No. _____

IN THE

Supreme Court of the United States

JOHNNY TAYLOR,
Petitioner,
v.

JEFF TANNER, ACTING WARDEN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. If an attorney's deficiency is grave enough, criminal defendants do not need to demonstrate prejudice to prove ineffective assistance of counsel. In these cases, courts presume prejudice. One such deficiency is a complete denial of counsel at a critical stage. But circuit courts disagree on what makes a denial "complete." Some circuits hold that any act, no matter how perfunctory, renders a denial of counsel incomplete. Others recognize that denial can be "complete" even if counsel did something at some point during a critical phase. Here, the Sixth Circuit held that Johnny Taylor did not suffer a complete denial of counsel at the critical pre-trial investigatory phase even though his counsel did no investigation and met with Taylor once for 10 minutes the night before trial, despite having been appointed five months earlier. The Sixth Circuit reasoned that a single reference to a discovery request, the 10-minute meeting, and counsel's presence at the preliminary examination meant Taylor did not suffer a "complete" denial of counsel. Is it clearly established that a denial of counsel is "complete"—warranting a presumption of prejudice—when counsel performs only perfunctory, negligible acts during a critical period?

2. The state court denied Taylor's ineffective-assistance claim because it reasoned Taylor did not prove the factual predicate of his claim. However, that same court denied Taylor's request to gather more evidence to prove his claim, even though he demonstrated a prima facie basis for ineffective assistance of counsel. The state court created a Catch-22 based on its unreasonable application of clearly established law. Can a federal court order an evidentiary hearing as a form of habeas relief in and of itself?

LIST OF PARTIES

Petitioner Johnny Taylor ("Taylor") was the habeas petitioner in the district-court proceedings and the Appellant in the Sixth Circuit Court of Appeals. Respondent Jeff Tanner is the Acting Warden of the Gus Harrison Correctional Facility in Lenawee County, Michigan, where Taylor is currently in prison. S.L. Burt was the respondent in the district-court proceedings, and Thomas Bell was the Appellee in the Sixth Circuit Court of Appeals.

CORPORATE DISCLOSURE STATEMENT

Taylor files this Petition as an individual. He is not a corporation.

LIST OF RELATED PROCEEDINGS

1. *People v. Taylor*, No. 2013-3884-FC (Cir. Ct. May 14, 2014) (state criminal trial)

2. *People v. Taylor*, No. 322629 (Mich. Ct. App. Nov. 17, 2015) (direct appeal of criminal conviction)

3. *People v. Taylor*, No. 153010 (Mich. June 28, 2016) (order denying leave to appeal)

4. *People v. Taylor*, No. 344898 (Mich. Ct. App. Oct. 17, 2018) (order denying motions to remand and leave to appeal)

5. *People v. Taylor*, No. 158810 (Mich. July 29, 2019) (order denying leave to appeal)

6. *Taylor v. Burt*, No. 1:17-cv-00855-RJJ-RSK (W.D. Mich. Mar. 4, 2021) (order denying petition for habeas corpus)

7. *Taylor v. Bell*, No. 21-1348 (6th Cir. Feb. 1, 2023) (opinion affirming denial of petition for habeas corpus)

8. *Taylor v. Bell*, No. 22A925 (U.S. Apr. 24, 2023) (granting application to extend time to file petition for a writ of certiorari)

TABLE OF CONTENTS

APPENDIX INDEX

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Johnny Taylor respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The court of appeals's opinion is unofficially reported at 2023 WL 1434057. [*See* App. A.] The district court's order, [*see* App. B], and the magistrate judge's report and recommendation, [*see* App. C], are unpublished.

JURISDICTION

The court of appeals entered its judgment on February 1, 2023. [App. A.] The court of appeals's mandate issued on February 23, 2023. [App. F.] This Court granted Taylor's Application for Extension of Time to File Petition for a Writ of Certiorari on April 24, 2023. *Taylor v. Bell*, No. 22A925. This petition is timely filed on June 1, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case arises from a petition of habeas corpus under 28 U.S.C. § 2254, [*see* App. G], asserting that Taylor received ineffective assistance of counsel in violation of the Sixth Amendment. The Sixth Amendment provides,

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

U.S. CONST. amend. VI.

STATEMENT OF THE CASE

I. INTRODUCTION

This case presents a circuit split and a novel Catch-22.

The circuit conflict arises from the phrase "complete denial of counsel." *United States v. Cronic*, 466 U.S. 648, 659 (1984). The Court has held that criminal defendants do not need to show prejudice in ineffective-assistance-of-counsel claims if there is a "complete denial of counsel . . . at a critical stage of his trial." *Id.* But the circuit courts disagree on what qualifies as a "complete" denial. Here, the Sixth Circuit held that any act—no matter how perfunctory—during the critical pre-trial period prevents application of the *Cronic*-prejudice presumption. Other circuits, however, acknowledge that mere presence and minimal acts during critical stages do not forgive an otherwise complete denial of counsel. Taylor's case, based on counsel's complete failure to investigate Taylor's defense, provides a compelling vehicle for the Court to resolve this issue.

The Catch-22 arises from the state court preventing Taylor from providing additional facts to prove his claim. Taylor's trial counsel did not investigate Taylor's case. When Taylor asked the state court to order an evidentiary hearing to develop the record on this lack of investigation, the state court said no. But when Taylor asked that same state court to rule that his counsel was ineffective, the state court held that Taylor did not develop a sufficient record. This Catch-22 resulted from an unreasonable application of clearly established federal law. The Sixth Circuit stated that it could order an evidentiary hearing as a remedy for this failure. The Court

should clarify that evidentiary hearings can function as a remedy for a habeas petition.

II. FACTUAL AND PROCEDURAL HISTORY

A. Taylor's counsel conducted no investigation and met with Taylor once for only 10-minutes on the eve of trial.

On December 26, 2013, Taylor was arrested on suspicion of armed robbery. [App. E at 50a.] Police followed footprints from the crime scene to Ms. Heather Banks's home and discovered Taylor there. [*Id.*] Police believed Taylor robbed a gas station, traveled almost a mile on foot to Ms. Banks's home—a woman the State alleged he barely knew—arrived after 2:00 AM, asked her for a ride, came in to make phone calls looking for a ride, and then hid in Ms. Banks's bedroom when the police arrived. [*Id.*]

At his preliminary examination on January 8, 2014, Taylor met his court-appointed counsel, Alfred Brandt. [*See* App. A at 7a.] Taylor did not see or hear from Brandt for five months, until the day before trial. [App. I at 72a.]

During those five months, Taylor repeatedly reached out to Brandt. [*Id.* at 72a–76a.] Taylor pled for Brandt to investigate evidence that (1) Taylor arrived at Ms. Banks's home well before the crime took place, not after 2:00 AM; (2) he had an extensive relationship with Ms. Banks; (3) he had a medical condition that made it impossible for him to travel from the crime scene to Ms. Banks's home in the time required for the State's narrative; and, (4) Ms. Banks's son, not Taylor, actually committed the crime. [*Id.* at 72a–74a.]

Brandt did not contact Taylor or follow any of these leads. [*See generally id.*] The only sign of an investigation in the record is a single reference to a discovery request Brandt made five days after the preliminary examination. [App. J at 84a.] The state court called the request "detailed," but the record does not demonstrate whether Brandt received any materials in response to this request, what the request was, and what he did with any material he may have received. [*See* App. E at 52a.] The record does show that Brandt never responded to Taylor or investigated any of the evidence to which Taylor pointed. [*See* App. I at 72a–82a.]

Brandt met with Taylor the day before trial for a total of 10 minutes. [*Id.* at 72a.] At this meeting, Taylor asked to review the video recordings of the robbery, which were mentioned at the preliminary examination. [*Id.* at 75a.] But Brandt stated that no videos existed. [*Id.*] This was not true, and surely should have been among any reasonable discovery Brandt requested. [*See id.*]

Brandt presented no opening statement, witnesses, or evidence at trial. [*Id.* at 76a.] Unsurprisingly, the jury found Taylor guilty, and sentenced him to 20 to 50 years. [App. E at 50a.]

B. The state appellate court rejected Taylor's ineffective-assistance-of-counsel claim because of a lack of facts.

On direct appeal, Taylor argued that he had received ineffective assistance of counsel and that prejudice should be presumed. [*See id.* at 51a–57a.] Taylor also requested a remand to the trial court for an evidentiary hearing, so he could place evidence on the record illustrating Brandt's deficiencies. [*See* App. D. at 48a.] Along with his request, Taylor submitted several affidavits demonstrating the kind of

evidence he could present at an evidentiary hearing demonstrating Brandt's constitutionally deficient performance. [*See* App. I.]

The state appellate court, however, denied Taylor's direct appeal and denied him the chance to put evidence on the record. [*See* App. D; App. E.] The state appellate court denied his evidentiary hearing request because he did not "demonstrate[] that further factual development of the record or an initial ruling by the trial court is necessary." [App. D at 48a.] But when that same court denied Taylor's appeal, it held that Taylor "failed to establish the factual predicate of his claim." [*See* App. E at 54a.] The court examined Taylor's arguments under the *Strickland* standard because it believed Taylor's claims "are premised on counsel's purported failures at specific points in the proceedings"—despite Brandt's failure to do any investigation over a five-month period. [*See id.* at 55a.] Further, while the state court noted that it had no obligation to consider Taylor's affidavits, it stated that the affidavits—which were intended to demonstrate *some* of the *types* of evidence Taylor would present at an evidentiary hearing—did not provide sufficient proof. [*Id.* at 54a.]

C. Taylor petitioned for and was denied habeas relief.

Taylor filed the at-issue habeas petition on October 8, 2019. [App. C at 24a.] The district court—adopting the full Report and Recommendation from the magistrate judge—denied Taylor's petition. [App. B; *see also* App. C.] The district court held that it could not presume prejudice because "[i]t is simply not possible to review the transcript of the trial and conclude that Petitioner suffered a complete

denial of counsel." [*See id.* at 30a.] Further, the district court reasoned the state court's analysis was "reasonable on its face." [*Id.* at 38a.]

The district court denied a certificate of appealability, [App. B at 18a] but the Sixth Circuit granted it, [App. H].

On February 1, 2023, the Sixth Circuit affirmed the district court's denial. [App. A.] ***First***, the Sixth Circuit held that it could not presume prejudice because Brandt's absence was not "*complete*." [*Id.* at 7a (emphasis in original).] Because Brandt met with Taylor before trial, submitted a discovery request, and was at the preliminary examination, he was not totally absent from pre-trial proceedings. [*Id.* at 7a–8a.] ***Second***, the Sixth Circuit held that the state court did not unreasonably apply *Strickland*. [*Id.* at 8a–12a.] It relied upon Brandt's request for discovery and reasoned that any failure to investigate could have been a strategic decision. [*Id.* at 9a–10a.] It also stated that there was no evidence demonstrating prejudice on the record. [*Id.* at 11a.] ***Finally***, the Sixth Circuit denied Taylor's request for an evidentiary hearing as a remedy for the state court's unreasonable application of clearly established law when denying his motion for remand. [*Id.* at 12a–13a.] The Sixth Circuit relied on the state court's determination that Taylor failed to establish the factual predicate of his claim, and "AEDPA's [the Anti-Terrorism and Effective Death Penalty Act] general bar against factfinding." [*Id.*]

This petition followed.

REASONS FOR GRANTING THE PETITION

The decision below demonstrates a long-existing circuit split and a novel Catch-22, both of which require correction.

I. THE COURT SHOULD ADDRESS THE *CRONIC* CIRCUIT SPLIT

The decision below illustrates how different circuit courts interpret what it means for a denial of counsel to be "complete" so as to presume prejudice. On the one hand, the Third, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits have held that any act, no matter how small, is enough for a denial to not be "complete." On the other hand, the Fifth and Ninth Circuits have recognized that a denial can be complete even when counsel does some act during a critical period. Further, the Second, Fourth, Sixth, and Ninth Circuits have recognized an exception for a "complete" denial limited to when counsel sleeps through a substantial portion of the trial. The Court should step in to state that it is clearly established that a denial of "counsel" is complete even if counsel performs minimal, perfunctory acts.

A. Courts disagree on when prejudice can be presumed for a "complete" denial of counsel.

In general, a criminal defendant suffers ineffective assistance of counsel if: (1) their counsel's performance was deficient, and (2) that deficiency prejudiced the defendant. *Stirckland v. Washington*, 466 U.S. 668, 687 (1984). However, in *Cronic*—decided the same day as *Strickland*—this Court announced that some deficiencies by trial counsel are so egregious that prejudice should be presumed. 466 U.S. at 658–60. The "[m]ost obvious" deficiency is "the complete denial of counsel." *Id.* at 659. This Court stated that if a defendant "is denied counsel at a critical stage of his trial," the trial is so fundamentally unfair that prejudice must be presumed. *Id.*

Since then, circuit courts have split on what qualifies as a "complete" denial at a critical stage.

The Third, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits have taken an extreme view of "complete." They hold that if counsel performs any act during the at-issue critical stage, then the denial of counsel is not "complete." The Third Circuit found that the *Cronic* presumption applied when court-appointed counsel did nothing during a competency hearing because they did not believe they were defendant's counsel, *Appel v. Horn*, 250 F.3d 203, 214–17 (3d Cir. 2001), and the *Cronic* presumption did not apply when counsel discussed the possibility of pleading with the defendant, as this was not "complete abandonment" during the critical pleading stage, *United States v. Nguyn*, 619 F. App'x 136, 138–140 (3d Cir. 2015). Similarly, the Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits have all stated that an absence from portions of a proceeding, even at a critical stage, is not a "complete" denial. *Glover v. Miro*, 262 F.3d 268, 276 (4th Cir. 2001) ("A finding of per-se prejudice for complete denial of counsel requires at a minimum that no lawyer be present at a critical stage of the proceedings."); *Schmidt v. Foster*, 911 F.3d 469, 481 (7th Cir. 2018) (The presence of an attorney—even though he could not participate in a proceeding—was a deprivation of counsel, but "the deprivation must be 'complete.'"); *Sweeney v. United States*, 766 F.3d 857, 861 (8th Cir. 2014) ("Although the absence occurred at a 'critical stage,' the brevity of the absence distinguishes this case from the '*complete* denial of counsel' discussed in *Cronic*."); *Acosta v. Raemisch*, 877 F.3d 918, 934 (10th Cir. 2017) ("The Sixth Amendment cases finding structural error generally involve a complete denial of counsel during the entire criminal proceeding. But here, while Mr. Acosta may have been denied counsel

at the two hearings, he had counsel for the remainder of his criminal proceeding, including trial and sentencing."); *United States v. Roy*, 855 F.3d 1133, 1144–48 (11th Cir. 2017) (Counsel's absence during portion of trial was not a "complete denial."). The Sixth Circuit clarified in this case that it accepts the strict interpretation shared by these circuits.

The Fifth and Ninth Circuits, on the other hand, have applied *Cronic* even when counsel does some act during a critical stage. The Fifth Circuit has held that counsel's absence during testimony regarding a defendant's alleged co-conspirators—but not the defendant—was a complete denial of counsel during a critical stage. *United States v. Russell*, 205 F.3d 768, 772 (5th Cir. 2000). The Ninth Circuit has also held that counsel abandoned his client at a critical stage when he essentially conceded the case during closing argument, despite being otherwise present during the trial and closing. *United States v. Swanson*, 943 F.2d 1070, 1075 (9th Cir. 1991).

Adding to the conflict, some circuits have held that a denial of counsel is complete if counsel sleeps through a substantial portion—but not all—of a trial. *See Tippins v. Walker*, 77 F.3d 682, 687 (2d Cir. 1996); *United States v. Ragin*, 820 F.3d 609, 619–20 (4th Cir. 2016); *Burdine v. Johnson*, 262 F.3d 336, 348 (5th Cir. 2001) (en banc); *Muniz v. Smith*, 647 F.3d 619, 624 (6th Cir. 2011); *Javor v. United States*, 724 F.2d 831, 833–834 (9th Cir. 1984) (pre-*Cronic*, same principle). These sleeping cases have been treated as distinct exceptions, but they further demonstrate that some circuits will treat a denial of counsel as "complete" even if the denial does not last an entire critical period. In these cases, the circuits presume prejudice because

"[t]he errors and lost opportunities may not be visible in the record." *Ragin*, 820 F.3d at 619. These failures may not have lasted an entire critical stage, but they were complete because they "undermine the fairness" of the criminal trial. *See Burdine*, 262 F.3d at 341. These cases recognize that the application of *Cronic* turns on "whether the circumstances are likely to result in such poor performance that an inquiry into its effects would not be worth the time." *Wright v. Van Patten*, 552 U.S. 120, 125 (2008).

B. Taylor's case is an ideal vehicle to resolve this split.

Taylor's counsel performed three perfunctory acts during the critical pre-trial period: he (1) attended the preliminary examination, (2) requested discovery, and (3) met with Taylor for 10 minutes. These acts did nothing to prepare Brandt to defend Taylor. The record shows that he did no other investigation during the pre-trial period. [*See* App. I.] Proper investigation is the cornerstone of the right to counsel, so Brandt's failure to properly investigate was particularly egregious. *See Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986) (noting that counsel's job is "to make the adversarial testing process work in the particular case" and that testing does not work if they fail to investigate).

Taylor's case, therefore, straddles the fence of the circuit split. Brandt performed *some* acts during the pre-trial period, but those acts were perfunctory at best. Deciding whether or not Brandt's minor acts remove the prejudice presumption demonstrates the clearly-established principles of this Court.

II. THE COURT SHOULD ADDRESS TAYLOR'S NOVEL CATCH-22.

Taylor's case presents a novel and significant Catch-22 that warrants correction.

The state appellate court simultaneously prevented Taylor from gathering additional evidence and faulted him for lacking evidence. The state appellate court's denial of his evidentiary hearing request was an unreasonable application of clearly established law, and the Sixth Circuit should have awarded an evidentiary hearing as a remedy.

The Sixth Circuit, however, did not. While exhibiting incorrect deference to the state court, the Sixth Circuit stated that there is a general bar on factfinding in the AEDPA context. [App. A at 12a–13a.] Accordingly, the Sixth Circuit determined it could not order an evidentiary hearing.

