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

LAFAYETTE DESHAWN UPSHAW, |
Petitioner-Appellee, |
v. |
GEORGE STEPHENSON, Warden, |
Respondent-Appellant. |
| > No. 22-1705

Appeal from the United States District Court for the
Eastern District of Michigan at Detroit.
No. 2:20-cv-12560—Linda V. Parker, District Judge.

Argued: October 25, 2023

Decided and Filed: March 28, 2024

Before: MOORE, GIBBONS, and
STRANCH, Circuit Judges.

COUNSEL

ARGUED: Jared D. Schultz, OFFICE OF THE
MICHIGAN ATTORNEY GENERAL, Lansing, Michigan,
for Appellant. Daniel S. Harawa, NEW YORK

UNIVERSITY, New York, New York, for Appellee. **ON BRIEF:** Jared D. Schultz, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellant. Daniel S. Harawa, Zach Hollstrom, Faith Katz, Jacob Seeley, Malak Shahin, WASHINGTON UNIVERSITY, St. Louis, Missouri, for Appellee.

OPINION

JANE B. STRANCH, Circuit Judge. This appeal centers on the habeas petition of Lafayette Deshawn Upshaw, a state inmate in the custody of the Michigan Department of Corrections. In 2014, the State charged Upshaw with crimes associated with two separate incidents that occurred on the same day: a gas station robbery and a home invasion. Upshaw entered a plea deal in the home invasion case but went to trial and was convicted on counts stemming from the robbery. Michigan's state courts affirmed his robbery conviction on direct appeal. After exhausting his state court remedies, Upshaw filed a petition for habeas relief in federal court. The district court granted relief on two of Upshaw's claims: an ineffective assistance of counsel claim based on trial counsel's failure to investigate alibi witnesses and a *Batson* claim deriving from the State's use of peremptory challenges to strike six Black jurors. The Warden now appeals. **We AFFIRM.**

I. BACKGROUND

A. Factual Background

After concluding work around 3:00 a.m. on May 28, 2014, Upshaw got a ride home from his boss, during which the pair discussed the tan Timberland boots that Upshaw was wearing. He arrived home around 3:15 or 3:20 a.m., where, according to evidence from Upshaw, his aunt, Crystal Holloway, and his grandmother, JoAnn Green, Upshaw knocked on the door to his home, which woke up his grandmother. Holloway, who suffers from insomnia, was awake when Upshaw knocked, and let him into the house. Green proceeded to “cuss[] [Upshaw] out” for waking her up, after which Upshaw went upstairs and played with his daughter until approximately 4:00 a.m.

Just after 3:35 a.m. that morning, a man robbed a gas station a little over three and a half miles away. Standing by the cash register in a bullet-proof glass “cage,” Tina Williams, the only gas station employee working that night, heard a man say to a female customer, “give me your money.” Williams heard this, looked up, and saw a man who was wearing a gray hoodie, blue shoes,¹ and a t-shirt pulled over his nose and mouth. The gunman then pointed his weapon at her, demanding she turn over money; when Williams instead locked the cage door, the man fired a shot at her. The man attacked the store display under the cage, continuing to shoot at least half a dozen times

¹ The parties and witnesses alternatively describe the shoes of the person who committed the robbery as “purple” and “blue.” This distinction is immaterial. What matters is that the robber wore blue or purple sneakers.

until he ran out of bullets, and then fled. Another man at the scene, later identified as Darrell Walker, remained at the coffee machine during the shooting, did not run when the shooter pointed the gun in his direction, and yelled at the cashier to open the door to the cash to stop the shooting.² A few hours later, police apprehended Walker and Upshaw invading a police officer's home. Five days later, on June 3, Williams identified Upshaw in a police photo array as the robber. The State indicted Upshaw for the store robbery.

B. Trial Proceedings

Upshaw and Wright were arraigned for the gas station robbery on July 25, 2014. During their initial appearance before the trial judge on August 5, the attorney retained by Upshaw's family, Anthony Paige, failed to appear. Upshaw later informed Paige of three potential alibi witnesses: Holloway; Green; and his girlfriend, Diamond Woods. Paige never provided Upshaw with any indication that he investigated any of these witnesses. On November 30, Upshaw's mother, Toya Green, submitted a notarized letter to Michigan's Attorney Grievance Commission, explaining that Paige failed to appear at "four required court hearings on four different days" and did not "notify the court or [Green] of his inability to keep the scheduled court hearings." Roughly two weeks before trial, Upshaw fired Paige over Paige's failure to investigate,

² Williams identified Upshaw's co-defendant, Walker, as the man who walked down the coffee aisle shortly before the robbery commenced. Williams also testified that Walker told her to call the police and left the store shortly after the man who committed the robbery, and that Walker "went in the same direction" as the robber.

appear in court, and keep Upshaw informed of developments in his case.

Upshaw then retained Wright Blake to represent him. During their first meeting, Upshaw informed Blake of his three known alibi witnesses—Holloway, Green, and Woods. (Blake did not follow up, then or later, with Upshaw’s alibi witnesses, spent his first meeting with Upshaw reviewing his case file, and did not support Upshaw’s request to the trial judge for an adjournment, instead assuring Upshaw and the judge that he would “bring [himself] up to speed by” the trial date.)

The trial took place over three days in October 2014. During jury selection, the State used six of its first eight peremptory strikes to remove African Americans from the jury, prompting Blake to raise a *Batson* challenge. Without determining whether Blake presented a *prima facie* case of discrimination, the court directed the State to provide its reasons for striking each of the jurors. The State offered facially race-neutral reasons for three of the challenged jurors, the court provided a facially race-neutral reason for another juror, and Blake argued that the proffered race-neutral explanation for one of the jurors was pretextual. The court denied the entire *Batson* challenge.

Trial proceeded. The State called Tina Williams, the gas station cashier, who identified Upshaw as the shooter. Blake called one witness: Jeffrey Haugabook, Upshaw’s boss, who stated that on the night of the robbery, he drove Upshaw home; that they talked about the “wheat colored” Timberland boots Upshaw was wearing; that Haugabook never observed Upshaw wear purple gym shoes; and that Haugabook dropped

Upshaw off at home around 3:15 or 3:20 a.m. The jury returned a guilty verdict, convicting Upshaw of armed robbery.

C. Post-Trial State Court Proceedings

Upshaw, represented by new counsel, appealed his robbery conviction to the Court of Appeals of Michigan (COA) in December 2014. There, he raised an ineffective assistance of counsel (IAC) claim stemming from Blake's failure "to investigate potential alibi witnesses" and failure "to file the required notice of intent to present an alibi defense" under Michigan Compiled Laws § 768.20. *People v. Walker*, No. 324672, 2016 WL 2942215, at *6 (Mich. Ct. App. May 19, 2016). Upshaw also argued that the State's use of peremptory challenges to strike African American jurors violated *Batson*. *Id.* The COA rejected these claims and affirmed Upshaw's conviction. *Id.* at 10. Upshaw filed an application for leave to appeal to the Supreme Court of Michigan, which was denied. *People v. Upshaw*, 891 N.W.2d 487 (Mich. 2017). The court also denied Upshaw's request for reconsideration and remand. *See People v. Upshaw*, 895 N.W.2d 515 (Mich. 2017). The United States Supreme Court denied certiorari on November 6, 2017. *Upshaw v. Michigan*, 583 U.S. 965 (2017).

Upshaw filed a pro se motion for relief from judgment in state trial court on July 10, 2018, raising several arguments for relief, including that the Michigan COA unreasonably applied *Batson*. The trial court

denied the motion on November 27.³ The COA denied Upshaw's application for leave to appeal, and his motions for remand for a *Crosby* hearing⁴ and a *Ginther* hearing,⁵ on July 22, 2019. On May 26, 2020, the Michigan Supreme Court also denied Upshaw leave to appeal.

D. Habeas proceedings

Upshaw, now represented by counsel, filed a petition for a writ of habeas corpus in federal district court on September 18, 2020, raising seven claims for relief. These included claims of ineffective assistance of trial counsel due to counsel's failure to "interview or otherwise investigate" the two alibi witnesses identified by Upshaw—"his grandmother, JoAnn Green, and his aunt, Crystal Holloway"—and a *Batson* violation due

³ The Honorable Wanda A. Evans issued this order; Upshaw's case was transferred to her upon the retirement of the judge who presided over his trial.

⁴ A *Crosby* hearing refers to a "limited remedy . . . where the trial court determines whether it would have issued a materially different sentence had the Michigan guidelines been advisory rather than mandatory at the time of the original sentencing." *Morrill v. Wardens*, 12 F.4th 626, 628 (6th Cir. 2021). The name comes from *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005).

⁵ A *Ginther* hearing is an evidentiary hearing that Michigan courts conduct when a defendant raises ineffective assistance of counsel claims. *See People v. Ginther*, 212 N.W.2d 922, 441-42 (Mich. 1973) ("When a defendant asserts that his assigned lawyer is not adequate or diligent or asserts, as here, that his lawyer is disinterested, the judge should hear his claim and, if there is a factual dispute, take testimony and state his findings and conclusion.").

to the State's use of "6 of 8 peremptory challenges against African-American potential jurors."

At a status conference on April 12, 2022, the district court expressed that it was inclined to grant an evidentiary hearing regarding the ineffective assistance of counsel claim. The Warden filed a motion to vacate the evidentiary hearing on April 27, arguing that *Cullen v. Pinholster*, 563 U.S. 170 (2011), precluded such a hearing. The court denied the motion, and held a hearing on May 17. On July 14, 2022, the district court granted Upshaw's habeas petition, determining that he qualified for relief on his IAC and *Batson* claims. The Warden timely appealed.

II. JURISDICTION AND STANDARD OF REVIEW

Jurisdiction over this appeal is proper pursuant to 28 U.S.C. § 1291, because the district court's grant of habeas constituted a final decision. 28 U.S.C. § 2253(a). "This Court reviews a district court's decision to grant habeas corpus relief *de novo*." *Lancaster v. Adams*, 324 F.3d 423, 428 (6th Cir. 2003). And "[w]e review the district court's findings of fact for clear error." *Id.*

As to the state courts' findings of fact, "AEDPA requires federal courts to accord a high degree of deference to such factual determinations," such that "a presumption of correctness" applies "unless clear and convincing evidence is offered to rebut this presumption." *Ferensic v. Birkett*, 501 F.3d 469, 472-73 (6th Cir. 2007) (quotations omitted); *see* 28 U.S.C. § 2254(e)(1). To overcome this presumption, the petitioner bears "the burden of rebutting the presumption

of correctness by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1). “When a state court’s adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in § 2254(d)(1) is satisfied.” *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007). Under such circumstances, the “federal court must then resolve the claim without the deference AEDPA otherwise requires.” *Id.* “A federal court can disagree with a state court’s credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence.” *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

III. ANALYSIS

“A federal court cannot grant habeas relief unless the state court’s rejection of the claim: (1) was contrary to or involved an unreasonable application of clearly established federal law, or (2) was based on an unreasonable determination of the facts.” *Bryan v. Bobby*, 843 F.3d 1099, 1105 (6th Cir. 2016). Only “the holdings of the Supreme Court’s decisions, not the dicta,” determine “whether a state-court decision is contrary to or an unreasonable application of clearly established Supreme Court precedent.” *Id.* at 1105. The Warden appeals the district court’s grant of habeas based on Upshaw’s ineffective assistance of counsel and *Batson* claims. We discuss each in turn.

A. Ineffective Assistance of Trial Counsel (IAC)

The district court’s first ground for granting Upshaw habeas relief was his ineffective assistance of

counsel claim. “[T]o obtain *habeas* relief for ineffective assistance of counsel, [a petitioner] must show that the state court’s decision was contrary to, or an unreasonable application of, Supreme Court precedent, namely, *Strickland v. Washington*, 466 U.S. 668 (1984).” *Poindexter v. Booker*, 301 F. App’x 522, 527 (6th Cir. 2008). “[W]here there is no other Supreme Court precedent directly on point,” a reviewing court applies *Strickland* “to evaluate ineffective-assistance-of-counsel claims.” *Knowles v. Mirzayance*, 556 U.S. 111, 122-23 (2009). Only rulings by the Supreme Court establish “principles of ‘clearly established law’”; however, “the decisions of lower federal courts may be instructive in assessing the reasonableness of a state court’s resolution of an issue.” *Stewart v. Erwin*, 503 F.3d 488, 493 (6th Cir. 2007).

The *Strickland* test has two prongs: performance and prejudice. Applying the performance prong, a reviewing court must determine whether an attorney’s performance failed to meet the constitutional minimum. See *Hinton v. Alabama*, 571 U.S. 263, 273 (2014). “[P]revailing professional norms,” not “best practices” or “common custom,” define this constitutional standard. *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quoting *Strickland*, 466 U.S. at 694). To demonstrate prejudice, a petitioner “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. A petitioner satisfies “reasonable probability” if he demonstrates “a probability sufficient to undermine confidence in the outcome.” *Id.*

Many courts—including this one—“have found ineffective assistance of counsel in violation of the Sixth Amendment where . . . a defendant’s trial counsel fails to file a timely alibi notice and/or fails adequately to investigate potential alibi witnesses.” *Clinkscale v. Carter*, 375 F.3d 430, 443 (6th Cir. 2004). Citing binding Supreme Court precedent, we have emphasized that “[c]ounsel’s duty to investigate has been repeatedly reaffirmed by the Supreme Court.” *Poindexter*, 301 F. App’x at 528 (citing *Wiggins v. Smith*, 539 U.S. 510, 534 (2003); and then citing *Williams v. Taylor*, 529 U.S. 362, 399 (2000)). Though “Strickland does not require counsel to investigate every conceivable line” of evidence, “strategic choices made after less than complete investigation are reasonable’ only to the extent that ‘reasonable professional judgments support the limitations on investigation.’” *Wiggins*, 539 U.S. at 533 (quoting *Strickland*, 466 U.S. at 690-91). Counsel’s choice “not to investigate thus ‘must be directly assessed for reasonableness in all the circumstances.’” *Id.* (quoting *Strickland*, 466 U.S. at 691). A choice is deemed strategic “based on what investigation reveals witnesses will actually testify to, not based on what counsel guesses they might say in the absence of a full investigation.” *Ramonez v. Berghuis*, 490 F.3d 482, 489 (6th Cir. 2007).

