate designed for pain relief. She had also taken Soma, a muscle relaxer. And she had likely taken Adderall, an amphetamine that helps one's concentration. Although Bergman had ingested only "therapeutic" levels of these drugs, Soma and oxycodone were depressants that could have "additive effect[s]" when taken together and with alcohol. Glinn Tr., R.6-12, PageID 738–39.

An expert in forensic toxicology, Dr. Michele Glinn, believed that Bergman could not "operate a motor vehicle properly" when taking the drugs. *Id.*, PageID 742. Glinn's opinion did not rest solely on this tragic accident. It also rested on Bergman's long history of reckless driving. She had many (known) incidents of taking drugs, getting behind the wheel, and driving dangerously.

January 2008 Incident: Early on New Year's Day, officers saw a car "driving erratically." Bockhausen Tr., R.6-8, PageID 471. They pulled the car over and arrested Bergman, its driver, after smelling intoxicants and finding pills and marijuana in the car.

March 17, 2012 Incident: On St. Patrick's Day, a family was out shopping when a Jeep rear-ended their car and fled. An officer tracked down the Jeep and its driver, Bergman.

Bergman failed field sobriety tests, confessed to taking a muscle relaxer and an opiate, and had pills in her car. A blood test showed these drugs in her system.

March 27, 2012 Incident: Ten days later, a person called the police because a woman who turned out to be Bergman was "passed out" behind the wheel of a Jeep in a party store's parking lot. Singleton Tr., R.6-10, PageID 583. An officer woke up a dazed Bergman, who had her child in the backseat. She failed field sobriety tests and admitted to taking Soma and an opiate. A blood test revealed these drugs.

May 2012 Incident: Some six weeks later, several drivers called 911 because a car "couldn't stay in one lane" on the freeway. Boulier Tr., R.6-8, PageID 507. The officer who stopped this car found Bergman with pills. She again failed field sobriety tests, and a blood test again showed drugs in her system.

August 2012 Incident: Three months later, two men were heading home from a fishing trip with their boat in tow when Bergman rear-ended the boat. While waiting for the police, she passed out. At the hospital, Bergman said that she had also "blacked out" before the crash and confessed to taking prescription drugs. Mynsberge Tr., R.6-9, PageID 541. A blood test confirmed her confession.

February 2013 Incident: Six months later, Bergman rear-ended the car of a woman who was driving to pick up her daughter from a dance class. The woman, a substance-abuse counselor, told Bergman that she was "clearly intoxicated[.]" McKeever Tr., R.6-9, PageID 525–26. During field sobriety tests, Bergman could not recite the alphabet beyond "P." Phillips Tr., R.6-9, PageID 552. For a fifth time, a blood test showed that she had prescription drugs in her system.

June 2013 Incident: A month before the fatal crash, a driver on the freeway called 911 on a Jeep that was "all over the road" and that almost "lost control several times." Newcomb Tr., R.6-9, PageID 561–62. Bergman, the culprit, once again failed field sobriety tests. Among other things, she responded with "7" when asked to identify a number between "15" and "13." Hoffman Tr., R.6-9, PageID 567. An officer found pills in her car, and a blood test confirmed that she had taken the same drugs as before.

For the fatal accident, the state charged Bergman with six counts—three for each victim. It charged her with causing the death of Ward and Raymo by operating her truck with a suspended license. Mich. Comp. Laws § 257.904(4). It charged her with causing their death by operating her truck while intoxicated. *Id.* § 257.625(4). And it charged her with second-degree murder for both victims. *Id.* § 750.317. This murder charge required the state to establish that Bergman "knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of her actions." Instr., R.6-13, PageID 860. The state relied on her prior incidents to prove that she knew the risks of getting behind the wheel after taking prescription drugs. *See People v. Bergman*, 879 N.W.2d 278, 291–92 (Mich. Ct. App. 2015).

At trial, the prosecution called many scientists. Some described their methods to identify the pills confiscated during Bergman's encounters with the police. Others described their methods to test Bergman's blood for drugs or alcohol and the results of the tests. Dr. Glinn also testified as an expert toxicologist, describing the drugs in Bergman's system and opining about their dangerous effects on her driving.

Bergman's counsel had anticipated these scientific witnesses before trial. Counsel had accordingly moved the trial court to provide Bergman with a state-funded expert toxicologist. At a pretrial hearing, counsel requested this expert for two reasons. Counsel could not understand the results of Bergman's blood tests. A toxicologist could explain in plain English whether problems existed with the state's testing and whether the drugs found in Bergman's system would have impaired her driving. Alternatively, counsel asked for a toxicologist to confirm the state's test results by retesting the preserved blood samples from Bergman's driving incidents.

The trial court denied this motion. It categorically rejected the request for an expert to retest the samples. As the court saw things, Bergman's speculation that the state scientists might have conducted invalid tests did not warrant a new round of testing. Yet the court did not "rul[e] out [a] consultant-type expert" if defense counsel followed up with a clear explanation of what he needed the expert for. Mot. Tr., R.6-4, PageID 345. At this stage, however, the court found that counsel had not shown a sufficient need for a consultant. Counsel apparently never offered additional briefing on this topic.

After Bergman's lengthy trial, the jury deliberated for less than two hours. It convicted her of all six counts. The trial court sentenced her to an indefinite term of 25 to 50 years' imprisonment.

On appeal in state court, Bergman relied on *Ake* to argue that the trial court had violated due process by refusing to provide her with an expert toxicologist. *Bergman*, 879 N.W.2d at 288–89. The court disagreed. *Id.* It read *Ake* to require a state-funded expert only if a defendant shows "a nexus between the need for an expert and the facts of the case." *Id.* at 289. The court held that Bergman had not established this nexus because she did not adequately demonstrate why an expert would help the defense. *Id.* It reasoned that Bergman identified no grounds to believe that the state testing had been improper. *Id.* It added that Bergman did not explain how a defense expert could dispute Dr. Glinn's findings about the drugs in her system or their effects on her driving. *Id.*

After the Michigan Supreme Court denied review, Bergman moved for federal relief under 28 U.S.C. § 2254. Among other claims, she again argued that the trial court violated due process by denying her a state-funded expert toxicologist. The district court agreed with Bergman that "fundamental fairness" required the state trial court to appoint a defense toxicologist at public expense to counter Dr. Glinn's testimony. *Bergman v. Brewer*, 542 F. Supp. 3d 649, 661–62 (E.D. Mich. 2021). The court nevertheless denied relief. Under AEDPA, it explained, Bergman must prove that the state court's conclusion violated due-process principles that were "clearly established" by the Supreme Court. *Id.* at 663 (citation omitted). And the Supreme Court had yet to extend *Ake*'s holding to other types of experts. *Id.*

Bergman moved for reconsideration. She argued that the state court had also unreasonably determined the facts when holding that her counsel had not explained the need for an expert. The district court disagreed because the state court's decision had been a legal determination, not a factual one. *Bergman v. Brewer*, 2021 WL 4389277, at *3–5 (E.D. Mich. Sept. 24, 2021).

II

Bergman now renews her claim that the state trial court violated the Due Process Clause by denying her request for a state-funded toxicologist. The parties agree that AEDPA's standards govern this claim because the Michigan appellate court resolved it "on the merits[.]" 28 U.S.C. § 2254(d). We thus cannot grant relief unless Bergman shows one of two things. The Michigan court must have issued 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[.]" *Id.* § 2254(d)(1). Or it must have issued "a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* § 2254(d)(2). Bergman suggests that the state court committed both errors. We will take her two legal arguments in turn, reviewing the district court's rejection of them de novo. *See Pouncy v. Palmer*, 846 F.3d 144, 158 (6th Cir. 2017); *Miller v. Lafler*, 505 F. App'x 452, 456 (6th Cir. 2012).

Issue 1: Did the state court unreasonably apply clearly established law?

Bergman first suggests that the Michigan court's rejection of her due-process claim amounted to an "unreasonable application" of "clearly established" Supreme Court precedent. 28 U.S.C. § 2254(d)(1). She must clear a "high bar" to pass this test—a test that Congress intentionally made "difficult to meet." *Woods v. Donald*, 575 U.S. 312, 316 (2015) (per curiam) (citations omitted).

Bergman initially must identify the "clearly established" legal principle on which she relies. To qualify as "clearly established," a principle must originate from an actual Supreme Court holding, not from its passing dicta. *See White v. Woodall*, 572 U.S. 415, 419 (2014). Bergman also must describe this holding with specificity. *See Brown v. Davenport*, 142 S. Ct. 1510, 1525 (2022). She cannot recite a holding at a "high level of generality" (for example, that a defendant must receive "adequate notice" of criminal charges) to expand the reach of an otherwise narrow ruling (for example, that the government may not convict a defendant of violating a statute that it did not charge). *Lopez v. Smith*, 574 U.S. 1, 6–8 (2014) (per curiam) (citation omitted).

Bergman next must show that the state court engaged in an "unreasonable application" of this principle. Under this test, a federal court's belief that a state court committed an error when applying a legal principle to the facts of a case does not suffice. Rather, we must be able to describe the state court's application as "objectively unreasonable[.]" *Woodall*, 572 U.S. at 419 (quoting *Lockyer v. Andrade*, 538 U.S. 63, 75–76 (2003)). To warrant that description, a state court must have committed "an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

These standards foreclose Bergman's claim. Our discussion of the "clearly established" law in this expert-witness area necessarily begins with *Ake*. There, Oklahoma charged Glen Burton Ake with capital murder. 470 U.S at 70, 72. Ake asked for a state-funded psychiatrist to help with his insanity defense. *Id.* at 72. The trial court denied this request, and an appellate court affirmed. *Id.* at 72–74. The Supreme Court reversed: "We hold that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one." *Id.* at 74.

To reach this result, *Ake* invoked the due-process "balancing" test from *Mathews v. Eldridge*, 424 U.S. 319 (1976). When the government seeks to deprive a person of a liberty or property interest, the *Mathews* test requires a court to weigh the person's private interests at stake against the burdens on the government if it were to offer additional procedural protections before the deprivation. *Ake*, 470 U.S. at 77; *Mathews*, 424 U.S. at 335. To measure these interests, a court should consider the marginal increase in accurate decisionmaking if the court were to grant the additional procedural protection. *See Ake*, 470 U.S. at 77. It should also consider the degree of the risk of a wrong decision if the court were to deny that protection. *See id.* Applying this test, *Ake* reasoned that criminal defendants have substantial interests on the line because the prosecution seeks to deprive them of their liberty or even their lives. *Id.* at 78. It next held that the (unquantified) costs of requiring states to pay for a psychiatrist were not "substantial" when measured against these interests. *Id.* at 79. It lastly described a psychiatric expert as a "virtual necessity" for a defendant with a credible insanity defense, estimating that the lack of this expert

would create an "extremely high" risk of a wrong decision (a decision that an insane defendant was not insane). *Id.* at 81–83 (citation omitted).

Ake's precise holding—that a state must provide an expert psychiatrist to an indigent defendant who makes a substantial showing of an insanity defense—does not directly control here. Bergman did not claim to be insane when she got behind the wheel of her F-350. She sought a toxicologist, not a psychiatrist. She wanted this expert to review the testing methods and results of the state's forensic scientists and to rebut Dr. Glinn's opinions about the effects of the drugs in her system on her driving. Did the Michigan court's refusal to provide this different type of state-funded expert qualify as an "unreasonable application" of *Ake*'s clearly established holding?

We think not. The Supreme Court has left open how *Ake* should extend to experts other than psychiatrists, *see Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985), and the Court's subsequent decisions have not created a "clear or consistent path for courts to follow" when answering this due-process question, *Lockyer*, 538 U.S. at 72. *Ake* relied on *Mathews* balancing to reach its result. 470 U.S. at 77–83. After *Ake*, however, the Court jettisoned this balancing test in this criminal context: "[T]he *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which . . . are part of the criminal process." *Medina v. California*, 505 U.S. 437, 443 (1992). *Medina* opted instead for a historically rooted "narrower inquiry" that asked whether the failure to provide a procedural safeguard "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 445–46 (citation omitted). When adopting this alternative approach, *Medina* recognized that *Ake* had applied *Mathews* in a criminal case. *Id.* at 444–45. *Medina* opted not to "disturb[]" *Ake*'s holding because it was "not at all clear that *Mathews* was essential to the result[] reached" in that case. *Id.* at 444. Rather, it suggested that *Ake*'s bottom-line result (when gutted of nearly all of its reasoning) could "be understood as an expansion of earlier due process cases holding that an indigent criminal defendant is entitled to the minimum assistance necessary to assure him 'a fair opportunity to present his defense' and 'to participate meaningfully in [the] judicial proceeding.'" *Id.* at 444–45 (quoting *Ake*, 470 U.S. at 76).

How should a lower-court judge now decide whether due process requires a state to provide a defendant with other types of experts? A fair reading of *Ake* would lead the judge to balance the private and public interests at stake with respect to this expert. 470 U.S. at 77. But *Medina* would tell the judge not to engage in this balancing. 505 U.S. at 443. It instead would require the judge to consider as a matter of "[h]istorical practice" whether states have long provided defendants with the type of expert at issue. *Id.* at 446. Or perhaps the judge should follow *Medina*'s dicta grounding *Ake* in the capacious language that a state must provide a defendant with the assistance necessary to assure the defendant "a fair opportunity to present his defense" and "to participate meaningfully in [the] judicial proceeding." *Id.* at 444–45 (citation omitted). Yet how should the judge then go about deciding what qualifies as a "fair" defense or a "meaningful" chance to litigate? Both *Mathews*'s balancing test and *Medina*'s historical test are two specific (if divergent) ways to give substance to this general language. If *Medina*'s dicta about *Ake* meant to hint at some third approach, the Court has yet to identify that alternative. Until the Court provides more specific guidance on this topic, then, the law will remain "unclear" and state courts will have "broad discretion" to determine the circumstances when defendants have a right to state-funded non-psychiatric experts. *Woodall*, 572 U.S. at 424 (citation omitted).

Caselaw confirms this uncertainty. *See Carey v. Musladin*, 549 U.S. 70, 76 (2006). We have previously noted that circuit courts "have not reached consensus" on whether "the right recognized in [*Ake*]—to a psychiatrist's assistance in support of an insanity defense—extends to non-psychiatric experts as well." *Babick v. Berghuis*, 620 F.3d 571, 579 (6th Cir. 2010). Some courts have suggested, at least prior to *Medina*, that *Ake*'s rules apply in the same way to other experts. *See Little v. Armontrout*, 835 F.2d 1240, 1243–44 (8th Cir. 1987) (en banc). Yet other courts have held that defendants must satisfy additional requirements, such as the requirement to demonstrate that the expert evidence is "both critical to the conviction and subject to varying expert opinion." *United States v. Snarr*, 704 F.3d 368, 405 (5th Cir. 2013) (citation omitted). We have ourselves sent mixed messages on this issue. *Babick*, 620 F.3d at 579 (citing cases). Perhaps for this reason, we have repeatedly denied certificates of appealability for claims like Bergman's on the ground that the Supreme Court has not clearly established when a defendant has a right "to a state-paid expert witness other than for a psychiatrist's assistance in support of

an insanity defense." *DeJonge v. Burton*, 2020 WL 2533574, at *5 (6th Cir. Apr. 20, 2020) (order); *Bullard v. Jackson*, 2018 WL 4735626, at *4 (6th Cir. Sept. 19, 2018) (order); *Davis v. Maclaren*, 2018 WL 4710071, at *3 (6th Cir. Apr. 3, 2018) (order); *McGowan v. Winn*, 2018 WL 1414902, at *2 (6th Cir. Mar. 21, 2018) (order).