This case presents a unique question of how far that bar on factfinding extends. The Court has held that evidentiary hearings are inappropriate when deciding whether or not a state court unreasonably applied clearly established law. *See Cullen v. Pinholster*, 563 U.S. 170, 181–82 (2011). However, the Court has never addressed what happens if a state court unreasonably applied clearly established law when deciding what evidence could be presented in the first instance.

It is crucial that the Court address this issue now. It is inordinately difficult for a prisoner to successfully argue a failure-to-investigate ineffective-assistance-of-counsel claim in a habeas petition. Federal courts are bound by the record in the state proceedings, but failures to investigate inherently do not appear in the trial record. It is crucial, therefore, that state courts permit additional record evidence to

properly examine failure-to-investigate claims. To do so, at least in Michigan, the state court must determine whether or not a defendant has demonstrated that "further factual development of the record . . . is necessary . . . to review the issues on appeal." [App. D at 48a.] Therefore, Michigan state courts have to do an initial analysis of the ineffective-assistance-of-counsel claim to determine whether it needs more facts. If state courts conduct this analysis unreasonably, federal courts on habeas review should provide a remedy. But if federal courts incorrectly view evidentiary hearings as *never* allowed, even as a remedy, failure-to-investigate claims will be all but doomed in habeas proceedings.

Taylor's case demonstrates exactly why this scenario is so grave. When Taylor asked for an evidentiary hearing in state court, he provided affidavits demonstrating that he had a colorable ineffective-assistance-of-counsel claim. [*See* App. I.] The state court did not believe these affidavits were enough to prove Taylor's claim. But they were enough to show that a reasonable jurist might believe Taylor received ineffective assistance of counsel. [*See* App. H at 69a.] Indeed, faced with these affidavits and allegations, the Sixth Circuit granted Taylor a Certificate of Appealability. [*Id.* at 66a–70a.] Because Taylor presented enough evidence to demonstrate that he—at least on a prima facie level—suffered ineffective assistance of counsel, the state court should have granted Taylor's request for an evidentiary hearing. Because it did not order that hearing, it condemned Taylor's claim to fail for the very reason Taylor sought an additional hearing: he needed more evidence.

Without the Court's guidance on this issue, this Catch-22 threatens to grant state courts a license to deny evidentiary hearings without any kind of check in habeas review. The Court should address this issue now.

CONCLUSION

For the aforementioned reasons, the Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

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June 1, 2023

APPENDIX

APPENDIX A

NOT RECOMMENDED FOR PUBLICATION
File Name: 23a0065n.06

Case No. 21-1348

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Feb 01, 2023
DEBORAH S. HUNT, Clerk

JOHNNY TAYLOR,

Petitioner-Appellant,

v.

THOMAS BELL, Warden,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

OPINION

Before: SUTTON, Chief Judge; STRANCH and DAVIS, Circuit Judges.

DAVIS, Circuit Judge. Johnny Taylor was convicted by a Michigan jury of armed robbery in 2014. After the Michigan Court of Appeals affirmed his conviction, Taylor, as a state prisoner, filed a petition in federal court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The United States District Court for the Western District of Michigan denied the petition and Taylor has appealed that decision. To prevail in his petition, Taylor needed to demonstrate that the state court either acted contrary to or unreasonably applied federal law as set forth by the Supreme Court. Because he has shown neither, we **AFFIRM** the district court's judgment.

I.

In December of 2013, Taylor was arrested and charged with the armed robbery of a gas station in violation of Michigan Compiled Laws § 750.529. Maintaining his innocence, Taylor proceeded to trial with court-appointed counsel. The Michigan Court of Appeals summarized the night of the crime as follows:

> [I]n the early morning hours of December 26, 2013, an Admiral Gas Station in Jackson, Michigan was robbed. During the robbery, the gas station attendant was struck in the head multiple times and forced at gunpoint to give the robber the money in the cash register. The robber then absconded with the money from the register, including a marked $2 bill. At trial, the clerk could not identify defendant as the robber because defendant was bundled up in a green coat that concealed his face. Likewise, there was video footage of the robbery, some of which was played for the jury, but the perpetrator's face is not visible in the footage.
>
> Police responding to the robbery were able to follow tracks from the gas station to the home of Heather Banks, a woman with whom defendant was acquainted. Even though it was after 2:00 am and her five small children were sleeping in the home, Banks testified that she let defendant into her home to make a telephone call. Further, she testified that when police arrived, she told defendant that police were looking for him, at which time defendant ran into Banks's bedroom and hid. Banks gave police permission to enter the home. However, when ordered to exit the bedroom by police, defendant refused, prompting police to deploy a police dog to find defendant in the closet of Bank's bedroom. The dog latched on to defendant's arm; but, because defendant was wearing several layers of clothing, the dog did not puncture defendant's skin. In particular, defendant was wearing a green jacket like the jacket worn by the gas station robber.
>
> After the dog apprehended defendant, defendant was taken to the hospital to make sure he was uninjured. On the way to the hospital, defendant waived his *Miranda* rights and, in response to police questioning, defendant stated that "the gun is not in the house." Additionally, when police searched the bedroom where defendant had been hiding, in the box spring of Banks's bed, near a pair of reading glasses on the floor that did not belong to Banks or her family members, police found a BB gun that looked like a handgun as well as the money from the robbery, including the tracer $2 bill. At the hospital, defendant told police that he needed his reading glasses to read some documents.

People v. Taylor, No. 322629, 2015 WL 7288030, at *1 (Mich. Ct. App. Nov. 17, 2015) (per curiam).

At trial, Taylor's attorney did not make an opening statement or call any witnesses. The trial lasted for one day, and the jury deliberated for less than an hour before finding him guilty. At sentencing, Taylor continued to maintain his innocence and – for the first time – alerted the court to his trial counsel's alleged deficiencies. Specifically, Taylor claimed that during the five months leading up to trial, his lawyer visited him only one time for ten minutes on the eve of trial.

He also reported that his lawyer told him during this visit that there was no video recording of the crime; but then at trial the next day, the state showed the jury surveillance footage. Taylor's trial counsel did not respond to these claims on the record and the trial court did not address them further. The court went on to sentence Taylor to 20 to 50 years in prison as a habitual offender.

On direct appeal in the Michigan Court of Appeals, aided by appointed appellate counsel, Taylor raised claims of ineffective assistance of trial counsel. According to Taylor, his trial counsel's shortcomings were extensive: he failed to investigate or prepare for trial; failed to impeach the state's primary witness; failed to test evidence for DNA; and only met with Taylor once for ten minutes the day before trial. Taylor also identified several theories, potential witnesses, and pieces of evidence that he believed should have been, but were not, presented to the jury. Among the theories he offered was one featuring Ms. Banks's 17-year-old son as an alternative suspect; he alleged Facebook photos of the son holding guns would have supported this. Taylor also claimed to have a witness who would have testified that he knew Ms. Banks more than she had suggested at trial, and that medical records and his treating physician could have provided evidence of his inability to traverse the distance between the gas station and Ms. Banks's home in the alleged timeframe. In addition to his appellate counsel's brief, Taylor personally filed a supplemental *pro per* brief,[1] asserting additional grounds for relief—namely, that trial counsel's deficiencies fit the standards established in *United States v. Cronic*, 466 U.S. 648 (1984).

After the state responded to Taylor's claims, Taylor's appellate counsel filed an untimely motion to remand for an evidentiary hearing. Taylor attached several affidavits, including his own and those of Taylor's mother, Taylor's brother, and a cousin of Ms. Banks. In its ruling on the

[1] In Michigan, an indigent criminal defendant who "insists that a particular claim or claims be raised on appeal against the advice of counsel" has the right, under Standard 4 of Administrative Order 2004–6, 471 Mich. cii (2004) to file a supplemental brief in *propria persona* presenting the claims.

motion, the state appellate court reasoned that Taylor "has not demonstrated that further factual development of the record or an initial ruling by the trial court is necessary at this time in order for this [c]ourt to review the issues on appeal." Because the state appellate court denied Taylor's motion to remand for an evidentiary hearing, the affidavits were not included in the lower court record and were thus not properly before the court on appeal. *Taylor*, 2015 WL 7288030, at *3. Nonetheless, the court explained that even if it were to consider the affidavits, Taylor's claims for ineffective assistance of counsel would still fail. *Id.* at *4-5.

After exhausting his claims in state court, Taylor, proceeding *pro se*, brought a 28 U.S.C. § 2254 petition for a writ of habeas corpus in federal court claiming that the state appellate court unreasonably applied clearly established federal law—first when it did not apply the ineffective assistance of counsel standard established by *Cronic*, and again when it did not find his trial counsel ineffective under the more general standard established by *Strickland v. Washington*, 466 U.S. 668 (1984). A magistrate judge was first to review the petition and recommended denying it on the merits. On *de novo* review, the district court adopted the magistrate judge's report and recommendation as the opinion of the court and declined to issue a certificate of appealability. This court then granted Taylor a certificate of appealability on the issue of whether he was denied his Sixth Amendment right to effective assistance of trial counsel and appointed new counsel to pursue his appeal. *See* 28 U.S.C. § 2253(c).

II.

Taylor's habeas petition is governed by 28 U.S.C. § 2254 as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Under the AEDPA, a federal court conducting habeas review must presume that the state court's factual determinations are correct unless the petitioner rebuts that presumption by clear and convincing evidence. *James v. Brigano*,

470 F.3d 636, 643 (6th Cir. 2006) (citing 28 U.S.C. § 2254(e)(1)). Further, the court may only grant habeas relief to a state prisoner upon a finding that the state court's adjudication on the merits was contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court or was based on an unreasonable determination of facts considering the state court evidence. 28 U.S.C. § 2254(d). We review a district court's denial of a habeas petition *de novo*. *Miller v. Colson*, 694 F.3d 691, 695 (6th Cir. 2012).

Taylor asserts only that the Michigan Court of Appeals' decision was an unreasonable application of clearly established federal law, and that the district court therefore erred in finding otherwise. A state court unreasonably applies clearly established federal law when it successfully identifies the relevant legal principle but is unreasonable in its application of that principle to the facts of the case. *Williams v. Taylor*, 529 U.S. 362, 407-408 (2000). The relevant inquiry is not whether the state court's conclusion was merely incorrect. *Harrington v. Richter*, 562 U.S. 86, 103 (2011). Rather, a petitioner must establish that the state court's decision was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* Applying this highly deferential standard, the state appellate court's decision was not objectively unreasonable.

Cronic Framework

Taylor first argues that the state appellate court unreasonably applied the Supreme Court's decision in *Cronic* by declining to analyze his ineffective assistance of counsel claims under its framework. 466 U.S. at 659. *Cronic* addresses particularly egregious instances of deficient representation "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified," and a Sixth Amendment violation will be presumed. *Id.* at 658. One such instance is the "complete denial" of counsel at a "critical stage" of the proceedings. *Id.*

at 659. Taylor contends that his trial counsel's failure to meet with him until the day before trial is precisely the type of complete denial of counsel that the Court contemplated in *Cronic* and that this failure occurred during the critical pre-trial stage of proceedings. *See id.*

The Michigan Court of Appeals considered Taylor's *Cronic* argument and concluded that his claims were "premised on counsel's purported failures at specific points in the proceedings," and thus, "properly analyzed under *Strickland*, not *Cronic*." *Taylor*, 2015 WL 7288030, at *6. The district court likewise concluded that "[I]t is simply not possible to review the transcript of the trial and conclude that Petitioner suffered a complete denial of counsel." *Taylor v. Burt*, No. 1:17-cv-855, 2021 WL 541791 at *5 (W.D. Mich. Jan. 21, 2021).

We agree. The *Cronic* framework is quite narrow. *See Fla. v. Nixon*, 543 U.S. 175, 190 (2004). Indeed, "for *Cronic's* presumed prejudice standard to apply, counsel's 'failure must be *complete*.'" *Id.* (quoting *Bell v. Cone*, 535 U.S. 685, 696-97 (2002) (emphasis added)). That simply is not the case here. In addition to meeting with Taylor before trial, his trial counsel submitted a detailed demand for discovery, and represented him during the preliminary examination – both of which are pre-trial proceedings. Moreover, the state court found that the evidence in the record showed that defense counsel both investigated the case and put the prosecution's case to meaningful adversarial testing. These facts undermine Taylor's claim of complete absence. Cases warranting application of the *Cronic* standard have involved factual scenarios far more egregious than those underlying Taylor's petition. *See, e.g.*, *Mitchell v. Mason*, 325 F.3d 732, 744 (6th Cir. 2003) (applying *Cronic* where counsel *never* consulted with client and was suspended from practicing law for the month preceding trial); *Hunt v. Mitchell*, 261 F.3d 575, 583 (6th Cir. 2001) (applying *Cronic* where the court appointed an attorney for trial on the day trial was to begin and the attorney did not meet with defendant at all before the start of voir dire).

Trial counsel's alleged deficiencies during these pre-trial proceedings, in contrast, were not so complete as to trigger the discretely-applied *Cronic* framework. The state appellate court was thus not unreasonable in proceeding to a *Strickland* analysis.

Strickland Framework

We next turn to Taylor's claim that the state appellate court unreasonably applied the broader standard established in *Strickland*, 466 U.S. at 687, when it determined that he failed to establish his ineffective assistance of counsel claim. Under *Strickland*, a petitioner proceeding on a theory of ineffective assistance of counsel must affirmatively prove both that the attorney's performance was deficient, and that petitioner was prejudiced as a result. *Id*. As to deficient performance, the proper inquiry is whether counsel's representation sunk to the level of "incompetence under 'prevailing professional norms,'" as opposed to whether counsel simply departed from best, or even common practice. *Harrington*, 562 U.S. at 105 (quoting *Strickland*, 466 U.S. at 690). And as to prejudice, the court must determine if the petitioner has demonstrated a substantial likelihood of a different outcome were it not for counsel's deficiencies. *Id*. at 112.

Because *Strickland* sets out a general standard, courts are granted additional latitude in this context. *Knowles v. Mirzayanc*e, 556 U.S. 111, 123 (2009). Thus, review of a *Strickland* claim evaluated under § 2254's high deference to the state court is "doubly deferential." *Id.* What's more, trial counsel is afforded great discretion in matters of trial strategy. *Taylor*, 2015 WL 7288030, at *2-3, *6-7; *see Bell*, 535 U.S. at 698 (*Strickland* requires a defendant to "overcome the 'presumption that … the challenged action might be considered sound trial strategy.'" (quoting *Strickland*, 466 U.S. at 689)).

Applying these multiple layers of deference, the state appellate court's decision was not an unreasonable application of *Strickland*. First, the court correctly articulated the standard.

See Taylor, 2015 WL 7288030, at *2. It invoked the appropriate "performance" and "prejudice" prongs under *Strickland* and took each issue in turn. *Id*. at *2-7. The court engaged in a detailed analysis of Taylor's complaints about the deficiencies raised in both his appellate counsel's brief and in his own *pro per* brief. The list of deficiencies included Taylor's claims that his counsel failed to adequately analyze the footprints in the snow, fingerprints on the gun, and DNA on the coat he allegedly wore during the robbery. He also faulted counsel for failing to investigate his claim that Ms. Banks's son was the true perpetrator of the crime, returning home to stash the cash and the gun in his mother's room the night of the robbery—the same room where police apprehended Taylor. In its decision, the district court aptly captures why Taylor's claims fail; they are either contradicted or altogether unsupported by the record, or they present challenges to counsel's strategic decisions—decisions to which we owe great deference. *See Taylor*, 2021 WL 541791, at *9-10.

Without question, failing to investigate certain theories and witnesses can support a showing of deficient performance under some circumstances, as Taylor suggests. *See Porter v. McCollum*, 558 U.S. 30, 39 (2009) (concluding that counsel's performance was constitutionally deficient where counsel "did not even take the first step of interviewing witnesses or requesting records"). But Taylor fails to show such deficiencies. Instead, he provides conjecture and assertions that are either unsupported or directly disputed by the record. For instance, Taylor alleges that counsel failed to procure or test various evidentiary items and failed to investigate various leads or present expert witnesses. But, as observed by the state appellate court, Taylor's trial counsel served the prosecution with extensive discovery requests and the record does not reveal what trial counsel may have ultimately received in response to those requests or who counsel did or did not investigate. *Taylor*, 2015 WL 7288030, at *3, *7. And during trial, counsel was

prepared to cross-examine witnesses and to present closing arguments. *Id.* Indeed, during his closing argument, trial counsel pointed out that (1) Taylor was not identifiable in the video of the robbery; (2) there was no fingerprint evidence even though the robber did not wear gloves; (3) police did not attempt to match the footprints leading to Banks's house to Taylor's shoes; (4) Banks's testimony about Taylor making calls while at her home was not corroborated by telephone records; and (5) Taylor's green coat had no dog bite marks despite the police dog's role in his apprehension. *Id*. at *3 n.3.

Furthermore, in analyzing Taylor's insistence that his attorney should have tested available evidence, the state appellate court allowed for the possibility that counsel was simply engaging in sound trial strategy. *See Strickland*, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to…reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."). To be sure, trial counsel faced difficult decisions regarding whether to attempt to match the footprints and whether to test the jacket and gun for DNA – the results of which could have worked to Taylor's detriment. Thus, the state appellate court soundly reasoned that counsel may have strategically decided against having evidence tested in order to avoid further incriminating Taylor. *Taylor*, 2015 WL 7288030, at *6. This reasoning is buttressed by trial counsel's closing argument during which he used the state's failure to test certain items to cast doubt on the prosecution's case. *Id.* We agree with the district court's conclusion that the state appellate court's assessment of Taylor's trial counsel's performance appropriately weighed Taylor's allegations against relevant considerations, including lack of evidentiary support, contradicting record evidence, and deference to counsel's sound trial strategy. *Taylor*, 2021 WL 541791, at *10. Taken together, the state appellate court's analysis was reasonable, and well-grounded in the record.