“If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court.” *Pinholster*, 563 U.S. at 185. This means “that a habeas petitioner who raise[s] IAC claims in state post-conviction [cannot] rely on new evidence presented in federal court to show that the state unreasonably adjudicated his constitutional

claim on the merits.” *Mitchell v. Genovese*, 974 F.3d 638, 646 (6th Cir. 2020). *Pinholster* thus bars a federal court “from admitting new evidence upon which to assess the reasonableness of a state court’s constitutional analysis.” *Id.* at 647.

Once a petitioner “clear[s] AEDPA’s procedural hurdles” of § 2254(d) on the state court record, however, a district court may hold an evidentiary hearing. *Brumfield v. Cain*, 576 U.S. 305, 324 (2015). “[I]f a review of the state court record shows that additional fact-finding was required under clearly established federal law or that the state court’s factual determination was unreasonable, the requirements of § 2254(d) are satisfied and the federal court can review the underlying claim on its merits.” *Stermer v. Warren*, 959 F.3d 704, 721 (6th Cir. 2020). Stated otherwise, where an evidentiary hearing serves “as a remedy for a federal-law error that had already been found by [a reviewing court] on the basis of the record that was before the state courts, *Pinholster* does not bar consideration of the evidence introduced for the first time in the district court.” *Harris v. Haeberlin*, 752 F.3d 1054, 1058 (6th Cir. 2014) (*Harris II*).

The district court here held that the state court’s resolution of Upshaw’s ineffective assistance of counsel claim was both an unreasonable application of *Strickland* and rested on an unreasonable determination of facts. On that basis, the court held that a federal evidentiary hearing was warranted to address this violation of federal law.

On appeal, the Warden urges that the district court erred in conducting the evidentiary hearing. In its order granting habeas relief, however, the district

court emphasized that “even without the evidence from the May 17 [2022] evidentiary hearing, and even when viewed under AEDPA’s deferential standard of review,” Upshaw qualified for habeas relief on his IAC claim. “Based only on the record before the Michigan courts,” the court explained, “it is clear that the State courts unreasonably adjudicated Upshaw’s” IAC claim. Because the district court’s evidentiary hearing was not necessary to resolve Upshaw’s habeas claim, we decline to rely on the federal evidentiary hearing here.⁶ Instead, we review the district court’s decision to grant Upshaw relief on his IAC claim based on the record before the state court.

In analyzing Upshaw’s IAC claim, the district court determined that “although the COA correctly identified *Strickland* as the proper standard, its application of *Strickland* was unreasonable as were its factual determinations regarding Upshaw’s alibi defenses and counsel’s performance.” At base, this conclusion rested on the court’s determination that the Michigan Court of Appeals impermissibly “collapsed *Strickland*’s two-prong inquiry into a single question focused on the strength of Upshaw’s alibi testimony.” Looking at the facts, the district court observed that the Michigan COA “defied common-sense in failing to consider travel time when evaluating the substance of Green’s statement,” because “it unreasonably assumed Upshaw could have traveled instantaneously between his home and the gas station.” Uncontroverted testimony in the state court record establishes

⁶ Because we are relying on the record before the state court exclusively, we find it unnecessary to—and decline to—determine whether the federal evidentiary hearing was proper.

that the gas station was three and a half miles from Upshaw's residence, and Upshaw did not have a car. If Upshaw was at home with Green between 3:20 and 3:30 a.m., then it was impossible for him to make it to the gas station several miles away for the 3:37 a.m. robbery.

The Warden argues that the district court's assessment of Green's letter amounted to a legal, not a factual, determination. But the district court clarified that "it was the State court's factual determination that the witness's statement did not contain certain information that this Court found objectively unreasonable because the statement *did* contain that information." Green's statement indicated that "she was with Upshaw between 3:20 and 3:30 AM" and "that she saw [Upshaw] leave the house around 7:45 AM." Yet the COA discredited Green's letter based on its conclusion that the letter did not "state that [Green] observed [Upshaw] at the exact time of the robbery." *Walker*, 2016 WL 2942215, at *6. This assessment, the district court emphasized, "defied common-sense" by not accounting for the time necessary to travel to the gas station when evaluating Green's statement.

The Warden also attempts to discount Green's letter by arguing that it does not qualify as "sworn testimony in this case," and therefore, is insufficient to support Upshaw's IAC claim. But the Warden provides no precedent articulating a basis for why these claims undermine the district court's determination. Such an approach is also unpersuasive because "no legal authority" supports the proposition "that a defendant claiming ineffectiveness of counsel based on the failure to file a timely alibi notice must produce an

affidavit from the potential alibi witnesses documenting the substance of their anticipated testimony.” *Clinkscale*, 375 F.3d at 444.

As the district court found, Blake’s failure to investigate Upshaw’s alibi witnesses, and his “failure to attempt to remedy the situation” when he missed the alibi witness deadline, constituted independent bases supporting Upshaw’s ineffective assistance of counsel claim. Blake’s performance, including his failure to request an adjournment to rectify the situation or request permission to file a late notice of his intent to call alibi witnesses, was, the court concluded, “not objectively reasonable,” because “Blake offered no reason for his actions.” The state court record alone, the district court emphasized, supports this conclusion. Determining that this “record reflects, at the very least, trial counsel’s failure to investigate Upshaw’s alibi defense,” and that “a week before trial Blake still had not reviewed the evidence against Upshaw,” the court concluded that the state court record presented “no reasonable justification for counsel’s decisions.” This analysis comports with our precedent. See *Ramonez*, 490 F.3d at 489 (finding counsel’s performance “objectively unreasonable” where he failed to interview or make reasonable attempts to interview three known potential alibi witnesses); *Towns v. Smith*, 395 F.3d 251, 258-60 (6th Cir. 2005) (holding that counsel’s failure to investigate a potential defense witness was objectively unreasonable); *Clinkscale*, 375 F.3d at 443 (same). On these bases, the district court correctly determined that the state court unreasonably applied *Strickland*.

Next, we consider prejudice. “*Strickland* instructs that ‘a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support,’” and that “the availability of willing alibi witnesses must also be considered in light of the [weight of the other evidence] supporting [a petitioner’s] conviction.” *Avery v. Prelesnik*, 548 F.3d 434, 439 (6th Cir. 2008) (quoting *Strickland*, 466 U.S. at 696). Put another way, “potential alibi witnesses coupled with an otherwise weak case renders the failure to investigate the testimony sufficient to ‘undermine confidence’ in the outcome of the jury verdict.” *Id.* In *Avery*, we affirmed the principle that a record showing counsel “never personally attempted to contact any of the potential alibi witnesses” warrants habeas relief. *Id.* at 438 (emphasis omitted). *Avery* also teaches that such failure, coupled with “the otherwise flimsy evidence supporting [a defendant’s] conviction,” comprised “almost entirely” of one eyewitness’s testimony, justifies a grant of habeas. *Id.* at 439.

Avery guides the disposition of Upshaw’s case. As in *Avery*, the State primarily relied on one piece of evidence to connect Upshaw to the robbery: Williams’s eyewitness identification of Upshaw as the robber. Eyewitness testimony is notoriously unreliable. We have noted our “grave reservations concerning the reliability of eyewitness testimony.” *Clinkscale*, 375 F.3d at 445 (quoting *Blackburn v. Foltz*, 828 F.2d 1177, 1186 (6th Cir. 1987)). Empirical studies support such concerns: a study by the Innocence Project determined that mistaken eyewitness identification arose “in approximately 69% of DNA exoneration cases, of which 77% involved multiple identification

procedures (i.e., witnesses were shown a photo more than once).⁷ Case law recognizes this reality. *See Towns*, 395 F.3d at 254 (describing the prosecution's case against the petitioner as "weak" where there was "no direct evidence" and "the strongest evidence against [the petitioner] was [a single person's] eyewitness testimony, which was equivocal at best"); *Ferguson*, 501 F.3d at 482-83 (recognizing eyewitness testimony's "inherent unreliability," and emphasizing that "eyewitness misidentification is 'the single most important factor leading to wrongful convictions in the United States'") (first quoting *Watkins v. Sowders*, 449 U.S. 341, 352 (1981); and then quoting *United States v. Brownlee*, 454 F.3d 131, 141 (3d Cir. 2006)).

The conclusion that the State's case against Upshaw was not overwhelming coheres with binding precedent. *See Matthews v. Abramajtys*, 319 F.3d 780, 790 (6th Cir. 2003). Stressing that "Upshaw's defense was that he had been misidentified and was elsewhere at the time of the gas station robbery," the district court concluded that Blake's failure to introduce alibi witnesses prejudiced Upshaw. The court characterized Blake's reliance on Haugabook's testimony that he dropped Upshaw off after work, and the fact that Upshaw "was wearing different shoes than those worn by the perpetrator of the armed robbery several minutes later," as "not much of a defense." This is particularly true in light of available evidence showing

⁷ Rianne Berube, Miko M. Wilford, Allison D. Redlich, Yan Wang, *Identifying Patterns Across the Six Canonical Factors Underlying Wrongful Convictions*, 3 Wrongful Conviction L. Rev. 166, 172 (2022) (citing *DNA Exonerations in the United States*, Innocence Project, <https://innocenceproject.org/dna-exonerations-in-the-united-states/>).

that “Green would have told the jury that within minutes of the robbery taking place, Upshaw was at home, with her, his aunt, his daughter, and his daughter’s mother, being reprimanded by Green, and that he left the house the next morning, hours after the armed robbery occurred.”⁸ These conclusions were drawn from the state court record. This record reveals that the State’s case “was not overwhelming,” as the district court explained, because “[a]part from Williams’ testimony, the State’s only evidence against Upshaw was that he had been arrested for home invasion with Walker several hours after the gas station was robbed.” In contrast, the other alibi witnesses that Upshaw provided but counsel ignored “could account for Upshaw’s whereabouts at the time of the crime,” and up until he left the home and became involved in the home invasion that resulted in his arrest.

On these facts, we conclude, like the district court, that “there is a substantial likelihood that the trial would have turned out differently if counsel had called even one alibi witness.” Other factual disparities in the state court record further support this conclusion. For example, Williams testified that the masked robber wore blue sneakers and carried a gun. But Haugabook said that he never observed Upshaw “wearing purple gym shoes”—not that night, not ever, and the officer who apprehended Upshaw hours after the robbery stated that Upshaw wore tan Timberlands and did not smell like gunpowder, nor did he carry a gun

⁸ The court also observed that though “Green is now deceased, her statement is part of the record and may be considered.”

or any shell casings. The evidence presented at trial was not, as the Warden contends, “extremely damning.” We affirm the grant of habeas relief on Upshaw’s IAC claim.

B. *Batson* Claim

The district court also concluded that Upshaw’s *Batson* claim entitled him to habeas relief. A *Batson* challenge proceeds in three steps. First, the party challenging the strike “must make a *prima facie* case that the challenged strike was based on race.” *United States v. McAllister*, 693 F.3d 572, 578 (6th Cir. 2012). “Once the defendant makes a *prima facie* showing, the burden shifts to the State to come forward with a neutral explanation for challenging” that potential juror. *Batson v. Kentucky*, 476 U.S. 79, 97 (1986). Last, the burden shifts back to the challenger, and the court then decides “whether the opponent of the peremptory strike has proven purposeful discrimination.” *McAllister*, 693 F.3d at 578. Evidence of pretext can include comparator juror analysis, *see id.* at 581; differential voir dire questioning of Black and non-Black prospective jurors, *see Miller-El v. Dretke*, 545 U.S. 231, 255-56 (2005); and other evidence indicating “that discrimination may have infected the jury selection process,” *Johnson v. California*, 545 U.S. 162, 172 (2005). Each step is mandatory: “the trial court may not short circuit the process by consolidating any two of the steps.” *United States v. Kimbrel*, 532 F.3d 461, 466 (6th Cir. 2008). If the State proceeds to give “a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination,” however, “the preliminary issue of whether the defendant had made a *prima facie*

showing becomes moot.” *Hernandez v. New York*, 500 U.S. 352, 359 (1991) (plurality opinion). The impermissible exclusion of even a single juror violates *Batson*. See *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008).

A *Batson* challenge does not turn on the number of race-based peremptory challenges. Rather, “the Supreme Court has directly held that even a single racially motivated peremptory strike by the prosecutor requires relief.” *Drain v. Woods*, 595 F. App’x 558, 568 (6th Cir. 2014). Nor can the eventual empaneling of a Black juror obviate the taint of an earlier *Batson* violation. See *Dretke*, 545 U.S. at 250.

The Warden challenges the district court’s decision granting habeas relief under *Batson* on several grounds. He first urges that the court erred in holding that the Michigan COA unreasonably applied *Batson*. This argument rests on the contention that the Supreme Court’s holding in *Hernandez* is not clearly established because it derives from a plurality opinion. Even were the step one inquiry moot, the Warden submits that Upshaw failed to meet his burden of persuasion.

