APPENDIX TABLE OF CONTENTS

NOT RECOMMENDED FOR PUBLICATION
File Name: 23a0002n.06

No. 21-2887

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

CAVANTA MCLILLY, Petitioner-Appellant, v. NOAH NAGY, Warden, Respondent-Appellee.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

OPINION

(Filed Jan. 3, 2023)

Before: KETHLEDGE, WHITE, and BUSH, Circuit Judges.

KETHLEDGE, Circuit Judge. A Michigan jury convicted Cavanta McLilly of armed robbery, assault with intent to kill, and several related firearms charges. At trial, his victim and three young accomplices identified McLilly as the perpetrator. But the trial court allowed two police officers to offer plainly inadmissible opinion testimony; and it sentenced McLilly based in part on judicially found facts that increased his minimum sentence. After losing his direct and collateral appeals in state court, McLilly brought this federal habeas action. The district court denied relief on the grounds that the trial court's mistakes were harmless. We agree, and affirm.

App. 2

I.

A.

On the night of December 21, 2012, Hergid Singh was working the cash register of a Flint gas station when three teenage boys came in to buy drinks and snacks, left, and then returned a few minutes later. Ordinarily Singh sat behind bullet-proof glass, but when one of the boys dropped his drink and shattered the bottle, Singh was forced to leave his enclosure to clean up the mess. When he did, two masked men ran into the store. The first threatened Singh with a gun, told him not to move, and demanded money. The other emptied the register and went through Singh's pockets. The first man then shot Singh in the chest, and the two left in a getaway car waiting for them outside. Multiple surveillance cameras captured the entire incident.

Singh survived the attack, and first responders brought him to the hospital. Meanwhile, the police discovered the surveillance footage and used it to create several still images. The stills showed the three boys outside, talking to an adult male who had been in the store shortly before the robbery. Flint Police Sergeant Petrich provided the pictures to a journalist, who circulated them on the local news—with immediate results. An anonymous caller told Petrich that the man pictured in the surveillance stills was Cavanta McLilly. And before the three boys even made it home, they received a phone call from their coach, who warned them that the police were circulating their photographs. The

three—Demetrius Robinson, Anthony Watson, and Allah' Jawan Reeder—then decided to turn themselves in.

Sergeant Petrich confronted the boys with pictures showing them talking to McLilly. Two of them—Demetrius and Anthony—said that McLilly had tried to sell them some marijuana. But Jawan—the youngest of the three—said that McLilly approached them as they were leaving the store and offered them $100 "to get the clerk from behind the counter." Jawan explained that this is why they decided to return to the store, and why Demetrius dropped his glass bottle.

Demetrius and Anthony soon realized the police would not believe their story; and their parents convinced them to return to the station. There, they recanted their earlier statements and confirmed that McLilly had asked them to drop the bottle. Meanwhile, McLilly realized he was a person of interest in the robbery investigation; so he hired an attorney and set up a date to turn himself in. McLilly was thereafter charged with armed robbery, assault with intent to murder, carrying a concealed weapon, and related firearms charges.

B.

At trial, the prosecution began with testimony from the police officers who had worked the case. That testimony quickly turned to descriptions of the security footage—which the jury had not yet seen firsthand. Over the defense's objection, one officer

testified that the footage showed someone picking up and breaking a glass bottle; and that the person may have been trying to distract the clerk because "he didn't look surprised" when he dropped the bottle. The court eventually cut this testimony short. But the bulk of the testimony from the prosecution's next witness, another police officer, also related to the security footage. That officer testified that the video showed an adult man enter the gas station, look at the beverage cooler, and leave; that the same man then re-entered the store wearing a mask and accompanied by an accomplice; and that the same man was the person who shot Singh. The prosecutor then asked if the officer could identify the perpetrator in court:

> Q: Okay. Do you see that person . . . in the Courtroom today?
>
> A: Yes.
>
> Mr. McCombs: I object. No sufficient foundation is laid that would indicate that from a mere picture on a video he can make a personal identification.

The court overruled the objection. The prosecution then repeated its question and asked "the defendant to stand up and stand next to the photo," a request the court granted:

> The Court: All right. Mr. McLilly, stand up there. Right up here by the video—photo.
>
> Q: Is this the same person?
>
> A: To me it looks exactly the same person.

The prosecution continued:

> Q: And then, Officer . . . Are these the same clothes that this person, who you've said is the Defendant, was wearing when he came in the store the first time, and then came back to rob the store?
>
> Mr. McCombs: I object. The photographs speak for themselves. We don't need this gentleman's artistic interpretation in order to—to draw whatever conclusions the Prosecutor wishes us to draw from this.
>
> The Court: Well, I'll overrule the objection. The witness can testify. Go ahead. Thank you.
>
> [. . .]
>
> Q: Same clothes?
>
> A: It appears the same clothes.

The prosecution elicited similar testimony from a detective, who opined, on the basis of his knowledge of the security footage, that the adult who visited the store before the robbery was "the same person that came back and robbed the store"—and then pointed at McLilly when asked to identify the robber.

The prosecution next called Demetrius, Jawan, and Anthony. Each of them testified that McLilly had offered them $100 to drop a bottle inside the store; and each of them identified McLilly in the courtroom. Demetrius and Anthony admitted to fabricating the earlier story about McLilly offering them weed. And Demetrius admitted to dropping the bottle for McLilly:

A: He said, he's going in there and drop a bottle or something.