Having determined that Taylor failed to establish his counsel's deficient performance under *Strickland*, the state appellate court still analyzed the prejudice prong. Notably, despite Taylor's numerous allegations about his counsel's deficiencies, he offers no proof of prejudice. For example, he points to no evidence in the record that the various lines of investigation he has suggested would have been fruitful, that expert witnesses he has identified would have testified as he claims, or that any DNA testing would have been favorable to his defense. Where "one is left with pure speculation on whether the outcome of the trial…could have been any different," prejudice has not been established. *Baze v. Parker*, 371 F.3d 310, 322 (6th Cir. 2004); *see also Tinsley v. Million*, 399 F.3d 796, 810 (6th Cir. 2005) ("In the absence of any evidence showing that [witnesses] would have offered specific favorable testimony, [petitioner] cannot show prejudice from counsel's strategy recommendation not to introduce this evidence."). In declining to find a reasonable probability of a different outcome, the state appellate court pointed to the overwhelming evidence of Taylor's guilt. In particular, it cited evidence in the trial record showing that (1) "police followed fresh footprints from the gas station to Banks's home where they found [Taylor] hiding in a closet;" (2) "cash from the robbery was found in the room where [he] was hiding" (3) "[he] was bundled up in several layers of clothing, including a green jacket consistent with that worn by the gas station robber"; and (4) "[he] obliquely admitted his knowledge of the gun used in the robbery when he told police that 'the gun is not in the house.'" *Taylor*, 2015 WL 7288030, at *4. In aggregate, these evidentiary findings are quite damning and the state appellate court's conclusion that Taylor was not prejudiced by his counsel's alleged deficiencies, considering the weight of the evidence against him was reasonable.

Like the district court, we find that "the court of appeals' application of the *Strickland* standard was detailed and thorough." *Taylor*, 2021 WL 541791, at *5. The state court provided

ample basis for its conclusion that Taylor failed to establish ineffective assistance of counsel under *Strickland*, and that conclusion was well within the realm of reasonableness.

II.

As an additional and final entreaty, Taylor argues that the state appellate court's denial of his untimely motion to remand for an evidentiary hearing was in and of itself an unreasonable application of *Cronic* and *Strickland*. He asserts that the appropriate remedy for this error, in the alternative to habeas relief, is for this court to remand to the district court for an evidentiary hearing. But as the state appellate court noted, Taylor failed to establish a factual predicate for any of the claims he makes in relation to potential witnesses he would call. *Taylor*, 2015 WL 7288030, at *4. Moreover, both his motion for remand and the accompanying affidavits he offered were untimely. Mich. Ct. R. 7.211(C)(1)(a) (amended 2021). The affidavits, according to state procedural rules, were thus not properly before the court. Regardless, the affidavits do not help his cause; the state appellate court later considered the affidavits attached to Taylor's motion to remand. And in an alternative analysis, the court noted that even if it were to consider the affidavits, Taylor would still be unable to show that his counsel's performance was objectively unreasonable or that he was prejudiced by such performance. *Taylor*, 2015 WL 7288030 at *4-5. The state court provided plenty of context to confirm the reasonableness of this conclusion. *Id.* at *3-5. As such, we do not find that the denial of Taylor's motion to remand was an unreasonable application of *Cronic* or *Strickland*.

In any event, this court is subject to the AEDPA's general bar against factfinding in the context of federal habeas review of state court proceedings. 28 U.S.C. § 2254(e)(2). Taylor neither alleges that his claim relies on a new rule of constitutional law that was previously unavailable, nor a factual predicate that could not have previously been discovered. *See id*. Thus, we are

foreclosed from now supplementing the record, or substituting our judgment for that of the Michigan appellate court.

IV.

Taylor has not overcome the deference afforded to state court determinations under the AEDPA. In reviewing the evidence before it – or lack thereof – the state appellate court's determination that Taylor did not suffer from Sixth Amendment ineffective counsel was not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103. The district court therefore properly denied Taylor's habeas petition. We **AFFIRM**.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHNNY TAYLOR,

Petitioner,

CASE No. 1:17-CV-855

v.

HON. ROBERT J. JONKER

S.L. BURT,

Respondent.
_____/

ORDER

This is a habeas corpus action brought by a state prisoner under 28 U.S.C. § 2254. On January 21, 2021, Magistrate Judge Kent filed a Report and Recommendation that recommended the Court deny the habeas petition and deny Petitioner a certificate of appealability. (ECF No. 34). An unnumbered docket entry reflects that a copy of the Report and Recommendation was mailed to Petitioner the next day, January 22, 2021. Objections were due within 14 days after service of the report. 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72(b); W.D. MICH. LCIVR 72.3(b). Twenty-three days later, on February 14, 2021, the docket reflected that no objections to the Report and Recommendation had been filed. Accordingly, the Court entered an Order and Judgment approving and adopting the Report and Recommendation. (ECF Nos. 35, 36).

On February 16, 2021, the Clerk of Court docketed an Objection to the Report and Recommendation. (ECF No. 37). The Objection contains a date of February 8, 2021, next to Petitioner's signature and was postmarked on February 9. (*Id.*). On March 1, 2021, Petitioner filed a motion and brief that requested the Court reconsider its Order adopting the Report and

Recommendation. (ECF Nos. 38, 39). Petitioner asks the Court to consider his objections which he says are timely.

PLAINTIFF'S MOTION FOR RECONSIDERATION

Under the prison mailbox rule, a *pro se* prisoner plaintiff's motion is usually considered as filed at the time he or she "delivered it to the prison authorities for forwarding to the court clerk." *Houston v. Lack*, 487 U.S. 266, 276 (1988). Petitioner's motion for reconsideration correctly analyzes the timing issue and submits documentation that demonstrates he complied with the prison mailbox rule for the timely filing of objections. Applying the prison mailbox rule, the Court considers Petitioner's Objections as filed on February 8, 2021. They are, therefore, timely filed under the applicable rules. For this reason, the Court grants Petitioner's motion for reconsideration to the extent it seeks consideration of his Objections; vacates the February 14, 2021 Order adopting the Report and Recommendation; and proceeds to review Petitioner's objections.

PLAINTIFF'S OBJECTIONS FAIL ON A DE NOVO REVIEW

The Court has reviewed Magistrate Judge Kent's Report and Recommendation (ECF No. 34) and Petitioner's Objection to the Report and Recommendation (ECF No. 37). Under the Federal Rules of Civil Procedure, where, as here, a party has objected to portions of a Report and Recommendation, "[t]he district judge . . . has a duty to reject the magistrate judge's recommendation unless, on de novo reconsideration, he or she finds it justified." 12 WRIGHT, MILLER, & MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3070.2, at 381 (2d ed. 1997). Specifically, the Rules provide that:

> The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition;

> receive further evidence; or return the matter to the magistrate judge with instructions.

FED R. CIV. P. 72(b)(3). De novo review in these circumstances requires at least a review of the evidence before the Magistrate Judge. *Hill v. Duriron Co.*, 656 F.2d 1208, 1215 (6th Cir. 1981). The Court has reviewed de novo the claims and evidence presented to the Magistrate Judge; the Report and Recommendation itself; and Petitioner's objections. After its review, the Court finds the Magistrate Judge correctly concluded that Petitioner is not entitled to habeas corpus relief.

The Magistrate Judge recommends denial of Petitioner's habeas petition. In his objections, Petitioner primarily reiterates and expands upon arguments presented before the state courts as well as in his habeas petition. He narrows his focus to three issues: First, Petitioner argues that his trial counsel failed to meet with him until the eve of trial, and that the State Court ought to have reviewed this ineffective assistance claim under the lens of *United States v. Cronic*, 466 U.S. 648 (1984), rather than *Strickland v. Washington*, 466 U.S. 668 (1984). Secondly, Petitioner claims that his trial counsel was ineffective for failing to adequately impeach a prosecutor's witness with an inconsistent earlier statement. In his third and final objection, Petitioner contends that at the very least, reasonable jurists could disagree with the Magistrate Judge's conclusions, and so a certificate of appealability should issue.

After de novo review, the Court is satisfied the Magistrate Judge's analysis is factually correct and legally sound. Petitioner's objections fail to account for the detailed determinations of the Michigan Court of Appeals, and the impact of the deferential AEDPA standard. Accordingly, the Court concludes that Petitioner is not entitled to federal habeas relief, for the very reasons detailed in the Report and Recommendation of the Magistrate Judge.

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a petitioner may not appeal in a habeas corpus case unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1). The Federal Rules of Appellate Procedure extend to district judges the authority to issue certificates of appealability. FED. R. APP. P. 22(b); *see also Castro v. United States*, 310 F.3d 900, 901-02 (6th Cir. 2002) (the district judge "must issue or deny a [certificate of appealability] if an applicant files a notice of appeal pursuant to the explicit requirements of Federal Rule of Appellate Procedure 22(b)(1)"). However, a certificate of appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

To obtain a certificate of appealability, Petitioner must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). While Petitioner is not required to establish that "some jurists would grant the petition for habeas corpus," he "must prove 'something more than an absence of frivolity' or the existence of mere 'good faith.'" *Id.* (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)). In this case, Petitioner has not made a substantial showing of the denial of a constitutional right. Therefore, he is not entitled to a certificate of appealability.

The Magistrate Judge properly concluded that Petitioner is not entitled to the habeas corpus relief he seeks. Petitioner is not entitled to a certificate of appealability.

CONCLUSION

ACCORDINGLY, IT IS ORDERED:

1. Plaintiff's Motion for Reconsideration (ECF No. 38) is **GRANTED** to the extent specified in this Order.

2. The Court's February 14, 2021, Order (ECF No. 35) is **VACATED.**

3. The Report and Recommendation of the Magistrate Judge (ECF No. 34) is **APPROVED and ADOPTED** as the Opinion of the Court following a de novo review.

4. Petitioner's Amended Petition for Writ of Habeas Corpus (ECF No. 20) is **DENIED**; and

5. Petitioner is **DENIED** a certificate of appealability.

The Court discerns no good-faith basis for appeal of this matter. *See McGore v. Wrigglesworth*, 114 F.3d 601, 611 (6th Cir. 1997); 28 U.S.C. § 1915(a)(3).

An Amended Judgment shall enter.

Dated: March 4, 2021

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHNNY TAYLOR,

Petitioner,

v.

S.L. BURT,

Respondent.
_____/

CASE No. 1:17-CV-855

HON. ROBERT J. JONKER

AMENDED JUDGMENT

In accordance with the Order entered this day, Judgment is entered in favor of Respondent S.L. Burt and against Petitioner Johnny Taylor.

Dated: March 4, 2021

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHNNY TAYLOR,

Petitioner,

v.

S.L. BURT,

Respondent.
_____/

Case No. 1:17-cv-855

Honorable Robert J. Jonker

REPORT AND RECOMMENDATION

This is a habeas corpus action brought by a state prisoner under 28 U.S.C. § 2254. Petitioner Johnny Taylor is incarcerated with the Michigan Department of Corrections at the Gus Harrison Correctional Facility (ARF) in Adrian, Lenawee County, Michigan. Following a one-day jury trial in the Jackson County Circuit Court, Petitioner was convicted of armed robbery, in violation of Mich. Comp. Laws § 750.529. On June 19, 2014, the court sentenced Petitioner as a fourth habitual offender, Mich. Comp. Laws § 769.12, to a prison term of 20 to 50 years[1].

On September 22, 2017, Petitioner filed his habeas corpus petition raising the following grounds for relief:

I. Petitioner was denied the effective assistance of counsel guaranteed by the federal and state constitution where trial counsel failed to investigate, failed to call supporting witnesses, failed to test the coat introduced into evidence for DNA, and failed to cross-examine the prosecution's primary witness.

II. Petitioner was denied the effective assistance of appellate counsel on direct appeal where counsel failed to timely file Petitioner's motion to remand

[1] Petitioner's armed robbery sentence is being served consecutively to sentences imposed for other offenses for which he was on parole at the time he committed the armed robbery. *See* Michigan Department of Corrections Offender Tracking Information System, https://mdocweb.state.mi.us/otis2/otis2profile.aspx?mdocNumber=195621 (visited Dec. 21, 2020.)

> pursuant to People v. Ginther, 390 Mich. 436 (1973), precluding appellate court review and depriving him of the necessary record support for his asserted claim of trial counsel's ineffective assistance.

(Pet'r's Br., ECF No. 1-1, PageID.30.) The Court concluded that Petitioner had arguably exhausted his ineffective assistance of trial counsel claims in the state appellate courts; however, he had not exhausted his ineffective assistance of appellate counsel claims. Because Petitioner had filed his petition so late in the period of limitation, the Court invited him to seek a stay pending exhaustion or to amend his petition to raise only his exhausted claims. Petitioner opted to file a motion to stay.

Petitioner filed a copy of the motion for relief from judgment that he intended to file in the trial court along with his motion to stay. The limited ineffective assistance of appellate counsel claim from his petition had expanded into eleven purported instances of professionally unreasonable conduct. (Pet'r's Draft Mot. for Relief from J., ECF No. 10-1, PageID.292-293.) The Court granted the stay, dismissing the unexhausted claims, directing Petitioner to file his motion for relief from judgment within 30 days, and directing Petitioner to return to this Court and file a motion to amend his petition to include any newly exhausted claims within 30 days after the Michigan Supreme Court issued its final decision relating to Petitioner's motion. (Order to Stay, ECF No. 13.)

Petitioner filed his motion for relief from judgment in the trial court—indeed, he filed it before the Court entered the motion to stay. By order entered February 20, 2018, the trial court denied Petitioner's motion because, under Mich. Ct. R. 6.508(D)(3), Petitioner had not shown cause for his failure to raise the issues on appeal or prejudice. Petitioner filed an application for leave to appeal in the Michigan Court of Appeals and, when that was denied by order entered October 17, 2018, (Mich. Ct. App. Order, ECF No. 30-6, PageID.906), in the Michigan Supreme

Court. The Michigan Supreme Court denied leave by order entered July 29, 2019. (Mich. Order, ECF No. 30-8, PageID.1104.)

Respondent claims that Petitioner failed to promptly return to this Court with a motion to amend his petition and, therefore, Petitioner's claims should be dismissed as untimely. (Resp. Mot. to Dismiss, ECF No. 29.) Respondent argues:

> This Court gave Taylor 30 days after the Michigan Supreme Court issued its order to file the present amended petition. He instead took 79 days and does not explain the delay.

(Answer, ECF No. 29, PageID.481.) Respondent mischaracterizes the Court's order. The Court allowed Petitioner 30 days after the Michigan Supreme Court decided his claims to file a motion to amend his petition, not the petition itself. (Order, ECF No. 13, PageID.355.) Petitioner timely filed his motion to amend, along with a proposed petition and brief and an unnecessary motion for extension of time to file those materials. (ECF Nos. 14-18.) The Court granted Petitioner leave to amend his petition, but directed Petitioner to file his amended petition on the Court's approved form within 28 days. (Order, ECF No. 19.) Petitioner signed his amended petition on October 7, 2019—the 27th day—and sent it in an envelope postmarked October 8, 2019. The Court determined that Petitioner had complied with the Court's direction and directed Respondent to answer the petition. Therefore, Respondent's motion to dismiss the amended petition as untimely will be denied.

The amended petition raises five grounds for relief, as follows:

I. Petitioner was constructively denied counsel at the critical pretrial stage of the proceeding when counsel failed to consult with Petitioner prior to the start of trial.

II. Appellate counsel rendered deficient performance which prejudiced Petitioner when trial counsel failed to move for DNA testing of the green jacket in violation of the Sixth Amendment.

III. Appellate and defense counsel ineffectiveness for failing to impeach the arresting officer, Galbreath, as to whether he actually removed the green jacket of Petitioner in police custody.

IV. Appellate counsel was ineffective for not raising on direct appeal the prosecutor's knowing use of false evidence to obtain a tainted conviction and failed to correct the false impression of facts left with the court and jury.

V. Appellate counsel failed to raise trial counsel's failure to subpoena Mr. Taylor's medical records and call medical personnel to establish Petitioner's total disability to not being able to run or physically run from the scene of the robbery as alleged by the prosecutor.

(Pet., ECF No. 20, PageID.422-428.) Respondent has filed an answer to the petition (ECF No. 29) stating that the grounds should be denied because they lack merit or are procedurally defaulted. Upon review and applying the standards of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (AEDPA), I find that the grounds are meritless. Accordingly, I recommend that the petition be denied.

Discussion

I. Factual allegations

The Michigan Court of Appeals described the evidence admitted at trial as follows:

> At trial, evidence showed that in the early morning hours of December 26, 2013, an Admiral Gas Station in Jackson, Michigan was robbed. During the robbery, the gas station attendant was struck in the head multiple times and forced at gunpoint to give the robber the money in the cash register. The robber then absconded with the money from the register, including a marked $2 bill. At trial, the clerk could not identify defendant as the robber because defendant was bundled up in a green coat that concealed his face. Likewise, there was video footage of the robbery, some of which was played for the jury, but the perpetrator's face is not visible in the footage.
>
> Police responding to the robbery were able to follow tracks from the gas station to the home of Heather Banks, a woman with whom defendant was acquainted. Even though it was after 2:00 am and her five small children were sleeping in the home, Banks testified that she let defendant into her home to make a telephone call. Further, she testified that when police arrived, she told defendant that police were looking for him, at which time defendant ran into Banks's bedroom and hid. Banks gave police permission to enter the home. However, when ordered to exit the bedroom by police, defendant refused, prompting police to deploy a police dog to find defendant in the closet of Bank's bedroom. The dog latched on to defendant's

> arm; but, because defendant was wearing several layers of clothing, the dog did not puncture defendant's skin. In particular, defendant was wearing a green jacket like the jacket worn by the gas station robber.
>
> After the dog apprehended defendant, defendant was taken to the hospital to make sure he was uninjured. On the way to the hospital, defendant waived his *Miranda* rights and, in response to police questioning, defendant stated that "the gun is not in the house." Additionally, when police searched the bedroom where defendant had been hiding, in the box spring of Banks's bed, near a pair of reading glasses on the floor that did not belong to Banks or her family members, police found a BB gun that looked like a handgun as well as the money from the robbery, including the tracer $2 bill. At the hospital, defendant told police that he needed his reading glasses to read some documents.

(Mich. Ct. App. Op., ECF No. 30-5, PageID.770-771) (footnote omitted).

Petitioner's counsel worked to poke holes in the prosecutor's case. He noted the gun found was not fingerprinted, even though the robber on the video did not wear gloves. (Trial Tr., ECF No. 30-3, PageID.734-738.) He noted that there was no effort to match the footprints that the police followed to Petitioner's shoes. (*Id*.) He noted that there were no puncture marks in the green coat even though the police claim Petitioner was wearing it when he was grabbed by the police dog. (*Id*.) The jury deliberated for about half an hour before finding Petitioner guilty of armed robbery.