At step one of the *Batson* inquiry, the challenger must make a *prima facie* showing that the prosecutor used her peremptory strikes to discriminate based on race. This step “becomes moot,” however, “[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination.” *Hernandez*, 500 U.S. at 359. The Warden contends that “[i]t cannot be said that a pattern of strikes against black jurors creates a *prima facie* case of discrimination if there is nothing more on the

record from which to establish the context of those strikes.” Though acknowledging “that this Court has held or implied that *Hernandez*’s mootness language is clearly established law for purposes of § 2254(d)(1),” the Warden argues that “none of those cases provided any reasoned analysis” in support of this practice.

As a threshold matter, *Hernandez* provides clearly established law. In a “fragmented” decision, the “position taken by those Members who concurred in the judgments on the narrowest grounds” controls. *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). This means that the plurality opinion, which included the mootness holding at the *prima facie* step, sets forth the clearly established federal law. *Hernandez*, 500 U.S. at 359. Precedent reflects this reality. First, “[t]he Supreme Court has subsequently relied upon the *Hernandez* plurality opinion in a number of cases.” *Drain*, 595 F. App’x at 569-70 (collecting cases). Second, the Sixth Circuit “has previously applied *Hernandez*’s mootness holding as clearly established law.” *Id.* at 570 (citing *Lancaster*, 324 F.3d at 434-35). Those prior applications are binding. *See Smith v. Stegall*, 385 F.3d 993, 998 (6th Cir. 2004) (“We are also bound by any prior Sixth Circuit decisions concluding that federal law on a particular issue has been ‘clearly established’ by certain holdings of the Supreme Court.”). The Warden complains that “none of those cases provided any reasoned analysis as to . . . how the plurality opinion in *Hernandez* otherwise could be considered clearly established,” but provides no authority that undermines the precedential value of those prior decisions. We decline to depart from our prior cases and the procedure set forth in the rules.

The district court correctly applied *Hernandez*'s holding in determining that because "the trial court reached step two and three of the *Batson* inquiry" the COA's decision to ground its rejection of Upshaw's *Batson* claim solely on the *prima facie* analysis was contrary to clearly established federal law, and appropriately reviewed Upshaw's claim *de novo*. Because the state trial court judge failed to rule on whether Upshaw met his *prima facie* burden before the State offered race-neutral reasons for its strikes, the step one inquiry is moot. *See Rice v. White*, 660 F.3d 242, 258 (6th Cir. 2011) (holding that petitioner satisfied his burden at step one "because the prosecutor proceeded to step two of *Batson* before the trial court made a ruling at step one" and proceeding to consider steps two and three). Our analysis turns to steps two and three of *Batson*.

At step two, "the State must provide race-neutral reasons for its peremptory strikes." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2241 (2019). As our sister circuits have observed, "when a trial court offers its own speculation as to the prosecutor's reasons for striking minority jurors, it essentially disregards its own core function under *Batson*—to evaluate the reasons offered by the prosecutor . . . to determine the prosecutor's true intent." *Johnson v. Martin*, 3 F.4th 1210, 1224 (10th Cir. 2021). The trial court here said to "[g]o ahead" when the State asked whether it should provide its reasons for each of the challenged jurors. The State then offered reasons for the first two challenged jurors. The court then inserted its own justification for the third challenged juror, stating that the juror had "relatives in prison." The district court recognized that the state trial court's statements "impermissibly

signaled to the prosecutor that this was a reason the court was prepared to find credible and never explored the prosecutor’s real reason.” These actions prevented the State from satisfying its burden at step two of *Batson*. By substituting its own reason for the State’s, the trial court failed to fulfill its obligation to “determine whether the prosecutor’s proffered reasons are the actual reasons” and to decide “whether the State was ‘motivated in substantial part by discriminatory intent.’” *Flowers*, 139 S. Ct. at 2244 (quoting *Foster v. Chatman*, 578 U.S. 488, 513 (2016)).

A second issue on step two also emerged at Upshaw’s trial. The Supreme Court has previously observed that the State’s refusal “to respond to a trial judge’s inquiry regarding [its] justification for making a strike” provides “additional support for the inference of discrimination raised by a defendant’s *prima facie* case.” *Johnson*, 545 U.S. at 171 n.6. At Upshaw’s trial, neither the State—nor the court—provided reasons for striking two of the challenged jurors. After the trial judge expressed that he did not “think the *Batson* motion [could] be sustained,” Blake renewed his challenge to one of the jurors whose strike the State failed to explain. The State did not respond. And the court moved on, without having the State justify the strike or conducting its own analysis as to the exclusion of this juror. Although the court failed to press the State on this point, the State’s refusal to offer a race-neutral reason for striking this juror after Blake, twice, challenged her exclusion “provide[d] additional support for the inference of discrimination.” *Johnson*, 545 U.S. at 171 n.6. “In the eyes of the Constitution, one racially discriminatory peremptory strike is one too many.” *Flowers*, 139 S. Ct. at 2241. Even if the other

Batson issues identified above did not amount to constitutional violations, then, as explained by the district court, the State's failure to put forth any justification for excluding this juror provides grounds for relief.

The final step requires the trial court to "determine whether the prosecutor's stated reasons were the actual reasons or instead were a pretext for discrimination." *Id.* As emphasized by the Supreme Court, "[i]f any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*," *Dretke*, 545 U.S. at 240, which imposed too onerous a burden on petitioners by requiring evidence of "systemic discrimination" by the State in jury trials, *id.* at 236. Based on this reality and the fact that "[s]ome stated reasons are false," *Batson* teaches that "a defendant may rely on 'all relevant circumstances' to raise an inference of purposeful discrimination." *Id.* (quoting *Batson*, 476 U.S. at 96-97). Moreover, "[i]f the stated reason [for a peremptory strike] does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false." *Id.* at 252.

Additional problems arose at step three. The trial court stated: "Well, the Prosecutor has given some explanation other than race being challenged. I don't think the *Batson* motion can be sustained. I don't have any further comments on whether it's good or bad. That's the strategy of a trial." The district court characterized this assessment as "the court summarily conclud[ing] that there had been no discrimination purely because 'the Prosecutor . . . gave *some*

explanation other than race being challenged.” The record corroborates this characterization. Nowhere in the transcript does the trial court consider, implicitly or explicitly, “the persuasiveness of the prosecutor’s justification for [her] peremptory strike.” *Cockrell*, 537 U.S. at 338-39. Instead of properly considering the validity and adequacy of the State’s reasons, the trial court asked whether the State provided any explanation. That is not the appropriate inquiry. And this inquiry is critical: if it reveals that “a prosecutor’s proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack [panelist] who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*’s third step.” *Dretke*, 545 U.S. at 241.

Although the State claimed that it struck an older Black woman from the jury due to her age, not her race, it empaneled three other retired nonblack women. This raises the probability that the State’s race-neutral explanation for striking the juror was pretextual. *See McAllister*, 693 F.3d at 581-82 (citing comparator analysis between excluded and impaneled jurors as reflecting “a failure on the part of the district court . . . to conduct a constitutionally sufficient *Batson* analysis” to “definitively resolv[e] these issues”). The State’s argument that Upshaw failed to meet his burden of persuasion misses the mark because it fails to account for these violations of *Batson*’s process.

“[T]he job of enforcing *Batson* rests first and foremost with trial judges.” *Flowers*, 139 S. Ct. at 2243. Because “America’s trial judges operate at the front lines of American justice,” they also “possess the primary responsibility to enforce *Batson* and prevent

racial discrimination from seeping into the jury selection process.” *Id.* Here, the Michigan Supreme Court had previously warned Upshaw’s trial judge that his handling of a *Batson* challenge, which included the judge’s observation that he was “not going to . . . indulge in . . . race baiting,” could justify a judicial misconduct investigation. *Pellegrino v. AMPCO System Parking*, 785 N.W.2d 45, 49 (Mich. 2010). As shown by the state court record, at Upshaw’s trial, the judge failed to properly apply *Batson* in multiple respects. On review, Michigan’s appellate courts failed to apply clearly established Supreme Court precedent and remedy these violations.

AEDPA requires “federal judges to attend with the utmost care to state-court decisions.” *Williams v. Taylor*, 529 U.S. 362, 386 (2000). It does not, however, “require the federal courts to cede” to state courts their “independent responsibility . . . to interpret federal law.” *Id.* at 379. This function is critical in the context of jury service, recognized as one of “the most substantial opportunit[ies] that most citizens have to participate in the democratic process.” *Flowers*, 139 S. Ct. at 2238. A federal court acts within its discretion when it “say[s] what the law is” and corrects state courts’ unreasonable application of clearly established federal law. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). We affirm the district court’s grant of habeas on Upshaw’s *Batson* claim.

IV. CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court’s judgment granting Upshaw habeas relief on both his IAC and *Batson* claims.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Mar 28, 2024

KELLY L. STEPHENS, Clerk

No. 22-1705

LAFAYETTE DESHAWN UPSHAW,

Petitioner - Appellee,

v.

GEORGE STEPHENSON, Warden,

Respondent - Appellant.

Before: MOORE, GIBBONS, and STRANCH,
Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the
district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens
Kelly L. Stephens, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LAFAYETTE DESHAWN UPSHAW,
Petitioner,
v. Case No. 20-cv-12560
Honorable Linda V. Parker

GEORGE STEPHENSON,
Respondent.

/

ORDER LIFTING STAY

Petitioner Lafayette Deshawn Upshaw (“Petitioner”) filed an application for the writ of habeas corpus pursuant to 28 U.S.C. § 2254, which this Court granted in a decision issued July 14, 2022. (ECF No. 26.) Judgment was entered the same date. (ECF No. 27.) The Court ordered Petitioner released from state custody for any further punishment related to the convictions at issue in his petition unless the State of Michigan commenced a new trial within 120 days of the entry of final judgment.¹ (*Id.* at Pg ID 1750.) Respondent appealed the Court’s decision (ECF No. 28) and filed a motion for a stay pending appeal (ECF No. 35). On November 10, 2022, this Court granted Respondent’s motion to stay. (ECF No. 38).

¹ In a previous decision, the Court indicated that the deadline to retry Petitioner was 180 days, not 120. (ECF No. 42 at PageID. 2006.) That was an error. The Judgment and other decisions clearly set forth a 120-day deadline. (See ECF No. 27 at PageID. 1750; ECF No. 38 at PageID. 1992.)

On March 28, 2024, the Sixth Circuit Court of Appeals affirmed the grant of habeas relief to Petitioner. (ECF No. 43.) The Sixth Circuit issued its mandate on May 1, 2024.

Accordingly,

IT IS ORDERED that the stay is **LIFTED**.

IT IS FURTHER ORDERED the State of Michigan must grant Petitioner a new trial within 120 days of the date of this Order or discharge him from any further punishment related to these convictions.

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

Dated: May 6, 2024

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

No: 22-1705

Filed: May 01, 2024

LAFAYETTE DESHAWN UPSHAW
Petitioner - Appellee

v.

GEORGE STEPHENSON, Warden
Respondent - Appellant

MANDATE

Pursuant to the court's disposition that was filed 03/28/2024 the mandate for this case hereby issues today.

COSTS: None

No. 22-1705

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Apr 23, 2024

KELLY L. STEPHENS, Clerk

LAFAYETTE DESHAWN UPSHAW,)
)
Petitioner-Appellant,)
) ORDER
v.)
)
GEORGE STEPHENSON, Warden,)
)
Respondent-Appellee.)

Before: MOORE, GIBBONS, and STRANCH, Circuit Judges.

On March 28, 2024, we issued an opinion affirming the district court's grant of habeas relief to Lafayette Deshawn Upshaw. On April 18, 2024, the day before the mandate was scheduled to issue, the State filed a motion to stay the mandate to permit time for it to file a petition for a writ of certiorari. Petitioner Upshaw filed a response within 10 days, making the motion ripe for decision. *See* Fed. R. App. P. 27(a)(3)(A). The mandate from the panel's opinion has thus been stayed to allow time for the disposition of the State's motion. *See* Fed. R. App. P. 41(b); 6 Cir. R. 41(a). This case's docket does not show that the State has filed a petition for a writ of certiorari during this time, which a review of the Supreme Court's docket

confirms. For the reasons discussed below, we deny the State's motion.

Federal Rule of Appellate Procedure 41(d)(1) allows a party to "move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court." Its motion "must show that the petition would present a substantial question and that there is good cause for a stay." *Id.* Generally, this is a daunting standard. *See Nara v. Frank*, 494 F.3d 1132, 1133 (3d Cir. 2007) (parties may only obtain a stay in "exceptional cases"); 16AA Charles A. Wright et al., *Fed. Prac. & Proc.* § 3987.1 (5th ed. Sept. 2020 update) ("[T]he grant of a motion to stay the mandate in these circumstances is far from a foregone conclusion.").

A stay pending the filing and disposition of a petition for a writ of certiorari is "not a matter of right" but "instead an exercise of judicial discretion, and the 'party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion.'" *Indiana State Police Pension Tr. v. Chrysler LLC*, 556 U.S. 960, 961 (2009) (quoting *Nken v. Holder*, 556 U.S. 418, 433-334 (2009)). The State did not present "good cause" for a stay, which Rule 41(d)(1) requires. *See United States v. Silver*, 954 F.3d 455, 460 (2d Cir. 2020) (per curiam) (denying stay when defendant did not demonstrate good cause).