In this case, moreover, the Michigan appellate court's logic—that Bergman failed to make an adequate showing to obtain a toxicologist—fits comfortably within the "leeway" given to the state courts as a result of the lack of clarity on how to apply *Ake*. *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). The Michigan court held that Bergman offered only speculation that the state scientists might have committed an error when testing her blood. *Cf. Yohey v. Collins*, 985 F.2d 222, 227 (5th Cir. 1993). And it held that she failed to make a preliminary showing that another toxicologist might offer opinions different from Dr. Glinn's. *Cf. id.* Nor did Bergman need an expert as a "virtual necessity" to meaningfully present her defense that she had not been under the influence of drugs. *Ake*, 470 U.S. at 81–82 (citation omitted). Her counsel presented this defense in other ways. He, for example, got witnesses to testify that Bergman appeared normal before and after the crash. And he got witnesses to describe the wet and foggy conditions (which could have offered an alternative explanation for the accident). *Cf. United States v. Rodriguez-Felix*, 450 F.3d 1117, 1128 (10th Cir. 2006).

Bergman's responses do not change things. She quotes Supreme Court cases noting that the Constitution entitles defendants to the "basic tools" of their defense, *Britt v. North Carolina*, 404 U.S. 226, 227 (1971), or to a "meaningful opportunity" to participate in a case, *Little v. Streater*, 452 U.S. 1, 12, 16 (1981) (citation omitted); *see also Griffin v. Illinois*, 351 U.S. 12, 16, 17–20 (1956). By treating this broad language as the holding of these decisions, she asks us to do what the Supreme Court has told us not to: "transform" narrow decisions into broad ones by framing their holdings at "a high level of generality[.]" *Nevada v. Jackson*, 569 U.S. 505, 512 (2013) (per curiam); *see Davenport*, 142 S. Ct. at 1525. Unlike *Ake*, moreover, none of these decisions even addressed experts. *Britt* held that the Equal Protection Clause entitled an indigent criminal defendant to a state-funded "transcript of prior proceedings" when an "effective defense" required it. 404 U.S. at 227. *Griffin* held the same when an effective appeal required a transcript. 351 U.S. at 19–20. And *Little* held that due process entitled indigent defendants to

state-funded paternity tests in child-support actions. 452 U.S. at 9–17. These decisions do not "remotely" analyze the expert-witness question at issue in Bergman's case. *Lopez*, 574 U.S. at 6.

Conceding that *Medina*'s discussion of *Ake* was dicta, Bergman next cites our cases suggesting that lower courts should follow Supreme Court dicta. But the decisions on which she relies address only our *common-law* rules of precedent, which suggest that Supreme Court dicta might sometimes allow us to depart from our prior decisions. *See Holt v. City of Battle Creek*, 925 F.3d 905, 910 (6th Cir. 2019); *see also United States v. Fields*, __ F.4th __, 2022 WL 17175576, at *16 n.13 (6th Cir. Nov. 23, 2022). These decisions say nothing about what qualifies as "clearly established" law within the meaning of 28 U.S.C. § 2254(d)(1). On that *statutory* front, the Supreme Court could not be clearer. Dicta does not count. *See Woodall*, 572 U.S. at 419.

Bergman lastly points out that some circuit decisions have already suggested that *Ake*'s holding should extend beyond psychiatrists to reach such other experts as pathologists or hypnotists. *See Terry v. Rees*, 985 F.2d 283, 284 (6th Cir. 1993) (per curiam); *Armontrout*, 835 F.2d at 1243. In *Terry*, for example, we indicated that a court should have provided an indigent defendant with an expert pathologist to rebut the government's evidence about the cause of a victim's death. *See* 985 F.2d at 284; *cf. Babick*, 620 F.3d at 579. In *Armontrout*, the Eighth Circuit similarly held that a court should have provided an indigent defendant with a hypnosis expert. *See* 835 F.2d at 1243. Bergman would have us "canvass" these decisions to conclude that her proposed rule of law—that indigent defendants are entitled to a state-funded toxicologist—"is so widely accepted among the Federal Circuits that it would, if presented to [the Supreme] Court, be accepted as correct." *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013) (per curiam). But AEDPA prohibits this approach. The Supreme Court has repeatedly warned that we may not use circuit decisions like the cases on which Bergman relies to "sharpen a general principle" from the Court "into a specific legal rule" that it has not clearly established. *Id.* If anything, Bergman's need to rely on circuit decisions like *Terry* all but confirms that the right she asserts has not been clearly established by the Supreme Court, and she must lose under § 2254(d)(1).

Issue 2: Did the Michigan appellate court unreasonably determine the facts?

Bergman falls back on the argument that the Michigan appellate court made an "unreasonable" factual finding when it rejected her due-process claim. 28 U.S.C. § 2254(d)(2). If true, this error would allow us to address the legal merits of that claim without giving deference to the state court's decision. *See Rice v. White*, 660 F.3d 242, 257 (6th Cir. 2011). What was the alleged factual error? When holding that Bergman failed to show a sufficient need for a defense toxicologist, the state court purportedly "ignored" or "overlooked" her counsel's explanations why she needed the expert. Appellant's Br. 40, 43. Yet this backup argument mistakes the *legal* question that the state appellate court resolved for a *factual* one that it did not.

To explain why, we start with a refresher on the different types of arguments that a state court might confront when resolving a constitutional claim. *Cf. Singh v. Rosen*, 984 F.3d 1142, 1148 (6th Cir. 2021). Consider a defendant's claim that counsel provided ineffective assistance in violation of the Sixth Amendment right to counsel. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Sometimes, a defendant might raise a "purely legal" question about this right. *See U.S. Bank Nat'l Ass'n ex rel. CWCapital Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 965 (2018). For example, what legal test should govern whether a lawyer's failure to file a notice of appeal violates the Sixth Amendment? *See Roe v. Flores-Ortega*, 528 U.S. 470, 477–84 (2000). This type of question turns on the abstract meaning of the Constitution without respect to the particular facts of a specific case. So we would evaluate a state court's resolution of this pure question of law under § 2254(d)(1), which asks whether the resolution "was contrary to" "clearly established law[.]" 28 U.S.C. § 2254(d)(1); *Williams v. Taylor*, 529 U.S. 362, 404–05 (2000); *cf. Vance v. Scutt*, 573 F. App'x 415, 420–21 (6th Cir. 2014).

Other times, a defendant might raise a "purely factual" question about the right to effective assistance. *See U.S. Bank*, 138 S. Ct. at 965. For example, did a defendant actually ask counsel to file a notice of appeal or did the defendant decline to appeal? *Cf. Cummings v. United States*, 84 F. App'x 603, 604–05 (6th Cir. 2003) (order). This type of question turns on the "basic, primary, or historical facts" about what happened in the real world without respect to the proper reading of the Constitution. *McMullan v. Booker*, 761 F.3d 662, 671 (6th Cir. 2014) (quoting *Thompson v. Keohane*, 516 U.S. 99, 110 (1995)). So we would evaluate a state court's

resolution of this question of fact under § 2254(d)(2), which asks whether the resolution "was based on an unreasonable determination of the facts[.]" 28 U.S.C. § 2254(d)(2); *Wood v. Allen*, 558 U.S. 290, 300–01 (2010); *cf. Thomas v. Neven*, 2021 WL 6103007, at *1 (9th Cir. Dec. 23, 2021) (mem.).

Yet defendants often raise neither a purely legal question nor a purely factual question about the right to effective assistance. *See U.S. Bank*, 138 S. Ct. at 965. Instead, they raise the question whether the "historical facts" about counsel's conduct violated the "legal test" for ineffective assistance. *Id.* at 966; *cf. Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1068–69 (2020). For example, did a case's record satisfy *Strickland*'s prejudice element by creating a reasonable probability that the defendant would have appealed but for counsel's bad advice? *See Neill v. United States*, 937 F.3d 671, 677–78 (6th Cir. 2019). The Supreme Court has interchangeably referred to this application-of-law-to-fact inquiry as a "mixed" or "ultimate" question. *See U.S. Bank*, 138 S. Ct. at 965; *Thompson*, 516 U.S. at 110–12; *Strickland*, 466 U.S. at 698.

Should we treat a state court's resolution of such a question as a legal determination subject to § 2254(d)(1) or a factual determination subject to § 2254(d)(2)? Both text and precedent show that this type of decision generally qualifies as a legal one subject to § 2254(d)(1). To begin with, the question falls squarely within 2254(d)(1)'s text. That text does not ask only whether a state court's decision was "contrary to" "clearly established" law; it also asks whether the decision was "an unreasonable application" of that law. 28 U.S.C. § 2254(d)(1). The provision thus gets triggered whenever a "state court identifies the correct governing legal rule . . . but unreasonably applies it to the facts of the particular state prisoner's case[.]" *Woodall*, 572 U.S. at 425 (citation omitted). In this way, the text tracks the Supreme Court's very definition of a mixed question: "the application of a legal standard to settled facts." *Guerrero-Lasprilla*, 140 S. Ct. at 1068.

Precedent points the same way. We have long explained that mixed questions fall within § 2254(d)(1) rather than § 2254(d)(2). *See Moore v. Mitchell*, 708 F.3d 760, 800 (6th Cir. 2013); *Barnes v. Elo*, 339 F.3d 496, 501 (6th Cir. 2003). This caselaw also comports with Supreme Court decisions in related contexts. The Court, for example, has often held that appellate courts

should review mixed questions about constitutional provisions (such as whether probable cause exists) under the de novo standard that governs legal issues. *See U.S. Bank*, 138 S. Ct. at 967 n.4. The Court has also held that a statute discussing "questions of law" (similar to § 2254(d)(1)) can reach mixed questions. *See Guerrero-Lasprilla*, 140 S. Ct. at 1068–72.

Turning to this case, Bergman herself concedes that her claim presents a "mixed" question about whether her attorney "presented adequate facts to show why an expert was needed" under the Michigan judiciary's sufficient-nexus test for *Ake* claims. Appellant's Br. 39. Just as a state court answers a mixed question governed by § 2254(d)(1) when it holds that counsel's conduct was not ineffective under *Strickland*, *see Barnes*, 339 F.3d at 501, so too the Michigan court here answered a mixed question subject to that provision when it held that counsel's explanation did not meet the nexus test under *Ake*, *see Bergman*, 879 N.W.2d at 289. Bergman argues that the court unreasonably applied this nexus test for various reasons—for example, because the court did not account for several factors that her counsel provided. Whether right or wrong, however, the court's ultimate application of the nexus test "ranked as a legal determination governed by § 2254(d)(1), not one of fact governed by § 2254(d)(2)." *Lopez*, 574 U.S. at 8.

To argue the contrary, Bergman relies on our *Rice* decision. That case considered a factual question about what a trial court decided. 660 F.3d at 254–57. The Michigan Supreme Court initially determined that the trial court had found that the prosecutor struck jurors for racially discriminatory reasons. *See Rice*, 660 F.3d at 247. After a remand, however, the Michigan Supreme Court inexplicably changed its mind by concluding that the trial court had rejected the race-discrimination claim. *See id.* at 254–55. We held that its second view of the trial court's decision was an unreasonable factual finding under § 2254(d)(2). *See id.* at 254–57. *Rice*, in other words, addressed a finding about the "basic, primary, or historical facts"—albeit *procedural* facts concerning the events that occurred in the trial court. *McMullan*, 761 F.3d at 671 (citation omitted). Here, by contrast, Bergman does not challenge a finding about a historical fact. Rather, she challenges the Michigan court's ultimate holding that Bergman "failed to establish the requisite nexus" under *Ake* "between the need for an expert and the facts of the case." *Bergman*, 879 N.W.2d at 289. This conclusion did not address "what happened."

Keohane, 516 U.S. at 110–11. Instead, it held that Bergman's arguments did not meet the legal test.

Bergman responds that the Michigan appellate court inaccurately described some *subsidiary* historical facts in the process of resolving this question. The court, for example, suggested that "she did not explain why she could not safely proceed to trial without her own expert" even though counsel did provide an explanation: he could not understand the test results. *Bergman*, 879 N.W.2d at 289. When read in context, however, the Michigan court was holding that counsel's explanation was *insufficient* to satisfy the legal test (not that he did not provide one at all as a matter of historical fact). Indeed, Bergman makes an argument that the Supreme Court has found summarily reversible. *See Lopez*, 574 U.S. at 8–9. In *Lopez*, the Ninth Circuit held that the state court's conclusion that the defendant had "adequate notice" of the charges against him was an unreasonable determination of the facts. *See id.* at 7. The Supreme Court rejected this view, noting that the Ninth Circuit wrongly treated a legal question as a factual one. *Id.* at 8. This reasoning covers Bergman's argument. *See also Miller*, 505 F. App'x at 457.

We end with one caveat. The Supreme Court has suggested that appellate courts might treat *some* fact-bound "mixed" or "ultimate" questions as factual rather than legal. *See U.S. Bank*, 138 S. Ct. at 966–68; *cf. Keohane*, 516 U.S. at 111. We do not foreclose that possibility. We hold only that Bergman's *Ake* question falls within § 2254(d)(1), not § 2254(d)(2).

We affirm.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LISA BERGMAN,

Petitioner,

v.

Case No. 17-cv-13506
Hon. Matthew F. Leitman

SHAWN BREWER, WARDEN,

Respondent.
_____/

ORDER (1) DENYING PETITIONER'S MOTION FOR RECONSIDERATION (ECF No. 20) AND (2) EXPANDING CERTIFICATE OF APPEALABILITY

In 2014, a jury in the St. Clair County Circuit Court convicted Petitioner Lisa Bergman of second-degree murder, operating a motor vehicle under the influence of intoxicating liquor or a controlled substance causing death, and other charges. Prior to trial, Bergman had sought the appointment of a defense toxicology expert at public expense. The state trial court denied that request, and the Michigan Court of Appeals affirmed that denial. At the conclusion of her direct appeal, Bergman filed a petition for a writ of habeas corpus in this Court. (*See* Pet., ECF No. 1.) In her petition, Bergman argued, among other things, that the state trial court violated her right to due process when it denied her motion for the appointment of a toxicology expert. In an Opinion and Order dated June 4 , 2021, the Court concluded that Bergman was not entitled to habeas relief on that claim because the decision of the Michigan

Court of Appeals on the toxicology expert issue was not contrary to, and did not involve an unreasonable application of, clearly established federal law. (*See* Op. and Order, ECF No. 18.)