On appeal, in the brief he filed with the assistance of counsel, Petitioner raised the ineffective assistance of trial counsel issue that he raises in his amended petition as issue I. In a *pro per* supplemental brief, Petitioner raised an additional ineffective assistance of trial counsel claim based on counsel's failure to subject the prosecution's case to a meaningful adversarial testing. Petitioner's argument paralleled the argument raised in the main brief; but he added a claim that counsel's failures were so significant that, under *United States v. Cronic*, 466 U.S. 648 (1984), Petitioner should not be required to show prejudice.

The court of appeals rejected Petitioner's challenges and affirmed the trial court in an unpublished opinion issued November 17, 2015. (Mich. Ct. App. Op., ECF No. 30-5,

PageID.770-777.) Petitioner then filed a *pro per* application for leave to appeal in the Michigan Supreme Court. Petitioner raised the first issue from his court of appeals brief and then a new issue claiming that appellate counsel rendered ineffective assistance because she failed to file a timely motion to remand to permit Petitioner to develop the factual foundation for his claims of ineffective assistance of trial counsel. By order entered June 28, 2016, the Michigan Supreme Court denied leave to appeal. (Mich. Order, ECF No. 30-7, PageID.1012.)

One year and 84 days later, Petitioner filed his initial petition in this Court. The Court stayed the petition to permit Petitioner to exhaust additional claims in the state court. Petitioner's efforts to exhaust the additional claims in the state court are chronicled above.

II. AEDPA standard

The AEDPA "prevent[s] federal habeas 'retrials'" and ensures that state court convictions are given effect to the extent possible under the law. *Bell v. Cone*, 535 U.S. 685, 693-94 (2002). An application for writ of habeas corpus on behalf of a person who is incarcerated pursuant to a state conviction cannot be granted with respect to any claim that was adjudicated on the merits in state court unless the adjudication: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d). This standard is "intentionally difficult to meet." *Woods v. Donald*, 575 U.S. 312, 316 (2015) (internal quotation omitted).

The AEDPA limits the source of law to cases decided by the United States Supreme Court. 28 U.S.C. § 2254(d). This Court may consider only the holdings, and not the dicta, of the Supreme Court. *Williams v. Taylor*, 529 U.S. 362, 412 (2000); *Bailey v. Mitchell*, 271 F.3d 652, 655 (6th Cir. 2001). In determining whether federal law is clearly established, the Court may not

consider the decisions of lower federal courts. *Williams*, 529 U.S. at 381-82; *Miller v. Straub*, 299 F.3d 570, 578-79 (6th Cir. 2002). Moreover, "clearly established Federal law" does not include decisions of the Supreme Court announced after the last adjudication of the merits in state court. *Greene v. Fisher*, 565 U.S. 34, 37-38 (2011). Thus, the inquiry is limited to an examination of the legal landscape as it would have appeared to the Michigan state courts in light of Supreme Court precedent at the time of the state-court adjudication on the merits. *Miller v. Stovall*, 742 F.3d 642, 644 (6th Cir. 2014) (citing *Greene*, 565 U.S. at 38).

A federal habeas court may issue the writ under the "contrary to" clause if the state court applies a rule different from the governing law set forth in the Supreme Court's cases, or if it decides a case differently than the Supreme Court has done on a set of materially indistinguishable facts. *Bell*, 535 U.S. at 694 (citing *Williams*, 529 U.S. at 405-06). "To satisfy this high bar, a habeas petitioner is required to 'show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Woods*, 575 U.S. at 316 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). In other words, "where the precise contours of the right remain unclear, state courts enjoy broad discretion in their adjudication of a prisoner's claims." *White v. Woodall*, 572 U.S. 415, 424 (2014) (internal quotations omitted).

The AEDPA requires heightened respect for state factual findings. *Herbert v. Billy*, 160 F.3d 1131, 1134 (6th Cir. 1998). A determination of a factual issue made by a state court is presumed to be correct, and the petitioner has the burden of rebutting the presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Davis v. Lafler*, 658 F.3d 525, 531 (6th Cir. 2011) (en banc); *Lancaster v. Adams*, 324 F.3d 423, 429 (6th Cir. 2003); *Bailey*, 271 F.3d at 656. This presumption of correctness is accorded to findings of state appellate courts, as well as the trial

court. *See Sumner v. Mata*, 449 U.S. 539, 546-547 (1981); *Smith v. Jago*, 888 F.2d 399, 407 n.4 (6th Cir. 1989).

III. Ineffective assistance of trial counsel (habeas ground I)

Petitioner repeats the ineffective assistance of trial counsel claim that his appellate counsel raised on direct appeal. That claim was far-reaching: trial counsel failed to investigate or prepare for trial, failed to call supporting witnesses, and failed to cross-examine the primary witness.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court established a two-prong test by which to evaluate claims of ineffective assistance of counsel. The petitioner must prove: (1) that counsel's performance fell below an objective standard of reasonableness; and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome. *Id.* at 687. A court considering a claim of ineffective assistance must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. The defendant bears the burden of overcoming the presumption that the challenged action might be considered sound trial strategy. *Id.* (citing *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)); *see also Nagi v. United States*, 90 F.3d 130, 135 (6th Cir. 1996) (holding that counsel's strategic decisions were hard to attack). The court must determine whether, in light of the circumstances as they existed at the time of counsel's actions, "the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. Even if a court determines that counsel's performance was outside that range, the defendant is not entitled to relief if counsel's error had no effect on the judgment. *Id.* at 691. In resolving Petitioner's ineffective assistance of counsel claims, the Michigan Court of Appeals expressly applied the *Strickland* standard. (Mich. Ct. App. Op., ECF No. 30-5, PageID.771.)

Petitioner argues that his ineffective assistance claims are properly measured against the standard of *United States v. Cronic*, 466 U.S. 648 (1984), not *Strickland*. Under *Cronic*, the denial of counsel during a critical stage of the proceeding amounts to a *per se* denial of the effective assistance of counsel. The court must reverse a criminal defendant's conviction "without any specific showing of prejudice to defendant when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *Id.* at 659 n.25. "In other words, when counsel is totally absent during a critical stage of the proceedings, prejudice must be presumed." *Mitchell v. Mason*, 325 F.3d 732, 741 (6th Cir. 2003). Petitioner contends counsel was "totally absent" because he ""entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." *Henness v. Bagley*, 644 F.3d 308, 323-24 (6th Cir. 2011) (citing *Bell v. Cone*, 535 U.S. 685, at 695-96 (2002).

Petitioner's attempt to expand the specific discrete failings of counsel into a complete failure to oppose the prosecution's case is unavailing. As the Supreme Court explained in *Bell*, the difference between counsel's failures when properly measured by *Strickland* and counsel's failures when properly measured by *Cronic* are "not of degree, but of kind." *Bell*, 535 U.S. at 697 (footnote omitted). "[T]he attorney's failure must be complete." *Id*. The "failures" of counsel alleged by Petitioner, however, are "of the same ilk as other specific attorney errors [the Supreme Court has] held subject to *Strickland's* performance and prejudice components." *Id*. at 697-98.

It is simply not possible to review the transcript of the trial and conclude that Petitioner suffered a complete denial of counsel. It is for that reason that the Michigan Court of Appeals declined to apply the *Cronic* standard but instead applied *Strickland*:

> [D]efendant's reliance on *United States v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984) and related cases is misplaced. Defendant's case does not fit within the narrow category of cases in which prejudice is presumed as described in

> *Cronic*, 466 US 648. That is, contrary to defendant's argument on appeal, the record evinces that defense counsel investigated the case and subjected the prosecution's case to meaningful adversarial testing. Defendant's claims to the contrary, as detailed below, are premised on counsel's purported failures at specific points in the proceedings, and such claims are properly analyzed under *Strickland*, not *Cronic*.

(Mich. Ct. App. Op., ECF No. 30-5, PageID.775.) The state appellate court's application of *Strickland* to resolve Petitioner's ineffective assistance of counsel claims is entirely consistent with the clearly established federal law of *Bell v. Cone*.

When a federal court reviews a state court's application of *Strickland* under § 2254(d), the deferential standard of *Strickland* is "doubly" deferential. *Harrington*, 562 U.S. at 105 (citing *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)); *see also Burt v. Titlow*, 571 U.S. 12, 15 (2013); *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011); *Premo v. Moore*, 562 U.S. 115, 122 (2011). In those circumstances, the question before the habeas court is "whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.*; *Jackson v. Houk*, 687 F.3d 723, 740-41 (6th Cir. 2012) (stating that the "Supreme Court has recently again underlined the difficulty of prevailing on a *Strickland* claim in the context of habeas and AEDPA . . . .") (citing *Harrington*, 562 U.S. at 102).

Petitioner's appellate complaints regarding trial counsel's failure were far-reaching and the court of appeals' application of the *Strickland* standard was detailed and thorough. The appellate court's analysis defies effective summary. At the risk of being long-winded, the analysis is set forth in its entirety below:

> [D]efendant first argues that trial counsel was ineffective for failing to investigate and for failing to prepare for trial. Specifically, defendant asserts that counsel did not meet with defendant an adequate number of times. According to defendant, counsel also failed to investigate the possibility that Banks's 17-year-old son was the gas station robber. Defendant claims that, before trial, he told his trial counsel that he was asleep on Banks's couch when Banks's son returned to the house at around 2 a.m. He now asserts that counsel should have investigated potential testimony from Banks's son regarding his activities that night, the presence of guns

in the home, and whether he had entered the room where the items from the robbery were found. Defendant also claims that counsel failed to procure evidence (or at least failed to share that evidence with defendant), including photographs of footprints in the snow, the video footage of the robbery showing all the camera angles, photographs of defendant's arm after he was bitten by the dog, photographs of the green coat worn by defendant, and photographs of the $2 bill found in Banks's home.

As noted, defendant failed to move the trial court for a new trial or for an evidentiary hearing. As a result, there is no record support for defendant's assertion that counsel failed to conduct an investigation, that counsel failed to meet with defendant a reasonable amount of times, that counsel failed to obtain evidence or to share it with defendant, or that Banks's son possessed guns, that he returned home late to the house, or that he had an opportunity to enter the room where police discovered evidence of the robbery. Cf. *People v Carbin*, 463 Mich 590, 601; 623 NW2d 884 (2001). To the contrary, by defendant's own admissions, counsel met with him before trial and defendant sent additional communications to his attorney via letter. Our review of the record also shows that, as a general matter, defense counsel made a detailed demand for discovery, and that at trial counsel was prepared to cross-examine witnesses and to present closing arguments.[3] While counsel may not have proceeded with the strategy now advanced by defendant on appeal, there is nothing in the record to support defendant's assertions that counsel's strategic decisions were made without adequate investigation or that they were unreasonable in light of counsel's pre-trial investigations. See *Trakhtenberg*, 493 Mich at 52.

[3] For example, counsel argued during closing (1) that defendant could not be identified from the video of the robbery, (2) that the robber did not wear gloves and yet no fingerprint evidence had been introduced to tie defendant to the crime, (3) that police made no effort to match defendant's shoes to the footprints they followed to Banks's house, (4) that there were no telephone records to support Banks's testimony that defendant made calls while at her house, and (5) that the green coat supposedly worn by defendant did not have dog marks as one would expect given the manner of defendant's apprehension. In these circumstances, counsel maintained that the prosecutor had shown nothing more than that defendant was in Banks's house and bitten by a dog.

Moreover, with respect to Banks's son in particular, the record evidence does not support the defense that defendant now claims his counsel should have investigated and presented at trial. That is, contrary to defendant's assertions on appeal, Banks denied having a gun in the home and, when defense counsel asked Banks at trial whether any of her children had "been out and come back in that night," she indicated that they had all stayed in all night. Police confirmed that Banks's children were in bed when they entered the home and that the children had to be removed to squad cars for their safety while police tried to rouse defendant from his hiding place in the closet. In other words, on the record presented, defendant has not established the factual predicate of the defense he now claims counsel should have investigated and pursued. See *Hoag*, 460 Mich at 6. And,

consequently, defendant has not shown counsel performed below an accepted standard of reasonableness or that he was prejudiced by counsel's performance.

We note that defendant filed an untimely motion in this Court to remand for an evidentiary hearing and, in support of that motion, defendant attached his own affidavit, attesting to counsel's failure to provide him with various pieces of evidence and describing a conversation in which he told counsel his theories about Banks's son. However, defendant's request for a remand was denied and, because defendant's affidavit is not part of the lower court record, we need not consider it at this time. See *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008); *People v Watkins*, 247 Mich App 14, 31; 634 NW2d 370 (2001).

Moreover, even if we were to consider defendant's affidavit, he cannot establish his ineffective assistance claim based on his attestations in that document. First, although defendant indicates that he told counsel his suspicions regarding Banks's son, he has not made an offer of proof from his attorney, Banks, or Banks's son to establish what efforts, or lack thereof, were made by his attorney to investigate this lead. Cf. *Carbin*, 463 Mich at 601. Consequently, even considering defendant's affidavit, he has not established the factual predicate of his claim and he has not overcome the presumption that counsel provided effective assistance. Second, it is clear that defendant has failed to make a showing of prejudice. Defendant in fact makes no effort on appeal to explain how counsel's purported failures could be construed to have affected the outcome of the proceeding. And, in contrast to defendant's threadbare allegations against Banks's son, the evidence of defendant's guilt is overwhelming. Shortly after the robbery, police followed fresh footprints from the gas station to Banks's home where they found defendant hiding in a closet. The cash from the robbery was found in the room where defendant was hiding, defendant was bundled up in several layers of clothing, including a green jacket consistent with that worn by the gas station robber, and defendant obliquely admitted his knowledge of the gun used in the robbery when he told police that "the gun is not in the house." Given this considerable evidence of defendant's guilt, we cannot conclude that further investigation or additional pre-trial preparation by counsel in the manner proposed by defendant would have been reasonably likely to affect the outcome of the proceedings. Thus, defendant has not shown that he was denied the effective assistance of counsel.

In a related argument, defendant also argues on appeal that counsel was ineffective for failing to call any supporting witnesses at trial. Specifically, defendant claims counsel should have called (1) an "internet expert" to locate photographs on Facebook that depicted Banks's son holding guns, (2) a medical expert to testify that defendant could not have travelled the distance from the gas station to Banks's house due to defendant's previous gunshot wound and his restless leg syndrome, (3) Banks's son to question him about his activities the night of the robbery as well as, more generally, his possession of guns, (4) defendant's brother to testify that he dropped defendant at Banks's home at 11:30 p.m. that evening, and (5) Banks's cousin to undermine Banks's claim that she was only minimally acquainted with

defendant when in fact her cousin would testify that Banks had known defendant since 1994.

Initially we note that defendant has failed to establish the factual predicate of his claim in relation to these witnesses that defendant now claims counsel should have called. First, there is absolutely no indication in the lower court record, or even in the materials supporting defendant's motion for remand, that an internet expert could have uncovered photographs of Banks's son on Facebook or that a medical expert would have testified in defendant's favor if called. Absent some offer of proof regarding how such experts might have testified, defendant has not [met] his burden of establishing the factual predicate of his claim. Cf. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Second, there is likewise a lack of evidence to establish how Banks's son would have testified if called, meaning defendant has not shown that such testimony would have been favorable to defendant or that its omission deprived defendant of a substantial defense. See *Russell*, 297 Mich App at 716. Finally, with respect to Banks's cousin and defendant's brother, there is no record support for the testimony defendant now claims they would have provided. It is true that defendant submitted affidavits from these individuals in relation to his untimely motion for a remand, but such documents are not properly before us on appeal because they are not part of the lower court record. See *Horn*, 279 Mich App at 38; *Watkins*, 247 Mich App at 31.

In any event, even considering the affidavits produced by defendant on appeal, it is clear that defendant cannot establish that he was prejudiced by counsel's failure to call the various witnesses he now mentions on appeal. As noted, there is no evidence that testimony from an internet expert, a medical expert, or Banks's son would have favored defendant, meaning that defendant has not shown a reasonably probability that, but for counsel's failure to call these witnesses, the result of the proceedings would have been different. Cf. *Ackerman*, 257 Mich App at 455-456. With respect to testimony from defendant's brother, he was not a witness to the robbery itself and his claim to have dropped defendant at Banks's house at 11:30 does not provide defendant with any sort of alibi for the robbery at 2:00 a.m. Rather, this evidence would only further confirm that defendant was in relatively close proximity to the gas station on the night of the robbery. Accordingly, we cannot conclude that counsel's failure to present this testimony affected the outcome of the proceedings. With respect to testimony from Banks's cousin, it appears defendant believes she could have testified regarding the length and nature of Banks's relationship with defendant for the purpose of impeaching Banks's claim that she did not know defendant well. But, any testimony on this issue would likely have been inadmissible because it would have involved impeachment of a witness's credibility though the use of extrinsic evidence regarding a collateral issue, which is prohibited by MRE 608(b). See *People v Rosen*, 136 Mich App 745, 758; 358 NW2d 584 (1984). Further, given that the nature of defendant's relationship with Banks is a tangential issue which did not bear directly on defendant's guilt or innocence, we fail to see how testimony from Banks's cousin on this issue could have created a reasonable probability of a different outcome. Thus, defendant has not shown he was denied the effective assistance of counsel.

Next, defendant argues that trial counsel was ineffective with respect to his cross-examination of Banks. In particular, defendant asserts that counsel failed to challenge Banks's credibility. Although defendant frames his argument in terms of counsel's cross-examination of Banks, he does not propose any questioning that defense counsel should have pursued or explain how such questioning would have created a reasonable probability of a different outcome. Instead, in support of this claim that counsel failed to challenge Banks's credibility, defendant rehashes his earlier arguments regarding testimony Banks's cousin might have provided with respect to defendant's relationship with Banks and defendant claims that he was naked when bitten by the police dog, a fact which defendant claims could have been proven with evidence showing the wound caused by the dog bite and DNA testing to establish that his blood was not on the green coat.