Q: When he said go in there and drop a bottle or something, what did you guys—did you guys say okay?

[. . .]

Q: And what'd you decide?

A: I—I went in and did it. I did it.

Q: You did it?

A: Yeah.

The cashier, Hergid Singh, also testified, and he too identified McLilly in court:

Q: . . . Do you see the person that shot you today in the courtroom?

A: Yes.

Q: Where is that person?

A: Right here.

When defense counsel tried to cast doubt on that identification, Singh doubled down:

Q: But it is—does present a problem, doesn't it in so far as the masks are concerned, because now you know that they were wearing masks. It makes it very difficult for you to identify anybody, isn't it?

A: There is no reason not to be able to identify him. It was my death. I will be able to identify.

[. . .]

Q: Do you agree that you could see nothing below the bridge of his nose if those masks were in place? Do you agree with that?

A: His height, and his weight and everything is sitting in front of me. Why would I lie?

The prosecution then rested, and McLilly testified in his own defense. He admitted to being in the gas station directly before the robbery and to talking to Demetrius, Anthony, and Jawan. But according to McLilly, Demetrius had offered to sell him some marijuana; and McLilly denied asking Demetrius to break a bottle, shooting Singh, or robbing the gas station.

On cross-examination, the prosecution emphasized the similarities between McLilly and the armed robber in the security footage:

Q: That's you. I mean, let's just get real. Same coat, same everything, same hairline, same one eyebrow. That's you. Isn't it?

A: No it's not.

[. . .]

Q: So, how is it that you get to this gas station, you go in and seven minutes later, the same person, same clothes, same everything if for the white mask that was down around is now up around your face—goes into that gas station and robs it? How does that even make sense? It was you, was it not?

A: No, it wasn't.

> [. . .]
>
> Q: Why would you wear the same boots to court that you wore into that robbery?
>
> A: Because if I did something, I would—I would—common sense, I wouldn't do nothing like that.

The jury found McLilly guilty on all counts.

C.

At sentencing, the government asked the court to increase McLilly's guidelines range on the basis that he acted with a premeditated intent to kill. Mich. Comp. Laws §777.36. At the time, Michigan's guidelines were mandatory. *See People v. Lockridge*, 498 Mich. 359 (2015). Although premeditation was not an element of any of the crimes for which McLilly had been convicted, the court found that McLilly had assaulted Singh with the premeditated intent to kill. As a result, McLilly's guidelines range changed from 135-450 to 225-570 months' imprisonment. The trial court then sentenced McLilly to concurrent prison terms of 45-60 years for assault with intent to murder, 40-60 years for armed robbery, 2-20 years for carrying a concealed weapon, and 5-30 years for being a felon in possession of a firearm; and it imposed a separate consecutive term of 2 years for the final firearms charge.

McLilly appealed his conviction, arguing primarily that the court erred by admitting the police officers'

lay opinion testimony about the identity of the masked assailant in the security footage. The Michigan Court of Appeals agreed, but denied relief on the ground that the error had been harmless as defined by state law. *People v. McLilly*, No. 318627, 2015 WL 302676 at *4 (Mich. App., Jan. 22, 2015). The Michigan Supreme Court denied leave to appeal. *People v. McLilly*, 498 Mich. 866 (2015).

McLilly then filed a motion for postconviction relief in the trial court, asserting, as relevant here, claims that the admission of lay opinion testimony resulted in the denial of a fair trial and that his sentence was imposed in violation of the Sixth Amendment under the Supreme Court's decision in *Alleyne v. United States*, 570 U.S. 99 (2013) and its Michigan equivalent *People v. Lockridge*, 498 Mich. 359 (2015). The trial court denied relief on the first claim because, it said, the Court of Appeals had already addressed it. As to the second claim, it held that *Alleyne* and *Lockridge* did not apply to McLilly's sentencing. In the alternative, the court held that it "would not have imposed a materially different sentence for defendant's Armed Robbery conviction"—apparently on the assumption that its premeditation finding had increased McLilly's robbery sentence, rather than his sentence for assault. The Michigan Court of Appeals and the Michigan Supreme Court denied leave to appeal.

McLilly then turned to federal court, where he reasserted his postconviction claims. The district court denied habeas relief. Like the Michigan Court of Appeals, it held that McLilly was not prejudiced by the

inadmissible opinion testimony. The district court also held that *Alleyne* did apply to McLilly's sentencing, which took place three months after the Supreme Court's decision. The court held that any Sixth Amendment violation, however, had already been cured by the trial court's holding that it would have imposed the same sentence under advisory guidelines. The district court certified both claims for appeal, and this appeal followed.

II.

We review de novo the district court's denial of habeas relief. *Theriot v. Vashaw*, 982 F.3d 999, 1003 (6th Cir. 2020).

A.

McLilly first argues that police officers' extensive opinion testimony about the security footage "so infected the entire trial that the resulting conviction violate[d] due process." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). Although state evidentiary rulings are generally "not cognizable in federal habeas review," habeas relief is available when "the state's evidentiary ruling is so fundamentally unfair that it rises to the level of a due-process violation." *Moreland v. Bradshaw*, 699 F.3d 908, 923 (6th Cir. 2012).

We begin by determining the applicable standard of review. If the state court "adjudicated" McLilly's federal constitutional claim "on the merits," 28 U.S.C.