Specifically, the Warden's arguments that the mandate will force it to endure the expense of retrying Upshaw and its unsubstantiated speculation that Upshaw presents a threat to the public fail to demonstrate that the State will suffer irreparable harm if the stay were denied. *See Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974)

(emphasizing that “[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury”). Such a showing is required; in its absence, we will not stay the mandate. *See Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). Issuance of the mandate does not prevent the State from filing a petition for certiorari. *See* 6 Cir. I.O.P. 41(d). Indeed, it has had several weeks to do so.

Therefore, the State’s motion to stay the mandate is **DENIED**.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens
Kelly L. Stephens, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LAFAYETTE DESHAWN UPSHAW,
Petitioner,

v. Case No. 20-12560
Honorable Linda V. Parker

GEORGE STEPHENSON,
Respondent.

/

OPINION AND ORDER GRANTING
RESPONDENT'S MOTION FOR A STAY
PENDING APPEAL (ECF NO. 35)

Petitioner Lafayette Deshawn Upshaw (“Petitioner”) filed an application for the writ of habeas corpus pursuant to 28 U.S.C. § 2254, which this Court granted in an Opinion and Order issued July 14, 2022. (ECF No. 26.) Judgment was entered on the same date. (ECF No. 27.) The Court ordered Petitioner released from state custody for any further punishment related to the convictions at issue in his petition unless the State of Michigan commenced a new trial within 120 days of the entry of final judgment. (*Id.* at Pg ID 1750.) Respondent appealed the Court’s decision (ECF No. 28) and moved to stay pending appeal (ECF No. 35). Petitioner has moved for bond pending appeal. (ECF No. 31.)

There is a presumption that a successful habeas petitioner should be released from custody pending

the state's appeal of a federal court decision granting habeas relief, but this presumption may be overcome if the judge rendering the decision, or an appellate court or judge, orders otherwise. *Hilton v. Braunschweig*, 481 U.S. 770, 774 (1987); *Workman v. Tate*, 958 F.2d 164, 166 (6th Cir. 1992); *see also* Fed. R. App. P 23(c). Because habeas proceedings are civil in nature, the general standards governing stays of civil judgments guide courts deciding whether to release a habeas petitioner pending the state's appeal. *Hilton*, 481 U.S. at 776. The factors relevant to the decision are: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Hilton*, 481 U.S. at 776; *Workman*, 958 F.2d at 166.

For the reasons already set forth in the Court's July 14 decision, this Court strongly disagrees with Respondent's assertion that he is likely to succeed on appeal. The state courts unreasonably applied clearly established federal law when analyzing Petitioner's *Batson* challenge. Further, even when considering only the record before the state court, the state courts made an unreasonable determination of the facts and unreasonably applied clearly established federal law when concluding that trial counsel was not ineffective in failing to investigate Petitioner's alibi witnesses and pursuing an alibi defense. Nevertheless, the Court is granting Respondent's request for a stay pending appeal because resources will be wasted if the State is required to retry Petitioner while the matter proceeds in the Sixth Circuit Court of Appeals.

As to Petitioner's request for bond pending appeal, the Court requires more time to assess the request and will issue a separate decision as soon as it does.

Accordingly,

IT IS ORDERED that Respondent's Motion for Stay Pending Appeal (ECF No. 43) is **GRANTED**.

IT IS SO ORDERED.

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

Dated: November 10, 2022

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LAFAYETTE DESHAWN
UPSHAW,

Petitioner, Case No. 20-cv-12560
Honorable Linda V. Parker

v.

GEORGE STEPHENSON,

Respondent.

/

**OPINION AND ORDER GRANTING PETITION
FOR A WRIT OF HABEAS CORPUS**

Petitioner, Lafayette Deshawn Upshaw, is currently serving between twenty and forty-two years in state prison for a conviction arising from a May 28, 2014 armed robbery. Two witnesses were available to testify that Upshaw was at home during the robbery; however, his trial attorneys failed to investigate and call them at trial. Claiming that his Sixth Amendment rights were violated due to counsel's ineffectiveness, as well as other errors in the proceedings, Upshaw filed an application for the writ of habeas corpus pursuant to 28 U.S.C. § 2254 in September 2020. (ECF No. 1.) On May 2, 2022, the Court granted summary judgment in favor of Upshaw on one of his claims and ordered that an evidentiary hearing be held with respect to two others. (ECF No. 19.) That hearing was held on May 17, 2022.

For the reasons set forth below and in its previous opinion and order (ECF No. 19), the Court is granting Upshaw's Petition as to three of his claims. As already discussed in the Court's May 2 decision, and as Respondent concedes, Upshaw's Sixth Amendment rights were violated when the trial court used facts not found by the jury when calculating the sentencing guidelines. As also discussed in that decision, and will be further discussed below, the State court unreasonably assessed the facts when evaluating whether Upshaw's two trial attorneys were ineffective in failing to investigate and present alibi witnesses. Two individuals had evidence that, when placed in context with judicially noticeable facts, indicated that Upshaw was at home when the armed robbery occurred. Upshaw repeatedly tried to get his attorneys to raise an alibi defense. Yet trial counsel failed to investigate and/or present Upshaw's alibi witnesses despite the fact that there was no strategic reason for failing to do so. Finally, the State court unreasonably applied Supreme Court precedent when rejecting Upshaw's claim that the prosecution exercised peremptory challenges based on race in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986).

I. Standard of Review

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides the standard of review applicable to Upshaw's application for habeas relief:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated

on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)

A state-court decision satisfies the “contrary to” clause if it “applies a rule that contradicts the governing law set forth in [the Supreme Court’s] cases” or “confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [its] precedent.” *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). Likewise,

[a] state-court decision is an unreasonable application of clearly established federal law if it “correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner’s case,” [Williams, 529 U.S.] at 407-08 . . . or if it “either unreasonably extends or unreasonably refuses to extend a legal principle from Supreme Court precedent to a new context,” *Seymour v. Walker*, 224 F.3d 542, 549 (6th Cir. 2000).

Murphy v. Ohio, 551 F.3d 485, 494 (6th Cir. 2009). The Supreme Court has cautioned, however, that “evidence introduced in federal court has no bearing on § 2254(d)(1) review.” *Cullen v. Pinholster*, 563 U.S. 170, 185 (2011). Thus, where, as here, “a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court.” *Id.*

Finally, with respect to the “unreasonable determination” clause, 28 U.S.C. § 2254(d)(2)

the question . . . “is not whether a federal court believes the state court’s determination was incorrect but whether that determination was unreasonable—a substantially higher threshold.” *Schrivo v. Landrigan*, 550 U.S. 465, 473 . . . (2007). . . . [And] “the petitioner must show that the resulting state court decision was ‘based on’ that unreasonable determination.” *Rice v. White*, 660 F.3d 242, 250 (6th Cir. 2011).

Hill v. Shoop, 11 F.4th 373, 384 (6th Cir. 2021); *see also* 28 U.S.C. § 2254(e)(1) (explaining that “determination[s] of . . . factual issue[s] made by a State court shall be presumed to be correct” but that “th[is] presumption of correctness [can be rebutted] by clear and convincing evidence”).

In conducting the § 2254(d) analysis, courts must be mindful “that even a strong case for relief does not mean the state court’s contrary conclusion was unreasonable.” *Richter*, 562 U.S. at 102 (citing *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003)). Rather, under

AEDPA, “[a] state court’s determination that a claim lacks merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the correctness of the state court’s decision.” *Id.* at 101 (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

II. Revisiting the Court’s May 2 Decision

The Court finds it necessary to address two issues before proceeding further with its analysis of Upshaw’s claims. First, in a supplemental brief filed after the evidentiary hearing, Respondent argues that the Court erred by “redetermine[ing] whether a state rule was properly applied” in relation to the affidavit of one of Upshaw’s alibi witnesses. (ECF No. 24 at Pg ID 1640.) While the Court did indicate in its May 2 decision that the affidavit satisfied the requirements of Michigan Court Rule 2.119(B)(1), contrary to the Michigan Court of Appeals’ conclusion, that did not factor into the Court’s conclusion that the State court’s analysis of Upshaw’s ineffective assistance claim was unreasonable. Instead, it was the State court’s factual determination that the witness’s statement did not contain certain information that this Court found objectively unreasonable because the statement *did* contain that information. (ECF No. 19 at Pg ID 1522.) Stated differently, this Court was not communicating that the Michigan Court of Appeals’ interpretation or application of state law was “unreasonable”—as that term is used in § 2254(d). (See ECF No. 19 at Pg ID 1522.) Instead, what the Court found objectively unreasonable, as contemplated in the habeas statute, was the State court’s *reading of the witness’ statement*. (*Id.*; *see also* 28 U.S.C. § 2254(d)(2) (providing for the grant of habeas relief where the

State court's adjudication of a claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings").

Next, as will be discussed more fully below, even without the evidence from the May 17 evidentiary hearing, and even when viewed under AEDPA's deferential standard of review, the Court concludes that Upshaw is entitled to habeas relief. Based only on the record before the Michigan courts, it is clear that the State courts unreasonably adjudicated Upshaw's ineffective assistance of counsel and *Batson* claims.

III. Background

A. Upshaw's Convictions and Sentence

Shortly after 8:00 a.m. on May 28, 2014, Upshaw and Darrell Miles Walker "were arrested in the process of committing a home invasion at a residence" located at 19475 Washburn Street in Detroit, Michigan. (ECF No. 6-9 at Pg ID 623; ECF No. 6-14 at Pg ID 863.) They "were caught as they exited separate windows of the house," from which they "had attempted to steal several items of jewelry." (ECF No. 6-14 at Pg ID 863.) Upshaw was charged with second-degree home invasion in violation of Michigan Compiled Laws § 750.110a(3); larceny in a building in violation of Michigan Compiled Laws § 750.360; and resisting and obstructing in violation of Michigan Compiled Laws § 750.81d(1). (ECF No. 6-6 at Pg ID 327.)

Several hours before Upshaw and Walker were arrested, an armed robbery occurred at 1920 West Fischer Service Drive, a gas station approximately ten

miles south of the invaded home.¹ (ECF No. 6-2 at Pg ID 231-32; ECF No. 6-14 at Pg ID 862-63.) Tina Williams was the only employee working at the time. (ECF No. 6-8, Pg ID 523.) She reported that around 3:30 a.m., just after she had returned to her bullet-proof cashier booth from attempting to help a strangely behaving man with the gas station's coffee machine, another man entered the station and robbed a female customer at gunpoint. (ECF No. 6-14 at Pg ID 863.)

The second man, whose face was obstructed by a t-shirt, then demanded that Williams give him the money in the cash register. (*Id.*; ECF No. 6-8 at Pg ID 489-90.) When Williams refused, the man tried to kick open the door of the cashier booth and fired several shots in her direction, which were blocked by the bullet-proof glass. (ECF No. 6-14 at Pg ID 863.) The first man "shouted at her to open the access door, indicating that . . . [she] should do so in order to simply end the situation and get [the shooter] out of the gas station," but Williams "stood her ground and did not comply." (*Id.*) The shooter eventually "gave up and ran out of the gas station." (*Id.*) After the altercation, the first man, who had remained at the coffee machine and had not run when the shooter's gun was pointed in his direction, approached the booth and told Williams that

¹ The distance between the house and the gas station is a fact of which the Court may take judicial notice. *See Livingston Christian Sch. v. Genoa Charter Twp.*, 858 F.3d 996, 1008 (6th Cir. 2017); *see also*, e.g., *Hund v. Hund*, No. 334313, 2017 Mich. App. LEXIS 1082, at *14 (Mich. Ct. App. July 6, 2017) (taking judicial notice of distance and extrapolating travel time).

she should call the police. (*Id.*) He “then fled in the same direction as the shooter.” (*Id.*)

A few days later, Williams identified Walker as the coffee machine man and Upshaw as the shooter in separate photographic lineups. (*Id.*; ECF No. 6-8 at Pg ID 500-04.) Upshaw thereafter was charged with five additional crimes: armed robbery in violation of Michigan Compiled Laws § 750.529; carrying a dangerous weapon with unlawful intent in violation of Michigan Compiled Laws § 750.226; possession of a firearm during the commission of a felony (“felony-firearm”) in violation of Michigan Compiled Laws § 750.227b; assault with intent to commit murder in violation of Michigan Compiled Laws § 750.83; and assault with intent to do great bodily harm less than murder in violation of Michigan Compiled Laws § 750.84. (ECF No. 6-2 at Pg ID 229.)

Upshaw ultimately pleaded guilty to second-degree home invasion but elected to go to trial on the gas station robbery charges. (ECF No. 6-7 at Pg ID 340-41; ECF No. 6-11 at Pg ID 757.) He was tried jointly with Walker before the Honorable Michael J. Callahan in Wayne County Circuit Court. (*See, e.g.*, ECF No. 6-7 at Pg ID 329.) A week before trial, during an October 2, 2014 pre-trial conference, Upshaw requested an adjournment. (ECF No. 6-5 at Pg ID 322.) He explained to the trial judge that he was dissatisfied with his attorney, Ray Paige, who failed to appear at an August 5, 2014 conference,² and had just

² In a letter to the Michigan Attorney Grievance Commission, Upshaw’s mother, Toya Green, stated that Paige had, in fact, failed to appear on *four* separate occasions. (ECF No. 6-14 at Pg ID 950.)

retained a new attorney, Wright Blake, who was present at the conference. (ECF No. 6-4 at Pg ID 314-15; ECF No. 6-5 at Pg ID 322.) The full colloquy proceeded as follows:

MR. BLAKE: And we're going to talk some more. Mr. Upshaw wants an adjournment. He doesn't feel that we're quite ready. I told him that I would bring myself up to speed by the time for the trial date. Is that correct, Mr. Upshaw?