To the extent defendant argues this evidence should have been presented to discredit Banks, his arguments in this respect are without merit because these claims are not factually supported by the lower court record. See *Hoag*, 460 Mich at 6. Testimony from police officers at trial indicates that defendant was fully clothed, and in fact wearing several layers of clothing, when bitten by the dog during his apprehension in Banks's home. Even if we were to consider the materials defendant offers on appeal, defendant makes no offer of proof to support his claim that DNA testing of the coat would have been favorable to his defense or that he was unclothed when apprehended. Therefore, counsel cannot be considered ineffective for failing to introduce evidence on these issues. Further, as discussed *supra*, impeachment of Banks through the presentation of extrinsic evidence from her cousin regarding a collateral issue would have been improper under MRE 608(b). See *Rosen*, 136 Mich App at 758. And, given the overwhelming evidence presented at trial, impeachment of Banks on this collateral issue would not have created a reasonable probability of a different outcome. Moreover, we note that more generally, contrary to defendant's arguments on appeal, counsel did not fail to challenge Banks's credibility, but in fact specifically argued during closing that, among other shortcomings, Banks's claim to have let a near-stranger into her home at 2:00 in the morning was "suspicious." Additionally, counsel did cross-examine Banks, and defendant has not overcome the presumption that trial counsel exercised reasonable professional judgment in his decisions regarding how to question Banks. See *Davis*, 250 Mich App at 368. On the whole, defendant has not shown that counsel's treatment of Banks's testimony was unreasonable or that, but for counsel's failure, there was a reasonable probability of a different outcome. Thus, defendant has not shown that he was deprived of the effective assistance of counsel.

In his Standard 4 brief, defendant also argues that he received ineffective assistance of counsel. Defendant largely reiterates the same arguments raised in appellate counsel's brief, which we reject for the same reasons discussed supra. Defendant's additional arguments are without merit for the reasons discussed below.

* * *

First, defendant argues that trial counsel was ineffective for failing to give an opening statement. "[T]he waiver of an opening statement involves 'a subjective

judgment on the part of trial counsel which can rarely, if ever, be the basis for a successful claim of ineffective assistance of counsel.'" *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Here, there is nothing in the record to overcome the presumption that counsel's decision not to give an opening statement was an exercise of sound trial strategy and there is no basis to conclude that counsel's failure to do so affected the outcome of the lower court proceedings. Cf. *id*.

Second, defendant argues that trial counsel failed to obtain and test various pieces of evidence. As noted, defense counsel made a detailed request for discovery, and the lower court record does not establish what evidence trial counsel actually obtained or failed to obtain. Thus, defendant has not established the factual predicate of his claim, *Hoag*, 460 Mich at 6, and he has not shown that counsel was objectively unreasonable for failing to obtain evidence. Regardless, defendant has not established that he was prejudiced by the alleged failures of counsel with respect to the various pieces of evidence identified in his brief. Defendant has not presented any information about what tests on the evidence would have shown or how the evidence or tests would support his defense. Further, trial counsel may have made the reasonable decision not to have the evidence tested to avoid creating any additional incriminating evidence against defendant. In fact, during closing arguments, trial counsel used the lack of testing to argue in defendant's favor, highlighting that the prosecution did not provide any evidence that the footprints matched defendant's shoes, that there was no fingerprint evidence tying defendant to the robbery, and that the green jacket, if worn by defendant, would have had puncture holes in it from a dog bite. On this record, defendant failed to overcome the presumption that trial counsel's decision to forego testing of items was sound trial strategy. *Davis*, 250 Mich App at 368.

Third, in his Standard 4 brief, defendant argues that trial counsel failed to cross-examine witnesses with respect to the color of the jacket defendant wore the night of the robbery in light of testimony at the preliminary examination that defendant wore a brown jacket that evening. Contrary to defendant's claim, more fully, at the preliminary examination, there was testimony that defendant's jacket was reversible and one side was dark green—which was the same "color and design of the jacket that was visible from the video surveillance." Trial counsel may not have wanted to highlight this fact. Defendant has not overcome the presumption that this decision was sound trial strategy. *Davis*, 250 Mich App at 368. Defendant also asserts various other problems with the cross-examination conducted by defense counsel in relation to the green coat, which we have reviewed and which are not supported by the record. Defense counsel in fact questioned witnesses about the coat, meaning that there is no factual predicate for these claims. *Hoag*, 460 Mich at 6. Defendant has not overcome the presumption that counsel's questioning of witnesses was a matter of trial strategy. See *Davis*, 250 Mich App at 368.

Fourth, defendant also argues that trial counsel failed to offer the defense that none of the evidence from the robbery was found on defendant. However, this point was clear from the testimony. The record plainly demonstrated that the money and gun

> were found inside the box spring, and there was no contention that the items were found on defendant. Trial counsel's decision not to raise or dispute an obvious point was a matter of trial strategy. See *id*.
>
> In sum, defendant has not demonstrated that counsel's performance was deficient or that, but for counsel's errors, there was a reasonable probability of a different outcome. Consequently, defendant has not established his ineffective assistance of counsel claim. See *Douglas*, 496 Mich at 592.

(Mich. Ct. App. Op., ECF No. 30-5, PageID.772-777.)

Petitioner's habeas arguments parallel the arguments he made to the Michigan Court of Appeals. He again insists, with no record support, that a more detailed analysis of the footprints in the snow, fingerprint analysis of the gun, or DNA analysis of the coat would have swayed the jury. Petitioner claims that he was sleeping on the couch, not fully dressed or swaddled in coats, when Ms. Banks's oldest son, apparently seventeen-years-old at the time, knocked on the door because he did not have the key to his own home. Petitioner posits that the boy had just committed the robbery and returned home; that the boy had the gun and the cash and, upon his return, stashed the gun and the cash in his mother's boxspring. When police followed the footprints to the Banks home and knocked on the door, Petitioner feared being caught—not because of his participation in a robbery, but for violating the terms of his parole—so he promptly fled to Ms. Banks's bedroom and hid in the closet. He remained hidden until the police dog pulled him out and he was handcuffed, still bleeding from his encounter with the dog.

Petitioner has constructed a story that might pin the robbery on Ms. Banks's son, but his story is contradicted by the testimony of other witnesses on several key points. Moreover, virtually all of the testimony that undercuts Petitioner's version was well-known to trial counsel from the very beginning because it was elicited at the preliminary examination. First, Petitioner's version of events finds no support in the testimony of Ms. Banks. Second, Petitioner's version of events is flatly contradicted by the officer who was present when the police dog pulled Petitioner

from the closet, wearing so many layers of clothing, including coats, that it was difficult to handcuff Petitioner. Third, Petitioner's claim that he was a stranger to the coat was contradicted by preliminary examination testimony that Petitioner was in the police vehicle outside the Banks home handcuffed and wearing the coat. Fourth, there is no testimony that the police dog punctured Petitioner's skin and the pictures of "injuries" that Petitioner proffered on appeal do not show any such punctures such that one might expect blood to be on the coat.

It is against that backdrop that counsel had to decide whether to compel a more in-depth analysis of the physical evidence, testing the gun for fingerprints, examining the footprints to show a mismatch with Petitioner's shoes, and testing the coat for DNA. At that point, counsel was forced to weigh the possibilities that more in-depth analyses might inculpate Petitioner against the possibilities that they would prove inconclusive or exculpate Petitioner.[2] Importantly, once the tests were done, there would be no turning back. Even inconclusive tests would carry a price because the results would eviscerate the claim that the prosecutor had failed to present important evidence that jurors might expect to see. Defense counsel could no longer argue that there were glaring holes in the prosecutor's presentation that might give rise to reasonable doubt.

But this Court's conclusions as to whether counsel's performance fell short on these issues are immaterial. What matters is whether the court of appeals' analysis was reasonable. It is reasonable on its face. It is well-grounded in the record. Petitioner has failed to demonstrate that the appellate court's determinations regarding his ineffective assistance of trial counsel claims are contrary to, or an unreasonable application of, *Strickland*. Accordingly, he is not entitled to habeas relief on those claims.

[2] It is noteworthy that in weighing those possibilities counsel was not unfamiliar with Petitioner. Trial counsel had represented Petitioner in multiple criminal prosecutions before the armed robbery case. (Sentencing Tr., ECF No. 30-4, PageID.762.) Indeed, Petitioner described trial counsel as "a good attorney, in my opinion, the best over here." (*Id*., PageID.763.)

IV. Ineffective assistance of appellate counsel (habeas grounds II-V)

The remainder of Petitioner's habeas grounds complain that his appellate counsel was ineffective for failing to raise, or properly investigate, Petitioner's claims that trial counsel was ineffective. It is difficult to fathom that appellate counsel failed to raise a particular ineffective-assistance-of-trial-counsel claim when appellate counsel raised such a broad ineffective-assistance-of-trial-counsel claim on appeal.

Moreover, the nature of appellate advocacy suggests that appellate counsel might still be effective even if counsel does not raise every possible issue on appeal. "'[W]innowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536 (1986) (quoting *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983)). To require appellate counsel to raise every possible colorable issue "would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." *Strickland*, 466 U.S. at 688. As the Supreme Court has observed, it is difficult to demonstrate that an appellate attorney has violated the performance prong where the attorney presents one argument on appeal rather than another. *Smith v. Robbins*, 528 U.S. 259, 289 (2000). In such cases, the petitioner must demonstrate that the issue not presented "was clearly stronger than issues that counsel did present." *Id.*

Generally, Petitioner cannot show that the issues counsel decided to forego were "clearly stronger" than the ones counsel raised because, even where counsel did not raise the issues, Petitioner raised the foregone arguments in his *pro per* supplemental brief and they were flatly rejected as meritless by the Michigan Court of Appeals. For example, even if appellate counsel failed to raise trial counsel's failure to test the green coat for DNA (habeas ground II), Petitioner raised it, the court of appeals addressed it, and concluded it was meritless. As set forth

above, the court of appeals' determination that trial counsel was not ineffective for failing to test the green coat for DNA was a reasonable application of *Strickland* and well-supported by the record. Thus, Petitioner has failed to show, as required by *Smith v. Robbins*, that this issue "was clearly stronger than issues that counsel did present." *Id*. at 289. Moreover, the fact that the issue was reasonably determined to be meritless means that appellate counsel was not professionally unreasonable for failing to raise it and that Petitioner was not prejudiced by the failure. *Coley v. Bagley*, 706 F.3d 741, 752 (6th Cir. 2013) ("Omitting meritless arguments is neither professionally unreasonable nor prejudicial.").

Similarly, Petitioner's claim that counsel was ineffective for not impeaching Officer Galbreath with the officer's preliminary examination testimony about the color of the jacket taken from Petitioner (habeas ground III) was rejected as meritless by the Michigan Court of Appeals. (Mich. Ct. App. Op., ECF No. 30-5, PageID.776.) Petitioner is correct that the officer testified at the preliminary examination that Petitioner was wearing a brown jacket. But, as noted by the appellate court, "contrary to defendant's claim, more fully, at the preliminary examination, there was testimony that defendant's jacket was reversible and one side was dark green—which was the same 'color and design of the jacket that was visible from the video surveillance.'" (*Id*.) Appellate counsel's decision to forego the claim that trial counsel was ineffective for not highlighting this testimony was, therefore, professionally reasonable and in no way prejudicial. *Coley*, 706 F.3d at 752.

Petitioner's argument that appellate counsel failed to raise trial counsel's failure to raise Petitioner's medical condition (habeas ground V)—that a gunshot wound limited Petitioner's mobility such that he could not have fled the gas station after the robbery—fails for a different reason. Appellate counsel raised the argument in Petitioner's appeal brief. (Pet'r's Appeal Br., ECF No. 30-5, PageID.803.) Moreover, the court of appeals addressed it as if counsel had raised

it below and rejected it as factually unsupported. (Mich. Ct. App. Op., ECF No. 30-5, PageID.773-774.) The state court's rejection of Petitioner's argument was patently reasonable, as his claim is unsupported.

Finally, Petitioner's argument that appellate counsel rendered ineffective assistance because counsel failed to challenge trial counsel's failure to raise the prosecutor's misconduct in presenting perjured testimony (habeas ground IV) is also meritless—factually and legally meritless. Working through the layers of Petitioner's claim, its merit depends on the determinations that Officer Galbreath presented false testimony, that the prosecutor knew the testimony was false, that trial counsel should have raised the prosecutorial misconduct claim, and that appellate counsel should have raised trial counsel's failure to raise the prosecutorial misconduct claim.

At the very base of Petitioner's claim is the testimony of Officer Galbreath. (Trial Tr., ECF No. 30-3, PageID.692-718.) Officer Galbreath was dispatched to the gas station initially. While there, he received a call that Petitioner had been apprehended at the Banks house. Officer Galbreath traveled to that location. At that time Petitioner was in a police vehicle awaiting transport to the hospital. Officer Galbreath participated in the search of the home with Ms. Banks's permission. Officer Galbreath found the glasses, the money, and the gun. Officer Galbreath then returned to the gas station. Following that, the officer returned to the police station where he finished processing the evidence and booking Petitioner. As part of the booking process, Officer Galbreath gathered Petitioner's clothing, including the green coat. Officer Galbreath testified:

> Prosecutor: Did you actually take any items from Mr. Taylor?
>
> Witness: Yes, I did. I believe we gathered his clothing and the things from him there.
>
> Prosecutor: All right. And the clothing that he had on, what—what specifically was he wearing?

Witness: He had a pair of white tennis shoes on, a pair of blue jeans and then a—a green jacket.

Prosecutor: Okay. And did you—you—you indicated that you took all those items?

Witness: I had—yes, I did.

Prosecutor: All right.

Witness: Obtained those items from him.

Prosecutor: I'm showing you what's been marked as People's proposed exhibit number four. . . . Please open that and describe--

Witness: It is the green jacket that Mr. Taylor was wearing which is very similar to the jacket that was observed in the video . . . .

Prosecutor: All right. And so you took that from Mr. Taylor back on December 26, 2013 during the booking process?

Witness: Yes. It was obtained from Mr. Taylor.

Prosecutor: And is it in substantially the same condition as when you –

Witness: Yes.

Prosecutor: Took that—took possession of it?

Witness: Yes. It was given to me, yes.

(Trial Tr., ECF No. 30-3, PageID.711-712.) Petitioner's counsel clarified the circumstances under which Galbreath came into possession of the coat:

Counsel: [A]t booking my client has that coat on?

Witness: I can't say for sure if he did or not. I just know it was given to me after it was taken from him.

Counsel: But you don't know if it was actually taken from him, do you?

Witness: No.

Counsel: You don't know where that came from other than it was in the house somewhere?

Witness: No, it was given—it was taken off of him by Officer Postma, I believe, at the hospital. Based on the label.

(Trial Tr., ECF No. 30-3, PageID.716.)

Petitioner reads the testimony and asks, "Which one was it, Officer Galbreath 'took the jacket during booking' or was it 'taken by Officer Postma at the hospital[']' or was it 'taken from somewhere in the house and someone gave it to him other than Officer Postma.'" (Pet., ECF No. 20-1, PageID.440.) The "taken from somewhere in the house" comment was not from Officer Galbreath, it was part of the question from Petitioner's counsel. Galbreath denied that proposition. The other two propositions, however, are not necessarily inconsistent. It is entirely possible that Officer Postma "took" the coat from Petitioner at the hospital and then turned the coat and Petitioner over to Officer Galbreath during booking.

"[D]eliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" *Giglio v. United States*, 405 U.S. 150, 153 (1972) (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)).

> The knowing use of false or perjured testimony constitutes a denial of due process if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. In order to establish prosecutorial misconduct or denial of due process, the defendants must show (1) the statement was actually false; (2) the statement was material; and (3) the prosecution knew it was false.

United States v. Lochmondy, 890 F.2d 817, 822 (6th Cir. 1989) (citations omitted). Petitioner bears the burden of demonstrating that the testimony was actually perjured. *Id.* "[M]ere inconsistencies in testimony by government witnesses do not establish knowing use of false testimony." *Id.*

Here, Petitioner has not identified inconsistent testimony, much less false testimony. His allegations are utterly groundless. But even if the testimony could be characterized as inconsistent or the words stretched beyond their common meaning to be actually false, Petitioner has failed to show that the prosecution knew the testimony to be false. Under those circumstances, it cannot be said that defense counsel was professionally unreasonable for failing to call out the

prosecutor for presenting false testimony or that appellate counsel should have raised that issue on appeal.

Petitioner raised the perceived inconsistency in Galbreath's testimony in his *pro per* supplemental brief on appeal. (Pet'r's *Pro Per* Supp. Br., ECF No. 30-5, PageID.849-850.) And Petitioner claimed his counsel was ineffective with regard to the testimony because his cross-examination was not effective. (*Id*.) But Petitioner did not claim the prosecutor presented knowingly false testimony, that trial counsel should have objected, or that appellate counsel should have raised trial counsel's failure to object, until the motion for relief from judgment. (Pet'r's Mot. for Relief from J., ECF No. 30-6, PageID.914.)

The trial court rejected the claim because Petitioner had failed to show "cause" for not raising the claim on direct appeal; Petitioner had failed to show that his appellate counsel was ineffective for failing to raise the trial counsel's failure to raise the prosecutor's presentation of knowingly false testimony. (Jackson Cnty. Cir. Ct. Order, ECF No. 30-6.) Although the circuit court resolved the bottom three levels of the issue—the perjured testimony, the prosecutor's knowing use of it, and trial counsel's failure to object—as procedurally defaulted, the state court resolved the top level of the issue—appellate counsel's ineffective assistance—on the merits. The court concluded that Petitioner had failed to demonstrate cause which is typically established by showing ineffective assistance of appellate counsel. Here, however, the trial court concluded that Petitioner could not blame appellate counsel for failing to raise the issue when Petitioner filed a *pro per* supplemental brief and also failed to raise the issue. (*Id*., PageID.975-976.) That reasoning has not been universally accepted by panels in the Sixth Circuit. *Compare Sheffield v. Burt*, 731 F. App'x 438, 442 (6th Cir. 2018) ("Sheffield had the opportunity to raise any issues in his Standard 4 brief on direct appeal that he felt his appellate counsel should have raised. He did not raise the issue."), and *McKinney v. Horton*, 826 F. App'x 468, 473 (6th Cir. 2020) ("We do not

read *Sheffield* . . . to mean that a habeas petitioner's failure to raise certain claims in his optional Standard 4 brief while on appeal in state court precludes a later finding that those claims constitute cause to excuse a procedural default based on ineffective assistance of appellate counsel.").