§ 2254(d), then we may not grant relief unless the court reached a decision contrary to Supreme Court precedent, unreasonably applied Supreme Court precedent, or based its decision on an unreasonable determination of the facts. *Johnson v. Williams*, 568 U.S. 289, 292 (2013); *see also Harrington v. Richter*, 562 U.S. 86, 101 (2011). If the state court did not adjudicate the claim on the merits, however, then our review is de novo unless the claim is procedurally defaulted. *Johnson*, 568 U.S. at 292; 28 U.S.C. § 2254(d).

Here, the Warden does not argue that McLilly has waived or defaulted his claim. And the Court of Appeals did not address whether the trial court's misapplication of the Michigan Rules of Evidence rose to the level of a due process violation. An adjudication under a state rule may be construed as an adjudication "on the merits" of a federal claim, for purposes of habeas review, if the state rule "subsumes the federal standard" and is "at least as protective as the federal standard." *Johnson*, 568 U.S. at 301. The Court of Appeals here applied a state rule which required McLilly to prove "that it is more probable than not that the [evidentiary] error was outcome determinative." *People v. Phillips*, 469 Mich. 390, 396-97 (2003) (cleaned up); *see McLilly*, 2015 WL 302676 at *4. That rule is not "at least as protective as the federal standard," which (on direct appeal) would require the prosecution to prove that any constitutional error was harmless "beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967); *see also Reiner v. Woods*, 955 F.3d 549, 555 (6th Cir. 2020). Thus, the Court of Appeals did not

resolve McLilly's constitutional claim on its merits, and we review his claim de novo. *Johnson*, 568 U.S. at 301.

Not even the Warden disputes that the trial court erred by permitting multiple police officers to opine about McLilly's resemblance to the perpetrator shown in grainy and purple-hued security footage. And we have previously held that improper opinion testimony from a police officer can render a trial fundamentally unfair, in violation of the Due Process Clause, at least where that testimony directly "suggests to the jury the guilt of the accused and the innocence of other suspects." *Cooper v. Sowders*, 837 F.2d 284, 287 (6th Cir. 1988).

Here, two officers who arrived on the scene long after the robbers had left identified McLilly as the perpetrator of the crime on the basis of a video that the jury had not yet seen. That testimony "invaded the province of the jury" by providing "an insider's opinion on who committed the crime." *Id.* The officers here did not just "suggest to the jury" that McLilly was guilty—they repeatedly said he was the robber. Those identifications almost certainly colored the jury's own viewing of the surveillance footage, which the prosecution did not show until the next day. And the admission of opinion testimony that directly influences a jury's consideration of guilt or innocence is constitutional error. *See Cooper*, 837 F.2d at 287. Hence the trial court's errors likely amounted to a violation of McLilly's right to a fair trial. *Estelle*, 502 U.S. at 72.

That does not end the matter, however, because this case comes to us on collateral review. As the Supreme Court has repeatedly explained, we may not grant habeas relief for even a constitutional error at trial unless it "had a substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 627 (1993); *Davis v. Ayala*, 576 U.S. 257, 276-77 (2015); *Brown v. Davenport*, 142 S. Ct. 1510, 1523 (2022). To grant relief, a federal habeas court must be "in grave doubt" about whether the error was harmless, which means that "the matter is so evenly balanced that [the judge] feels himself in virtual equipoise as to the harmlessness of the error." *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995).

Here, the prosecution built a powerful case against McLilly. At trial, the victim repeatedly identified McLilly as his assailant. He explained that he recognized McLilly because "his eyes and his face is the same thing" and said that "his height, and his weight and everything is sitting in front of me." The three boys who spoke to McLilly all testified that McLilly had offered them money to lure the store clerk from his protective enclosure; and they all identified McLilly in the courtroom. And McLilly admitted that he talked to the boys outside the gas station on the night of the robbery—which meant he could not challenge their in-court identifications.

Meanwhile, McLilly's own version of events was implausible. He tried to adopt the story Demetrius and Anthony had initially told the police—that he and the boys discussed marijuana—but said that Demetrius

had offered to sell him the drugs, rather than the other way around. And he denied all involvement in the robbery. To believe McLilly, the jury would have had to accept that Demetrius reentered the store on a whim; grabbed and dropped a glass bottle entirely by accident; and led the store clerk to leave his enclosure immediately before an armed robbery by mere happenstance. And the jury would need to believe that despite testimony from all three boys that Demetrius dropped the bottle at McLilly's insistence; and in spite of the boys' prior statements to the police, in which they voluntarily implicated themselves in an armed robbery. Even if defense counsel successfully cast doubt on the elder boys' changing stories, Jawan's confession was immediate, spontaneous, and consistent—and the defense found no way to challenge it at trial.

In light of this evidence, which was untainted by the court's errors, we conclude that McLilly cannot show the prejudice required for the "extraordinary remedy" of habeas relief. *Brecht*, 507 U.S. at 634.

B.

McLilly next argues that his sentence violated the Sixth Amendment because the trial court relied on judicially found facts to increase McLilly's mandatory minimum sentence. As the Supreme Court has explained, "any fact that, by law, increases the penalty for a crime is an element that must be submitted to a jury and found beyond a reasonable doubt." *Alleyne*, 570 U.S at 103. The Warden concedes that McLilly's

sentence violated the Sixth Amendment. Hence the only issue is whether McLilly is entitled to relief for that violation.