Bergman has now filed a motion for reconsideration. (*See* Mot., ECF No. 20.) She contends that the Court failed to address her argument that the Michigan Court of Appeals' decision on the toxicology expert issue involved an unreasonable determination of the facts. (*See id.*) Bergman is correct that the Court did not take up that argument. But that omission by the Court does not entitle Bergman to reconsideration because the result of the Court's ruling would not have changed if the Court had analyzed the argument. For the reasons explained below, the Court concludes that the Michigan Court of Appeals' decision did not involve an unreasonable determination of the facts. The Court will therefore **DENY** Bergman's motion for reconsideration. However, it will **EXPAND** its previously-granted certificate of appealability to include its denial of this motion and its conclusion herein that the Michigan Court of Appeals' decision did not involve an unreasonable determination of the facts.

I

The facts and procedural history underlying the claims in Bergman's petition are set forth in detail in the Court's prior Opinion and Order, and the Court will not repeat them here. Instead, the Court incorporates its earlier recitation of the facts

and history into this Order. However, the Court will briefly recount the facts and procedural history underlying Bergman's claim related to her request for the appointment of a toxicology expert at public expense.

Before Bergman's trial began, it became clear to her attorney that the prosecution's case would rely heavily upon (1) the results of toxicology tests that had been run on her blood following the vehicle accident at issue and (2) testimony from toxicology expert witnesses. Bergman's attorney therefore sought the appointment of a toxicology expert at public expense to assist him in understanding the prosecution's toxicology evidence, in assessing whether proper toxicology testing protocols were followed, and in developing cross-examination questions for the prosecution's experts. (*See* 10/17/13 Mot. Hr'g Tr., ECF No. 6-4, PageID.337-345.) The state trial court declined to appoint a toxicology expert on the ground that Bergman had not shown a sufficient nexus between her need for an expert and the prosecution's case. (*See id*., PageID.345-346.) That court was "not convinced that [the expert was] absolutely necessary." (*Id*.)

On direct appeal, Bergman argued that the state trial court erred when it declined to appoint a toxicology expert for her at public expense. The Michigan Court of Appeals rejected that argument and affirmed Bergman's convictions. *See People v. Bergman,* 879 N.W.2d 278, 289 (Mich. App. 2015).

When Bergman's direct appeal concluded, she filed a habeas petition in this Court. (*See* Pet., ECF No. 1.) She argued, among other things, that the state trial court violated her right to due process of law when it declined to appoint a toxicology expert for her at public expense. After reviewing the petition and Respondent's answer to the petition, the Court appointed counsel for Bergman. (*See* Order, ECF No. 11.) Counsel then filed supplemental briefs in further support of the petition. (*See* Supp. Brs., ECF No. 15, 17.) Together, Bergman and her counsel argued that the decision of the Michigan Court of Appeals affirming the state trial court's refusal to appoint the expert (1) was contrary to, or involved an unreasonable application of, clearly established federal law, and/or (2) involved an unreasonable determination of the facts. (*See id.*)

In the Opinion and Order, this Court denied relief on Bergman's due process claim. The Court expressed its own strong belief that state trial court's refusal to appoint a toxicology expert for Bergman had, indeed, resulted in a fundamentally unfair trial. But the Court nonetheless held that Bergman was not entitled to relief because she had not shown that the Michigan Court of Appeals' decision was contrary to, or involved an unreasonable application of, clearly established federal law. (*See* Op. and Order, ECF No. 18, PageID.1302-1310.) The Court did not address Bergman's argument that the Michigan Court of Appeals' decision involved an unreasonable determination of the facts.

Bergman now moves for reconsideration. (*See* Mot., ECF No. 20.) She argues that the Court erred when it failed to address her argument that the factual determinations by the Michigan Court of Appeals were unreasonable. She further contends that this Court should now evaluate that argument and should conclude that the state appellate court's factual determinations were unreasonable. Finally, she argues that when those unreasonable factual determinations are corrected, it becomes clear that she is entitled to habeas relief on her due process claim.

II

Motions for reconsideration in this Court are governed by Local Rule 7.1(h). Under that rule, the movant must demonstrate that the Court was misled by a "palpable defect." E.D. Mich. L.R. 7.1(h)(3). A "palpable defect" is a defect that is obvious, clear, unmistakable, manifest, or plain. *See Witzke v. Hiller*, 972 F.Supp. 426, 427 (E.D. Mich. 1997). The movant must also show that the defect, if corrected, would result in a different disposition of the case. *See* E.D. Mich. L.R. 7.1(h)(3).

III

Bergman has satisfied the first half of her burden in seeking reconsideration. She has shown that the Court committed a clear error when it failed to address her argument that the Michigan Court of Appeals' decision involved an unreasonable determination of the facts. But to be entitled to reconsideration, she must also show

that the result of the Court's ruling would have been different if the Court had addressed that argument. She has not done so.

A

Bergman's attack on the factual determinations of the Michigan Court of Appeals rests upon 28 U.S.C. § 2254(d)(2). Under that statute, habeas relief may be "warranted where the state-court adjudication 'resulted in a decision that was based on an unreasonable determination of the facts.'" *Pouncy v. Palmer*, 846 F.3d 144, 158 (6th Cir. 2017) (quoting 28 U.S.C. § 2254(d)(2)). "To show that a state court's determination of the facts was 'unreasonable,' it is not enough that the 'federal habeas court would have reached a different conclusion in the first instance.'" *Id.* (quoting *Wood v. Allen*, 558 U.S. 290, 301 (2010)). Instead, a "state court decision involves an unreasonable determination of the facts in light of the evidence presented in the State court proceeding only if it is shown that the state court's presumptively correct factual findings are rebutted by clear and convincing evidence and do not have support in the record." *Id.* (internal citations omitted).

B

Bergman's argument that the Michigan Court of Appeals unreasonably determined the facts focuses on the Court of Appeals' statement that she "did not explain why she could not safely proceed to trial without her own [toxicology] expert." *Bergman*, 879 N.W.2d at 289. Bergman argues as follows:

> The Michigan Court of Appeals determined, as a factual matter, that Bergman "did not explain why she could not safely proceed to trial without her own expert." (R. 6-16, MCOA Op., PgID. 941.) The transcripts show, however, that [Bergman's defense attorney] explained that an expert was necessary "because without expert witness assistance, Lisa Lynn Bergman will be denied the right to meaningful and informed cross-examination of the prosecution's expert witnesses." (R. 1, Mot., PgID 79 (emphasis added).) The Michigan Court of Appeals ignored the critical portion of [defense counsel's] explanation, rendering its determination of the facts unreasonable.

(Bergman Reply Br., ECF No. 17, PageID.1280.)

The problem with this argument is that it does not account for the context in which the Michigan Court of Appeals said that Bergman "did not explain why she could not safely proceed to trial without her own expert." Once that statement is viewed in context, it becomes apparent that the state appellate court was not making a factual finding that Bergman literally offered *no* explanation as to why she needed an expert to proceed to trial. Instead, the court was making a *legal* determination that Bergman did not offer a *sufficient* explanation as to why she needed an expert.

The Michigan Court of Appeals began its Opinion with a recitation of the factual background and procedural history of Bergman's case. In that section of the Opinion, the state appellate court acknowledged that Bergman *did* offer an explanation as to why she needed a toxicology expert, and the court proceeded to describe Bergman's explanation:

Defendant also moved for appointment of an expert witness at public expense. She argued that the accuracy and interpretation of the State Police laboratory tests were critical issues in the case, and *claimed that she would be deprived of a "meaningful defense" unless an independent expert determined the accuracy and relevance of the "purported findings" in the laboratory reports*. The cost of an independent examination of each test result was $1,500. A retest of what defendant referred to as "Sample B" was $760. Defendant argued that, at a minimum, she required an expert evaluation of her blood test results on the night of the fatal collision and the Sample B blood draw. She asserted that she was indigent and unable to pay these costs.

The prosecutor argued in response that the prosecutor's endorsement of an expert witness does not automatically entitle an indigent defendant to a court-appointed expert. Defendant also failed to allege any irregularity or deficiency with respect to the State Police Crime Lab's methods or protocols that would establish a genuine need for a defense expert. *At the hearing on this motion, defense counsel stated that he needed an expert to advise him on reviewing the toxicology reports and the "B sample." He explained that two samples are taken: the A sample, which is analyzed by the forensic lab, and the B sample, which is reserved for later testing. He asserted that the prosecutor could not reasonably argue that toxicology reports were relevant to the prosecution's case, but not relevant to the defense*. The prosecutor responded that defendant's motion did not include arguments about relevance and interpretation of lab results. Rather, defendant's motion was based on reviewing methods and protocols to ensure that the State Police Crime Lab used proper methods, and a defendant is not entitled to an expert merely because the prosecutor relies on an expert, but instead must establish a "sufficient nexus" between appointment of an expert and a potential flaw in the prosecution's expert evidence. *Defense counsel replied that he could not determine whether protocols were*

> *followed.* The trial court stated that the prosecutor was making every effort to provide the "instrumental data" to the defense for review and analysis. The trial court agreed with the prosecutor that defendant had not established a sufficient nexus justifying further testing or duplicate testing to see if the same result would be obtained. The court indicated that it was unwilling to appoint at public expense an expert to duplicate the prosecution's forensic testing, but it did not rule out the appointment of a consultant-type expert to assist in reviewing the existing data and materials from the prosecution.

Bergman, 879 N.W.2d at 283-84 (emphasis added).

After setting forth this procedural history, the Michigan Court of Appeals provided its analysis of Bergman's due process claim. The statement highlighted by Bergman appears in that analysis. The analysis was as follows:

> Defendant relies on *Ake v. Oklahoma,* 470 U.S. 68, 77 (1985) (quotation marks and citation omitted), in which the United States Supreme Court held that "[m]eaningful access to justice" and fundamental fairness require that indigent defendants be afforded, at state expense, the "basic tools of an adequate defense or appeal[.]" This Court recognized *Ake* in *People v. Leonard,* 224 Mich. App. 569, 580–581, 569 N.W.2d 663 (1997), and still concluded that "a defendant must show a nexus between the facts of the case and the need for an expert." *Id.* at 582, 569 N.W.2d 663.
>
> We conclude that *Ake* does not require appointment of a defense expert without a demonstration of a nexus between the need for an expert and the facts of the case. Here, defendant failed to establish the requisite nexus. She asserted that toxicology evidence was a critical part of the prosecution's case, but she did not explain why she could not safely proceed to trial without her own expert. She did not establish why the objective results of blood analysis

> might be unreliable. She made no offer of proof that an expert could dispute the prosecution experts' opinions regarding the side effects of prescription medications and their contribution to impaired driving. Defendant failed to establish that expert testimony would likely benefit her case. A mere possibility that the expert would have assisted the defendant's case is not sufficient.

Id. at 289 (internal citations omitted).

It seems difficult, if not impossible, to reconcile the two quoted passages above with Bergman's argument that the Michigan Court of Appeals "determined, as a factual matter" that Bergman offered no explanation as to why she needed a toxicology expert. First, as the first passage above shows, the state appellate court expressly recognized that Bergman did offer at least some explanation regarding why she required a toxicology expert. In light of that recognition, it seems unreasonable to read the appellate court's later statement that she "did not explain why she could not safely proceed to trial without her own expert" as meaning that she literally said nothing about why she needed an expert. Second, after saying that Bergman "did not explain" her need for an expert, the Michigan Court of Appeals offered examples of what Bergman did not present. This structure suggests that the appellate court was attempting to show that the explanation that Bergman did offer was lacking. Indeed, if the Michigan Court of Appeals had meant that Bergman had offered literally no explanation, it would have had no need to go further to point out the specific deficiencies in her showing. Finally, the last statement of the Michigan

Court of Appeals' analysis in the second passage quoted above further suggests that that court recognized that Bergman had offered some explanation as to why she needed a toxicology expert. The court stressed that a "mere possibility that the expert would have assisted the defendant's case is not sufficient." *Id.* This indicates that the court viewed Bergman's explanation as qualitatively insufficient because it showed only a "mere possibility" that a toxicology expert would be helpful to the defense. If the Michigan Court of Appeals had believed that Bergman said absolutely nothing about why she needed an expert, it would have had no reason to invoke the "mere possibility" standard.

The bottom line is this: while the Michigan Court of Appeals certainly could have expressed itself more clearly, it is most reasonable to read that court's decision as concluding that Bergman did not provide a *sufficient* explanation as to why she needed a toxicology expert, not as concluding that Bergman provided literally no explanation as to why she needed the expert. And the court's conclusion that Bergman's explanation was insufficient is not a *factual* determination that is subject to review under Section 2254(d)(2). *See McMullan v. Booker*, 761 F.3d 662, 670–71 (6th Cir. 2014) (holding that a trial court's decision whether to give a jury instruction is not a factual determination and explaining that for purposes of Section 2254(d)(2), "[f]actual issues" include "basic, primary, or historical facts: facts in the sense of a recital of external events and the credibility of their narrators;" "a

defendant's competency to stand trial and a juror's impartiality [because] these issues depend on a trial court's appraisal of witness credibility and demeanor;" and "whether a petitioner made a *Batson prima facie* showing of racial discrimination.").[1]

C

For all of the reasons explained in detail by the Court in its earlier Opinion and Order, the Court remains firmly convinced that the Michigan Court of Appeals acted unreasonably when it determined that Bergman failed to show that she needed a toxicology expert. Indeed, the state trial court's refusal to provide such an expert to Bergman at public expense left Bergman without any meaningful opportunity to develop an effective counter to the prosecution's key toxicology evidence and expert testimony. But while the Michigan Court of Appeals' ruling was unreasonable, it did not involve an unreasonable determination of the facts. Therefore, Bergman has not satisfied Section 2254(d)(2), and she is not entitled to habeas relief on her due

[1] The cases cited by Bergman in support of her contention that the Michigan Court of Appeals made a factual finding are not to the contrary. (*See* Bergman Supp. Br., ECF No. 23, PageID.1327-1328.) Those cases do not address whether a determination like the one made by the Michigan Court of Appeals is a factual one. *See Castellanos v. Small*, 766 F.3d 1137 (9th Cir. 2014) (explaining that under *Batson v. Kentucky*, 476 U.S. 79, 98 n.21 (1986), "intent to discriminate is an issue of fact," and then concluding that state court unreasonably determined the facts when it found a lack of discriminatory intent); *Campos v. Stone*, 201 F.Supp.3d 1083 (N.D. Cal. 2016) (holding that state court's interpretation of a police interrogation constituted an unreasonable determination of the facts).

process claim. The Court thus declines to reconsider its decision in the Opinion and Order to deny Bergman federal habeas relief.