To prevail here, Petitioner must show that the state court's determination that appellate counsel did not render ineffective assistance is contrary to, or an unreasonable application of, clearly established federal law. Petitioner has not shown that the court's decision is contrary to *Strickland*, the clearly established federal law regarding ineffective assistance, even if one might argue that it is contrary to *McKinney*. Moreover, whether or not the state court adopted the right reason, it reached the correct result. For the reasons set forth above, at every level of this layered claim, the claim is meritless. Accordingly, Petitioner is not entitled to habeas relief.

Certificate of Appealability

Under 28 U.S.C. § 2253(c)(2), the Court must determine whether a certificate of appealability should be granted. A certificate should issue if Petitioner has demonstrated a "substantial showing of a denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Sixth Circuit Court of Appeals has disapproved issuance of blanket denials of a certificate of appealability. *Murphy v. Ohio*, 263 F.3d 466, 467 (6th Cir. 2001) (per curiam). Rather, the district court must "engage in a reasoned assessment of each claim" to determine whether a certificate is warranted. *Id.* Each issue must be considered under the standards set forth by the Supreme Court in *Slack v. McDaniel*, 529 U.S. 473 (2000). *Murphy*, 263 F.3d at 467. Consequently, I have examined each of Petitioner's claims under the *Slack* standard. Under *Slack*, 529 U.S. at 484, to warrant a grant of the certificate, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* "A petitioner satisfies this standard by demonstrating that . . . jurists of reason could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*,

537 U.S. 322, 327 (2003). In applying this standard, the Court may not conduct a full merits review, but must limit its examination to a threshold inquiry into the underlying merit of Petitioner's claims. *Id.*

I find that reasonable jurists could not conclude that this Court's dismissal of Petitioner's claims would be debatable or wrong. Therefore, I recommend that the Court deny Petitioner a certificate of appealability.

Moreover, although I conclude that Petitioner has failed to demonstrate that he is in custody in violation of the constitution and has failed to make a substantial showing of a denial of a constitutional right, I would not conclude that any issue Petitioner might raise on appeal would be frivolous. *Coppedge v. United States*, 369 U.S. 438, 445 (1962).

Recommended Disposition

For the foregoing reasons, I recommend that the habeas corpus petition be denied. I further recommend that a certificate of appealability be denied. Finally, I recommend that the Court not certify that an appeal would not be taken in good faith.

Dated: January 21, 2021

/s/ Ray Kent
United States Magistrate Judge

NOTICE TO PARTIES

Any objections to this Report and Recommendation must be filed and served within 14 days of service of this notice on you. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b). All objections and responses to objections are governed by W.D. Mich. LCivR 72.3(b). Failure to file timely objections may constitute a waiver of any further right of appeal. *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981); *see Thomas v. Arn*, 474 U.S. 140 (1985).

APPENDIX D

Court of Appeals, State of Michigan

ORDER

People of MI v Johnny Taylor

Docket No. 322629

LC No. 13-003884-FC

Jane M. Beckering
Presiding Judge

David H. Sawyer

Joel P. Hoekstra
Judges

The Court orders that the motion to remand pursuant to MCR 7.211(C)(1) is DENIED. Defendant-appellant has not demonstrated that further factual development of the record or an initial ruling by the trial court is necessary at this time in order for this Court to review the issues on appeal.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

MAY 29 2015

Date

Chief Clerk

APPENDIX E

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 17, 2015
v	No. 322629 Jackson Circuit Court
JOHNNY TAYLOR, Defendant-Appellant.	LC No. 13-003884-FC

Before: GADOLA, P.J., and HOEKSTRA and M. J. KELLY, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529. He was sentenced as an habitual offender, fourth-offense, MCL 769.12, to 20 to 50 years' imprisonment. Defendant appeals as of right. Because defendant has not shown that he was denied the effective assistance of counsel, we affirm.

At trial, evidence showed that in the early morning hours of December 26, 2013, an Admiral Gas Station in Jackson, Michigan was robbed. During the robbery, the gas station attendant was struck in the head multiple times and forced at gunpoint to give the robber the money in the cash register. The robber then absconded with the money from the register, including a marked $2 bill. At trial, the clerk could not identify defendant as the robber because defendant was bundled up in a green coat that concealed his face. Likewise, there was video footage of the robbery, some of which was played for the jury, but the perpetrator's face is not visible in the footage.

Police responding to the robbery were able to follow tracks from the gas station to the home of Heather Banks, a woman with whom defendant was acquainted. Even though it was after 2:00 am and her five small children were sleeping in the home, Banks testified that she let defendant into her home to make a telephone call. Further, she testified that when police arrived, she told defendant that police were looking for him, at which time defendant ran into Banks's bedroom and hid. Banks gave police permission to enter the home. However, when ordered to exit the bedroom by police, defendant refused, prompting police to deploy a police dog to find defendant in the closet of Bank's bedroom. The dog latched on to defendant's arm; but, because defendant was wearing several layers of clothing, the dog did not puncture defendant's skin. In particular, defendant was wearing a green jacket like the jacket worn by the gas station robber.

After the dog apprehended defendant, defendant was taken to the hospital to make sure he was uninjured. On the way to the hospital, defendant waived his *Miranda*[1] rights and, in response to police questioning, defendant stated that "the gun is not in the house." Additionally, when police searched the bedroom where defendant had been hiding, in the box spring of Banks's bed, near a pair of reading glasses on the floor that did not belong to Banks or her family members, police found a BB gun that looked like a handgun as well as the money from the robbery, including the tracer $2 bill. At the hospital, defendant told police that he needed his reading glasses to read some documents. As noted, the jury convicted defendant of armed robbery. Defendant now appeals as of right.

On appeal, the only issues before us are various claims of ineffective assistance of counsel, some of them raised by appellate defense counsel in defendant's brief on appeal and others raised by defendant in his Standard 4 brief. Defendant failed to move the trial court for an evidentiary hearing or a new trial, meaning his claims of ineffective assistance are unpreserved and our review is limited to mistakes apparent on the record. *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). Claims of ineffective assistance of counsel are mixed questions of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Findings of fact by the trial court, if any, are reviewed for clear error, and questions of constitutional law are reviewed de novo. *Id.*

Under the standard set forth in *Strickland*,[2] to establish a claim of ineffective assistance of counsel, a defendant must show that: "(1) that counsel's representation fell below an objective standard of reasonableness, and (2) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v Douglas*, 496 Mich 557, 592; 852 NW2d 587 (2014) (quotation marks and citation omitted). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012). Trial counsel has "great discretion" in matters of trial strategy, *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994), and this Court will not substitute its judgment for counsel on matters of trial strategy, *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy[.]" *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Further, failure to call a witness only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense. *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012). However, defense attorneys always have a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary," and strategic choices "made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012) (quotation marks and citation omitted). Finally, a defendant bears the burden of establishing the factual predicate of his claim, meaning

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

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

that, "[t]o the extent his claim depends on facts not of record, it is incumbent on him to make a testimonial record at the trial court level . . . ." *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999) (citation omitted).

In this case, on appeal, defendant first argues that trial counsel was ineffective for failing to investigate and for failing to prepare for trial. Specifically, defendant asserts that counsel did not meet with defendant an adequate number of times. According to defendant, counsel also failed to investigate the possibility that Banks's 17-year-old son was the gas station robber. Defendant claims that, before trial, he told his trial counsel that he was asleep on Banks's couch when Banks's son returned to the house at around 2 a.m. He now asserts that counsel should have investigated potential testimony from Banks's son regarding his activities that night, the presence of guns in the home, and whether he had entered the room where the items from the robbery were found. Defendant also claims that counsel failed to procure evidence (or at least failed to share that evidence with defendant), including photographs of footprints in the snow, the video footage of the robbery showing all the camera angles, photographs of defendant's arm after he was bitten by the dog, photographs of the green coat worn by defendant, and photographs of the $2 bill found in Banks's home.

As noted, defendant failed to move the trial court for a new trial or for an evidentiary hearing. As a result, there is no record support for defendant's assertion that counsel failed to conduct an investigation, that counsel failed to meet with defendant a reasonable amount of times, that counsel failed to obtain evidence or to share it with defendant, or that Banks's son possessed guns, that he returned home late to the house, or that he had an opportunity to enter the room where police discovered evidence of the robbery. Cf. *People v Carbin*, 463 Mich 590, 601; 623 NW2d 884 (2001). To the contrary, by defendant's own admissions, counsel met with him before trial and defendant sent additional communications to his attorney via letter. Our review of the record also shows that, as a general matter, defense counsel made a detailed demand for discovery, and that at trial counsel was prepared to cross-examine witnesses and to present closing arguments.[3] While counsel may not have proceeded with the strategy now advanced by defendant on appeal, there is nothing in the record to support defendant's assertions that counsel's strategic decisions were made without adequate investigation or that they were unreasonable in light of counsel's pre-trial investigations. See *Trakhtenberg*, 493 Mich at 52.

[3] For example, counsel argued during closing (1) that defendant could not be identified from the video of the robbery, (2) that the robber did not wear gloves and yet no fingerprint evidence had been introduced to tie defendant to the crime, (3) that police made no effort to match defendant's shoes to the footprints they followed to Banks's house, (4) that there were no telephone records to support Banks's testimony that defendant made calls while at her house, and (5) that the green coat supposedly worn by defendant did not have dog marks as one would expect given the manner of defendant's apprehension. In these circumstances, counsel maintained that the prosecutor had shown nothing more than that defendant was in Banks's house and bitten by a dog.

Moreover, with respect to Banks's son in particular, the record evidence does not support the defense that defendant now claims his counsel should have investigated and presented at trial. That is, contrary to defendant's assertions on appeal, Banks denied having a gun in the home and, when defense counsel asked Banks at trial whether any of her children had "been out and come back in that night," she indicated that they had all stayed in all night. Police confirmed that Banks's children were in bed when they entered the home and that the children had to be removed to squad cars for their safety while police tried to rouse defendant from his hiding place in the closet. In other words, on the record presented, defendant has not established the factual predicate of the defense he now claims counsel should have investigated and pursued. See *Hoag*, 460 Mich at 6. And, consequently, defendant has not shown counsel performed below an accepted standard of reasonableness or that he was prejudiced by counsel's performance.

We note that defendant filed an untimely motion in this Court to remand for an evidentiary hearing and, in support of that motion, defendant attached his own affidavit, attesting to counsel's failure to provide him with various pieces of evidence and describing a conversation in which he told counsel his theories about Banks's son. However, defendant's request for a remand was denied and, because defendant's affidavit is not part of the lower court record, we need not consider it at this time. See *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008); *People v Watkins*, 247 Mich App 14, 31; 634 NW2d 370 (2001).

Moreover, even if we were to consider defendant's affidavit, he cannot establish his ineffective assistance claim based on his attestations in that document. First, although defendant indicates that he told counsel his suspicions regarding Banks's son, he has not made an offer of proof from his attorney, Banks, or Banks's son to establish what efforts, or lack thereof, were made by his attorney to investigate this lead. Cf. *Carbin*, 463 Mich at 601. Consequently, even considering defendant's affidavit, he has not established the factual predicate of his claim and he has not overcome the presumption that counsel provided effective assistance. Second, it is clear that defendant has failed to make a showing of prejudice. Defendant in fact makes no effort on appeal to explain how counsel's purported failures could be construed to have affected the outcome of the proceeding. And, in contrast to defendant's threadbare allegations against Banks's son, the evidence of defendant's guilt is overwhelming. Shortly after the robbery, police followed fresh footprints from the gas station to Banks's home where they found defendant hiding in a closet. The cash from the robbery was found in the room where defendant was hiding, defendant was bundled up in several layers of clothing, including a green jacket consistent with that worn by the gas station robber, and defendant obliquely admitted his knowledge of the gun used in the robbery when he told police that "the gun is not in the house." Given this considerable evidence of defendant's guilt, we cannot conclude that further investigation or additional pre-trial preparation by counsel in the manner proposed by defendant would have been reasonably likely to affect the outcome of the proceedings. Thus, defendant has not shown that he was denied the effective assistance of counsel.

In a related argument, defendant also argues on appeal that counsel was ineffective for failing to call any supporting witnesses at trial. Specifically, defendant claims counsel should have called (1) an "internet expert" to locate photographs on Facebook that depicted Banks's son holding guns, (2) a medical expert to testify that defendant could not have travelled the distance from the gas station to Banks's house due to defendant's previous gunshot wound and his restless leg syndrome, (3) Banks's son to question him about his activities the night of the

robbery as well as, more generally, his possession of guns, (4) defendant's brother to testify that he dropped defendant at Banks's home at 11:30 p.m. that evening, and (5) Banks's cousin to undermine Banks's claim that she was only minimally acquainted with defendant when in fact her cousin would testify that Banks had known defendant since 1994.

Initially we note that defendant has failed to establish the factual predicate of his claim in relation to these witnesses that defendant now claims counsel should have called. First, there is absolutely no indication in the lower court record, or even in the materials supporting defendant's motion for remand, that an internet expert could have uncovered photographs of Banks's son on Facebook or that a medical expert would have testified in defendant's favor if called. Absent some offer of proof regarding how such experts might have testified, defendant has not meant his burden of establishing the factual predicate of his claim. Cf. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Second, there is likewise a lack of evidence to establish how Banks's son would have testified if called, meaning defendant has not shown that such testimony would have been favorable to defendant or that its omission deprived defendant of a substantial defense. See *Russell*, 297 Mich App at 716. Finally, with respect to Banks's cousin and defendant's brother, there is no record support for the testimony defendant now claims they would have provided. It is true that defendant submitted affidavits from these individuals in relation to his untimely motion for a remand, but such documents are not properly before us on appeal because they are not part of the lower court record. See *Horn*, 279 Mich App at 38; *Watkins*, 247 Mich App at 31.

In any event, even considering the affidavits produced by defendant on appeal, it is clear that defendant cannot establish that he was prejudiced by counsel's failure to call the various witnesses he now mentions on appeal. As noted, there is no evidence that testimony from an internet expert, a medical expert, or Banks's son would have favored defendant, meaning that defendant has not shown a reasonably probability that, but for counsel's failure to call these witnesses, the result of the proceedings would have been different. Cf. *Ackerman*, 257 Mich App at 455-456. With respect to testimony from defendant's brother, he was not a witness to the robbery itself and his claim to have dropped defendant at Banks's house at 11:30 does not provide defendant with any sort of alibi for the robbery at 2:00 a.m. Rather, this evidence would only further confirm that defendant was in relatively close proximity to the gas station on the night of the robbery. Accordingly, we cannot conclude that counsel's failure to present this testimony affected the outcome of the proceedings. With respect to testimony from Banks's cousin, it appears defendant believes she could have testified regarding the length and nature of Banks's relationship with defendant for the purpose of impeaching Banks's claim that she did not know defendant well. But, any testimony on this issue would likely have been inadmissible because it would have involved impeachment of a witness's credibility though the use of extrinsic evidence regarding a collateral issue, which is prohibited by MRE 608(b). See *People v Rosen*, 136 Mich App 745, 758; 358 NW2d 584 (1984). Further, given that the nature of defendant's relationship with Banks is a tangential issue which did not bear directly on defendant's guilt or innocence, we fail to see how testimony from Banks's cousin on this issue could have created a reasonable probability of a different outcome. Thus, defendant has not shown he was denied the effective assistance of counsel.

Next, defendant argues that trial counsel was ineffective with respect to his cross-examination of Banks. In particular, defendant asserts that counsel failed to challenge Banks's

credibility. Although defendant frames his argument in terms of counsel's cross-examination of Banks, he does not propose any questioning that defense counsel should have pursued or explain how such questioning would have created a reasonable probability of a different outcome. Instead, in support of this claim that counsel failed to challenge Banks's credibility, defendant rehashes his earlier arguments regarding testimony Banks's cousin might have provided with respect to defendant's relationship with Banks and defendant claims that he was naked when bitten by the police dog, a fact which defendant claims could have been proven with evidence showing the wound caused by the dog bite and DNA testing to establish that his blood was not on the green coat.

To the extent defendant argues this evidence should have been presented to discredit Banks, his arguments in this respect are without merit because these claims are not factually supported by the lower court record. See *Hoag*, 460 Mich at 6. Testimony from police officers at trial indicates that defendant was fully clothed, and in fact wearing several layers of clothing, when bitten by the dog during his apprehension in Banks's home. Even if we were to consider the materials defendant offers on appeal, defendant makes no offer of proof to support his claim that DNA testing of the coat would have been favorable to his defense or that he was unclothed when apprehended. Therefore, counsel cannot be considered ineffective for failing to introduce evidence on these issues. Further, as discussed *supra*, impeachment of Banks through the presentation of extrinsic evidence from her cousin regarding a collateral issue would have been improper under MRE 608(b). See *Rosen*, 136 Mich App at 758. And, given the overwhelming evidence presented at trial, impeachment of Banks on this collateral issue would not have created a reasonable probability of a different outcome. Moreover, we note that more generally, contrary to defendant's arguments on appeal, counsel did not fail to challenge Banks's credibility, but in fact specifically argued during closing that, among other shortcomings, Banks's claim to have let a near-stranger into her home at 2:00 in the morning was "suspicious." Additionally, counsel did cross-examine Banks, and defendant has not overcome the presumption that trial counsel exercised reasonable professional judgment in his decisions regarding how to question Banks. See *Davis*, 250 Mich App at 368. On the whole, defendant has not shown that counsel's treatment of Banks's testimony was unreasonable or that, but for counsel's failure, there was a reasonable probability of a different outcome. Thus, defendant has not shown that he was deprived of the effective assistance of counsel.

In his Standard 4 brief, defendant also argues that he received ineffective assistance of counsel. Defendant largely reiterates the same arguments raised in appellate counsel's brief, which we reject for the same reasons discussed *supra*. Defendant's additional arguments are without merit for the reasons discussed below.

As a preliminary matter, we note that defendant's reliance on *United States v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984) and related cases is misplaced. Defendant's case does not fit within the narrow category of cases in which prejudice is presumed as described in *Cronic*, 466 US 648. That is, contrary to defendant's argument on appeal, the record evinces that defense counsel investigated the case and subjected the prosecution's case to meaningful adversarial testing. Defendant's claims to the contrary, as detailed below, are premised on counsel's purported failures at specific points in the proceedings, and such claims are properly analyzed under *Strickland*, not *Cronic*. See *People v Frazier*, 478 Mich 231, 243-244 & n 10;

733 NW2d 713 (2007). Consequently, we review all of defendant's claims under the *Strickland* standard set forth *supra*.