Two remedies are available to resolve a Sixth Amendment sentencing problem. *See Morrell v. Wardens*, 12 F.4th 626, 627-28 (6th Cir. 2021). The reviewing court may order a full resentencing, or it may opt for a remand to "ask the sentencing court if it would change its mind" under advisory guidelines. *Reign v. Gidley*, 929 F.3d 777, 783 (6th Cir. 2019). For purposes of habeas review, a state court may choose either remedy without falling afoul of "clearly established federal law." *Morrell*, 12 F.4th at 633.

Here, the trial court mistakenly rejected McLilly's Sixth Amendment claim. But it held in the alternative that "the Court would not have imposed a materially different sentence for defendant's Armed Robbery conviction" under advisory guidelines. The question, then, is whether that alternative holding suffices to cure the Sixth Amendment violation in lieu of a remand. Precedent says that it does. *Reign*, 929 F.3d at 783. We need not "ask the sentencing court if it would change its mind" when it has already made clear that it would not. *Id.*

McLilly seeks to avoid this conclusion by pointing to the trial court's mistaken reference to his armed robbery sentence. True, the court held that it would not have changed McLilly's robbery sentence, even though the Sixth Amendment violation affected only his sentence for assault. But we agree with the Warden that

this mistake was inconsequential. McLilly raised, and the trial court considered, only a single Sixth Amendment argument, which was an objection to the court's premeditation finding. That finding affected only McLilly's assault sentence. The trial court therefore had no reason to address the substance of McLilly's armed robbery sentence, and its reference to that sentence could only have been a mistake. The writ of habeas corpus is a guard "against extreme malfunctions in the state criminal justice systems," *Harrington*, 562 U.S. at 101; not a tool to correct scrivener's errors. By considering whether it would have imposed a materially different sentence under advisory guidelines, the trial court granted McLilly constitutionally adequate relief for the defect in his sentence. *Reign*, 929 F.3d at 783. We need not grant that relief a second time. *Id.*

The district court's judgment is affirmed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CAVANTA MCLILLY,

Petitioner,

v.

ANTHONY STEWART,

Respondent. /

Case No. 18-10397
Honorable
David M. Lawson

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

(Filed Aug. 17, 2021)

Petitioner Cavanta McLilly is in the custody of the Michigan Department of Corrections at its G. Robert Cotton facility in Jackson, Michigan serving a prison sentence for assault with intent to murder, armed robbery, carrying a concealed weapon, felon in possession of a firearm, and felony firearm convictions. He filed a petition for a writ of habeas corpus through counsel under 28 U.S.C. § 2254 raising three claims for relief: the admission of lay opinion testimony denied him a fair trial; he received ineffective assistance of counsel at trial and on direct appeal; and the sentence imposed for the assault with intent to murder conviction violated his Sixth Amendment right to a trial by jury. Because McLilly has not shown that the state courts contravened or unreasonably applied federal law in the disposition of his claims, the Court will deny the petition.

I.

A Genesee County, Michigan jury determined that McLilly shot Hergid Singhin in the chest during a 2012 armed robbery of a convenience store. The Michigan Court of Appeals summarized the facts adduced at trial in its opinion on direct appeal as follows:

> Before the robbery, defendant approached three young men, Demetrius Robinson, Anthony Watkins, and AJR, a minor, and asked them to go into the store and drop a bottle on the floor; defendant promised them one hundred dollars apiece if they did this. The three then went into the store and Robinson dropped a bottle on the floor. An employee of the store, Hergid Singh, left his bulletproof enclosure to clean up the broken bottle. After he did so, defendant and two other men demanded money from him at gunpoint, and took money from the store's cash register. Defendant made Singh lie down on the floor, stood over him, and shot him once in the chest. A witness, Madison Wortham, saw at least two men enter the store wearing masks, and called 911. Singh identified defendant as the man who had robbed and shot him. Robinson and AJR identified defendant as the man who had offered them money. Wortham identified a picture taken from a store video as depicting two men who had entered the store, although he testified that he could not see their faces because of their masks. Defendant denied committing the robbery or the shooting,

> although he did admit to being in the store earlier to make a purchase.

People v. McLilly, No. 318627, 2015 WL 302676, at *1 (Mich. Ct. App. Jan. 22, 2015).

During the trial, two police officers, William Jennings and Michael Dumanois, were permitted to testify over defense objection that the masked robber depicted on the store surveillance video was McLilly. The video was received in evidence as well.

The jury found McLilly guilty of armed robbery, assault with intent to murder, carrying a concealed weapon, possession of a firearm by a felon, and possession of a firearm in the commission of a felony (felony-firearm). On September 27, 2013, McLilly was sentenced as a fourth habitual offender to concurrent prison terms of 40 to 60 years for armed robbery, 43 to 65 years for assault with intent to murder, 2 to 10 years for carrying a concealed weapon, and 5 to 30 years for being a felon in possession of a firearm. He was sentenced to an additional consecutive two-year term for felony-firearm. McLilly's convictions were affirmed on appeal. *People v. McLilly*, 2015 WL 302676, *lv. den.* 498 Mich. 866 (2015).

McLilly filed a motion for relief from judgment, which was denied. *People v. McLilly*, No. 13-033099-FC (Genesee Cnty. Cir. Ct. Oct. 21, 2016) (ECF No. 5-14, PageID.1096-1100). The Michigan appellate courts also denied relief. *People v. McLilly*, No. 3356694 (Mich. Ct. App. March 29, 2017), *lv. den.* 501 Mich. 946 (2017).