IV

For all of the reasons explained above, Bergman's motion for reconsideration (ECF No. 20) is **DENIED**.[2]

At the conclusion of the Court's Opinion and Order, it explained that "Bergman should be able to present to the Sixth Circuit all of her arguments seeking relief based upon the denial of her motion for the appointment of a toxicology expert at public expense." (Op. and Order, ECF No. 18, PageID.1311.) It therefore granted her a certificate of appealability "limited to her claim that the state trial court violated her rights to due process and to a fair trial when it denied her pretrial motion for the appointment of a defense toxicology expert at public expense." (*Id.*) The Court's earlier certificate of appealability may be broad enough to encompass the issues addressed in this Order. But in case it is not, the Court now expands the certificate of appealability to include its denial of this motion and its ruling that the Michigan Court of Appeals' decision did not involve an unreasonable determination of the facts. Expanding the certificate of appealability in this regard is appropriate because

[2] Respondent has offered a number of additional arguments regarding why the Court should deny reconsideration and deny relief on Bergman's due process claim. (*See* Respondent's Response Br., ECF No. 24.) The Court does not reach these arguments.

reasonable jurists could debate whether the Court should have resolved this issue in a different manner and because the issue has sufficient merit to deserve encouragement to proceed further. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

IT IS SO ORDERED.

s/Matthew F. Leitman
MATTHEW F. LEITMAN
UNITED STATES DISTRICT JUDGE

Dated: September 24, 2021

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on September 24, 2021, by electronic means and/or ordinary mail.

s/Holly A. Monda
Case Manager
(810) 341-9764

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LISA BERGMAN,

Petitioner,

v.

Case No. 17-cv-13506
Hon. Matthew F. Leitman

SHAWN BREWER, WARDEN,

Respondent.
_____/

OPINION AND ORDER (1) DENYING PETITION FOR WRIT OF HABEAS CORPUS (ECF NO. 1), (2) GRANTING A LIMITED CERTIFICATE OF APPEALABILITY, AND (3) GRANTING PERMISSION TO APPEAL *IN FORMA PAUPERIS*

Habeas petitioner Lisa Bergman was convicted of second-degree murder, operating a motor vehicle under the influence of intoxicating liquor or a controlled substance causing death, and other charges following a jury trial that, in this Court's opinion, was fundamentally unfair. The charges against Bergman arose of out a car accident in which a vehicle driven by Bergman collided with another vehicle, killing the passengers in the other vehicle. One of the prosecution's star witnesses was a toxicology expert who testified, among other things, that controlled substances in Bergman's system at the time of the accident could cause serious impairing side effects and prevented her from safely operating her motor vehicle.

Prior to trial, Bergman's attorney anticipated that the prosecution's toxicology evidence and expert testimony would play a key role in the case against Bergman. So he moved the trial court to appoint a toxicology expert for Bergman, who was indigent, at public expense. Her counsel explained to the trial court that he needed such an expert in order to help him understand and evaluate the prosecution's toxicology evidence and to formulate ways to attack that evidence. Bergman also had an obvious need to present her own toxicology expert witness, if possible. But the trial court refused to appoint a toxicology expert for Bergman. That ruling unfairly insulated the prosecution's toxicology opinion evidence – a core of the prosecution's case – from the most effective cross examination, and it also deprived Bergman of the opportunity to attempt to locate and present her own toxicology expert to directly challenge the prosecution's expert. The Michigan Court of Appeals nonetheless affirmed Bergman's convictions.

But the Court cannot grant habeas relief to Bergman. Such relief is available only where a state court decision on the merits is contrary to, or involves an unreasonable application of, "clearly established federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(2), and the Supreme Court has not held that a criminal defendant – other than a defendant whose sanity is at issue and who seeks the appointment of a psychiatric expert – is entitled to the appointment of an expert witness. Thus, the decision of the Michigan Court of

Appeals – though clearly wrong in this Court's view – was neither contrary to, nor an unreasonable application of, clearly established federal law. Habeas relief is therefore unavailable to Bergman on this claim.

Bergman brings other claims as well, but for the reasons explained below, she is not entitled to federal habeas relief on those claims either. Accordingly, the Court will **DENY** her petition for a writ of habeas corpus (ECF No. 1). But the Court will **GRANT** Bergman a limited certificate of appealability and **GRANT** her permission to appeal *in forma pauperis*.

I

Bergman was convicted by a jury in the St. Clair County Circuit Court of two counts each of second-degree murder, Mich. Comp. Laws § 750.317; operating a vehicle under the influence of intoxicating liquor or a controlled substance causing death, Mich. Comp. Laws § 257. 625(4); and operating a vehicle with a suspended license causing death, Mich. Comp. Laws § 257.904(4). Bergman was sentenced as a second-offense habitual offender, Mich. Comp. Laws § 769.10, to concurrent prison terms of twenty-five to fifty years for each of the second-degree murder convictions, and five to twenty-two and one-half years for the remaining convictions.

The Michigan Court of Appeals summarized Bergman's case as follows:

Defendant's convictions arise from a two-vehicle collision in Kimball Township in St. Clair County shortly before 2:00 a.m. on July 20, 2013. A witness to the scene of the accident testified that there was heavy rain and fog. Defendant was driving a Ford F–350 pickup truck in the eastbound lane of Lapeer Road when she crossed the centerline, veered into the westbound lane, and collided head-on with a GMC Sonoma S–10 pickup truck. Lieutenant Terpenning, an expert in accident reconstruction, testified that there was "no question" in his mind that defendant's vehicle crossed the centerline into oncoming traffic. He did not observe anything to indicate that the S–10 pickup truck did anything improper or did "anything other than driv[e] down its intended lane of travel." The driver of the GMC truck, Russell Ward, and his passenger, Koby Raymo, both died from blunt traumatic injuries.

Defendant's blood alcohol concentration (BAC) was below the legal limit, but she also tested positive for carisoprodol (trade name Soma, which is a muscle relaxant and not an opiate), meprobamate (the active metabolite of carisoprodol), oxycodone, and amphetamine. Although the levels of these drugs in her system were within the therapeutic range, Dr. Michele Glinn, an expert in forensic toxicology and the effect of drugs and alcohol on the human body, testified that the drugs, other than amphetamine, were central nervous system depressants and combining them could magnify the effects and keep the drugs in the system longer. Glinn testified that, in particular, alcohol and Soma are a "bad combination." In Glinn's opinion, the drugs in defendant's system affected her ability to operate a motor vehicle.

At trial, over defendant's objection, the prosecution presented evidence of seven prior incidents in which defendant drove erratically, was passed out in her vehicle, or struck another vehicle while impaired or under the influence of prescription substances, such as carisoprodol or Soma, or was in possession of pills, such as Vicodin or

> Soma. This evidence was offered for its relevance to the malice element of second-degree murder because it was probative of defendant's knowledge of how her substance abuse impaired her driving.

People v. Bergman, 879 N.W.2d 278, 281-283 (Mich. App. 2015) (internal footnotes omitted).

Bergman filed a direct appeal in the Michigan Court of Appeals challenging the trial court's exclusion of evidence of drugs and alcohol in the bloodstream of the driver of the other car, its denial of Bergman's request for the appointment of a toxicologist and a private investigator at public expense, the charging of and conviction on six criminal counts for only two homicide offenses, the improper admission of prior "bad acts" evidence, and judicial factfinding at sentencing. (*See* Ct. App. Rec., ECF No. 6-16, PageID.964.) That court affirmed her convictions and sentence. *See Bergman*, 879 N.W.2d at 281. The relevant portions of the Court of Appeals' decision are discussed in more detail below.

Bergman then filed an application for leave to appeal in the Michigan Supreme Court. That court denied the application in a standard form order, *see People v. Bergman*, 877 N.W.2d 893 (Mich. 2016), and denied her motion for reconsideration. *See People v. Bergman*, 884 N.W.2d 289 (Mich. 2016).

Bergman filed her *pro se* petition for a writ of habeas corpus in this Court on October 24, 2017, raising the following four issues:

I. THERE WAS INSUFFICIENT EVIDENCE IN PETITIONER'S CASE TO PROVE THE ESSENTIAL ELEMENTS OF SECOND DEGREE MURDER WHERE PETITIONER'S CONDUCT DID NOT RISE TO THE LEVEL OF REQUIRED MALICE (DEPRAVED INDIFFERENCE FOR HUMAN LIFE) ACCORDING TO THE STANDARD SET FORTH IN *JACKSON V. VIRGINIA*, 443 U.S. 307; 99 S. CT. 2781; 61 L.ED.2D 560 (1979).

II. PETITIONER'S SIXTH [AMENDMENT] CONSTITUTIONAL RIGHT TO PRESENT HER DEFENSE WAS VIOLATED WHEN THE TRIAL COURT EXCLUDED EVIDENCE OF INTOXICANTS AND CONTROLLED SUBSTANCES IN THE DRIVER OF THE OTHER CAR'S BLOOD STREAM VIOLATING, IN PART, *BRADY V. MARYLAND*, 373 U.S. 83; 83 S. CT. 1194; 10 L.ED.2D 215 (1963).

III. PETITIONER'S DUE PROCESS AND SIXTH . . . AMENDMENT RIGHT[S] TO PRESENT HER DEFENSE WERE VIOLATED WHEN THE TRIAL COURT DENIED TO APPOINT A TOXICOLOGIST TO COMBAT THE STATE'S EXPERT.

IV. PETITIONER'S CONSTITUTIONAL RIGHTS TO BE PRESUMED INNOCENT UNTIL PROVEN GUILTY (U.S.C. ART. 11) AND TO RECEIVE A FAIR TRIAL WITH IMPARTIAL AND UNBIASED JURORS (U.S.C. FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS) WERE VIOLATED WHERE THE TRIAL COURT ALLOWED INADMISSIBLE AND HIGHLY PREJUDICIAL EVIDENCE OF PRIOR BAD ACTS TO CONSUME AND TAINT THE TRIAL.

(Pet., ECF No. 1, PageID.5.)

On December 8, 2020, the Court appointed the Federal Defender's Office to represent Bergman because the Court believed that she would benefit from the

assistance of counsel. (*See* Order, ECF No. 11.) Counsel then filed a supplemental brief on Bergman's behalf addressing two issues: the denial of funding for an independent toxicologist and the exclusion of the victim's toxicology report. (*See* Supp. Br., ECF No. 15.)

II

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), codified at 28 U.S.C. § 2241 *et seq*., sets forth the standard of review that federal courts must use when considering habeas petitions brought by prisoners challenging their state court convictions. AEDPA provides in relevant part:

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

28 U.S.C. § 2254(d).

"The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was

unreasonable—a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007).

III

A

The Court begins with Bergman's claim that the prosecution failed to present sufficient evidence to support her second-degree murder conviction. Bergman did not present this claim to the Michigan Court of Appeals on direct review, and that Court did not decide the claim on the merits. However, Respondent "is not arguing" that the claim is not exhausted nor that the claimed is procedurally defaulted. (Resp. to Petition, ECF No. 5, PageID.116.) The Court will therefore proceed to review the claim *de novo*.[1]

When reviewing this claim, the Court applies the standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 321 (1979). Under *Jackson*, this Court must ask "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable

[1] Both Bergman and Respondent appear to have assumed that the Michigan Court of Appeals reviewed this claim and therefore AEDPA deference applies to the claim. However, this Court must undertake its own review and make its own determination as to the proper standard of review to be applied to Bergman's claims. When the Court undertook that review, it discovered that while the Court of Appeals addressed certain evidentiary issues, it did not review the sufficiency of the evidence. Since that court did not decide Bergman's sufficiency of the evidence claim on the merits, this Court reviews the claim *de novo*.

doubt." *Jackson*, 443 U.S. at 319. And it must do so "with explicit reference to the substantive elements of the criminal offense as defined by state law." *Id.* The elements of second-degree murder under Michigan law are "(1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death." *Bergman*, 879 N.W.2d at 288 (quoting *People v. Smith*, 731 N.W.2d 411, 414-15 (Mich. 2007)). In the petition, Bergman insists that the prosecution failed to present sufficient evidence of the third element: that she acted with malice. "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. The prosecution is not required to prove that the defendant actually intended to harm or kill. Instead, the prosecution must prove the intent to do an act that is in obvious disregard of life-endangering consequences." *Id.* (internal citation omitted).

Here, when the evidence is viewed in the light most favorable to the prosecution, a rational jury could have concluded that there was sufficient evidence of malice. At trial, the prosecution introduced evidence that Bergman had "seven prior incidents in which [she] drove erratically, was passed out in her vehicle, or struck another vehicle while impaired or under the influence of prescription substances, such as carisoprodol or Soma, or was in possession of pills, such as

Vicodin or Soma." *Id.* at 282. Given Bergman's prior history of dangerous driving while impaired – including, most importantly, an incident where she struck another vehicle – the jury, after drawing all reasonable inferences in favor of the prosecution, could reasonably have concluded that she had "knowledge of *her* own propensity to create a notably severe hazard when driving while intoxicated." *Id.* at 288 (emphasis in original).

This is the same conclusion that the Michigan Court of Appeals reached under similar facts in *People v. Werner*, 659 N.W.2d 688 (Mich. App. 2002). In *Werner*, the Michigan Court of Appeals explained that there was sufficient evidence of malice where a driver drove under the influence of alcohol while he was aware of his own prior history of dangerous driving while impaired:

> This is not a case where a defendant merely undertook the risk of driving after drinking. Defendant knew, from a recent prior incident, that his drinking did more than simply impair his judgment and reflexes. He knew that he might actually become so overwhelmed by the effects of alcohol that he would completely lose track of what he was doing with his vehicle. If defendant knew that drinking before driving could cause him to crash on boulders in front of a house, without any knowledge of where he was or what he was doing, he knew that another drunken driving episode could cause him to make another major mistake, one that would have tragic consequences.

Werner, 659 N.W.2d at 693. Likewise here, the jury could reasonably have concluded that Bergman knew from her prior incidents that driving while impaired could have "tragic consequences."

For all of these reasons, Bergman has failed to persuade the Court that the prosecution failed to introduce sufficient evidence to establish the malice element of of her second-degree murder conviction. Bergman is therefore not entitled to federal habeas relief on this claim.

B

The Court next addresses Bergman's claim that the state trial court violated her constitutional rights when it allowed the prosecution to introduce the evidence of her past impaired driving incidents described above (*i.e.*, the evidence that supported malice) under Michigan Rule of Evidence 404(b). Bergman insists that this evidence was unduly prejudicial, that it undermined her presumption of innocence, and that the conduct described in the prior incidents was "completely different" from her behavior the night of the offense. (Pet., ECF No. 1, PageID.46-50.)