First, defendant argues that trial counsel was ineffective for failing to give an opening statement. "[T]he waiver of an opening statement involves 'a subjective judgment on the part of trial counsel which can rarely, if ever, be the basis for a successful claim of ineffective assistance of counsel.' " *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Here, there is nothing in the record to overcome the presumption that counsel's decision not to give an opening statement was an exercise of sound trial strategy and there is no basis to conclude that counsel's failure to do so affected the outcome of the lower court proceedings. Cf. *id.*

Second, defendant argues that trial counsel failed to obtain and test various pieces of evidence. As noted, defense counsel made a detailed request for discovery, and the lower court record does not establish what evidence trial counsel actually obtained or failed to obtain. Thus, defendant has not established the factual predicate of his claim, *Hoag*, 460 Mich at 6, and he has not shown that counsel was objectively unreasonable for failing to obtain evidence. Regardless, defendant has not established that he was prejudiced by the alleged failures of counsel with respect to the various pieces of evidence identified in his brief. Defendant has not presented any information about what tests on the evidence would have shown or how the evidence or tests would support his defense. Further, trial counsel may have made the reasonable decision not to have the evidence tested to avoid creating any additional incriminating evidence against defendant. In fact, during closing arguments, trial counsel used the lack of testing to argue in defendant's favor, highlighting that the prosecution did not provide any evidence that the footprints matched defendant's shoes, that there was no fingerprint evidence tying defendant to the robbery, and that the green jacket, if worn by defendant, would have had puncture holes in it from a dog bite. On this record, defendant failed to overcome the presumption that trial counsel's decision to forego testing of items was sound trial strategy. *Davis*, 250 Mich App at 368.

Third, in his Standard 4 brief, defendant argues that trial counsel failed to cross-examine witnesses with respect to the color of the jacket defendant wore the night of the robbery in light of testimony at the preliminary examination that defendant wore a brown jacket that evening. Contrary to defendant's claim, more fully, at the preliminary examination, there was testimony that defendant's jacket was reversible and one side was dark green—which was the same "color and design of the jacket that was visible from the video surveillance." Trial counsel may not have wanted to highlight this fact. Defendant has not overcome the presumption that this decision was sound trial strategy. *Davis*, 250 Mich App at 368. Defendant also asserts various other problems with the cross-examination conducted by defense counsel in relation to the green coat, which we have reviewed and which are not supported by the record. Defense counsel in fact questioned witnesses about the coat, meaning that there is no factual predicate for these claims. *Hoag*, 460 Mich at 6. Defendant has not overcome the presumption that counsel's questioning of witnesses was a matter of trial strategy. See *Davis*, 250 Mich App at 368.

Fourth, defendant also argues that trial counsel failed to offer the defense that none of the evidence from the robbery was found on defendant. However, this point was clear from the testimony. The record plainly demonstrated that the money and gun were found inside the box

spring, and there was no contention that the items were found on defendant. Trial counsel's decision not to raise or dispute an obvious point was a matter of trial strategy. See *id.*

In sum, defendant has not demonstrated that counsel's performance was deficient or that, but for counsel's errors, there was a reasonable probability of a different outcome. Consequently, defendant has not established his ineffective assistance of counsel claim. See *Douglas*, 496 Mich at 592.

Affirmed.

/s/ Michael F. Gadola
/s/ Joel P. Hoekstra
/s/ Michael J. Kelly

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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Filed: February 23, 2023

Ms. Ann E. Filkins
U.S. District Court
for the Western District of Michigan at Grand Rapids
110 Michigan Street, N.W.
Suite 399 Federal Building
Grand Rapids, MI 49503-0000

Re: Case No. 21-1348, *Johnny Taylor v. Thomas Bell*
Originating Case No. 1:17-cv-00855

Dear Ms. Filkins:

Enclosed is a copy of the mandate filed in this case.

Sincerely yours,

s/Patricia J. Elder, Senior Case Manager
for Michelle Lambert, Case Manager

cc: Ms. Andrea M. Christensen-Brown
Mr. Michael Dominic Meuti
Mr. John S. Pallas
Mr. Jerrold E. Schrotenboer
Mr. Jared D. Schultz
Mr. Michael Benjamin Silverstein

Enclosure

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 21-1348

Filed: February 23, 2023

JOHNNY TAYLOR

Petitioner - Appellant

v.

THOMAS K. BELL, Warden

Respondent - Appellee

MANDATE

Pursuant to the court's disposition that was filed 02/01/2023 the mandate for this case hereby issues today.

COSTS: None

APPENDIX G

28 U.S.C. § 2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) 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 unless it appears that—

> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant

shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral postconviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

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Filed: November 08, 2021

Ms. Andrea M. Christensen-Brown
Office of the Attorney General
of Michigan
P.O. Box 30217
Lansing, MI 48909

Mr. Jerrold E. Schrotenboer
Jackson County Prosecutor's Office
312 S. Jackson Street
Jackson, MI 49201

Johnny Taylor
Gus Harrison Correctional Facility
2727 E. Beecher Street
Adrian, MI 49221

Re: Case No. 21-1348, *Johnny Taylor v. Thomas Bell*
Originating Case No. 1:17-cv-00855

Dear Counsel,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Michelle R. Lambert
Case Manager
Direct Dial No. 513-564-7035

cc: Mr. Thomas Dorwin

Enclosure

No. 21-1348

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Nov 08, 2021
DEBORAH S. HUNT, Clerk

JOHNNY TAYLOR,

Petitioner-Appellant,

v.

THOMAS K. BELL, Warden,

Respondent-Appellee.

ORDER

Before: STRANCH, Circuit Judge.

Johnny Taylor, a pro se Michigan prisoner, applies for a certificate of appealability ("COA") in his appeal from the district court's denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. *See* 28 U.S.C. § 2253(c)(1)(A). Taylor also moves to proceed in forma pauperis. Respondent did not respond to either motion.

After a one-day trial, a jury convicted Taylor of armed robbery of a gas station attendant. The robber could not be identified by either the surveillance video or the attendant because he was bundled up in a coat that covered his face. Police followed footprint tracks in the snow leading from the gas station to the home of a woman named Heather Banks. She testified that around the time of the robbery, Taylor showed up at her home and that approximately ten or fifteen minutes later, the police showed up. She further testified that when the police arrived, Taylor went to her bedroom. Police officers testified that they entered Banks's home and removed her and her children before sending a K-9 dog to retrieve Taylor from the closet where he was hiding. Police further testified they arrested Taylor and later found a gun and some cash, including a marked two-dollar bill from the gas station, in the box spring located in the bedroom where he was hiding. Following his conviction, the trial court sentenced Taylor to twenty to fifty years of imprisonment. *See People v. Taylor*, No. 322629, 2015 WL 7288030, at *1 (Mich. Ct. App. Nov. 17, 2015) (per

curiam). His direct appeal was unsuccessful. *Id.*, *perm. app. denied*, 880 N.W.2d 582 (Mich. 2016).

Taylor sought and was denied post-conviction relief in state court for violation of his Sixth Amendment right to effective assistance of counsel. *See People v. Taylor*, 931 N.W.2d 364 (Mich. 2019) (mem.). Taylor then sought relief in federal court, filing an amended § 2254 petition. A magistrate judge recommended denying the petition on the merits and the district court adopted that recommendation over Taylor's objections, denied the petition, and declined to issue a COA. *See Taylor v. Burt*, No. 1:17-CV-855, 2021 WL 564665 (W.D. Mich. Feb. 14, 2021) (adopting report and recommendation). Taylor now seeks a COA from this court to appeal the district court's denial of his habeas petition.

A court may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The COA standard "does not require a showing that the appeal will succeed." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). Rather, "[t]hat standard is met when 'reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner,'" *Welch v. United States*, 136 S. Ct. 1257, 1263 (2016) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)), or when "jurists could conclude the issues presented are adequate to deserve encouragement to proceed further," *Miller-El*, 537 U.S. at 327. In addition, "[a] document filed pro se is 'to be liberally construed.'" *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)) (per curiam).

Generally, a habeas petitioner must prove ineffective assistance of counsel by showing that his attorney's performance was deficient and that he was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).[1] First, to show counsel's deficient performance, "the

[1] But "a defendant can show a Sixth Amendment violation without the need to prove prejudice when there is a 'complete denial of counsel' at, or counsel is 'totally absent' from, a 'critical stage of the proceedings.'" *Clark v. Lindsey*, 936 F.3d 467, 470 (6th Cir. 2019), *cert. denied*, 141 S. Ct. 165 (2020) (quoting *United States v. Cronic*, 466 U.S. 648, 658-59 & n.25 (1984)). Taylor asserts that his counsel did not meet with him until the day before trial and that even that meeting lasted

defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. An attorney's "'strategic choices must be respected' if they were 'made after thorough investigation of law and facts relevant to plausible options.'" *Higgins v. Renico*, 470 F.3d 624, 632 (6th Cir. 2006) (quoting *Strickland*, 466 U.S. at 690). Importantly, "the investigation leading to the choice of a so-called trial strategy must itself have been reasonably conducted lest the 'strategic' choice erected upon it rest on a rotten foundation." *Ramonez v. Berghuis*, 490 F.3d 482, 488 (6th Cir. 2007).

In the present case, Taylor raises issues related to his counsel's alleged failure to investigate his case and the resulting deficient performance at trial. For example, Taylor's assertion that his attorney met with him only one time, for ten minutes, on the eve of trial calls into question the thoroughness of any investigation conducted by the attorney. At that lone meeting, Taylor requested to view the surveillance video of the robbery and his attorney replied there was no video—a fact that proved false the next day at trial when the prosecutor presented two of four total surveillance videos. Taylor points to several witnesses whose testimony would have impeached Heather Banks, one of the prosecution's key witnesses, had his attorney investigated and presented them at trial. Taylor requested his attorney investigate Heather Banks's oldest son as an alternative suspect[2] and requested his attorney obtain Taylor's medical records and present his treating physician to testify that he was not physically capable of traversing the distance between the gas station and Banks's home in the alleged timeframe. Notably, these assertions are part of the record in Taylor's criminal case because Taylor notified the court of these allegations at sentencing, which went unanswered by his attorney. **(*See* R. 30-4, Sentencing Tr., PageID 763–65)** At trial, Taylor's attorney did not make an opening statement and did not call any witnesses. As mentioned

---

only ten minutes. This fact, Taylor argues, amounts to a per se denial of counsel during the critical pre-trial phase. Therefore, Taylor contends that *Cronic* should apply, and prejudice should be presumed. While Taylor's argument may be true, this court need not reach it at this stage because he makes a substantial showing under the *Strickland* test, which was also applied by the state courts and district court below.

[2] Taylor asserts that he was asleep at Banks's home when her oldest son came home around the time of the robbery. Taylor further asserts that when the police arrived, he hid in the bedroom closet because he was on parole and out past curfew.

above, Taylor identifies several witnesses whose testimony would have aided in his defense. *See, e.g.*, *Towns v. Smith*, 395 F.3d 251, 259 (6th Cir. 2005) (quoting *Combs v. Coyle*, 205 F.3d 269, 288 (6th Cir. 2000) (finding deficient performance where attorney's decision not to call a witness "was objectively unreasonable because it 'was a decision made without undertaking a full investigation' into whether" the witness could aid in the client's defense).

Second, to show prejudice under *Strickland*, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694. When a petitioner "establishes 'sufficient doubt' about the evidence strong enough to 'sway even one juror,' then she has necessarily 'undermine[d] confidence in the outcome' under *Strickland*." *United States v. Miller*, 953 F.3d 804, 808 (D.C. Cir. 2020) (citation omitted and alterations in original). When an attorney fails to put up a defense of his client, an average juror may assume the attorney thinks his client is guilty. Taylor was also prejudiced when his attorney failed to utilize available witnesses to impeach a key witness for the prosecution, sufficiently undermining confidence in the outcome of his trial. This court has previously held failure to impeach a witness can establish prejudice under *Strickland*. *See, e.g.*, *Vasquez v. Bradshaw*, 345 F. App'x 104, 121 (6th Cir. 2009); *Poindexter v. Booker*, 301 F. App'x 522, 531 (6th Cir. 2008).

Reasonable jurists could debate whether the petition should have been resolved differently or conclude that the issues raised by Taylor deserve encouragement to proceed further. Taylor makes a substantial showing that he was denied his Sixth Amendment right to effective assistance of trial counsel and that issue is certified for appeal.

In addition, Taylor moved to proceed in forma pauperis on appeal. In support of his motion, he submitted an affidavit establishing his inability to pay. Accordingly, his motion to proceed in forma pauperis is granted.

Finally, this court may appoint counsel to represent an indigent person seeking relief under 28 U.S.C. § 2254 when "the interests of justice so require." 18 U.S.C. § 3006A(a)(2). Taylor is

an incarcerated pro se litigant and the issues on appeal are complex. Accordingly, the interests of justice require the court to appoint counsel to represent Taylor in this appeal.

Both Taylor's COA application and his motion to proceed in forma pauperis are **GRANTED**. The court also appoints counsel to represent Taylor in this appeal.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX I

State of Michigan

In the Court of Appeals

People of the State of Michigan, Plaintiff-Appellee,	Court of Appeals No. 322629
vs	Jackson County Circuit Court 13-3884 FC
Johnny Taylor, Defendant-Appellant.	Judge: Thomas D. Wilson

Attorney for Plaintiff:	Attorney for Defendant-Appellant: Laurel Kelly Young P-40671 PO Box 8797 Grand Rapids, MI 49518 (616) 901-0243

AFFIDAVIT OF JOHNNY TAYLOR

I, Johnny Taylor, being first duly sworn, deposes and says:

1. I am an adult of sound mind and body and am otherwise competent to testify to the allegations averred herein.
2. I make this Affidavit based upon personal knowledge to which I could testify if called upon to do so.
3. I was convicted of Armed Robbery (MCL 750.529) after a jury trial on May 14, 2014 and was sentenced to 20 to 50 years in prison on June 19, 2014.
4. Trial counsel failed to meet with me to prepare for trial until the day before trial.
5. On the day before trial our meeting lasted 10 minutes.
6. Prior to trial I wrote to trial counsel on many occasions and requested that he investigate the following:

a. I told trial counsel that I was asleep on the couch with Ms. Banks at 308 Williams St. on the night of December 25-26, 2013, when Ms. Banks 17 year old son, Marquis Dayton Banks, banged on the door around 2 a.m. and she let him in because he said he had lost his key.

b. I told trial counsel that when the police arrived a few minutes after Ms. Banks let her son in, that because I was on parole and out past curfew, that I ran to the back bedroom.

c. Ms. Banks son would have had an opportunity to hide the money and gun in his mother's bedroom when she let him in before the police arrived and before I entered the bedroom.

7. I wrote to trial counsel and advised him that I had the following witnesses that I wanted to testify in my defense.

a. The cousin of Ms. Banks' who would have testified that I have known Ms. Banks since 1994 and that we have had relations since then. His testimony would have undermined her claim that we weren't really acquainted and that I had showed up at her door at 2 o'clock in the morning of December 26, 2014. (Tr, Preliminary Examination, 1/8/14, p 22)

b. My brother who would have testified that he dropped me off at 1308 Williams St. because of my bad leg around 11:30 p.m.to 12:00 a.m.

c. My brother who would have testified that I have been knowing Ms. Banks since 1994 and that I introduced him to Ms. Banks not him introducing me to Ms. Banks as she claimed. This would have undermined Ms. Banks claim that we weren't acquainted.

d. An internet expert to locate and offer into evidence photos of Ms Banks' son brandishing guns in photographs on Facebook. This would have undermined Ms. Banks claim that her son doesn't own, handle or have guns in her home as well as shown that one of her sons could be posing with the very gun used in the robbery.

e. I wanted Ms Banks' son, Marquis Banks, interviewed about his online Facebook photos depicting him brandishing guns.

f. I wanted Ms. Banks son interviewed as to where he was coming from December 26, 2013 at 2 a.m. when his mother let him in.

g. I wanted the medical doctor interviewed who treated me due to the gunshot wounds to my femoral artery, stomach, the bullet still remaining in my leg, the doctor who diagnosed the blood clot in my leg in November of 2013, my restless leg syndrome and the fact that I walk with a cane and could not have traveled 10 blocks, a mile or more through the snow from the Admiral Gas Station or 250 W. Prospect to 1308 Williams Street within 5-7 minutes as Officer Galbreath testified to at trial (TT, May, 2014, p 105) as well as Ms. Banks testified at preliminary examination that I allegedly was there 5 minutes before the police arrived. (PT, Page 26)

h. My medical files proving all injuries.

i. My cousin who would have testified that, along with Heather Banks cousin, John White, and my brother, Robert L. Taylor, Jr. that Ms. Banks appeared at my sister's BBQ Fourth of July weekend, asking me to come to to her house where we all danced at BBQ and played cards into the night.

8. Trial counsel did not even submit a witness list or investigate any of my witnesses.

9. I told trial counsel that I wanted to review the video recordings of the robbery that the prosecutor said he would get to my attorney in open court. Trial counsel told me, the day before trial at our only meeting after we initially, met, that there was no video of the robbery. At trial the next day the prosecutor introduced video recordings of the robbery from four different angles. At that time I asked trial counsel to adjourn trial so that I could review the video recordings of the robbery before the jury saw them. He did not adjourn nor did trial counsel object to the prosecutor only showing two of the camera angles, in fact he agreed to the prosecutor only showing two of the four camera angles knowing I had no seen any camera angles (TT, P 134) Telling me, "You can't see the robber's face" which had no connection to my conviction or how the prosecutor prosecuted my case upon me allegedly being the one wearing the coat in the robbery video not as to seeing the robber's face according to the prosecutor's opening statement ((TT p 56-57) As well as closing argument (TT, p 163-165) I told trial counsel I needed to view the robbery video to see if the robber had any distinctive marks, scars, or tattoos to prove it was not me in the video.