McLilly then filed the present petition for a writ of habeas corpus asserting the following issues:

> I. The admission of opinion testimony regarding the identity of the person in the surveillance video resulted in the denial of a fair trial by a jury.
>
> II. Petitioner's attorneys at trial and on direct appeal were constitutionally ineffective.
>
> III. Sentence was imposed as to the assault with intent to murder conviction in violation of the Sixth Amendment right to trial by jury.

Pet. at 9-26, ECF No. 1. PageID.24-41.

The warden filed an answer to the petition raising the defense of procedural default as to the second claim. McLilly has filed a reply to Respondent's answer and a supplemental brief.

The "procedural default" argument is a reference to the rule that the petitioner did not preserve properly some of his claims in state court, and the state court's ruling on that basis is an adequate and independent ground for the denial of relief. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). The Court finds it unnecessary to address the procedural question. It is not a jurisdictional bar to review of the merits, *Howard v. Bouchard*, 405 F.3d 459, 476 (6th Cir. 2005), and "federal courts are not required to address a procedural-default issue before deciding against the petitioner on the merits," *Hudson v. Jones*, 351 F.3d 212, 215 (6th Cir. 2003) (citing *Lambrix v. Singletary*, 520 U.S. 518,

525 (1997)). The procedural defense will not affect the outcome of this case, and it is more efficient to proceed directly to the merits.

II.

Certain provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996), which govern this case, "circumscribe[d]" the standard of review federal courts must apply when considering an application for a writ of habeas corpus raising constitutional claims, including claims of ineffective assistance of counsel. *See Wiggins v. Smith*, 539 U.S. 510, 520 (2003). A federal court may grant relief only if the state court's adjudication "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 if the adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2).

"Clearly established Federal law for purposes of § 2254(d)(1) includes only the holdings, as opposed to the *dicta*, of [the Supreme] Court's decisions." *White v. Woodall*, 572 U.S. 415, 419 (2014) (quotation marks and citations omitted). "As a condition for obtaining habeas corpus from a federal court, a state prisoner must 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." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). The distinction between mere error and an objectively unreasonable application of Supreme Court precedent creates a substantially higher threshold for obtaining relief than *de novo* review. Mere error by the state court will not justify issuance of the writ; rather, the state court's application of federal law "must have been objectively unreasonable." *Wiggins*, 539 U.S. at 520-21 (quoting *Williams v. Taylor*, 529 U.S. 362, 409 (2000) (quotation marks omitted)). The AEDPA imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be "given the benefit of the doubt." *Renico v. Lett*, 559 U.S. 766, 773 (2010).

A.

McLilly's first claim is based on the erroneous admission of the police officers' opinion testimony that the person depicted in the surveillance video was the petitioner. The state court of appeals agreed that the testimony should not have been received in evidence because it "was impermissible lay opinion testimony" that "invaded the province of the jury." *People v. McLilly*, No. 318627, 2015 WL 302676, at *2-3 (Mich. Ct. App. Jan. 22, 2015). However, that court determined that the error was harmless because of the abundant legitimate identification evidence in the record. McLilly contends that the evidentiary error

rendered his trial fundamentally unfair and violated his rights under the Due Process Clause.

State evidentiary rulings will not trigger federal due process concerns unless the evidence admitted (or excluded) renders the trial fundamentally unfair. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). The Supreme Court has stated that for evidence that is so unfairly prejudicial "that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Payne v. Tennessee*, 501 U.S. 808, 825 (1991). The evidentiary ruling must be "so extremely unfair that its admission violates 'fundamental conceptions of justice.'" *Dowling v. United States*, 493 U.S. 342, 352 (1990) (quoting *United States v. Lovasco*, 431 U.S. 783, 790 (1977)). A fundamental conception of justice is one that is "rooted in the traditions and conscience of our people." *Seymour v. Walker*, 224 F.3d 542, 552 (6th Cir. 2000) (citation omitted).

The store video received in evidence was a composite of 14 cameras. McLilly, 2015 WL 302676. Before it was received, detective William Jennings described what he saw on the videotape. Several times, he identified one of the masked robbers depicted in the video as McLilly. He also identified McLilly as one of the robbers depicted in still photos created from the store video. Police officer Michael Dumanois also identified McLilly as the masked robber. Defense counsel objected numerous times on the ground that the testimony invaded the province of the jury. The trial court overruled defense counsel's objections, incongruously

finding that the testimony went "to the weight" and that it was admissible because the witnesses conducted the actual scene investigation and were permitted to testify about what they personally saw. After those police witnesses testified, the video was played for the jury and select still images created from the video by the Michigan State Police were admitted as exhibits.

The Michigan Court of Appeals determined on direct appeal that the error was harmless because two witnesses – the young men who were offered money to break the bottle in the store – identified McLilly as the person who talked to them, and Hergid Singh, the shooting victim, positively identified him as well. *Id.* at *3. And, of course, the jury saw the video footage and was permitted to make its own assessment.

The state court of appeals's finding of harmlessness has double significance. First, if the evidentiary error is harmless, it could not violate "fundamental conceptions of justice." For a habeas court, a constitutional error that implicates trial procedures is considered harmless if it did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993); *see also Fry v. Pliler*, 551 U.S. 112, 117-18 (2007) (confirming that the *Brecht* standard applies in "virtually all" habeas cases); *Ruelas v. Wolfenbarger*, 580 F.3d 403, 411 (6th Cir. 2009) (ruling that *Brecht* is "always the test" in the Sixth Circuit). That test is much more rigorous than the one applied on direct review. *See Chapman v. California*, 386 U.S. 18, 24 (1967) (holding

that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt").