MR. UPSHAW: Yes, but as you can see, your Honor, I have retained a new lawyer because of my insufficient counsel for not showing up and not coming and telling me the information. So I feel like my lawyer hasn't, my lawyer hasn't saw the DVD. He hasn't retained the transcript or anything and I feel like it's best grounds of adjournment right there, your Honor, just to get him caught up on what's going on with the case cause I just retained him like a week and a half ago, probably not even that.

THE COURT: Well, I'm not granting an adjournment at this point. We'll see what happens. Okay.

MR. BLAKE: Thank you, your Honor.

(ECF No. 6-5 at Pg ID 321-22.)

The trial began on October 9, 2014 and lasted three days. (*See* ECF No. 6-1 at Pg ID 225.) On October 16, 2014, the jury found Upshaw guilty of armed

robbery, carrying a dangerous weapon with unlawful intent, and felony-firearm. (ECF No. 6-10 at Pg ID 743.) He was acquitted of the assault charges. (*Id.*)

On November 14, 2014, the trial court sentenced Upshaw to prison for two years for felony-firearm followed by concurrent terms of eighteen to forty years for armed robbery, one to five years for carrying a dangerous weapon, and one to fifteen years for second-degree home invasion. (ECF No. 6-11 at Pg ID 756-57.)

B. Upshaw's State Appellate and Post-Conviction Efforts

On December 17, 2014, Upshaw commenced an appeal as of right through counsel. (ECF No. 6-14 at Pg ID 905.) Upshaw raised several claims, including denial of his Sixth Amendment right to the effective assistance of counsel due to trial counsel's failure to investigate potential alibi witnesses, file the required notice to present an alibi defense, and present alibi witnesses. (*Id.* at 975.) Upshaw also moved to remand for an evidentiary hearing pursuant to Michigan Court Rule 7.211(C)(1) and *People v. Ginther*, 212 N.W.2d 922 (Mich. 1973). (ECF No. 6-14 at Pg ID 895-96.)

In support, Upshaw provided an affidavit in which he stated:

. . . on May 28, 2014, at about 3:30 a.m., a co-worker dropped me off at my home, where my aunt (Crystal Holloway) let me in, and along with my grandmother (Joann Holloway), along with my significant other (Diamond

Woods), all heard me preparing a meal in the kitchen of the home before I went to bed.

I was never at, or near[,] the Mobil gas station located at 1920 West Fischer Drive. Neither was I with Darrell Walker in that early morning, until around 7:30-7:45 a.m., due to the fact I caught the bus to go help someone move, and saw him along the bus ride and which we did a criminal act along the way. The information above is true, and are facts that need to be established, due to my attorney lacking adequate information and time to prepare my defense. I had nothing to do with an armed robbery, nor did I have any knowledge of one.

(*Id.* at 897 (capitalization omitted).) Also attached was an affidavit from Upshaw's co-defendant, Walker, in which Walker stated that Upshaw was not at the gas station with him and that Walker went to the gas station alone. (*Id.* at 898.) On May 6, 2015, the Court of Appeals denied Upshaw's Motion to Remand. (*Id.* at 894.)

With the assistance of newly retained appellate counsel, Upshaw filed a successive motion to remand and moved for leave to file a supplemental brief on January 25, 2016. (*Id.* at 912-14.) In support of the motion to remand, Upshaw attached a new affidavit that he signed, along with notarized statements from his grandmother, JoAnn Green, and his aunt, Crystal Holloway. (*Id.* at 878-84.) In her statement, Holloway averred:

I was a [sic] alibi witness to some events that happened on May [sic]. [Upshaw's] lawyer

knew about me being a witness but he choose [sic] not to call on me to give my testimony. . . . I am writing this letter in hopes that [Upshaw] will be granted a new trial in which he will be able to have his witness called to the stand to testify on his behalf.

(*Id.* at 882.)

Green's affidavit provided Upshaw an alibi for the time immediately preceding the robbery, suggested that Upshaw did not leave the home until 7:45 a.m. that day, and described with particularity why Green remembered the details of that night. Green wrote, in part, that she lived with her children and Upshaw and on May 28, 2014:

I know Shawn . . . could not have been anywhere else, because at between 3:20 and 3:30 he was getting blessed out by me[.] [H]e'd woke me again. I'd been watching one of my programs and fell asleep[.] I woke up from the knock on the door[,] look at the tv set the time on the cable box[,] that's why I know he couldn't be in too [sic] places at a time[.] I was mad after seeing what time it was and I let (Shawn) Lafayette Upshaw know it to[o], later when he left at around 7:45, I was still upset, sitting on my front porch didn't want a kiss or say love you.

(ECF No. 6-14 at Pg ID 884.)

The Michigan Court of Appeals denied Upshaw's successive motion to remand, holding that Upshaw failed to "demonstrate[] that further factual

development of the record or an initial ruling by the trial court [was] necessary.” (*Id.* at 874.)³ Nevertheless, the court of appeals permitted the filing of a supplemental brief. (*Id.* at 911.) As relevant here, Upshaw argued in the supplemental brief that “the trial court abused its discretion when it denied [his] request for a brief adjournment” and that “[he] was denied a fair trial and due process of law [because] the prosecutor improperly dismissed minority venire members” and gave “insufficient [race-neutral reasons] to avoid a finding of purposeful discrimination.” (*Id.* at 927, 930 (capitalization omitted).)

On May 19, 2016, the Michigan Court of Appeals rejected all of Upshaw’s arguments and affirmed his convictions and sentence. *People v. Walker*, Nos. 324672, 325195, 2016 WL 2942215 (Mich. Ct. App. May 19, 2016). On April 4, 2017, the Michigan Supreme Court denied leave to appeal. *People v. Upshaw*, 891 N.W.2d 487 (Mich. 2017). The United States Supreme Court denied Upshaw’s petition for the writ of certiorari on November 6, 2017. *Upshaw v. Michigan*, 138 S. Ct. 422 (2017).

On July 10, 2018, Upshaw filed a pro se motion for relief from judgment. (ECF No. 6-12 at Pg ID 760.) In it, he argued, among other things, that his Sixth Amendment rights were violated by the trial court’s use of judicially found facts to score offense variables one, four, and nine (which increased his mandatory minimum sentence and guidelines range), as well as his appellate counsel’s failure to raise this issue; and

³ Presiding Judge Cynthia Diane Stephens disagreed and would have granted the motion to remand. (*Id.*)

that the Michigan Court of Appeals unreasonably applied the Supreme Court’s precedent in *Batson v. Kentucky*, 476 U.S. 79 (1986), in violation of the Fourteenth Amendment. (*Id.* at 796, 806.) On November 27, 2018, the Honorable Wanda A. Evans (to whom the case was reassigned following Judge Callahan’s retirement) denied Upshaw’s motion. (ECF No. 6-13 at Pg ID 855; *see also* ECF No. 6-1 at Pg ID 225.) Both the Michigan Court of Appeals and the Michigan Supreme Court denied leave to appeal. (ECF No. 6-15 at Pg ID 1057; ECF No. 6-17 at Pg ID 1316.)

C. Upshaw’s Habeas Petition (ECF No. 1)

On September 18, 2020, Upshaw filed the current federal habeas petition. (ECF No. 1.) Upshaw raises seven grounds for relief in his petition: (1) that his “trial counsel was constitutionally ineffective for failing to investigate potential alibi witnesses and failing to file an alibi notice;” (2) that “the trial court denied [his] motion for a brief adjournment . . . in violation of due process;” (3) that “the prosecutor dismissed African-American potential jurors in a discriminatory manner, in violation of the Equal Protection Clause;” (4) that “the trial court found facts that were not found by the jury to score offense variable 14, which increased the mandatory minimum sentence, in violation of the Sixth and Fourteenth Amendments;” (5) that “appellate counsel was constitutionally ineffective for failing to request a ‘Crosby remand’ as the remedy for [the offense variable 14] claim;” (6) that “the trial court found facts that were not found by the jury to score offense variables 1, 4, and 9, which increased the mandatory minimum sentence, in violation of the Sixth and Fourteenth Amendments, and

[that] appellate counsel was constitutionally ineffective for failing to raise this claim on direct appeal;” and (7) that “trial and appellate counsel were constitutionally ineffective for failing to argue that prior record variable 5 was [inappropriately] []scored.” (*Id.* at Pg ID 6-11 (capitalization omitted).)

On May 2, 2022, this Court granted summary judgment in favor of Upshaw on claim six; found claims four, five, and seven moot in light of the relief appropriate for claim six; and ordered an evidentiary hearing on claims one and two. (ECF No. 19.) With respect to claim one, the Court concluded that the State court’s adjudication of the claim involved an unreasonable application of *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984), as well as an unreasonable determination of the facts. (*Id.* at Pg ID 1520.) The Court therefore held that Upshaw had overcome the limitation of § 2254(d)(1) and that AEDPA deference is inappropriate as to that claim. (*Id.* at Pg ID 1530.)

The evidentiary hearing was held on May 17, 2022. (ECF No. 23.) Three witnesses testified: Upshaw, Blake, and Holloway. (*See id.* at Pg ID 1548.)

D. Evidentiary Hearing

1) Upshaw’s and Holloway’s Testimony

After getting off work at Tony’s Bar and Grill in the early morning of May 28, 2014, Upshaw received a ride home from his manager, Jeffrey Haugabook. (*Id.* at Pg ID 1555.) Upshaw needed a ride because, at the time, he had no car or bike, and relied exclusively on public transportation and ridesharing to get around. (*Id.* at Pg ID 1555-56.) Upshaw did not have

his keys with him when he arrived home around 3:25 a.m., so he knocked on the front door. (*Id.* at Pg ID 1556.) Holloway, who suffers from insomnia, heard the knocking from her bedroom upstairs and let him in. (*Id.* at Pg ID 1555, 1613-14.)

Upshaw's knocking also woke up Green, who was sleeping on the couch downstairs. (*Id.* at Pg ID 1583, 1614-15.) Green was very angry with Upshaw for waking her up and spent several minutes yelling at him. (*Id.* at Pg ID 1583, 1608.) Eventually, Upshaw went upstairs and began to attend to his infant daughter, who had been awakened by the commotion. (*Id.* at Pg ID 1583-84, 1609, 1612.) Holloway, who also went upstairs, was in and out of her bedroom for about twenty or thirty minutes, during which time she spoke with Upshaw and heard him playing with his daughter. (*Id.* at Pg ID 1583-84, 1615.)

Diamond Woods, the mother of Upshaw's daughter, was with Upshaw as well. (*Id.* at Pg ID 1615, 1619.) Holloway retired to her room for the night "a little before 4:00 [a.m.]." (*Id.* at Pg ID 1615.) At some point, Upshaw went downstairs to make something to eat. (*Id.* at Pg ID 1583.) He then returned to his room, which he shared with Woods, and went to sleep. (*Id.* at Pg ID 1584.) The next morning, Upshaw awoke around 6:30 or 7:00 and left the house shortly thereafter. (*Id.* at Pg ID 1585.) Green was awake and sitting downstairs when he left. (*Id.* at Pg ID 1585.)

After being charged with the armed robbery of the gas station, Upshaw retained Ray Paige to represent him at trial. (*Id.* at Pg ID 1572.) At their first meeting, Upshaw informed Paige that he had been at home with his baby, Green, Holloway, and Woods at the

time of the robbery and that the three women were willing to serve as alibi witnesses. (*Id.* at Pg ID 1562, 1565, 1572-73.) At no point during the following months, however, did Paige try to contact them. (*Id.* at Pg ID 1562-63, 1565, 1610, 1621.) This total failure to investigate, combined with Paige's poor communication and absence at certain pre-trial proceedings, proved too much for Upshaw. (*Id.* at Pg ID 1564.) Accordingly, he replaced Paige with another attorney, Wright Blake, about two weeks before trial. (*Id.* at Pg ID 1566.) Despite the little time remaining before trial, Blake waited nearly a week to meet with Upshaw and failed to familiarize himself with the facts of Upshaw's case beforehand. (*Id.* at Pg ID 1566-67, 1573.)

At their first meeting, eight days before trial, Upshaw told Blake that he was home at the time of the gas station robbery and that Green, Holloway, and Woods were prepared to testify at trial to his alibi. (*Id.*) Upshaw also gave Blake their contact information. (*Id.* at Pg ID 1568.) Blake, who primarily used the meeting to review Upshaw's discovery packet for the first time, offered no response and took no notes. (*Id.* at Pg ID 1566-67, 1574.)

The next day, Blake told Upshaw that he had missed the deadline to call alibi witnesses. (*Id.* at Pg ID 1576-77.) Nevertheless, Blake declined to make any arguments at the pre-trial conference in support of Upshaw's plea for an adjournment and, instead, told the trial court that he could be prepared for trial the following week. (*Id.* at Pg ID 1566-67; ECF No. 6-5 at Pg ID 321-22.) Blake did not meet with Upshaw

again before trial and did not contact Holloway. (*Id.* at Pg ID 1575-76, 1610.)

Green, Holloway, and Woods spoke with Upshaw “[m]ultiple times” about serving as alibi witnesses and even attempted to reach out to Blake. (*Id.* at Pg ID 1579-80.) Blake, however, called none of these individuals to testify—though all attended the trial. (*Id.* at Pg ID 1580.) Blake ultimately called only one witness, Haugabook. (*Id.* at Pg ID 1576.) Haugabook, however, did not offer an alibi. (ECF No. 6-9 at Pg ID 671.)