Bergman raised this claim on direct review and the Michigan Court of Appeals rejected it:

> Defendant next argues that the trial court erred by admitting evidence of her prior acts under MRE 404(b)(1). We disagree.
>
> We review the trial court's decision to admit evidence for an abuse of discretion. *People v. Gursky,* 486 Mich. 596, 606, 786 N.W.2d 579 (2010). MRE 404(b)(1) prohibits "[e]vidence of other crimes, wrongs, or acts" to prove a defendant's character or propensity to commit the charged crime, but permits such evidence for other purposes, "such

as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material....” Evidence of other crimes or bad acts is admissible when it is offered for a proper purpose, MRE 404(b)(1); it is relevant under MRE 402; and its probative value is not substantially outweighed by unfair prejudice, MRE 403. *People v. VanderVliet,* 444 Mich. 52, 74–75, 508 N.W.2d 114 (1993), amended 445 Mich. 1205, 520 N.W.2d 338 (1994).

In *Werner,* 254 Mich.App. at 533–534, 659 N.W.2d 688, this Court held that evidence that the defendant had previously experienced an alcohol-induced blackout while driving, during which he “crash[ed] on boulders in front of a house, without any knowledge of where he was or what he was doing,” was admissible under MRE 404(b)(1) in a case in which the defendant was charged with second-degree murder; OUIL causing death, OUIL causing serious impairment of a body function; MCL 257.625(5); and driving with a suspended license, second offense, MCL 257.904(1). This Court held that the evidence was properly admitted to show knowledge and absence of mistake, and was probative of the malice element for second-degree murder because it showed “that defendant knew that heavy drinking could lead to a blackout, and that a blackout could lead to defendant’s driving without any understanding of what he was doing.” *Id.* at 539–540, 659 N.W.2d 688. The evidence also was relevant because the defendant’s previous blackout while driving “made it more probable than not that he was aware this could happen to him.” *Id.* at 540, 659 N.W.2d 688. This Court further concluded that the probative value of the evidence outweighed any prejudicial effect because the prior incident involving a one-vehicle accident with no injuries to anyone was a minor incident in comparison to the charged offense, in which the defendant drove the wrong way on a freeway and caused the death of a young woman and seriously

> injured a young man. In addition, the trial court gave an appropriate cautionary instruction. *Id.*
>
> We conclude that *Werner* is directly on point. The prior acts evidence here involved incidents in which defendant either drove unsafely, was passed out in her vehicle, or was involved in an accident while impaired or under the influence of prescription substances, or was in possession of pills, such as Vicodin and Soma. This evidence was properly admitted to show defendant's knowledge and absence of mistake, and was relevant to the malice element for second-degree murder because it was probative of defendant's knowledge of her inability to drive safely after consuming prescription substances. And, because the prior incidents were minor in comparison to the charged offenses involving a head-on collision that caused the deaths of two individuals, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice under MRE 403. Lastly, the trial court gave an appropriate cautionary instruction to reduce any potential for prejudice.

Bergman, 879 N.W.2d at 291-92.

As an initial matter, to the extent that Bergman argues that the admission of this "other acts" evidence violated Michigan law, that claim is not cognizable on federal habeas review. It is "not the province of a federal habeas court to reexamine state-court determinations on state-court questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Errors in the application of state law, including rulings regarding the admissibility of evidence under state rules of evidence, are generally not cognizable in a federal habeas proceeding. *See Seymour v. Walker*, 224 F.3d 542, 552 (6th Cir. 2000).

Bergman has also failed to show that the admission of the "other acts" evidence violated her constitutional rights. "[S]tate-court evidentiary rulings [do not] rise to the level of due process violations unless they 'offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Wilson v. Sheldon*, 874 F.3d 470, 475–76 (6th Cir. 2017) (quoting *Seymour*, 224 F.3d at 552). Here, Bergman has neither established that the admission of this evidence violated her due process rights nor that it offended some deeply rooted "principle of justice." She has not identified any clearly established Supreme Court precedent to support this claim for relief. And the Sixth Circuit recently confirmed that "no clearly established Supreme Court precedent . . . holds that a state violates due process by permitting propensity evidence in the form of other bad acts evidence." *Stewart v. Winn*, 967 F.3d 534, 538 (6th Cir.), *cert. den. sub nom. Stewart v. Stoddard*, 141 S. Ct. 929 (2020) (quoting *Bugh v. Mitchell*, 329 F.3d 496, 512–13 (6th Cir. 2003)). Nor has Bergman cited any Supreme Court (or other) precedent holding that the admission of other acts evidence violates the presumption of innocence.

For all of these reasons, Bergman is not entitled to federal habeas relief on this claim.

C

The Court now turns to Bergman's claim that the state trial court violated her constitutional right to present a defense when it excluded the toxicology report for deceased driver Ward. That report showed that Ward had intoxicants and controlled substances in his blood at the time of the crash. This issue arose at trial as follows:

> In another pretrial motion, the prosecutor sought to exclude evidence of the deceased victims' toxicology reports. The prosecutor noted that Ward's toxicology report indicated that he had a BAC of 0.054 grams per 100 milliliters, and 6.2 nanograms per milliliter of delta–9 tetrahydrocannabino (THC) and 17 nanograms per milliliter of delta–9 carboxy THC in his bloodstream. His passenger, Koby Raymo, had a BAC of 0.110 grams per 100 milliliters, and also 7.5 nanograms per milliliter of delta–9 THC and 10 nanograms per milliliter of delta–9 carboxy THC in his bloodstream. The prosecutor argued that this evidence should be excluded because it was not relevant and it was unduly prejudicial. Raymo's toxicology results were irrelevant because he was a passenger and could not have contributed to the accident. Ward's toxicology results were irrelevant because the evidence clearly established that defendant crossed the centerline and struck Ward's vehicle head-on, with no negligence by Ward. Finally, the prosecutor argued that any probative value of the evidence was outweighed by the danger of unfair prejudice, misleading the jury, and confusion of the issues.
>
> Defendant argued in response that Ward's toxicity levels were relevant to the issues of fault and causation. At the hearing on the motion, defense counsel argued that the other driver had "therapeutic levels" of the opiate pain reliever Tramadol and benzodiazepine. The trial court excluded the evidence on the basis that there was no legitimate question of fact regarding the proximate cause

> of the accident. At trial, defense counsel conducted voir dire examination of Dr. Mary Pietrangelo, the deputy medical examiner who performed autopsies on Ward and Raymo, in order to create a record of excluded testimony. Pietrangelo testified that Ward's ethanol level was below the legal limit, his level of Tramadol (a pain medication) was within a therapeutic dosage, and he had been exposed to marijuana or a similar substance, but she could not determine the level of exposure. Pietrangelo ruled out those substances as contributing factors to his manner of death. Defense counsel then renewed his motion to admit Ward's toxicology results. He argued that they were relevant to show that Ward was unable to remain alert and react to sudden emergencies. The trial court stated that if Ward's conduct was a factor in the proximate cause of his death, "that does not necessarily negate or nullify the conduct of Ms. Bergman if the facts support what it is that she's being accused of." The trial court concluded that in order for such evidence to be potentially admissible, there would have to be something "fairly substantial in terms of the detail of this accident that would suggest that Mr. Ward was somehow a cause of the accident." While the trial court did not rule out admitting the evidence of Ward's toxicology after development of the testimony, it was never admitted.

Bergman, 879 N.W.2d at 285.

On direct review, Bergman argued that the trial court erred when it excluded the toxicology report for Ward, and the Michigan Court of Appeals rejected her argument. *See id.* at 285-88. The appellate court held that the trial court properly excluded the evidence under Michigan Rule of Evidence 402. It explained that "the excluded evidence [was] not probative of an intervening or superseding cause that could break the causal link between [Bergman's] conduct and the victims' deaths"

because "[t]here was no evidence that Ward was not properly driving within his marked lane, or that Ward's vehicle would not have safely passed defendant if defendant had not crossed the centerline in front of Ward, presenting a serious and unexpected hazard. Thus, there was no evidence that Ward did anything that contributed to the accident in a way that would establish that he was negligent or grossly negligent and by his conduct was an intervening cause of the accident." *Id.* The Court of Appeals further concluded that because "the offense of second-degree murder is committed when the defendant has knowledge of *her* own propensity to create a notably severe hazard when driving while intoxicated, [] the victim's state of intoxication [was] irrelevant to the defendant's knowledge of her own susceptibility to hazardous driving." *Id.* at 288 (emphasis in original).

Bergman is not entitled to habeas relief on this claim for two reasons. First, as discussed above, the admission or exclusion of evidence under state rules of evidence is a state-law issue that is generally not cognizable on federal habeas review short of a denial of fundamental fairness or due process, *see Seymour*, 224 F.3d at 552 (6th Cir. 2000); *Wilson*, 874 F.3d at 475–76 (6th Cir. 2017), and Bergman has not shown that she meets that standard here. It does not strike this Court as fundamentally unfair that the trial court excluded evidence of Ward's toxicology report when there was no evidence that Ward's driving in any way contributed to the crash. Second, Bergman has not cited any holding of the Supreme Court that

compelled the trial court to admit Ward's toxicology report. For these reasons, Bergman is not entitled to federal habeas relief on her claim related to Ward's toxicology report.

D

Finally, Bergman claims that the state trial court violated her right to due process and denied her a fundamentally fair trial when it denied her pretrial motion for the appointment of a defense toxicology expert at public expense. Bergman sought the appointment of such an expert to assist her attorney in understanding the prosecution's toxicology evidence, in assessing whether proper toxicology testing protocols were followed, and in developing cross-examination questions for the prosecution's experts. (*See* 10/17/13 Mot. Hrg. Tr., ECF No. 6-4, PageID.337-345.) The trial court declined to appoint a toxicology expert at public expense on the ground that Bergman had not shown a sufficient nexus between her need for an expert and the prosecution's case and because that court was "not convinced that [the expert was] absolutely necessary." (*Id*., PageID.345-46.)

On direct appeal, Bergman argued that the trial court erred when it declined to appoint a toxicology expert for her at public expense, and the Michigan Court of Appeals rejected that argument:

> Defendant relies on *Ake v. Oklahoma,* 470 U.S. 68, 77 (1985) (quotation marks and citation omitted), in which the United States Supreme Court held that "[m]eaningful access to justice" and fundamental fairness require that

> indigent defendants be afforded, at state expense, the "basic tools of an adequate defense or appeal[.]" This Court recognized *Ake* in *People v. Leonard,* 224 Mich. App. 569, 580–581, 569 N.W.2d 663 (1997), and still concluded that "a defendant must show a nexus between the facts of the case and the need for an expert." *Id.* at 582, 569 N.W.2d 663.
>
> We conclude that *Ake* does not require appointment of a defense expert without a demonstration of a nexus between the need for an expert and the facts of the case. Here, defendant failed to establish the requisite nexus. She asserted that toxicology evidence was a critical part of the prosecution's case, but she did not explain why she could not safely proceed to trial without her own expert. She did not establish why the objective results of blood analysis might be unreliable. She made no offer of proof that an expert could dispute the prosecution experts' opinions regarding the side effects of prescription medications and their contribution to impaired driving. Defendant failed to establish that expert testimony would likely benefit her case. A mere possibility that the expert would have assisted the defendant's case is not sufficient.

Bergman, 879 N.W.2d at 289 (internal citations omitted).

The Court respectfully disagrees with the Michigan Court of Appeals' analysis and conclusion. It seems clear to this Court that as a matter of fundamental fairness the state trial court should have appointed a defense toxicologist at public expense. Because Bergman did not have the assistance of such an expert, she could not effectively respond to the prosecution's expert toxicology testimony. And that testimony was an essential pillar of the prosecution's case. Indeed, one of the prosecution's star witnesses was Dr. Michele Glinn, "an expert in forensic

toxicology and the effect of drugs and alcohol on the human body." *Id.* at 282. Dr. Glinn provided detailed testimony about the various drugs that Bergman had in her system at the time of the crash, and Dr. Glinn explained to the jury how each of those drugs could have impaired Bergman's ability to drive and caused various side effects such as drowsiness, dizziness, confusion, and decreased reaction time. (*See* 1/16/14 Trial Tr., ECF No. 6-12, PageID.737-740.) Dr. Glinn further testified that even if the drugs did not exceed a "therapeutic level," they could still have caused serious side effects when taken together. (*Id.*, PageID.740.) In particular, Dr. Glinn testified that two of the drugs Bergman had taken – alcohol and Soma – "together [were] a bad combination." (*Id.*, PageID.748.) Finally, Dr. Glinn told the jury that it was her opinion that the combination of drugs that Bergman had taken "affect[ed] her ability" to drive safely and rendered Bergman unable to "operate a motor vehicle properly." (*Id.*, PageID.742.) Bergman's counsel cross-examined Dr. Glinn, but he was not able to meaningfully undermine her testimony. (*See id.*, PageID.743-747.)

Dr. Glinn's testimony then became a focal point of the final arguments to the jury. The prosecution highlighted that testimony several times during its closing. For example, the prosecution reminded the jury of Dr. Glinn's testimony about the "effects on the body" of the drugs Bergman had taken. (1/17/14 Trial Tr., ECF No. 6-13, PageID.798; *see also id.*, PageID.813.) It then emphasized Dr. Glinn's conclusion that Bergman could not safely operate a vehicle:

> And finally you heard from Doctor Glinn, and she in her expert opinion – and the reason why I, I admitted her resume is because I want you guys to look at her credentials. I want you to look and see how much experience this person has in terms of this kind of thing and the effects of these kinds of drugs on her body, and I want you to be able to listen –or re-evaluate her testimony in terms of the fact that her conclusion was that this woman was under the influence and, and those kinds of similar drug categories that she was talking about, mixing with alcohol, can clearly affect the Defendant's ability to operate her vehicle in, in Doctor Glinn's opinion.
>
> [….]
>
> This is a woman who knows, well, I do get a little drowsy when I take this other stuff, maybe. I don't know. I'm talking in her voice, but if, if she does that, what has she got to do to counteract some of that? She's got to take a different drug. And none of them are prescribed. And Doctor Glinn tells you that you can't you shouldn't mix these things, and you shouldn't take them without a doctor's orders, and you shouldn't be operating a motor vehicle. And that, that all these pills have this kind of warning on it.

(*Id.*, PageID.811, 814-815.) In response, defense counsel mentioned Dr. Glinn's testimony numerous times in his closing argument. (*See id.*, PageID.829-833, 842.) Finally, the prosecution then returned to her testimony several times in its rebuttal. (*See id.*, PageID.843-844, 846.)

Without the assistance of a toxicology expert, Bergman's defense counsel was substantially hampered in his ability to (1) critically analyze Dr. Glinn's opinions and method of analyzing the available data and (2) formulate effective cross-

examination questions aimed at casting doubt on the reliability of her opinions. Just as importantly, because the trial court did not appoint a defense toxicology expert, Bergman was left without the ability to seek her own expert testimony responding to Dr. Glinn's opinions. Simply put, Bergman was deprived of a meaningful opportunity to develop the most effective challenge to a pillar of the prosecution's case.