Second, the state court's harmlessness decision is itself entitled to deference. *Davis v. Ayala*, 576 U.S. 257, 269 (2015). The habeas court may not grant relief unless the state court's "'*harmlessness determination itself* was unreasonable.'" *Ibid.* (citations omitted). The application of that principle is satisfied by adhering to *Brecht*'s teaching because where "the state court adjudicated [the petitioner's] claim on the merits, the *Brecht* test subsumes the limitations imposed by AEDPA." *Id.* at 270. In such cases, "a federal habeas court need not 'formal[ly]' apply both *Brecht* and 'AEDPA/*Chapman*.'" *Id.* at 268.

McLilly cannot clear *Brecht*'s high hurdle because the evidence against him was substantial. To recap, Demetrius Robinson identified McLilly as the person who offered him and his friends money to go inside the BP gas station and break a bottle. Robinson did as McLilly requested and then left the store. As he waited by the side of the building for his money, he saw someone exit the car where McLilly had been a passenger and enter the store with a gun, but he was unable to identify that person as McLilly. Anthony Watkins, Robinson's companion that day, also identified McLilly as the person who offered them money to break a bottle inside the store. After he and Robinson exited the store, Watkins saw someone get out of the car with a gun. and Allah' Jawan Reeder, the third youth, testified that McLilly was the person who offered them money to

divert the clerk's attention. Hergid Singh identified McLilly as the person who shot him, asserting that he was able to identify McLilly even though McLilly was wearing a mask.

That evidence, coupled with the video images and still shots that the jury reviewed, tips the balance substantially in favor of the state. To grant habeas relief, a federal court must have at least "grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict.'" *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995) (quoting *Brecht*, 507 U.S. at 627). "'[G]rave doubt' about whether the error was harmless means that 'the matter is so evenly balanced that [the court] feels [it]self in virtual equipoise as to the harmlessness of the error.'" *O'Neal v. Balcarcel*, 933 F.3d 618, 624 (6th Cir. 2019) (quoting *O'Neal*, 513 U.S. at 435). That is not the case here. The state court of appeals's decision that the unfortunate evidentiary error was harmless did not contravene or unreasonably apply federal law.

B.

In his second claim, McLilly argues that he received ineffective assistance of trial and appellate counsel. He says that trial counsel was ineffective by failing to object to an "undisputed accomplice instruction" and by failing to object to the above-the-guidelines sentence imposed for the armed robbery conviction. He contends that appellate counsel was

ineffective by failing to raise these issues on direct appeal.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to the effective assistance of counsel. An ineffective assistance of counsel claim has two components. A petitioner must show that counsel's performance was deficient, and that deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). An attorney's performance meets the first element when "counsel's representation [falls] below an objective standard of reasonableness." *Id.* at 688. The petitioner must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. The Supreme Court has "declined to articulate specific guidelines for appropriate attorney conduct and instead [has] emphasized that the proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Wiggins*, 539 U.S. at 521 (quoting *Strickland*, 466 U.S. at 688) (quotation marks omitted).

An attorney's deficient performance is prejudicial if "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. The petitioner must show "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." *Id.* at 694. Unless a defendant demonstrates both deficient performance and prejudice, "it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* at 687.

Success on ineffective assistance of counsel claims is relatively rare, because the *Strickland* standard is "'difficult to meet.'" *White*, 572 U.S. at 419 (quoting *Metrish v. Lancaster*, 569 U.S. 351, 357-58 (2013)). And under AEDPA, obtaining relief under *Strickland* is even more difficult because "[t]he standards created by *Strickland* and § 2254(d) are both highly deferential and when the two apply in tandem, review is doubly so." *Richter*, 562 U.S. at 105 (internal citations and quotation marks omitted). This doubly-deferential standard requires the Court to give "both the state court and the defense attorney the benefit of the doubt." *Burt v. Titlow*, 571 U.S. 12, 15 (2013). "[T]he question is not whether counsel's actions were reasonable," but whether "there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Richter*, 562 U.S. at 105.

The jury instruction that McLilly believes his lawyer should have contested focused on Demetrius Robinson as an accomplice. The trial court told the jury:

> Mr. Robinson has testified that he took part in the crime that the Defendant is charged with committing in count one, armed robbery. He has now been convicted of charges arising out of the commission of that crime. The evidence clearly shows that Demetrius Robinson was

guilty of the same crime, and that is armed robbery, as an aider and abettor, with which the Defendant McLilly is charged in count one, the armed robbery count.

Such a[ ] witness is called an accomplice. You should examine an accomplice's testimony closely, and be very careful about accepting it. You may think about whether the accomplice's testimony is supported by other evidence, because then it may be more reliable.

However, there is nothing wrong with the Prosecutor using an accomplice as a witness. You may convict the Defendant based only on an accomplice's testimony if you believe the testimony and if it proves the Defendant's guilt beyond a reasonable doubt.

When you decide whether you believe an accomplice, consider the following:

Was the accomplice's testimony falsely slanted to make the Defendant seem guilty, because of the accomplice's interests, biases, or for some other reason?