From Upshaw’s perspective, Blake “just winged the whole case.” (ECF No. 23 at Pg ID 1577.) At every opportunity, even as the trial wore on, Upshaw renewed his pleas for Blake to call his alibi witnesses. (*Id.* at Pg ID 1575.) But Blake repeatedly insisted that he could do nothing because he had missed the alibi witness deadline. (*Id.*)

2. Blake’s Testimony

Blake remembered very little of Upshaw’s case and had no records pertaining to his representation of Upshaw. (*Id.* at Pg ID 1596.)⁴ Blake recalled that the trial took place in 2014, that the charges involved a gas station, and that there was a video. (*Id.* at Pg ID 1595-96.) But that was about it. (*Id.* at Pg ID 1598-99.) He did not recall how many weeks before trial he had been retained, whether he met with Upshaw more than once before trial, whether he had been informed of the existence of alibi witnesses, whether he contacted any of those witnesses, or how much time he

⁴ Blake stated that “[he] always take[s] notes,” but admitted that he is “not a very good notetaker.” (ECF No. 23 at Pg ID 1604-05.)

spent preparing for trial. (*Id.* at Pg ID 1596-98.) Despite these numerous lapses in memory, Blake was “sure” that he was adequately prepared for Upshaw’s trial. (*Id.* at Pg ID 1597.)

The Court’s confidence in Blake’s credibility was seriously diminished, however, by his inconsistent statements and complete lack of preparation—or attempt to prepare—for the evidentiary hearing. For example, Blake initially claimed that no one, except possibly the Attorney General’s office, contacted him about the evidentiary hearing, and that he did not know why he was being called to testify until he looked up the docket. (*Id.* at Pg ID 1601.) He later recalled, however, that Upshaw’s habeas counsel contacted him via email before subpoenaing him and that he responded. (*Id.* at 1602.) Similarly, Blake claimed that he was “sure” he would have requested an adjournment if he was retained so soon before trial. (*Id.* at Pg ID 1605.) Yet, at the October 2, 2014 pre-trial conference, he did not do so. (ECF No. 6-5 at Pg ID 321-22.)⁵

In addition, Blake declined to review (or even request) any materials from the record to prepare to give testimony, save for the register of actions, despite the fact that he could recall almost nothing related to his representation of Upshaw and knew that the

⁵ Although Blake no longer remembers how soon before trial he joined the case, he does not dispute Upshaw’s claim that it was two weeks. (ECF No. 23 at Pg ID 1568, 1604.) The Court also notes that at the October 2, 2014 pre-trial conference, where Blake declined to argue for an adjournment, he did not disagree with Upshaw’s statement that he had been retained “a week and a half ago, probably not even that.” (ECF No. 6-5 at Pg ID 322.)

evidentiary hearing would focus on that representation. (*Id.* at Pg ID 1598, 1601.) Against this backdrop, the Court does not find credible Blake's claim that he would have asked the trial court for an adjournment if he was provided alibi witnesses past the time to file an alibi notice. (*Id.* at Pg ID 1599.)

IV. Analysis

A. Trial Counsel's Failure to Investigate and Call Alibi Witnesses to Testify at Trial (Claim I)

In his first claim, Upshaw argues that his "trial counsel was constitutionally ineffective for failing to investigate potential alibi witnesses and failing to file an alibi notice." (ECF No. 1 at Pg ID 6 (capitalization omitted).)

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 685-86 (1984). To prove ineffective assistance of counsel, Upshaw must satisfy *Strickland*'s familiar two-prong test. *See, e.g., Peoples v. Lafler*, 734 F.3d 503, 512 (6th Cir. 2013).

The first prong assesses counsel's performance. Under this prong, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. In other words, a court assessing an ineffective assistance claim must "determine whether, in light of all the circumstances, the challenged acts or omissions were outside the wide range of

professionally competent assistance.” *Id.* at 690. When making this assessment, “counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Id.*

Second, in order to amount to a constitutional violation, the error by counsel must have been prejudicial to the defendant. *Id.* at 691-92. To prove prejudice, “the 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.” *Id.* at 694. “The question is not whether a court can be certain counsel’s performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. . . . The likelihood of a different result must be substantial, not just conceivable.” *Richter*, 562 U.S. at 111-12.

Stermer v. Warren, 959 F.3d 704, 736 (6th Cir. 2020) (brackets omitted).

Before turning to the proper application of *Strickland*, the Court makes the following factual findings as to the handling of Upshaw’s case by Paige and Blake. These findings are based upon the Court’s careful review of the record evidence as well as its consideration of the testimony adduced at the evidentiary hearing.

Upshaw, with the assistance of his mother and Green, retained Paige in June or July 2014. (ECF No. 6-2 at Pg ID 227; ECF No. 6-14 at Pg ID 950; ECF No. 23 at Pg ID 1565, 1572, 1620.) The two women took responsibility for corresponding with Paige. (ECF No. 6-14 at Pg ID 950; ECF No. 23 at Pg ID 1620.) At their very first attorney-client meeting, Upshaw told Paige that he was innocent and that Green, Holloway, and Woods could provide alibi testimony. (ECF No. 23 at Pg ID 1562, 1565, 1572-73.) Paige, however, did not contact Holloway, and likely did not contact Woods. (*Id.* at Pg ID 1562-63, 1610, 1621.) Paige may have spoken to Green on one occasion, but he did not pursue her alibi testimony. (*Id.* at Pg ID 1562-63; ECF No. 6-14 at Pg ID 884.) At no time during the next two months did Paige file an alibi notice. (ECF No. 23 at Pg ID 1577.) In addition, Paige failed to appear for at least one, and possibly multiple, proceedings. (ECF No. 6-1 at Pg ID 225; ECF No. 6-4 at Pg ID 314-15; ECF No. 6-5 at Pg ID 322; ECF No. 6-14 at Pg ID 950; ECF No. 23 at Pg ID 1564.)

Approximately two weeks before trial, Upshaw, again with the help of his mother and Green, retained Blake to replace Paige. (ECF No. 6-5 at Pg ID 322; ECF No. 6-14 at Pg ID 950; ECF No. 23 at Pg ID 1566.) Although time was of the essence, Blake waited until eight days before trial to meet with Upshaw and did not begin familiarizing himself with the case materials until that first attorney-client meeting. (ECF No. 23 at Pg ID 1566-67, 1573.) During that meeting, Upshaw told Blake that he had been home at the time of the robbery and that Green, Holloway, and Woods

were prepared to testify to his alibi at trial.⁶ (*Id.*) Upshaw also provided their contact information. (*Id.* at Pg ID 1568; ECF No. 6-14 at Pg ID 950.) Blake, however, used the meeting to review Upshaw's discovery packet, which he had not obtained the previous week, and did not discuss Upshaw's alibi. (ECF No. 23 at Pg ID 1566-67, 1574.)

The next day, Blake told Upshaw that he missed the deadline to call alibi witnesses and, at the pre-trial conference, declined to make any arguments in support of Upshaw's plea for an adjournment. (*Id.* at Pg ID 1566-67, 1576-77; ECF No. 6-5 at Pg ID 321-22.) Blake made no attempt to seek an extension of the alibi-witness deadline. He instead told the trial court that he could be prepared for trial by the following week. (ECF No. 6-5 at Pg ID 322). That was the last time Upshaw saw Blake before trial. (ECF No. 23 at Pg ID 1575-76.) And although Green reached out to Blake on behalf of herself, Holloway, and Woods, Blake did not attempt to file an alibi notice, did not investigate Holloway if not also Green and Woods, and ultimately called none of the women to testify. (*Id.* at

⁶ Respondent argues that Upshaw's testimony should not be believed because it is "self-serving." (ECF No. 24 at Pg ID 1636.) This argument is unpersuasive, however. *See Hodges v. Colson*, 727 F.3d 517, 538 (6th Cir. 2013) (en banc) (quoting *Miller v. Straub*, 299 F.3d 570, 581 (6th Cir. 2002)) (explaining that "testimony, though self-serving, may be enough by itself to satisfy [Strickland's] prejudice prong"). Upshaw and Holloway were both very credible at the hearing. Their testimony, in combination with Green's notarized letter, lead the Court to find that Upshaw told Paige and Blake that he had an alibi defense and witnesses to back it up. Significantly, Blake never claimed that he was not informed of Upshaw's alibi witnesses but stated that he "did not remember."

Pg ID 1580, 1610; ECF No. 6-14 at Pg ID 884.) At every opportunity, Upshaw renewed his pleas for Blake to call alibi witnesses, but Blake insisted that he could do nothing because he had missed the deadline. (*Id.* at Pg ID 1575.)

1) Performance

“Under *Strickland*, trial counsel has a duty to investigate his case[.]” *Stewart v. Wolfenbarger*, 468 F.3d 338, 356 (6th Cir. 2006). “This duty includes the obligation to investigate *all witnesses* who may have information concerning . . . [a] client’s guilt or innocence.” *Id.* (quoting *Towns v. Smith*, 395 F.3d 251, 258 (6th Cir. 2005)) (emphasis added). In this case, it was objectively unreasonable for Paige to neither contact nor investigate Holloway after Upshaw informed him at their initial meeting that she was a potential alibi witness.⁷ *Id.*; see also, e.g., *McQueen v. Winn*, No. 19-2212, 2020 U.S. App. LEXIS 14373, at *17 (6th Cir. May 5, 2020) (citing *Towns*, 395 F.3d at 258; *Clinscale v. Carter*, 375 F.3d 430, 443 (6th Cir. 2004)) (“An attorney is . . . ineffective when he or she fails to investigate potential alibi witnesses.”). Likewise, it was objectively unreasonable for Blake to fail to undertake *any* investigation into Upshaw’s case until eight days before trial, after the deadline for filing an alibi notice had passed. *See Williams v. Taylor*, 529 U.S. 362, 395 (2000) (failure to begin mitigation

⁷ Although it seems likely that Paige also failed to investigate Green and Woods, the Court bases its decision specifically on Holloway because her testimony at the evidentiary hearing was highly credible and based on personal knowledge. (ECF No. 23 at Pg ID 1610 (“I can’t speak for my mother, but he didn’t contact me.”)).

investigation until a week before trial was unreasonable); *see also Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (citation omitted) (requiring “a *prompt* investigation”) (emphasis added). Blake, who testified that he has tried “thousands” of cases, knew or should have known that Michigan law requires a defendant to file an alibi notice at least ten days before trial, and should have moved quickly to ascertain whether Upshaw had an alibi. (ECF No. 23 at Pg ID 1599); Mich. Comp. Laws § 768.20(1); *see Clinkscale*, 375 F.3d at 443 (citations omitted) (noting that “a number of courts have found ineffective assistance of counsel in violation of the Sixth Amendment where . . . a defendant’s trial counsel fails to file a timely alibi notice and/or fails adequately to investigate potential alibi witnesses”).

Even assuming that Blake’s late addition to the case hindered his ability to timely discover Upshaw’s alibi defense, Blake’s failure to attempt to remedy the situation is independently sufficient to constitute ineffective assistance of counsel. *See Bigelow v. Williams*, 367 F.3d 562, 570-71 (6th Cir. 2004) (citing *Matthews v. Abramajtys*, 319 F.3d 780, 789-90 (6th Cir. 2003); *Blackburn*, 828 F.2d at 1182-83) (“[T]he failure to call a known alibi witness generally . . . constitute[s] ineffective assistance of counsel.”); *see also Wilson v. Cowan*, 578 F.2d 166, 168 (6th Cir. 1978) (reaching same conclusion under pre-*Strickland* standard).

After learning of the existence of Upshaw’s alibi defense, Blake had various remedial options available to him to avoid the preclusion of Upshaw’s alibi witnesses. The most reasonable course of action was for

Blake to argue for an adjournment which, given the circumstances, the trial court was obliged to grant. *See People v. Merritt*, 238 N.W.2d 31, 37-38 (Mich. 1976) (providing that it would be an abuse of discretion for the trial court to preclude a defendant from filing a timely alibi notice by denying a continuance where there is no evidence of prejudice to the prosecution or intentional delay by the defendant). But at the very least, Blake could have requested permission to file a late alibi notice. *See* Mich. Comp. Laws § 768.20(1) (requiring notice to be served “not less than 10 days before the trial of the case, *or at such other time as the court directs*”) (emphasis added); *People v. Travis*, 505 N.W.2d 563, 568 (Mich. 1993) (explaining that this language “preserves the trial court’s discretion to fix the timeliness of notice in view of the circumstances”). Blake, however, did neither.⁸ Instead, he compounded his ineffectiveness by emphasizing that the adjournment request was coming from his client, not him, and assuring the trial court that he could be ready to try the case the following week. (ECF No. 6-5 at Pg ID 322 (“*Mr. Upshaw* wants an adjournment. *He* doesn’t feel that we’re quite ready. *I told him*

⁸ It seems likely that Blake’s failure to request permission to file a late alibi notice was at least partially based on his lack of knowledge of the trial court’s discretion “to fix the timeliness of notice in view of the circumstances.” *Travis*, 505 N.W.2d at 568; (*see* ECF No. 23 at Pg ID 1575 (“Even during trial, I kept telling him [about my alibi witnesses]. He was like, ‘We can’t do nothing. We – it’s a deadline. I didn’t meet my deadline.’”).) This is further evidence of deficient performance. *See King v. Westbrooks*, 847 F.3d 788, 797 (6th Cir. 2017) (quoting *Hinton v. Alabama*, 571 U.S. 263, 274 (2014)) (“An attorney’s ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*.”).

that I would bring myself up to speed by the time for the trial date.”) (emphasis added); ECF No. 23 at Pg ID 1567.)