Moreover, the Michigan Court of Appeals' conclusion that Bergman's lawyer failed to adequately explain his need for a toxicology expert was unreasonable. Bergman's trial counsel persuasively explained to the trial court that he needed assistance from an expert so he could understand what the prosecution's toxicology reports meant and so he could properly prepare for a cross-examination of the prosecution's several experts:

> I'm not a toxicologist, I don't know chemistry [….] So I need to talk to a professional who can advise me as to what the results mean and how it impacts my client's defense [….] I can't interpret them.
>
> […]
>
> [I need someone to] go over the police report, the lab results, and be able to speak to me about what these things mean in terms of the Defense.
>
> […]
>
> I am not competent as a chemist or toxicologist to know what do these numbers mean. They may not mean anything. Or maybe they mean that this person is highly

> impaired by these things because she's got such and such milligrams of this and this. I don't know […]
>
> My motion is I need someone who can first of all, look at the numbers in the, in the context of the police report in terms of their description of the events and tell me do these – what do these numbers mean. Does this indicate a toxic level for someone or is this something that does not affect driving.

(10/7/13 Mot. Hrg. Tr., ECF No. 6-4, PageID.337-339, 343.[2]) This explanation of counsel's need for an expert was more than sufficient. Indeed, the Michigan Supreme Court has explained that it would be unfair to require a criminal defendant to offer a more detailed explanation of his need for the appointment of an expert under these circumstances:

> Until an expert is consulted, a defendant might often be unaware of how, precisely, the expert would aid the defense. If, in such cases, the defendant were required to prove in detail with a high degree of certainty that an expert would benefit the defense, the defendant would essentially be tasked with the impossible: *to get an expert, the defendant would need to already know what the expert would say.*

People v. Kennedy, 917 N.W.2d 355, 366 (Mich. 2018) (emphasis added).[3]

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[2] Bergman's counsel also told the trial court that he needed expert assistance because he "ha[d] no idea" whether testing protocols had been followed properly. (10/7/13 Mot. Hrg. Tr., ECF No. 6-4, PageID.344.)

[3] The Court acknowledges that Bergman has not submitted an affidavit from an expert that explains what testimony that expert could have provided at Bergman's trial and/or how the expert could have helped Bergman's counsel develop cross-examination questions for Dr. Glinn. But Bergman is indigent, and she has never been in a position to consult with an expert.

Despite this Court's conclusion that depriving Bergman of a toxicology expert rendered her trial fundamentally unfair and that the Michigan Court of Appeals should have vacated her convictions as a result, this Court may not grant habeas relief to Bergman. That is because the Michigan Court of Appeals' decision was not contrary to, or an unreasonable application of, "clearly established federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(2).

The Supreme Court has not held that a criminal defendant in Bergman's position is entitled to the appointment of the type of expert she sought. In *Ake*, the Supreme Court held that "the Constitution requires that an indigent defendant have access to the psychiatric examination and assistance necessary to prepare an effective defense based on his mental condition, when his sanity at the time of the offense is seriously in question." *Ake*, 470 U.S. at 70. But the Supreme Court "has not yet extended *Ake* to non-psychiatric experts." *Conklin v. Schofield*, 366 F.3d 1191, 1206 (11th Cir. 2004). *See also Hawkins v. Mullin*, 291 F.3d 658, 671 n. 6 (10th Cir. 2002) ("Although this court has extended *Ake* to the State's provision of investigators and other experts as well, the Supreme Court has not specifically done so") (citations omitted); *McGowan v. Winn*, No. 17-2000, 2018 WL 1414902, at *2 (6th Cir. Mar. 21, 2018) ("Because the Supreme Court has not extended *Ake* to non-psychiatric experts, the rejection of [petitioner's] claim is not contrary to or an unreasonable application of clearly established federal law as determined by the

Supreme Court") (internal citation omitted).[4] For that reason, AEDPA precludes this Court from granting Bergman habeas relief based upon the trial court's refusal to appoint her a expert toxicology witness at public expense.

Bergman argues that a post-*Ake* case, *Medina v. California*, 505 U.S. 437, (1992), provides the clearly-established law in support of her argument. *Medina* observed that "[t]he holding in *Ake* can be understood as an expansion of earlier due process cases holding that an indigent criminal defendant is entitled to the minimum assistance necessary to assure him 'a fair opportunity to present his defense' and 'to participate meaningfully in [the] judicial proceeding.'" *Id*. at 444–45 (citing *Ake*, 470 U.S. at 76).

However, the statement from *Medina* cited by Bergman does not constitute clearly established federal law. "[C]learly established Federal law for purposes of § 2254(d)(1) includes only" Supreme Court "holdings." *White v. Woodall*, 572 U.S. 415, 419 (2014) (internal quotation marks omitted). And the Supreme Court in *Medina* did not issue any holdings concerning the appointment of expert witnesses.

The question in *Medina* was "whether the Due Process Clause permits a State to require a defendant who alleges incompetence to stand trial to bear the burden of

[4] District courts within the Sixth Circuit have reached this same conclusion. *See*, *e.g.*, *McGowan v. MacLaren*, 2017 WL 3172840, at *12 (W.D. Mich. July 26, 2017); *Phlegm v. Berghuis*, 2014 WL 7433415, at *7 (E.D. Mich. Dec. 31, 2014) (O'Meara, J.) (citing *Conklin*, 366 F.3d at 1206); *Raar v. Rivard*, 2014 WL 3709235, at *7 (E.D. Mich. July 28, 2014) (Goldsmith, J.).

proving so by a preponderance of the evidence." *Medina*, 505 U.S. at 439. While the court analyzed in detail the allocation of that burden of proof, *see id*. at 446-52, it did not make any rulings concerning whether the defendant was entitled to the appointment of an expert at public expense. In fact, *Medina*'s only two citations to *Ake* are in its discussion of the applicability of the procedural due process balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976). *See Medina*, 505 U.S. at 444-45. Thus, *Medina* does not clearly establish that a criminal defendant has the right to the appointment of a non-psychiatric expert witness.

Finally, in her supplemental brief, Bergman also relies upon the Supreme Court's decision in *Britt v. North Carolina*, 404 U.S. 226 (1971). In *Britt*, the Supreme Court observed that "the State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners." *Britt*, 404 U.S. at 227. But the question in *Britt* was whether "the state court properly determined that the transcript requested in [that] case was not needed for an effective defense." *Id.* Thus, *Britt* did not *hold* that a criminal defendant is entitled to the appointment of a non-psychiatric expert.

For all of the reasons stated above, Bergman is not entitled to federal habeas relief on her claim that the trial court violated her right to due process when it refused to appoint a toxicology expert witness for her.

IV

In order to appeal the Court's decision, Bergman must obtain a certificate of appealability. To obtain a certificate of appealability, a prisoner must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). To demonstrate this denial, the applicant is required to show that reasonable jurists could debate whether the petition should have been resolved in a different manner, or that the issues presented were adequate to deserve encouragement to proceed further. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). A federal district court may grant or deny a certificate of appealability when the court issues a ruling on the habeas petition. *See Castro v. United States*, 310 F.3d 900, 901 (6th Cir. 2002).

The Court will **GRANT** Bergman a certificate of appealability limited to her claim that the state trial court violated her rights to due process and to a fair trial when it denied her pretrial motion for the appointment of a defense toxicology expert at public expense. The Sixth Circuit has not yet determined in a published decision whether *Ake* clearly establishes that a criminal defendant in Bergman's position has a constitutional right to the appointment of a non-psychiatric expert at the public's expense. That issue deserves further consideration on appeal. Bergman should be able to present to the Sixth Circuit all of her arguments seeking relief based upon the denial of her motion for the appointment of a toxicology expert at public expense.

However, the Court will **DENY** a certificate of appealability with respect to Bergman's other claims. Jurists of reason would not debate the Court's conclusion that Bergman has failed to demonstrate an entitlement to habeas relief on any of those claims. Nor do those claims warrant further consideration on appeal.

Finally, the Court **GRANTS** Bergman leave to proceed *in forma pauperis* on appeal. The standard for granting such leave is not as strict as the standard for certificates of appealability. *See Foster v. Ludwick*, 208 F.Supp.2d 750, 764 (E.D. Mich. 2002). While a certificate of appealability requires a substantial showing of the denial of a constitutional right, a court may grant *in forma pauperis* status if it finds that an appeal is being taken in good faith. *See id*. at 764-65; 28 U.S.C. § 1915(a)(3). In this case, an appeal could be taken in good faith. Accordingly, the Court **GRANTS** Bergman permission to proceed in forma pauperis on appeal.

V

For the reasons stated above, the Court (1) **DENIES WITH PREJUDICE** Bergman's petition for a writ of habeas corpus (ECF No. 1), (2) **GRANTS** Bergman a limited certificate of appealability as described above, and (3) **GRANTS** Bergman permission to appeal *in forma pauperis*.

IT IS SO ORDERED.

s/Matthew F. Leitman
MATTHEW F. LEITMAN
UNITED STATES DISTRICT JUDGE

Dated: June 4, 2021

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on June 4, 2021, by electronic means and/or ordinary mail.

s/Holly A. Monda
Case Manager
(810) 341-9761

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v LISA LYNNE BERGMAN, Defendant-Appellant.	FOR PUBLICATION September 29, 2015 9:10 a.m. No. 320975 St. Clair Circuit Court LC No. 13-002220-FC Advance Sheets Version

Before: TALBOT, P.J., and WILDER and FORT HOOD, JJ.

WILDER, J.

A jury convicted Lisa Lynne Bergman of two counts each of second-degree murder, MCL 750.317; operating a vehicle under the influence of intoxicating liquor or a controlled substance (OUIL) causing death, MCL 257.625(4); and operating a vehicle with a suspended license causing death, MCL 257.904(4). The trial court sentenced defendant, as a second-offense habitual offender, MCL 769.10, to concurrent prison terms of 25 to 50 years each for the second-degree murder convictions, and 5 to 22½ years for each conviction of OUIL and driving with a suspended license. Defendant appeals as of right. We affirm.

I

Defendant's convictions arise from a two-vehicle collision in Kimball Township in St. Clair County shortly before 2:00 a.m. on July 20, 2013. A witness to the scene of the accident testified that there was heavy rain and fog. Defendant was driving a Ford F-350 pickup truck in the eastbound lane of Lapeer Road when she crossed the centerline, veered into the westbound lane, and collided head-on with a GMC Sonoma S-10 pickup truck. Lieutenant Terpenning,[1] an expert in accident reconstruction, testified that there was "no question" in his mind that defendant's vehicle crossed the centerline into oncoming traffic. He did not observe anything to indicate that the S-10 pickup truck did anything improper or did "anything other than driv[e] down its intended lane of travel." The driver of the GMC truck, Russell Ward, and his passenger, Koby Raymo, both died from blunt traumatic injuries.

[1] Lieutenant Terpenning's first name does not appear in the record.

Defendant's blood alcohol concentration (BAC) was below the legal limit,[2] but she also tested positive for carisoprodol (trade name Soma, which is a muscle relaxant and not an opiate), meprobamate (the active metabolite of carisoprodol), oxycodone, and amphetamine. Although the levels of these drugs in her system were within the therapeutic range,[3] Dr. Michele Glinn, an expert in forensic toxicology and the effect of drugs and alcohol on the human body, testified that the drugs, other than amphetamine, were central nervous system depressants and combining them could magnify the effects and keep the drugs in the system longer. Glinn testified that, in particular, alcohol and Soma are a "bad combination." In Glinn's opinion, the drugs in defendant's system affected her ability to operate a motor vehicle.

At trial, over defendant's objection, the prosecution presented evidence of seven prior incidents in which defendant drove erratically, was passed out in her vehicle, or struck another vehicle while impaired or under the influence of prescription substances, such as carisoprodol or Soma, or was in possession of pills, such as Vicodin or Soma.[4] This evidence was offered for its relevance to the malice element of second-degree murder because it was probative of defendant's knowledge of how her substance abuse impaired her driving. Glinn opined that the current accident was the only incident in which defendant used alcohol in combination with other drugs.

Before trial, the prosecutor filed notice of its intent to introduce evidence of defendant's prior acts under MRE 404(b). The prosecutor asserted that defendant's prior conduct showed that she knew that consuming drugs and alcohol impaired her ability to safely operate a vehicle, and the evidence was relevant to prove the necessary element of malice for second-degree murder. Defendant moved to exclude evidence of her prior acts and to strike the prosecutor's filing of notice. She argued that the police reports filed with the prosecutor's notice of intent were inadmissible hearsay, and she contended that the filing of these reports would give the media access to unproven charges and deprive her of a fair trial. Defendant further argued that the prior incidents were not admissible under MRE 404(b) because the court rule was intended to apply only to preplanned criminal activity, not to unintentional conduct. Lastly, defendant argued that if the prior incidents were admitted, she would lose her right to have her guilt or innocence determined on the facts of the case. She asserted that a limiting instruction would not be sufficient to prevent any prejudice.

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[2] Defendant's BAC measured from blood samples taken at the hospital after the accident was 52 milligrams per deciliter (.052 grams per 100 milliliters). There was testimony that this would be equivalent to a ".04 whole blood result[]." The sample measured by the State Police revealed a BAC of .01 grams per 100 milliliters.

[3] According to expert testimony, defendant's carisoprodol level was within the therapeutic range and her meprobamate level was possibly within the therapeutic range, although the expert could not say for certain.

[4] This other-acts evidence is discussed more fully in Part VI of this opinion.

The prosecutor argued that in all of the prior incidents, defendant had carisoprodol, or Soma, and its metabolite, meprobamate, in her system.[5] In a majority of the cases, defendant had hydrocodone (Vicodin) in her system. The instant case involved the opiate oxycodone (Oxycontin). In all but one prior incident, defendant was in possession of various pills, including Soma and Vicodin. The prosecutor argued that these incidents established a pattern of behavior in which defendant ingested controlled substances and drove her vehicle, despite knowing the risk of doing so. The prosecutor also argued that defendant's persistence in this pattern clearly demonstrated a lack of mistake or accident, and showed that she knowingly engaged in behavior that created a high risk of death or serious harm to others. As such, the prosecutor contended, the evidence was relevant to prove the requisite degree of malice for second-degree murder.

At the hearing on this motion, defendant argued that the "gratuitously filed" police reports filed in this matter should be struck. Defendant argued that if the prosecutor was permitted to introduce evidence of the other cases, "we will be fighting . . . perhaps up to five simultaneous cases all at the same time in the Circuit Court," which would result in a "prejudicial effect . . . beyond any possible curative jury instruction[.]" Defendant argued that knowledge, accident, and absence of mistake were irrelevant when there was no allegation that defendant committed an intentional act. The trial court denied the defendant's motion, concluding that knowledge and absence of mistake were at issue and the prosecutor had a legitimate purpose in admitting the evidence "to show that this particular Defendant had knowledge of how these particular drugs affect her and how it affects her ability to drive . . . ." The trial court agreed to give a cautionary instruction if requested.