Has the accomplice been promised that he will not be prosecuted, or promised a lighter sentence, or in this case, actually, it's allowed to plead to a lesser he is charged unarmed robbery?

If so, could this have influenced his testimony?

Does the accomplice have a criminal record?

> In general, you should consider an accomplice's testimony more cautiously than you would that of an ordinary witness.
>
> You should be sure you have examined it closely before you base a conviction on it.

ECF No. 5-8, PageID.913-14.

McLilly criticizes this instruction because it was factually inaccurate in two material respects. First, the instruction incorrectly stated that Robinson was "convicted" of a crime. Robinson entered a guilty plea pursuant to Michigan's Holmes Youthful Trainee Act (HYTA), Mich. Comp. Laws § 762.11. HYTA is a hybrid diversion/probation statute that allows an offender between the ages of 17 and 24 years to plead guilty, and the court, without entering a formal adjudication of guilt, may impose a supervisory punishment. Mich. Comp. Laws § 762.11(1). If the defendant complies with certain conditions, "upon final release of the individual from the status as youthful trainee, the court shall discharge the individual and dismiss the proceedings." Mich. Comp. Laws § 762.14(1). The statute specifies that "[a]n assignment of an individual to the status of youthful trainee as provided in this chapter is not a conviction for a crime[.]" Mich. Comp. Laws § 762.14(2). The trial court erred in characterizing Robinson's guilty plea under HYTA as a conviction. McLilly contends that his trial counsel performed deficiently when he did not object to this aspect of the jury instruction.

The trial court addressed and rejected that argument in its opinion denying the motion for relief from judgment, which was affirmed summarily by the state appellate courts. It held that defense counsel was not ineffective by failing to object to this instruction because the evidence presented supported the instruction. The court reasoned that counsel, therefore, did not act unreasonably when he did not object to the instruction and that McLilly was not prejudiced by counsel's failure to object.

Although that aspect of the jury instruction technically was incorrect, the trial court's performance and prejudice conclusions did not unreasonably apply clearly established federal law. It would have been reasonable for defense counsel to conclude that the instruction, as a whole, adequately conveyed Robinson's accomplice status regardless of a formal guilt adjudication. The distinction between a guilty plea under HYTA and a criminal conviction is critical to a youthful offender, but this distinction was far less important to McLilly's defense. Whether the jury believed Robinson pleaded guilty but was not formally convicted or that Robinson had been convicted likely was not pertinent to the jury's evaluation of his testimony and counsel was reasonable in declining to object.

McLilly also challenges the statement that Robinson had been convicted of armed robbery. This was incorrect. Robinson was charged with armed robbery as an aider and abettor, but he pleaded guilty to unarmed robbery. The trial court held that counsel was not

ineffective by failing to object to the instruction on the basis of this error.

That decision likewise did not contravene or unreasonably apply federal law. Although the instruction at first incorrectly stated that Robinson had pleaded guilty to armed robbery, the trial court corrected this error a few sentences later by instructing the jury that Robinson had received a benefit from his testimony, namely he was permitted to "plead to a lesser . . . charge[] unarmed robbery." The instructions sufficiently cautioned the jury about the considerations it should take into account when evaluating Robinson's testimony. Further, the instructions as a whole also clearly instructed the jury as to each element of the charged crimes and the burden of proof.

McLilly also argues that his defense attorney was ineffective because he failed to object to an upward departure on McLilly's sentence for armed robbery. Michigan uses an indeterminate sentencing scheme for custodial sentences in which the sentencing court sets a minimum term of imprisonment that may be as long as two-thirds of the statutory maximum sentence. *See* Mich. Comp. Laws § 769.34(2)(b); *People v. Babcock*, 469 Mich. 247, 255 n. 7, 666 N.W.2d 231, 237 n. 7 (2003) (citing *People v. Tanner*, 387 Mich. 683, 690, 199 N.W.2d 202 (1972)). The statutory maximum automatically becomes the top end of the statutory term. If the statutory maximum sentence is life in prison, as in the case of armed robbery, then the sentencing court has discretion to set the maximum term as well. *Babcock*, 469 Mich. at 256 n. 7, 666 N.W.2d at 237 n. 7. Michigan's

sentencing guidelines prescribe a range for the minimum sentence. The applicable guideline range for the armed robbery minimum sentence in this case was 135 to 450 months (11-1/4 to 37-1/2 years). The maximum sentence was life in prison. The petitioner was a fourth habitual offender. The court imposed a sentence of 480 to 720 months (40 to 60 years), that is, 30 months above the guideline range for the minimum sentence. The court did not articulate any basis for exceeding the guidelines as was required under state law. *See* Mich. Comp. Laws § 769.34(3).

On state-court collateral review, the State conceded that counsel's failure to object to a sentence above the guidelines range was objectively unreasonable but argued that McLilly was not prejudiced by counsel's failure because the minimum sentence of 45 years for his assault-with-intent-to-murder conviction subsumed the armed robbery sentence. The trial court did not address counsel's defective performance; it agreed that no prejudice occurred because of the concurrent sentence on the assault conviction that exceeded the armed robbery sentence. ECF No. 5-14, PageID.1099.