Counsel’s actions were not objectively reasonable. *See Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000) (citing *Strickland*, 466 U.S. at 688) (“The relevant question is not whether counsel’s choices were strategic, but whether they were reasonable.”); *Matthews*, 319 F.3d at 790 (finding that trial counsel “[met] the standard for incompetence” where he “actively barred his client from introducing [an] alibi witness” and thereby “appear[ed] to . . . furnish[] a net negative to the defense”); *Clinkscale*, 375 F.3d at 443-44 & n.9 (holding that trial counsel’s failure to call the defendant’s father as an alibi witness was objectively unreasonable even though the jury might have suspected the father had motive to lie and might have found his alibi weak). Blake offered no reason for his actions and in fact indicated that if he had been retained so soon before Upshaw’s trial, he certainly would have requested a continuance. But, again, he did not. Upshaw has accordingly overcome the “strong presumption that [his] counsel’s conduct [fell] within the wide range of reasonable professional assistance.” *Strickland*, 466 U.S. at 689. The Court reaches the same conclusion even if it considers only the record before the State court.

That record reflects, at the very least, trial counsel’s failure to investigate Upshaw’s alibi defense. *See Stewart*, 468 F.3d at 356 (an attorney’s duty “includes the obligation to investigate all witnesses *who may have information* concerning his or her client’s guilt or innocence”) (emphasis added). Despite being aware of

Upshaw's claim that he was home with Woods, Holloway, and Green at the time of the armed robbery, Paige apparently did nothing to investigate that defense. The Court sees no reasonable justification for that failure. *See Ramonez v. Berghuis*, 490 F.3d 482, 488 (6th Cir. 2007) ("[T]he 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.").

Blake could have attempted to remedy that defect when he stepped in as trial counsel but he made no attempt to do so. Although he was hired to represent Upshaw less than two weeks before trial, the record reflects that a week before trial Blake still had not reviewed the evidence against Upshaw. (See ECF No. 6-5 at Pg ID 321-22.) Blake was made aware of Upshaw's alibi defense. Yet Blake undermined Upshaw's request for a continuance, which would have given Blake time to investigate and prepare a defense. Again, there is no reasonable justification for counsel's decisions.

2) Prejudice

"When trial counsel fails to present an alibi witness, 'the difference between the case that was and the case that should have been is undeniable.'" *Caldwell v. Lewis*, 414 F. App'x 809, 818 (6th Cir. 2011) (quoting *Stewart* 468 F.3d at 361) (brackets omitted). For this reason, the Sixth Circuit has repeatedly found prejudice where trial counsel fails to present a known alibi witness, especially where "alibi is a critical aspect of [the] defendant's defense." *Clinkscale*, 375 F.3d at 443; *see, e.g.*, *Stewart*, 468 F.3d at 360

(finding prejudice where the “[p]etitioner’s entire defense strategy was an alibi defense”).

In this case, Upshaw’s defense was that he had been misidentified and was elsewhere at the time of the gas station robbery. (ECF No. 6-14 at Pg ID864.) But because of Blake’s deficient performance, Upshaw did not offer a single alibi witness to back up that argument. By Blake’s own admission, Haugabook could not “testify to where . . . Upshaw was at the time that the shooting happened” and would not be providing Upshaw with an alibi. (ECF No. 6-9 at Pg ID 670.) Through Haugabook, Upshaw was able to establish only that he had been dropped off at home around 3:20 a.m. and was wearing different shoes than those worn by the perpetrator of the armed robbery several minutes later. (ECF No. 6-8 at Pg ID 542-44; ECF No. 6-10 at Pg ID 682-83.) This was not much of a defense.

In contrast, had Holloway and Green been able to testify, the jury would have heard an entirely different narrative. The State court records reflect that, at the very least, Green would have told the jury that within minutes of the robbery taking place, Upshaw was at home, with her, his aunt, his daughter, and his daughter’s mother, being reprimanded by Green, and that he left the house the next morning, hours after the armed robbery occurred. (ECF No. 23 at Pg ID 1608-09, 1613-15; ECF No. 6-14 at Pg ID 884.)

The Court finds no reasonable explanation for presenting Haugabook as a witness but not Upshaw’s alibi witnesses, and Blake has offered none. Haugabook could have bolstered and corroborated Green’s and Holloway’s alibi testimony. Standing alone,

Haugabook's testimony was of marginal benefit to the defense.

Contrary to the State court's conclusion, Green's statements did place Upshaw at home at the time of the robbery—or close enough to it that “there is a reasonable probability that, but for counsel's [failure to investigate and present her testimony], the result of the proceeding would have been different.”⁹ *Strickland*, 466 U.S. at 694. Green's statements had to be read in context of Haugabook's testimony that he dropped Upshaw at home around 3:20 a.m., trial testimony that Walker entered the gas station at 3:35 a.m. and the person believed to be Upshaw approached seconds before 3:37 a.m., that they both arrived on foot, that the gas station is approximately three-and-a-half miles from Upshaw's home, and Walker's statement that Upshaw was not with him at the gas station when the robbery occurred.

There is no reason to conclude that Green or Holloway would have testified to anything other than what has been presented in the record. And while the Court recently learned that Green is now deceased, her statement is part of the record and may be considered. *See* Rule 7(b) of the Rules Governing § 2254 Cases (permitting a federal habeas court to consider “letters predating the filing of the petition” as well as “documents” and other “exhibits”). The Michigan Court of Appeals noted that Green's statement did not

⁹ Green's statement strongly suggests that Upshaw was home from 3:20 a.m. until he left at 7:45 a.m. Effective counsel at least would have questioned Green to determine whether she knew and intended to convey in her statement that Upshaw was home this entire period.

comply with Michigan Court Rule 2.119(B), *see* 2016 WL 2942215, at *6; however, the court did not strike the statement, although it had the authority to do so, and still evaluated it as an offer of proof.

Respondent argues that Upshaw cannot demonstrate prejudice because “the jury would not have been obligated to believe the[] testimony” of his alibi witnesses. (ECF No. 24 at Pg ID 1636.) However, the Sixth Circuit rejected a nearly identical argument in *Clinkscale*:

The state attacks the significance of Arthur Clinkscale’s affidavit on the grounds that: (1) he is defendant Clinkscale’s father and therefore has a motive to lie; and (2) the substance of his affidavit “only barely provides an alibi for Clinkscale” because “Clinkscale could certainly have driven from Columbus to Youngstown in the hours between the shooting and the time his father allegedly saw him that morning.” . . . These arguments are unavailing. In considering the significance of this affidavit, our role is limited to determining whether there is a “reasonable probability” that the outcome of Clinkscale’s trial would have been different but for his counsel’s errors. *Strickland*, 466 U.S. at 694. The factors that the state has highlighted may ultimately affect the credibility of Arthur Clinkscale’s testimony in the eyes of the jury, but they are not dispositive with respect to our analysis.

375 F.3d at 444 n.9. The lesson from *Clinkscale* is that where a defense theory hinges upon placing the defendant elsewhere than at the scene of the crime, a

trial attorney's failure to call a willing and available alibi witness will likely be prejudicial even if the persuasive value of the testimony might be diminished on cross-examination. *See, e.g., Matthews*, 319 F.3d at 789 (finding a reasonable probability of a different outcome where trial counsel failed "to present potential alibi witnesses, whose testimony would have been quite useful, *even if not conclusive*") (emphasis added). Indeed, the Sixth Circuit has found prejudice "even where the state postconviction court said the alibi witnesses would have been 'unconvincing,' and there were other alibi witnesses presented at trial." *Caldwell*, 414 F. App'x at 818 (quoting *Bigelow v. Haviland*, 576 F.3d 284, 291 (6th Cir. 2009)); *see also Ramonez v. Berghuis*, 490 F.3d 482, 485-86 (6th Cir. 2007) ("Even though the jury could have discredited the potential witnesses here based on factors such as bias and inconsistencies in their respective stories, there certainly remained a reasonable probability that the jury would not have."); *Matthews*, 319 F.3d at 790 (citing *Strickland*, 466 U.S. at 694) ("[A] 'reasonable probability' does not mean a certainty, or even a preponderant likelihood, of a different outcome, nor, even more, that no rational juror could constitutionally find [the defendant] guilty.") (internal citation omitted).

Finally, "the availability of willing alibi witnesses must . . . be considered in light of . . . otherwise flimsy evidence supporting [a defendant's] conviction." *Avery v. Prelesnik*, 548 F.3d 434, 439 (6th Cir. 2008) (citing *Strickland*, 446 U.S. at 696). Here, contrary to Respondent's assertions, the State's case against Upshaw "was not overwhelming." *Matthews*, 319 F.3d at 790. The State's chief evidence as to Upshaw's guilt

was Williams' testimony. But eyewitness testimony is "inherent[ly] unreliab[le]." *Ferensic v. Birkett*, 501 F.3d 469, 482 (6th Cir. 2007) (quoting *Watkins v. Sowders*, 449 U.S. 341, 352 (1981)); *see also Wilson v. Cowan*, 578 F.2d 166, 168 (6th Cir. 1978) (explaining that "the identification of strangers in violent crime situations is fraught with the hazard of mistake" and collecting cases). Furthermore, "[e]ven putting aside [the Sixth Circuit's] 'grave reservations concerning the reliability of eyewitness testimony,' the accuracy of [the] identification [in this case] is highly suspect" given the particular circumstances under which Williams saw the shooter. *Clinkscale*, 375 F.3d at 445 (quoting *Blackburn*, 828 F.2d at 1186). Not only was Williams unable to see the shooter's entire face, which was covered with a t-shirt, but she viewed him while in a state of fear, while he pointed a gun and shot at her six or seven times. (ECF No. 6-2 at Pg ID 237-38); *see, e.g., Thomas v. Heidle*, 615 F. App'x 271, 278 (6th Cir. 2015) (listing "factors . . . known to create problems for accurate eyewitness testimony," including "stress," "fright," and "weapon focus").

Apart from Williams' testimony, the State's only evidence against Upshaw was that he had been arrested for home invasion with Walker several hours after the gas station was robbed.¹⁰ (ECF No. 6-10 at

¹⁰ Respondent argues that this evidence is "highly incriminating" and must be considered when deciding *Strickland*'s prejudice prong. (ECF No. 24 at Pg ID 1649.) But this argument fails to appreciate that the Court is not determining that the State court's prejudice analysis was an unreasonable application of *Strickland*. Rather, the Michigan Court of Appeals' prejudice analysis relies upon multiple objectively unreasonable *factual* determinations and assumptions. *See* 28 U.S.C. § 2254(d)(2). Because subsections (d)(1) and (2) of § 2254 are disjunctive, the

Pg ID 691-94.) But the Sixth Circuit has found prejudice in the face of far more damning evidence. In *Matthews*, for example, the court found prejudice where trial counsel failed to call the defendant's family members as alibi witnesses, despite evidence that the defendant had (1) sold jewelry stolen from the victim's house within days of his murder, and (2) previously been photographed wearing a distinctive jacket that was also seen on a man fleeing the scene of the crime. 319 F.3d at 783-84, 789-90. Likewise, in *Stewart*, the court found prejudice where two alibi witnesses were unable to testify due to a deficient alibi notice, even though one of the State's witnesses "testified that he saw [the defendant] holding a gun and point[ing] the gun . . . at the victim" and another testified that the defendant had "stated he was going to kill the victim." 468 F.3d at 343-44, 357-59.

"If [Upshaw's] alibi witnesses are to be believed, they present a complete defense to the crime." *United States v. Murillo*, No. 07-20417, 2011 WL 5039800, at *13 (E.D. Mich. Oct. 24, 2011). "Had even one alibi witness been permitted to testify," Haugabook's testimony would have been corroborated and far more persuasive. *Clinkscale*, 375 F.3d at 445. And the jury would not have been left to wonder why no one could account for Upshaw's whereabouts at the time of the crime. Without Upshaw's alibis, however, "the only credible identifying witness's testimony [was] virtually unchallenged" and the jury was "foreclosed . . . from hearing valuable countervailing evidence." *Blackburn*, 828 F.2d at 1186. Thus, because there is a

Court is not required to *also* find that the State court's prejudice analysis was an objectively unreasonable *application* of *Strickland*.

substantial likelihood that the trial would have turned out differently if counsel had called even one alibi witness, habeas relief is appropriate based on Claim I.

B. Prosecutor's Dismissal of Six Black Prospective Jurors (Claim III)

In his third claim, Upshaw argues that he was denied equal protection, in violation of the Fourteenth Amendment, when the prosecutor used six of her peremptory challenges against Black prospective jurors in violation of *Batson*. (ECF No. 1 at Pg ID 8.) In *Batson*, the Supreme Court held that the Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges for the purpose of excluding from the jury members of the defendant's race. 476 U.S. at 96.

1) State Court's Decision

The Michigan Court of Appeals rejected Upshaw's *Batson* claim,¹¹ summarizing the trial proceedings and reasoning:

Our Supreme Court in *Knight* stated that *Batson* "announced a three-step process for determining the constitutional propriety of a peremptory challenge." [People v. Knight, 473

¹¹ While Upshaw last presented his *Batson* claim in his July 10, 2018 motion for relief from judgment (ECF No. 6-12 at Pg ID 763-65), the State trial court made no reference to the claim when denying the motion (ECF No. 6-13 at Pg ID 855-59.) The Court therefore "look[s] through the [trial court's] unexplained decision to the last related state-court decision that does provide a relevant rationale[.]" *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018).