10. Trial counsel ignored my many written requests that I wrote to him and letters sent through a client of his that was in the cell with me when he went to court asking him to send me the discovery and to bring the robbery video of the robbery prior to trial and to review any photographs, but not limited to:

    a. The shoes and shoe prints in the snow,

    b. My arm that had been chewed up by the police dog,

    c. The coat that I was allegedly wearing when the dog bit me,

d. The two dollar bill that was allegedly in the Admiral Station cash drawer and log book it was recorded in as being in the drawer.

11. I told trial counsel to have the coat tested for DNA to show I could not have had the coat on in the robbery video, nor could I have been wearing the coat when the dog bit me because my blood would have been in the coat had I had the coat on when the dog bit me.

12. I told trial counsel to have the gun finger printed to show that my prints were not on the gun and that Ms. Banks son, Marquis Banks, could have been,proving I didn't handle the gun but her son did.

13. Trial counsel failed to question Ms. Banks as to whether or not it was actually her own son who knocked on the door that night of December 26, 2013 at 2:00 a.m. because he claimed he lost his key so his mother had to let him in.

14. Trial counsel failed to make an opening statement because he had no witnesses to call to testify or any evidence to support my defense because trial counsel failed to investigate anyone I asked him to or interview any of my witnesses.

FURTHER AFFIANT SAITH NOT.

Dated: 3-18-15

Johnny Taylor

The foregoing instrument was acknowledged before me this 18 day of March, 2015, by Johnny Taylor, who is personally known to me and who did take an oath.

Subscribed and sworn to before me this 18 day of March, 2015

Notary Public

Notary Public, Saginaw, Co., MI
My commission expires 10/3/2018

State of Michigan

In the Court of Appeals

People of the State of Michigan, Plaintiff-Appellee,	Court of Appeals No. 322629
vs	Jackson County Circuit Court 13-3884 FC
Johnny Taylor, Defendant-Appellant.	Judge: Thomas D. Wilson

Attorney for Plaintiff:	Attorney for Defendant-Appellant: Laurel Kelly Young P-40671 PO Box 8797 Grand Rapids, MI 49518 (616) 901-0243

AFFIDAVIT OF ROBERT L. TAYLOR, Jr.

I, Robert L. Taylor, Jr., being first duly sworn, deposes and says:

1. I am an adult of sound mind and body and am otherwise competent to testify to the allegations averred herein.
2. I make this Affidavit based upon personal knowledge to which I could testify if called upon to do so.
3. I dropped my brother Johnny off at Heather Banks house at 1308 Williams St. on the night of December 25-26, 2013 between 11:30 p.m. – 12:00 a.m.
4. Heather Banks and Johnny have been knowing each other since 1994 and it was Johnny who introduced me to Heather, not me introducing Johnny to her.
5. On the Fourth of July weekend, 2013, Heather came by my sister's house twice while my family was at the BBQ, asking Johnny to come by her house where Johnny took

myself, our cousin Leron Watson, Heather's cousin John White to Heather's house where we ate BBQ, danced played cards into the morning as well as other nights.

6. On several occasions Johnny called me complaining that his attorney had not been to see him at the jail to bring the video of the robbery or had not sent his discovery.
7. Johnny Taylor and Heather Banks has been more than acquainted since 1994.
8. Attorney Alfred Brandt did not contact me to testify at Johnny's trial.

FURTHER AFFIANT SAITH NOT.

Dated: 3/18/15

Robert L. Taylor, Jr.

The foregoing instrument was acknowledged before me this 18th day of March, 2015, by Robert L. Taylor, Jr., who is personally known to me and who did take an oath.

Subscribed and sworn to before me this 18th day of March, 2015

Linda Samon, Notary Public

Notary Public, LINDA SAMON
NOTARY PUBLIC, Jackson County, MI
My commission expires My Commission Expires April 23, 2018

State of Michigan

In the Court of Appeals

People of the State of Michigan, Plaintiff-Appellee,	Court of Appeals No. 322629
vs	Jackson County Circuit Court 13-3884 FC
Johnny Taylor, Defendant-Appellant.	Judge: Thomas D. Wilson

Attorney for Plaintiff:	Attorney for Defendant-Appellant: Laurel Kelly Young P-40671 PO Box 8797 Grand Rapids, MI 49518 (616) 901-0243

AFFIDAVIT OF CAROLYN TAYLOR

I, Carolyn Taylor, being first duly sworn, deposes and says:

1. I am an adult of sound mind and body and am otherwise competent to testify to the allegations averred herein.
2. I make this Affidavit based upon personal knowledge to which I could testify if called upon to do so.
3. I am the mother of Johnny Taylor and on several occasions Johnny wrote to me complaining that his attorney, Alfred Brandt, had not been visited by him, brought the video of the robbery of sent his discovery while in the county jail.
4. Johnny sent me a letter that he wanted me to take to the Jackson County Courthouse to get his discovery by way of Freedom Of Information Act.

5. Johnny called me May 13, 2013 on his attorney Alfred Brandt's phone to ask me to bring him clothes for trial because he had trial the next day.

6. Johnny wrote me several letters asking me to call his attorney to ask his attorney to bring the video of the robbery and his discovery.

FURTHER AFFIANT SAITH NOT.

Dated: 3/18/15

Carolyn Taylor

The foregoing instrument was acknowledged before me this 18th day of March, 2015, by Carolyn Taylor, who is personally known to me and who did take an oath.

Subscribed and sworn to before me this 18th day of March, 2015

Linda Samon
Notary Public

Notary Public, _____, _____
My commission expires _____

LINDA SAMON
NOTARY PUBLIC, Jackson County, MI
My Commission Expires April 23, 2018

State of Michigan

In the Court of Appeals

People of the State of Michigan, Plaintiff-Appellee,	Court of Appeals No. 322629
vs	Jackson County Circuit Court 13-3884 FC
Johnny Taylor, Defendant-Appellant.	Judge: Thomas D. Wilson

Attorney for Plaintiff:	Attorney for Defendant-Appellant: Laurel Kelly Young P-40671 PO Box 8797 Grand Rapids, MI 49518 (616) 901-0243

AFFIDAVIT OF JOHN WHITE

I, John White, being first duly sworn, deposes and says:

1. I am an adult of sound mind and body and am otherwise competent to testify to the allegations averred herein.
2. I make this Affidavit based upon personal knowledge to which I could testify if called upon to do so.
3. On the Fourth of July weekend, 2013, myself, Johnny, Leron Watson, and Robert L. Taylor, Jr. all were at my cousin's Heather Bank's house where we ate BBQ, played cards, and danced into the early morning as well as other days we were at Heather's house partying.
4. Attorney Alfred Brandt did not contact me to testify at Johnny's trial.

FURTHER AFFIANT SAITH NOT.

Dated: 3/18/15

John White

The foregoing instrument was acknowledged before me this 18th day of March, 2015, by John White, who is personally known to me and who did take an oath.

Subscribed and sworn to before me this 18th day of March, 2015

Linda Samon
Notary Public

Notary Public, LINDA SAMON
My commission expires NOTARY PUBLIC, Jackson County, MI
My Commission Expires April 23, 2018

APPENDIX J

CLOSED FOR REGISTER OF ACTIONS 03/03/20 PAGE 1
13-003884-FC JUDGE WILSON FILE 01/10/14 ADJ DT 05/14/14 CLOSE 06/19/14
JACKSON SCAO:SEC B LINE 01

D 001 TAYLOR,JOHNNY, DOB: 08/25/69 SEX: M RACE: B
310 MOORMAN DR CTN:381300374101 TCN:
JACKSON, MI 49202 SID:1388923M PIN:4973644613
DLN:XXXXXXXXXXXXX ST:XX
ATY: YOUNG,LAUREL KELLY, PROSECUTOR: DICKERSON,CHRISTOPHER J.,
P-40671 616-901-0243 P-72396
LOWER DISTRICT: 1200 CTY# 38 CASE# 1303884FY PRELIM: HELD 01/08/14
INCARCERATION DATE: 12/26/13 DISTRICT ARRAIGNMENT: 12/27/13

Bond History

Num	Amount	Type	Posted Date	Status
1	$50,000.00	Cash/Surety		Cancelled

Charges

Num	Type	Charge(Pacc)	Asc/Trf	Charge Description	Offense Dt	Dsp	Evt
01	ORG	750.529		ROBBERY ARMED	12/26/13	GTY	JTW
	HAB	769.12		HABITUAL OFFENDER 4TH CON			

Assessments

Account	Ordered	Paid	Balance
STATE MINIMUM COSTS	$68.00	$.00	$68.00
CRIME VICTIM RIGHTS	$130.00	$.00	$130.00
COURT APPOINTED ATTY FEE	$600.00	$.00	$600.00
TOTAL:	$798.00	$.00	$798.00

PAYMENT DUE: 7/07/14 LATE FEE DATE: 9/02/14

Actions, Judgments, Case Notes

Num	Date	Judge	Chg/Pty	Event Description/Comments	
1	01/08/14	WILSON		RETURN TO CIRCUIT COURT	CLK AMP
				$50,000 CASH/SURETY NOT POSTED	CLK
2	01/13/14			INFORMATION	CLK LAD
				REQUEST FOR DISCOVERY	CLK
				PROOF OF SERVICE	CLK
3	01/28/14			NOTICE SENT FOR: 03/04/14 8:30 AM PRE-TRIAL HEARING	CLK NEM
				W/PROOF OF SERVICE	CLK
4	02/12/14			PRELIMINARY EXAM TRANSCRIPT	CLK LSA
5	03/04/14			PRE-TRIAL HEARING	CRT NEM
				ATTY DICKERSON FOR THE PROS	CRT
				ATTY BRANDT W/DFT IN CUSTODY	CRT
				PRETRIAL IS RESET	CRT
				DFT IS CONTINUED ON BOND	CRT
6				NOTICE SENT FOR: 03/18/14 8:30 AM PRE-TRIAL HEARING	CLK NEM
				W/PROOF OF SERVICE	CLK

7	03/18/14		PRE-TRIAL HEARING	CRT NEM
			ATTY DICKERSON FOR THE PROS	CRT
			ATTY BRANDT W/DFT IN CUSTODY	CRT
			MATTER IS SET FOR A JURY TRIAL	CRT
			DFT IS REMANDED TO CUSTODY	CRT
8			NOTICE SENT FOR: 05/14/14 8:30 AM JURY TRIAL	CLK NEM
			W/PROOF OF SERVICE	CLK
9	03/24/14		PEOPLE'S WITNESS LIST	CLK LAD
			PROOF OF SERVICE	CLK
10	05/09/14		PEOPLE'S WITNESS LIST	CLK AMP
			AMENDED	CLK
			PROOF OF SERVICE	CLK
11	05/14/14	00001	JURY TRIAL WHOLE DAY	CRT SMC
			FOUND GUILTY	CRT
			DICKERSON FOR PROS, OFFICER	CRT
			GALBREATH @ COUNSEL TABLE,	CRT
			BRANDT W/DFT, ALL JURORS	CRT
			ESCORTED INTO COURTROOM AND	CRT
			SWORN, VOIR DIRE, JURY	CRT
			SELECTED AND SWORN, COURT/JURY	CRT
			HEAR OPENING STATEMENT BY	CRT
			DICKERSON, EXHIBITS ADMITTED	CRT
			AS STATED BY PROS, COURT/JURY	CRT
			HEAR SWORN WITNESS TESTIMONY	CRT
			AND CLOSING STATEMENTS, COURT	CRT
			INSTRUCTS THE JURY, CLERK	CRT
			SWEARS IN BAILIFF, JURY	CRT
			RETURNS WITH A GUILTY VERDICT,	CRT
			DFT REMANDED BACK TO JAIL,	CRT
			DNA ORDER SENT OVER WITH	CRT
			DEPUTY	CRT
12		00001	SET NEXT DATE FOR: 06/19/14 8:30 AM SENTENCING	CLK SMC
13			ORDER FOR DNA SAMPLE SENT OVER	CLK SMC
			WITH DEPUTY	CLK
14	05/15/14		ORDER FOR DNA SAMPLE CERTIFICATION	CLK SDC
			AND RETURN	CLK
15	06/19/14	00001	SENTENCING	CRT KAH
			DICKERSON FROM PROS	CRT
			BRANDT W/DFT IN CUSTODY	CRT
			HALSEY FROM PROBATION	CRT
			DFT SENTENCED TO MICH DEPT	CRT
			OF CORRECTIONS;DFT REMANDED	CRT

SENTENCE PRISON:	MINIMUM	MAXIMUM	CREDIT
	20-MMM-DDD	50-MMM-DDD	YYY-MMM-DDD

BEGIN 06/19/14

$68.00	STATE MINIMUM COSTS	130.00	CRIME VICTIM RIGHTS
$300.00	COURT COSTS	600.00	COURT APPOINTED ATTY FEE

16			FINAL ORDER OR JUDGEMENT FILED	CLK KAH
			JUDGMENT OF SENTENCE	CLK
			COMMITMENT TO MDOC	CLK
17			NOTICE OF APPEAL OF RIGHTS	CLK KAH
18			ORDER TO REMIT PRISONER FUNDS	CLK KAH
19			BOND CANCELLED (01)	CLK KAH
20		D 001	FROM: BRANDT,ALFRED P.,	CLK KAH
			TO: PRO-PER	CLK

21	06/24/14		JURY INSTRUCTIONS	CLK NEM
22			VERDICT FORM (5-14-2014)	CLK NEM
23	06/26/14		NOTICE OF RIGHT TO APPELLATE	CLK AMP
			REVIEW & REQUEST FOR	CLK
			APPOINTMENT OF ATTORNEY	CLK
24	06/27/14	D 001	ORDER	CLK LAD
			ATTORNEY: P-40671 YOUNG	CLK
			CLAIM OF APPEAL & ORDER	CLK
			APPOINTING COUNSEL	CLK
25	07/03/14		REPORTER/RECORDER CERTIFICATE	CLK LAD
			OF ORDERING OF TRANSCRIPT ON	CLK
			APPEAL-COURT OF APPEALS	CLK
26	07/07/14		AMENDED JUDGMENT OF SENTENCE	CLK NEM
			COMMITMENT TO DEPARTMENT OF	CLK
			CORRECTIONS	CLK
27			ORDER TO REMIT PRISONER FUNDS	CLK NEM
			AMENDED	CLK
28			MONEY ORDERED	CRT NEM
	$300.00- COURT COSTS			
29	09/23/14		NOTICE OF FILING OF TRANSCRIPT	CLK AMP
			& AFFIDAVIT OF MAILING	CLK
30			TRANSCRIPT OF SENTENCING	CLK AMP
			6/19/14-TRANSCRIBED BY	CLK
			THERESA'S TRANSCRIPTION	CLK
			SERVICE	CLK
31	01/22/15		FILES & TRANSCRIPTS SENT TO	CLK JLI
			MICHIGAN COURT OF APPEALS	CLK
			GRAND RAPIDS OFFICE	CLK
32	02/19/15		REC'D COPY OF DVD FROM	CLK LSA
			PROSECUTORS OFFICE FOR FILE	CLK
33			SENT COPY OF DVD TO THE	CLK ALE
			COURT OF APPEALS GRAND RAPIDS	CLK
34	03/03/15		CLAIM OF APPEAL W/PROOF OF	CLK LSA
			SERVICE	CLK
35	11/19/15		STATE OF MICHIGAN-COURT OF	CLK LKK
			APPEALS-UNPUBLISHED	CLK
			AFFIRMED	CLK
36	11/23/15		MAACS STATEMENT OF SERVICE/ORDER	CLK MRS
			FOR PAYMENT CRT-APP'T COUNSEL	CLK
			ATTORNEY YOUNG PAID $2353.36	CLK
37	07/05/16		ORDER	CLK LKK
			RE:APPLICATION FOR LEAVE TO	CLK
			APPEAL THE 11/17/2015	CLK
			JUDGMENT OF THE COURT OF	CLK
			APPEALS - DENIED	CLK
			FILE RETURNED	CLK
38	11/27/17		RELIEF FROM JUDGMENT	CLK AMP
39			PRO PER MOTION FOR RELIEF	CLK AMP
			FROM JUDGMENT-AMENDMENT	CLK
40	12/11/17	D 001	MOTION FILED	CLK LKK
			RE:FRANKS HEARING	CLK
41	12/15/17		MAILED ROA TO DFT	CLK KMC
42	01/22/18		ANSWER TO MOTION	CLK LKK
			RE:FOR RELIEF FROM JUDGMENT	CLK
43	02/22/18		ORDER	CLK KMC
			FOLLOWING MOTION FOR RELIEF	CLK
			FROM JUDGMENT	CLK

44	02/27/18	DFT'S EXHIBITS 1,2,4 & 7	CLK KMC
45	05/30/18	RELIEF FROM JUDGEMENT W/	CLK LSA
		AFFIDAVIT OF JOHNNY TAYLOR	CLK
46	08/14/18	ROA MAILED TO DFT	CLK KMC
47	10/03/18	PEOPLES ANSWER TO SECOND	CLK ASE
		MOTION FOR RELIEF FROM	CLK
		JUDGMENT	CLK
48	10/19/18	ORDER	CLK AMP
		COURT OF APPEALS,ST OF MI-	CLK
		MOTION FOR EXTENSION IS	CLK
		DISMISSED,MOTIONS TO REMAND	CLK
		ARE DENIED & DELAYED APP FOR	CLK
		LEAVE TO APPEAL IS DENIED	CLK
49	01/14/19	SENT ENTIRE FILE/TRANSCRIPTS	CLK TSP
		TO: MICHIGAN SUPREME COURT	CLK
		RECORDS DEPT.	CLK
50	08/07/19	ORDER	CLK EWA
		FROM MICHIGAN SUPREME COURT-	CLK
		THE APPLICATION FOR LEAVE TO	CLK
		APPEAL THE 10/17/18 ORDER IS	CLK
		DENIED	CLK
51		ENTIRE FILE RECEIVED BACK FROM	CLK EWA
		MICHIGAN SUPREME COURT	CLK
52	02/26/20	CORRESPONDENCE FROM ATTORNEY	CLK CKR
		GENERAL REQUESTING COPY OF	CLK
		FILE AND TRANSCRIPTS.	CLK
53	03/02/20	CORRESPONDENCE FROM ATTORNEY	CLK CKR
		GENERAL. ALL REQUESTED	CLK
		DOCUMENTS WERE SENT OUT	CLK

..... END OF SUMMARY .....