That decision is consistent with federal law. It is true that prejudice exists if there is a reasonable probability that a petitioner would have avoided even "a minimal amount of additional time in prison" were it not for counsel's performance at sentencing. *Glover v. United States*, 531 U.S. 198, 203 (2001). *See also McPhearson v. United States*, 675 F.3d 553, 563 (6th Cir. 2012) ("An error by counsel at sentencing that

amounts to any extra jail time is prejudicial under the Sixth Amendment."). But McLilly did not receive any extra prison time because his total custodial sentence was governed by the assault sentence.

McLilly has not shown a redressable violation of his right to counsel under the Sixth Amendment.

C.

Last, McLilly argues that his sentence violates the Sixth Amendment jury trial guarantee because the sentencing judge used facts not admitted by McLilly or found by a jury beyond a reasonable doubt to enhance his sentence by increasing the sentencing guideline range. The sentencing court scored 50 points under Offense Variable 6 based upon the judge-found fact that McLilly had a premeditated intent to kill, which increased the offense level and the corresponding guideline range.

The Sixth Amendment's guarantee of a trial by jury means that "[a]ny fact that, by law, increases the penalty for a crime . . . must be submitted to the jury and found beyond a reasonable doubt." *Alleyne v. United States*, 570 U.S. 99, 103 (2013). In *Robinson v. Woods*, 901 F.3d 710 (6th Cir. 2018), the court of appeals granted habeas relief to a habeas petitioner whose mandatory minimum sentence was increased based upon judge-found facts and who was sentenced after *Alleyne* was decided. *Id.* at 714-15. The Sixth Circuit held that "*Alleyne* clearly established the

unconstitutionality of Michigan's mandatory sentencing regime." *Id.* at 714.

Alleyne applies to McLilly's case, as he was sentenced approximately two months after *Alleyne* was decided. *Alleyne* represents clearly established federal law in effect before McLilly's convictions and sentences became final. In 2015, well after McLilly's sentencing, the Michigan Supreme Court held that Michigan's sentencing guidelines scheme, which allowed juridical fact-finding to increase the floor of the sentencing guidelines range, violated the Sixth Amendment. *People v. Lockridge*, 498 Mich. 358, 879 N.W.2d 502 (2015). As a remedy, the court declared that the guidelines are advisory. *Id.* at 365, 879 N.W.2d at 506. McLilly's sentence, therefore, was imposed before the state sentencing guidelines became advisory and the sentence violated his rights under the Sixth Amendment.

Here, the trial court denied McLilly's claim on collateral review holding that *Lockridge* was not applicable to cases on collateral review without mentioning *Alleyne.* Alternatively, the sentencing court held that even if the guidelines were advisory rather than mandatory, "the Court would not have imposed a materially different sentence." ECF No. 5-14, PageID.1100. That pronouncement suggests that the error was harmless.

Once again, this Court must apply *Brecht* to determine if the error had a "substantial and injurious effect or influence" on the outcome of the case. *Brecht*, 507 U.S. at 637. Applying that rubric, keep in mind that the error here was not so much that the guideline scoring

was driven by judge-found facts, but that the state sentencing scheme at the time mandated application of the guidelines. *See Reign v. Gidley*, 929 F.3d 777, 780 (6th Cir. 2019) ("[T]he constitutional error here was the mandatory application of the guidelines, not merely the consideration of judge-found facts."). The sentencing court here stated that it would have imposed the same sentence for the assault conviction under an advisory guideline regime.

McLilly argues that the error is not harmless because the judge who presided over his sentencing and motion for relief from judgment retired in 2018. He maintains that any claim that the replacement judge would impose the same sentence is "purely speculative." There is something to that argument. The remedy prescribed by the Michigan Supreme Court in cases where a pre-*Lockridge* sentence was based on judge-found facts is to "remand[] to the trial court to determine whether that court would have imposed a materially different sentence but for the constitutional error. If the trial court determines that the answer to that question is yes, the court shall order resentencing." *Lockridge*, 498 Mich. at 397, 870 N.W.2d at 523-24. If this Court were to grant habeas relief, that would be the proper remedy here. And who is to say that a successor judge would look at the case the same way as the original sentencing judge?

But McLilly has no constitutional right to be sentenced by a particular judge. *Fitzgerald v. Withrow*, 292 F.3d 500, 503 (6th Cir. 2002) (finding no constitutional right to a trial before a particular judge); *Firishchak v.*

Holder, 636 F.3d 305, 310 (7th Cir. 2011) ("The Fifth Amendment's due process clause guarantees the right to an impartial decisionmaker, . . . but not to a particular judge.") (citations omitted). This Court must decide the case on the record before it, which includes the sentencing judge's assurance that she would not have imposed a materially different sentence under current law. That statement comports with *Alleyne* and the state law counterpart. And McLilly cites no precedent to support his argument that he is entitled to a second chance for a post-*Alleyne*/*Lockridge* state-court review of his sentence. *See Reign v. Gidley*, 929 F.3d 777 (6th Cir. 2019) (holding that a state sentencing court's determination the same sentence would have been imposed even if the guidelines had been advisory was sufficient to render an *Alleyne* error harmless).

McLilly has not established a right to relief on this claim.

III.

None of the petitioner's claims presents a basis to issue a writ of habeas corpus under 28 U.S.C. § 2254(d). The state courts' decisions in this case were not contrary to federal law, an unreasonable application of federal law, or an unreasonable determination of the facts. The petitioner has not established that he is presently in custody in violation of the Constitution or laws of the United States.

Accordingly, it is **ORDERED** that the petition for a writ of habeas corpus is **DENIED**.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: August 17, 2021