Defendant also moved for appointment of an expert witness at public expense. She argued that the accuracy and interpretation of the State Police laboratory tests were critical issues in the case, and claimed that she would be deprived of a "meaningful defense" unless an independent expert determined the accuracy and relevance of the "purported findings" in the laboratory reports. The cost of an independent examination of each test result was $1,500. A retest of what defendant referred to as "Sample B" was $760. Defendant argued that, at a minimum, she required an expert evaluation of her blood test results on the night of the fatal collision and the Sample B blood draw. She asserted that she was indigent and unable to pay these costs.

The prosecutor argued in response that the prosecutor's endorsement of an expert witness does not automatically entitle an indigent defendant to a court-appointed expert. Defendant also failed to allege any irregularity or deficiency with respect to the State Police Crime Lab's methods or protocols that would establish a genuine need for a defense expert.

At the hearing on this motion, defense counsel stated that he needed an expert to advise him on reviewing the toxicology reports and the "B sample." He explained that two samples are taken: the A sample, which is analyzed by the forensic lab, and the B sample, which is reserved

[5] Contrary to the prosecutor's argument below, the evidence at trial did not establish that defendant was under the influence of Soma during the January 1, 2008 incident, although she was in possession of Soma pills.

for later testing. He asserted that the prosecutor could not reasonably argue that toxicology reports were relevant to the prosecution's case, but not relevant to the defense. The prosecutor responded that defendant's motion did not include arguments about relevance and interpretation of lab results. Rather, defendant's motion was based on reviewing methods and protocols to ensure that the State Police Crime Lab used proper methods, and a defendant is not entitled to an expert merely because the prosecutor relies on an expert, but instead must establish a "sufficient nexus" between appointment of an expert and a potential flaw in the prosecution's expert evidence. Defense counsel replied that he could not determine whether protocols were followed. The trial court stated that the prosecutor was making every effort to provide the "instrumental data" to the defense for review and analysis. The trial court agreed with the prosecutor that defendant had not established a sufficient nexus justifying further testing or duplicate testing to see if the same result would be obtained. The court indicated that it was unwilling to appoint at public expense an expert to duplicate the prosecution's forensic testing, but it did not rule out the appointment of a consultant-type expert to assist in reviewing the existing data and materials from the prosecution.

Also before trial, defendant moved for appointment of an investigator "to interview witnesses who were in a position to observe the defendant prior to and immediately following the collision." Defendant needed the investigator because defense counsel's attempts to perform an investigation had not yet yielded results. Defendant subsequently withdrew this motion after the trial court granted an adjournment of trial to allow defense counsel more time for preparation.

In another pretrial motion, the prosecutor sought to exclude evidence of the deceased victims' toxicology reports. The prosecutor noted that Ward's toxicology report indicated that he had a BAC of 0.054 grams per 100 milliliters, and 6.2 nanograms per milliliter of delta-9 THC and 17 nanograms per milliliter of delta-9 carboxy THC in his bloodstream. His passenger, Koby Raymo, had a BAC of 0.110 grams per 100 milliliters, and also 7.5 nanograms per milliliter of delta-9 THC and 10 nanograms per milliliter of delta-9 carboxy THC in his bloodstream. The prosecutor argued that this evidence should be excluded because it was not relevant and it was unduly prejudicial. Raymo's toxicology results were irrelevant because he was a passenger and could not have contributed to the accident. Ward's toxicology results were irrelevant because the evidence clearly established that defendant crossed the centerline and struck Ward's vehicle head-on, with no negligence by Ward. Finally, the prosecutor argued that any probative value of the evidence was outweighed by the danger of unfair prejudice, misleading the jury, and confusion of the issues.

Defendant argued in response that Ward's toxicity levels were relevant to the issues of fault and causation. At the hearing on the motion, defense counsel argued that the other driver had "therapeutic levels" of the opiate pain reliever Tramadol and benzodiazepine. The trial court excluded the evidence on the basis that there was no legitimate question of fact regarding the proximate cause of the accident. At trial, defense counsel conducted voir dire examination of Dr. Mary Pietrangelo, the deputy medical examiner who performed autopsies on Ward and Raymo, in order to create a record of excluded testimony. Pietrangelo testified that Ward's ethanol level was below the legal limit, his level of Tramadol (a pain medication) was within a therapeutic dosage, and he was exposed to marijuana or a similar substance, but she could not determine the level of exposure. Pietrangelo ruled out those substances as contributing factors to his manner of death. Defense counsel then renewed his motion to admit Ward's toxicology results. He argued

that they were relevant to show that Ward was unable to remain alert and react to sudden emergencies. The trial court stated that if Ward's conduct was a factor in the proximate cause of his death, "that does not necessarily negate or nullify the conduct of Ms. Bergman if the facts support what it is that she's being accused of." The trial court concluded that in order for such evidence to be potentially admissible, there would have to be something "fairly substantial in terms of the detail of this accident that would suggest that Mr. Ward was somehow a cause of the accident." While the trial court did not rule out admitting the evidence of Ward's toxicology after development of the testimony, it was never admitted.

After the prosecution rested its case, defendant moved for a directed verdict regarding the two second-degree murder charges. The trial court denied the motion.

The jury found defendant guilty of both counts of second-degree murder, both counts of OUIL causing death, and both counts of driving with a suspended license causing death. At sentencing, defendant objected to the scoring of 50 points for offense variable (OV) 3, but the trial court found that 50 points were properly assessed. Defendant also objected to the scoring of OV 9, but the trial court found that 100 points were properly assessed. Defendant objected to the scoring of 25 points for OV 6, but the trial court found that the assignment of 25 points was proper. Next, defendant objected to the scoring of 25 points for OV 13, and the trial court agreed that it should be scored at zero points. Defendant argued that OV 17 should be scored at zero points and the prosecution agreed. According to the sentencing information report, OV 5 was scored at 15 points, and OV 18 was scored at five points. Defendant's total OV score was 195 points, and her prior record variable (PRV) score was 37 points, placing her in OV level III (100+ points) and PRV level D (25-49 points) of the applicable sentencing grid, MCL 777.61. The trial court concluded from these scores that defendant's sentencing guidelines range was 270 to 562 months or life, as enhanced for a second-offense habitual offender, and sentenced defendant to concurrent prison terms of 25 to 50 years each for the second-degree murder convictions, and 5 to 22½ years for each conviction of OUIL causing death and driving with suspended license causing death.

II

Defendant first contends that the trial court erred by excluding evidence of intoxicants and controlled substances in the bloodstream of Ward, the driver of the other vehicle, on the basis that the evidence was relevant to establishing that Ward may have been negligent and that defendant's own conduct did not rise to the level of depraved indifference for human life. We disagree.

We review preserved claims of evidentiary error for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Id*. at 217.

"Generally, all relevant evidence is admissible at trial," and "[e]vidence which is not relevant is not admissible." *People v Powell*, 303 Mich App 271, 277; 842 NW2d 538 (2013) (quotation marks and citations omitted); see also MRE 402. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the

determination of the action more probable or less probable than it would be without the evidence." MRE 401; see also *People v McLaughlin*, 258 Mich App 635, 665; 672 NW2d 860 (2003). "Relevance involves two elements, materiality and probative value. Materiality refers to whether the fact was truly at issue." *People v Benton*, 294 Mich App 191, 199; 817 NW2d 599 (2011) (quotation marks and citation omitted). Evidence is probative if it "tends to make the existence of any fact that is of consequence of the determination of the action more probable or less probable than it would be without the evidence[.]" *People v Feezel*, 486 Mich 184, 197; 783 NW2d 67 (2010) (opinion by CAVANAGH, J.) (quotation marks and citation omitted).

In *Feezel*, the defendant struck and killed a pedestrian with his car. In dark and heavily rainy conditions, the victim was walking in the middle of an unlit, five-lane road, with his back to oncoming traffic. The victim was "extremely intoxicated" at the time of the accident with a blood alcohol content of 0.268 grams per 100 milliliters of blood, or higher. The defendant's blood alcohol content was 0.091 to 0.115 grams per 100 milliliters, and marijuana was detected in his blood. *Feezel*, 486 Mich at 188-189 (opinion by CAVANAGH, J.). The defendant was charged with failing to stop at the scene of an accident that resulted in death, MCL 257.617(3); operating while intoxicated, second offense, MCL 257.625(1); and operating a motor vehicle with the presence of a controlled substance in his body, causing death, MCL 257.625(4) and (8). *Id*. at 187-188. The defendant argued on appeal that the trial court abused its discretion by granting the prosecutor's motion in limine to preclude evidence related to the victim's intoxication. *Id*. at 189, 191. Our Supreme Court concluded that the evidence was relevant to the issue of causation. *Id*. at 191. The Court reviewed the concept of proximate cause, observing:

> Proximate causation "is a legal construct designed to prevent criminal liability from attaching when the result of the defendant's conduct is viewed as too remote or unnatural." If the finder of fact determines that an intervening cause supersedes a defendant's conduct "such that the causal link between the defendant's conduct and the victim's injury was broken," proximate cause is lacking and criminal liability cannot be imposed. Whether an intervening cause supersedes a defendant's conduct is a question of reasonable foreseeability. Ordinary negligence is considered reasonably foreseeable, and it is thus not a superseding cause that would sever proximate causation. In contrast, "gross negligence" or "intentional misconduct" on the part of a victim is considered sufficient to "break the causal chain between the defendant and the victim" because it is not reasonably foreseeable. Gross negligence, however, is more than an enhanced version of ordinary negligence. "It means wantonness and disregard of the consequences which may ensue . . . ." "Wantonness" is defined as "[c]onduct indicating that the actor is aware of the risks but indifferent to the results" and usually "suggests a greater degree of culpability than recklessness . . . ." Therefore, while a victim's negligence is not a defense, it is an important factor to be considered by the trier of fact in determining whether proximate cause has been proved beyond a reasonable doubt. [*Id*. at 195-196 (citations omitted).]

The Court concluded that, because the prosecution was required to prove the element of causation beyond a reasonable doubt, evidence of the victim's BAC was material. *Feezel*, 486

Mich at 198 (opinion by CAVANAGH, J.). The Court held that the evidence was "highly probative of the issue of gross negligence, and therefore causation, because the victim's intoxication would have affected his ability to perceive the risks posed by his conduct and diminished his capacity to react to the world around him." *Id*. at 199. The Court acknowledged that "being intoxicated, by itself, is not conduct amounting to gross negligence." *Id*. However, examining the specific circumstances of that case, the Court determined that "the proffered superseding cause was the victim's presence in the middle of the road with his back to traffic at night during a rain storm with a sidewalk nearby." *Id*. Accordingly, "the proofs were sufficient to create a jury-submissible question about whether the victim was grossly negligent, and the victim's high level of intoxication would have aided the jury in determining whether the victim acted with 'wantonness and a disregard of the consequences which may ensue . . . .' " *Id*. (citation omitted). The Court also importantly noted:

> Depending on the facts of a particular case, there may be instances in which a victim's intoxication is not sufficiently probative, such as when the proofs are insufficient to create a question of fact for the jury about whether the victim was conducting himself or herself in a grossly negligent manner. [*Id*. at 198-199.]

Applying *Feezel* to the instant case, we conclude that the excluded evidence is not probative of an intervening or superseding cause that could break the causal link between defendant's conduct and the victims' deaths. Unlike the pedestrian in *Feezel*, who unnecessarily placed himself in the path of oncoming traffic in conditions of poor visibility, there was no evidence that the victims in this case had placed themselves in a hazardous situation at the time of the collision. The evidence established that defendant's vehicle crossed the centerline and struck the GMC truck head-on. There was no evidence that Ward was not properly driving within his marked lane, or that Ward's vehicle would not have safely passed defendant if defendant had not crossed the centerline in front of Ward, presenting a serious and unexpected hazard. Thus, there was no evidence that Ward did anything that contributed to the accident in a way that would establish that he was negligent or grossly negligent and by his conduct was an intervening cause of the accident. Although defendant speculates that Ward's consumption of controlled substances impaired his ability to react and avoid the accident, a driver's failure to avoid a vehicle that suddenly crosses the median directly in the path of oncoming traffic does not constitute gross negligence breaking the causal link. An accident victim's inability to protect himself and others from the consequences of another person's unexpected introduction of a serious hazard does not constitute an intervening cause severing the causal chain between the defendant and the victim.

Defendant also argues that Ward's intoxication was relevant to her defense of the second-degree murder charge because it would have shown that she did not have the requisite level of intent. "[T]he relationship of the elements of the charge, the theories of admissibility, and the defenses asserted governs what is relevant and material." *Powell*, 303 Mich App at 277 (citation and quotation marks omitted). The elements of second-degree murder are: "(1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death." *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007). "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v Goecke*,

457 Mich 442, 464; 579 NW2d 868 (1998). "The prosecution is not required to prove that the defendant actually intended to harm or kill. Instead, the prosecution must prove the intent to do an act that is in obvious disregard of life-endangering consequences." *People v Werner*, 254 Mich App 528, 531; 659 NW2d 688 (2002) (quotation marks and citation omitted). In *Werner*, this Court addressed circumstances in which intoxicated driving resulting in a fatality rises to the level of second-degree murder:

> We also recognize that *Goecke* held that not every intoxicated driving case resulting in a fatality constitutes second-degree murder. However, the evidence in this case disclosed "a level of misconduct that goes beyond that of drunk driving." This is not a case where a defendant merely undertook the risk of driving after drinking. Defendant knew, from a recent prior incident, that his drinking did more than simply impair his judgment and reflexes. He knew that he might actually become so overwhelmed by the effects of alcohol that he would completely lose track of what he was doing with his vehicle. If defendant knew that drinking before driving could cause him to crash on boulders in front of a house, without any knowledge of where he was or what he was doing, he knew that another drunken driving episode could cause him to make another major mistake, one that would have tragic consequences. [*Werner*, 254 Mich App at 533 (citations omitted).]

Thus, the offense of second-degree murder is committed when the defendant has knowledge of *her* own propensity to create a notably severe hazard when driving while intoxicated, and the victim's state of intoxication is irrelevant to the defendant's knowledge of her own susceptibility to hazardous driving. We find no basis to depart from the intervening-cause analysis articulated in *Feezel* in a case such as this, a prosecution for second-degree murder, when the evidence does not support the theory that the victim broke the chain of causation stemming from the defendant's conduct. Accordingly, we conclude that the trial court did not abuse its discretion in excluding as irrelevant the evidence of Ward's alcohol and substance exposure.

III

Defendant next argues that she was denied due process of law and is entitled to a new trial because the trial court erroneously denied her motion for appointment of a toxicology expert at public expense. We disagree.

We review the trial court's decision whether to appoint an expert for an abuse of discretion. *People v Tanner*, 469 Mich 437, 442; 671 NW2d 728 (2003).

> MCL 775.15 authorizes payment for an expert witness, provided that an indigent defendant is able to show "that there is a material witness in his favor within the jurisdiction of the court, without whose testimony he cannot safely proceed to trial . . . ." If the defendant makes this showing, the judge, "in his discretion," may grant funds for the retention of an expert witness. A trial court is not compelled to provide funds for the appointment of an expert on demand.

> To obtain appointment of an expert, an indigent defendant must demonstrate a nexus between the facts of the case and the need for an expert. It is not enough for the defendant to show a mere possibility of assistance from the requested expert. Without an indication that expert testimony would likely benefit the defense, a trial court does not abuse its discretion in denying a defendant's motion for appointment of an expert witness. [*People v Carnicom*, 272 Mich App 614, 617; 727 NW2d 399 (2006) (citations omitted).]

Defendant relies on *Ake v Oklahoma*, 470 US 68, 77; 105 S Ct 1087; 84 L Ed 2d 53 (1985) (quotation marks and citation omitted), in which the United States Supreme Court held that "[m]eaningful access to justice" and fundamental fairness require that indigent defendants be afforded, at state expense, the "basic tools of an adequate defense or appeal[.]" This Court recognized *Ake* in *People v Leonard*, 224 Mich App 569, 580-581; 569 NW2d 663 (1997), and still concluded that "a defendant must show a nexus between the facts of the case and the need for an expert." *Id*. at 582.

We conclude that *Ake* does not require appointment of a defense expert without a demonstration of a nexus between the need for an expert and the facts of the case. Here, defendant failed to establish the requisite nexus. She asserted that toxicology evidence was a critical part of the prosecution's case, but she did not explain why she could not safely proceed to trial without her own expert. See MCL 775.15. She did not establish why the objective results of blood analysis might be unreliable. She made no offer of proof that an expert could dispute the prosecution experts' opinions regarding the side effects of prescription medications and their contribution to impaired driving. Defendant failed to establish that expert testimony would likely benefit her case. A mere possibility that the expert would have assisted the defendant's case is not sufficient. *Carnicom*, 272 Mich App at 617. Accordingly, the trial court did not abuse its discretion by denying defendant's motion.

IV

Defendant also argues that the trial court erred by denying her motion for appointment of an investigator. Although defendant moved for the appointment of a defense investigator, defendant withdrew the motion before it was decided. By voluntarily withdrawing her motion, defendant waived her right to a defense investigator. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (waiver is the intentional relinquishment or abandonment of a known right). A waiver extinguishes any error, leaving no error to review. *Id*.

V

Defendant next argues that her convictions for multiple counts of second-degree murder, OUIL causing death, and driving with a suspended license causing death in connection with the death of each victim violated her double jeopardy protections under the United States and Michigan Constitutions. US Const, Am V; Const 1963, art 1, § 15. We disagree.

Because defendant did not raise this double jeopardy issue in the trial court, review is limited to plain error affecting substantial rights. *People v Meshell*, 265 Mich App 616, 628; 696 NW2d 754 (2005). "The double jeopardy clauses of the United States and Michigan

constitutions protect against governmental abuses for both (1) multiple prosecutions for the same offense after a conviction or acquittal and (2) multiple punishments for the same offense." *People v Calloway*, 469 Mich 448, 450; 671 NW2d 733 (2003). "A dual prosecution and conviction of a higher offense and a lesser cognate offense are permissible where the Legislature intended to impose cumulative punishment for similar crimes, even if both charges are based on the same conduct." *Werner*, 254 Mich App at 535. In *Werner*, this Court squarely held that dual convictions for OUIL causing death and second-degree murder do not violate the double jeopardy clauses, explaining:

> In *People v Kulpinski*, 243 Mich App 8, 620 NW2d 537 (2000), this Court found no double jeopardy implications where a defendant was convicted of both OUIL causing death and involuntary manslaughter, MCL 750.321. Because the Legislature intended for the two statutes to enforce distinct societal norms, and because each statute contained an element not found in the other, the Court concluded that multiple punishments were permissible. *Id*. at 18-24; see also *People v Price*, 214 Mich App 538; 543 NW2d 49 (1995). This reasoning applies with equal force to dual convictions of second-degree murder and OUIL causing death. If the Legislature intended for the OUIL causing death statute to enforce societal norms that are distinct from the societal norms enforced by the involuntary manslaughter statute (grossly negligent conduct), it clearly also intended the OUIL statute to enforce societal norms other than those enforced by the second-degree murder statute (proscribing wanton conduct likely to cause death or great bodily harm). *Id*. at 543-544; *Kulpinski*, *supra* at 22-23. Moreover, the OUIL causing death statute and second-degree murder statute each contain an element not found in the other. The OUIL causing death statute includes the element of operating a motor vehicle with a specified blood alcohol level, but not the element of malice; the converse is true of the second-degree murder statute. *Price*, *supra* at 545-546; *Kulpinski*, *supra* at 23-24. Accordingly, defendant's convictions of both second-degree murder and OUIL causing death do not violate the Double Jeopardy Clauses. [*Werner*, 254 Mich App at 535-536.]

Although the *Werner* Court did not address double jeopardy concerns with respect to convictions of second-degree murder and driving with a suspended license causing death, or convictions of OUIL causing death and driving with a suspended license causing death, the analysis in *Werner* applies with equal force to these combinations of convictions. The statutes governing second-degree murder and driving with a suspended license causing death enforce distinct societal norms, and their respective elements of malice and lack of a valid operator's license are distinctive to each. See *Smith*, 478 Mich at 70; MCL 257.904(4). Similarly, the OUIL and suspended-license statutes enforce distinct societal norms, and their respective elements of intoxication while driving and lack of a valid operator's license are distinctive to each. See MCL 257.625(4); MCL 257.904(4).[6] Accordingly, defendant's multiple convictions do not violate the double jeopardy clauses.

[6] Defendant concedes that this Court is bound by *Werner*.

VI

Defendant next argues that the trial court erred by admitting evidence of her prior acts under MRE 404(b)(1). We disagree.

We review the trial court's decision to admit evidence for an abuse of discretion. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). MRE 404(b)(1) prohibits "[e]vidence of other crimes, wrongs, or acts" to prove a defendant's character or propensity to commit the charged crime, but permits such evidence for other purposes, "such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material . . . ." Evidence of other crimes or bad acts is admissible when it is offered for a proper purpose, MRE 404(b)(1); it is relevant under MRE 402; and its probative value is not substantially outweighed by unfair prejudice, MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

In *Werner*, 254 Mich App at 533-534, this Court held that evidence that the defendant had previously experienced an alcohol-induced blackout while driving, during which he "crash[ed] on boulders in front of a house, without any knowledge of where he was or what he was doing," was admissible under MRE 404(b)(1) in a case in which the defendant was charged with second-degree murder, OUIL causing death, OUIL causing serious impairment of a body function, MCL 257.625(5), and driving with a suspending license, second offense, MCL 257.904(1). This Court held that the evidence was properly admitted to show knowledge and absence of mistake, and was probative of the malice element for second-degree murder because it showed "that defendant knew that heavy drinking could lead to a blackout, and that a blackout could lead to defendant's driving without any understanding of what he was doing." *Id*. at 539-540. The evidence also was relevant because the defendant's previous blackout while driving "made it more probable than not that he was aware this could happen to him." *Id*. at 540. This Court further concluded that the probative value of the evidence outweighed any prejudicial effect because the prior incident involving a one-vehicle accident with no injuries to anyone was a minor incident in comparison to the charged offense, in which the defendant drove the wrong way on a freeway and caused the death of a young woman and seriously injured a young man. In addition, the trial court gave an appropriate cautionary instruction. *Id*.

We conclude that *Werner* is directly on point. The prior acts evidence here involved incidents in which defendant either drove unsafely, was passed out in her vehicle, or was involved in an accident while impaired or under the influence of prescription substances, or was in possession of pills, such as Vicodin and Soma. This evidence was properly admitted to show defendant's knowledge and absence of mistake, and was relevant to the malice element for second-degree murder because it was probative of defendant's knowledge of her inability to drive safely after consuming prescription substances. And, because the prior incidents were minor in comparison to the charged offenses involving a head-on collision that caused the deaths of two individuals, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice under MRE 403. Lastly, the trial court gave an appropriate cautionary instruction to reduce any potential for prejudice.

We reject defendant's assertion that, under *Old Chief v United States*, 519 US 172; 117 S Ct 644; 136 L Ed 2d 574 (1997), there was no need to introduce the prior acts evidence because she could have stipulated that her license was suspended. In *Old Chief*, the United States Supreme Court held that the trial court abused its discretion in rejecting the defendant's offer to stipulate that he had a prior felony conviction, a necessary element of the charged offense of felon in possession of a firearm. *Id*. at 174. The Court observed that "evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice to the defendant" and that the defendant's admission of a prior conviction was not only sufficient to prove that element of the charged offense, but also was "seemingly conclusive evidence of the element." *Id*. at 185-186. The Court acknowledged that "the accepted rule that the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away rests on good sense," but reasoned that the "recognition that the prosecution with its burden of persuasion needs evidentiary depth to tell a continuous story has . . . virtually no application when the point at issue is a defendant's legal status, dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior charged against him." *Id*. at 189-190.

In *People v Crawford*, 458 Mich 376, 378; 582 NW2d 785 (1998), our Supreme Court considered the admission of the defendant's prior conviction of possession with intent to deliver cocaine in his jury trial for possession with intent to deliver cocaine. Citing *Old Chief*, the Court concluded that the defendant's intent was in issue "[b]ecause the prosecution must carry the burden of proving every element beyond a reasonable doubt, regardless of whether the defendant specifically disputes or offers to stipulate any of the elements . . . ." *Crawford*, 458 Mich at 389. In *People v McGhee*, 268 Mich App 600, 610 n 3; 709 NW2d 595 (2005), this Court, citing *Crawford*, rejected the defendant's argument that the prosecutor should not be permitted to introduce prior acts evidence to prove that the defendant acted with the requisite intent to distribute drugs.

Here, defendant's offer to stipulate that she had a suspended license, while being conclusive of a necessary element for that offense, would not have been conclusive of or a sufficient substitute for the malice element of second-degree murder, for which the evidence was offered. Proof that defendant intentionally acted "in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm," *Goecke*, 457 Mich at 464, is not a matter of legal status. Even a stipulation to the fact of prior charges or convictions would not have been conclusive of or a sufficient substitute for the malice element. Defendant's prior incidents revealed that she already had several close calls involving drug-impaired driving, and thus should have recognized that she could not safely drive while using drugs. Accordingly, the trial court did not abuse its discretion by admitting the other-acts evidence.

VII

Finally, relying on *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013), and *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), defendant argues that judicial fact-finding at sentencing was improperly used to score OVs 3, 7,

9, and 19,[7] and thereby increase the floor of the guidelines minimum sentence range, in violation of her Sixth Amendment right to a jury trial. We disagree.

In *Apprendi*, 530 US at 490, the United States Supreme Court announced the general Sixth Amendment principle that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Alleyne*, 570 US ___; 133 S Ct at 2155; 186 L Ed 2d at 321, the Supreme Court extended this rule to mandatory minimum sentences. The Court held that "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." *Id*.

In *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), our Supreme Court recently addressed the application of the *Apprendi* and *Alleyne* rules to Michigan's sentencing guidelines. The Court concluded that Michigan's sentencing guidelines violate the Sixth Amendment to the extent that they allow a sentencing judge to find by a preponderance of the evidence facts that are used to score the offense variables and, thereby, to mandatorily increase the floor of the guidelines minimum sentence range. *Id*. at 399. To remedy this constitutional violation, the Court held that the guidelines are "advisory only." *Id*. The Court "sever[ed] MCL 769.34(2) to the extent that it is mandatory and [struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)." *Id*. at 391. The Court stated, however, that the guidelines remain "a highly relevant consideration in a trial court's exercise of sentencing discretion," *id*., and that sentencing judges remain obligated to determine the applicable guidelines range and to take the guidelines range into account when imposing a sentence, *id*. at 392.

The *Lockridge* Court further clarified that when, as in this case, the defendant did not object to the scoring of the offense variables at sentencing on *Apprendi*/*Alleyne* grounds, review is for plain error affecting substantial rights. *Lockridge*, 498 Mich at 392. The Court also discussed how that standard is to be applied in other cases. As relevant to this case, the Court stated:

> First, we consider cases in which (1) facts admitted by the defendant and (2) facts found by the jury were sufficient 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. In those cases, because the defendant suffered no prejudice from any error, there is no plain error and no further inquiry is required. [*Id*. at 394-395.]

In this case, the trial court scored the sentencing guidelines for defendant's second-degree murder conviction. Defendant's total OV score was 195 points and her PRV score was 37 points, placing her in OV level III (100+ points) and PRV level D (25-49 points). OV Level III is the highest level of offense severity on the applicable sentencing grid. MCL 777.61. Thus, as long as at least 100 OV points can be sustained on the basis of facts found by the jury beyond a

[7] We note that the trial court did not score OV 7 or 19.

reasonable doubt, defendant cannot establish prejudice from any error, and relief is not required. Defendant alleges that judicial fact-finding occurred in the scoring of OVs 3, 7, 9, and 19.[8]

The trial court assessed 50 points for OV 3, which is appropriate when (1) a victim was killed, (2) the "death results from the commission of a crime and the offense . . . involves the operation of a vehicle," and (3) "[t]he offender was under the influence of or visibly impaired by the use of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance." MCL 777.33(1)(b) and (2)(c)(*i*). Each of these facts was necessarily found by the jury beyond a reasonable doubt. The jury found defendant guilty of second-degree murder, which requires the death of a victim. The jury also found defendant guilty of OUIL causing death, which required the jury to find that defendant was operating a vehicle while under the influence of alcoholic liquor, a controlled substance, or other intoxicating substance or a combination thereof. MCL 257.625(1)(a). Thus, each of the facts necessary to support a 50-point score for OV 3 was necessarily found by the jury beyond a reasonable doubt. Accordingly, the trial court's scoring of OV 3 did not violate defendant's Sixth Amendment right to a jury trial.

The trial court also assessed 100 points for OV 9, which is appropriate when "[m]ultiple deaths occurred." MCL 777.39(1)(a). MCL 777.39(2)(b) indicates that 100 points are to be assessed only in homicide cases. The jury found defendant guilty of two counts each of second-degree murder. These verdicts reflect that the jury found beyond a reasonable doubt that multiple deaths occurred. Accordingly, the trial court's scoring of OV 9 did not violate defendant's Sixth Amendment right to a jury trial.

In sum, because facts found by the jury were sufficient to assess the minimum number of OV points necessary for defendant's placement in the D-III cell of the sentencing grid under which she was sentenced, there was no plain error and defendant is not entitled to resentencing or other relief under *Lockridge*.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Michael J. Talbot
/s/ Karen M. Fort Hood

[8] She does not, however, challenge the accuracy of the scoring of those OVs.