Mich. 324, 336 (2005)]. “First, the opponent of the peremptory challenge must make a *prima facie* showing of discrimination.” *Id.* . . . “Second, if the trial court determines that a *prima facie* showing has been made, the burden shifts to the proponent of the peremptory challenge to articulate a race-neutral explanation for the strike.” *Id.* at 337. . . . “Finally, if the proponent provides a race-neutral explanation as a matter of law, the trial court must then determine whether the race-neutral explanation is a pretext and whether the opponent of the challenge has proved purposeful discrimination.” *Id.* at 337-338. . . .

In the instant case, after the prosecutor exercised multiple peremptory challenges, Upshaw’s attorney informed the trial court that he had a motion to make. The trial court excused the veniremembers and those remaining in the jury pool. Upshaw’s counsel then presented a *Batson* challenge, arguing that six of the eight peremptory challenges exercised by the prosecutor pertained to African-Americans; both defendants are African-American. Walker’s attorney indicated that he would join in the motion. Other than noting the number of peremptory challenges exercised by the prosecutor and the race of those excused veniremembers, the defense attorneys did not provide any additional argument in support of making a *prima facie* case of discrimination. The trial court, failing to indicate whether defendants had made the required *prima facie* showing of discrimination, asked

the prosecutor whether she had any response as to why the African-American veniremembers were excused. The prosecutor then provided race-neutral explanations for the strikes in regard to four of the African-American veniremembers. Before the prosecutor could continue with her explanations concerning the remaining two African-American veniremembers, the trial court interjected, asking Upshaw's counsel whether he had any response. Upshaw's attorney then began addressing and challenging the race-neutral explanation given by the prosecutor in regard to one of the stricken veniremembers. The trial court quickly chimed in, "Yes, but are you saying that's a pretext to get her off the jury because she's black?" Upshaw's counsel replied in the affirmative, at which point the trial court queried, "Anything else?" Upshaw's attorney replied, "No, your Honor." Walker's attorney also indicated that he had nothing to add.

Next, the trial court ruled:

Well, the prosecutor has given some explanation other than race being challenged. I don't think the *Batson* motion can be sustained. I don't have any further comments on whether it's good or bad. . . .

After some further discussion on the matter, Upshaw's attorney began challenging the race-neutral explanation given by the prosecutor regarding another veniremember, but

the trial court interrupted, making clear that it had denied the *Batson* motion.

In *Knight*, 473 Mich. at 339, our Supreme Court counseled the bench with respect to *Batson* challenges, stating that “trial courts must meticulously follow Batson’s three-step test, and we strongly urge our courts to clearly articulate their findings and conclusions on the record.” The Court further noted that “when a trial court methodically adheres to Batson’s three-step test and clearly articulates its findings on the record, issues concerning what the trial court has ruled are significantly ameliorated.” *Id.* at 338-339. Here, unfortunately, the trial court failed to adhere to the directive announced by the *Knight* Court a decade earlier.

With respect to the first step, i.e., whether defendants made a *prima facie* showing of discrimination, actual proof of discrimination is not required. *Id.* at 336. And, given that there is no dispute that the veniremembers at issue in this case were members of a cognizable racial group and that peremptory challenges were exercised to exclude them from the jury, the question in regard to step one becomes whether all of the relevant circumstances raised an inference that the prosecutor struck the excluded veniremembers on the basis of race. *Id.* The trial court’s statements on the bench failed to expressly indicate whether it found that defendants had made a *prima facie* case of discrimination. Although such a

finding might be implied because the court asked the prosecutor to articulate explanations for why veniremembers were stricken, the court's ruling is ultimately unclear and muddled on the matter. We cannot conclude, on the existing record, that defendants made a *prima facie* showing or case of racial discrimination. While not binding precedent, we find persuasive the following discussion by the United States Court of Appeals for the Eleventh Circuit in *United States v. Ochoa-Vasquez*, 428 F3d 1015, 1044 ([11th Cir.] 2005):

In order to determine whether a *Batson* objector . . . has established a *prima facie* case of discrimination, courts must consider all relevant circumstances. This Court has cautioned that the mere fact of striking a juror or a set of jurors of a particular race does not necessarily create an inference of racial discrimination. While statistical evidence may support an inference of discrimination, it can do so only when placed in context. For example, the number of persons struck takes on meaning *only* when coupled with other information such as the racial composition of the venire, the race of others struck, or the voir dire answers of those who were struck compared to the answers of those who were not struck. . . .

The Eleventh Circuit observed that pertinent circumstances to consider include the racial composition of remaining potential jurors, “the percentage of jurors of a particular race or ethnicity struck and the percentage of their representation on the venire,” whether members of the relevant racial group served unchallenged on the jury, and whether the prosecutor used all or nearly all of his or her challenges to strike veniremembers of a particular race. *Id.* at 1044-1045. Here, the only argument posed by defense counsel during voir dire was that six of eight peremptory challenges exercised by the prosecutor concerned veniremembers of the same race as defendants. Neither Walker nor Upshaw’s attorney made a record regarding any other surrounding circumstance, such as those alluded to in *Ochoa-Vasquez*, nor are we able to discern from the existing record whether additional relevant facts or circumstances were present, e.g., information regarding the percentage of African-American jurors on the venire. Assuming that the trial court found that defendants had made a *prima facie* case of discrimination, it erred in that part of its analysis. Absent a *prima facie* showing of discrimination, the remaining two steps in the *Batson* analysis are rendered moot. Reversal is unwarranted.

2016 WL 2942215, *7-8 (original brackets and footnote omitted).

2) Overall Analysis

Although the Michigan Court of Appeals correctly identified *Batson* as providing the relevant standard, its application of *Batson* and its progeny was objectively unreasonable. 28 U.S.C. § 2254(d)(1). Specifically, the State court failed to adhere to the Supreme Court's admonition that “[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a *prima facie* showing becomes moot.” *Hernandez v. New York*, 500 U.S. 352, 359 (1991) (plurality opinion).¹²

¹² Respondent argues that *Hernandez* is not “clearly established” for purposes of AEDPA because it was a plurality opinion. (ECF No. 5 at Pg ID 183.) The Sixth Circuit has explicitly rejected this argument, however. *See Drain v. Woods*, 595 F. App’x 558, 570 (6th Cir. 2014) (citation omitted) (“This Court has previously applied *Hernandez*’s mootness holding as clearly established law and we see no reason to treat it otherwise now.”); *see also Braxton v. Gansheimer*, 561 F.3d 453, 461 (6th Cir. 2009) (treating *Hernandez*’s mootness holding as clearly established); *Smith v. Stegall*, 385 F.3d 993, 998 (6th Cir. 2004) (“We are . . . bound by any prior Sixth Circuit decisions concluding that federal law on a particular issue has been ‘clearly established’ by certain holdings of the Supreme Court.”). Moreover, the concurring justices in *Hernandez* “wrote separately because [they] believe[d] that the plurality opinion [went] further than it need[ed] to in assessing the constitutionality of the prosecutor’s asserted justification for his peremptory strikes.” *Hernandez*, 500 U.S. at 372 (O’Connor, J., concurring in the judgment). However, they otherwise “agree[d] with [the plurality’s] analysis of th[e discriminatory intent] issue,” a necessary subset of which was its preliminary mootness determination. *Id.*

In *Lancaster v. Adams*, the Sixth Circuit, applying *Batson* and *Hernandez*, held that the State court unreasonably applied Supreme Court precedent by solely analyzing step one of the *Batson* analysis—the strength of the petitioner’s prima facie showing of discrimination—even though “the trial court . . . had ruled on the ultimate question under *Batson*.” 324 F.3d 423, 435 (6th Cir. 2003). Here, like in *Lancaster*, the trial court reached step two and three of the *Batson* inquiry,¹³ but the court of appeals nevertheless analyzed the prima facie issue anew and rested its decision solely on that issue. (ECF No. 6-7 at Pg ID 427; ECF No. 6-14 at Pg ID 870.) This was an unreasonable application of *Batson* and *Hernandez*. See *Lancaster*, 324 F.3d at 435; cf. *Braxton v. Gansheimer*, 561 F.3d 453, 461 (6th Cir. 2009) (citing *Lancaster*, 324 F.3d at 435) (concluding “that the Ohio Court of Appeals’ application of *Batson* and *Hernandez* was neither erroneous nor unreasonable because the appellate court did not rely solely upon the moot issue in rejecting [the petitioner’s] *Batson* claim”) (emphasis added).

Accordingly, the Court will review de novo the trial court’s *Batson* inquiry, “unencumbered by the deference AEDPA normally requires.” *Rice*, 660 F.3d at 251-52 (quoting *Panetti v. Quarterman*, 551 U.S. 930, 948 (2007)); see also *id.* (citing *Henness v. Bagley*, 644 F.3d 308 (6th Cir. 2011); *Smith v. Bradshaw*, 591 F.3d 517, 522, 525 (6th Cir. 2010)) (explaining that a claim adjudicated on the merits is review de novo “if

¹³ As set forth in more detail below, the trial court failed to conduct the proper analysis at step three. However, this failure does not change the fact that the court still reached a final decision on the merits of Upshaw’s motion, mooting the prima facie inquiry on appeal.

the petitioner shows, by virtue of one of its exceptions, that the relitigation bar of § 2254(d) does not apply” and explaining that one of those exceptions includes the state court’s unreasonable application of clearly established law).

3) *Batson Steps Two and Three*

As set forth above, “[Upshaw] met his burden [at step one] because the prosecutor proceeded to step two of *Batson* before the trial court made a ruling at step one. As a result, ‘the preliminary issue of whether [Upshaw] . . . made a *prima facie* showing [is] moot.’” *Rice*, 660 F.3d at 258 (quoting *Braxton*, 561 F.3d at 461); *see Hernandez*, 500 U.S. at 355 (plurality opinion). Accordingly, the Court proceeds directly to steps two and three.

At step two, “the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question.” *Hernandez*, 500 U.S. at 358 (citing *Batson*, 476 U.S. at 97-98); *see Johnson v. California*, 545 U.S. 162, 171 (2005) (noting that “even . . . frivolous or utterly nonsensical justification[s]” are sufficient to satisfy this step of the inquiry). Finally, step three requires the trial court to “determine whether the defendant has carried his burden of proving purposeful discrimination.” *Hernandez*, 500 U.S. at 358 (citing *Batson*, 476 U.S. at 98); *see Bryan v. Bobby*, 843 F.3d 1099, 1110 (6th Cir. 2016) (citing *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003)) (explaining that “[t]he critical question here is . . . whether the trial court finds the prosecutor’s race-neutral explanations credible or pretextual”).

Upshaw's counsel made his *Batson* motion after the prosecutor exercised peremptory challenges against eight prospective jurors, six of whom were Black. (ECF No. 6-14 at Pg ID 869.) And although Upshaw's counsel initially referenced only two of the stricken Black jurors by name, it is clear that his challenge encompassed all six. (ECF No. 6-7 at Pg ID 426 (arguing that “[a]ll of them had neutral responses that they could be fair and impartial”); *see People v. Knight*, 701 N.W.2d 715, 728 (2005) (explaining that *Batson* objections launched after several jurors are stricken apply “to all strikes in [an] alleged pattern”).

After moving past the prima facie determination, the trial court engaged the attorneys in the following colloquy:

THE COURT: Do you have any response why they were challenged?

[PROSECUTOR]: Well, do you want me to go specifically one by one, Judge?

THE COURT: Go ahead.

[PROSECUTOR]: Ms. Stinson, I dismissed recently because she seemed to have very delayed responses to questions as if she really wasn't focused or paying attention and she's an older female. As relates to Ms. Williams, Ms. Williams is convicted of a CCW. Mr. Smith was in seat #6, I believe.

THE COURT: He was. He's the jury with had [sic] the relatives in prison.

[PROSECUTOR]: Yes, thank you, Judge. That is correct. Ms. Jones, was a student, I believe. I believe she was too young, in my opinion. Too young for this particular case. Not based on her race, but based on her age. I also thought that when I watched her, her demeanor was very distracted. You'd have to repeat questions to her as if she really wasn't listening. That is seat #13. I think that I've established—

THE COURT: Mr. Blake?

MR. BLAKE: Well, Judge, too young? Apparently she's not too young, Ms. Jones, to be a juror. So, that particular response is—

THE COURT: Yes, but are you saying that's a pretext to get her off the jury because she's black?

MR. BLAKE: Yes, Judge.

THE COURT: Anything else?

MR. BLAKE: No, your Honor.

THE COURT: Mr. Goze?

[WALKER'S COUNSEL]: Just joining what the Counsel said.

THE COURT: Well, the Prosecutor has given some explanation other than race being challenged. I don't think the Batson motion can be sustained. I don't have any further comments on whether it's good or bad. That's the

strategy of a trial. The Batson challenge, well, see Batson would be to a specific juror. Were you challenging her excusal of the last, of White and Stinson?

MR. BLAKE: Of both of the Jones'; Pamela Jones.

THE COURT: No, you can't do it that way. Once you say there's a pattern, then you challenge a specific juror challenge.

MR. BLAKE: Well, Judge, with respect to Ms. Stinson, the fact that she's elderly. She gave direct responses, although they weren't rapid speed, but her answers were clear and concise and we'd ask the Court not to excuse her.

THE COURT: Denied. As to Ms. White? She was challenged in the last challenges by the People. Was she the student? Ms. White has not been challenged?

[PROSECUTOR]: Ms. White was in seat #14. She was a white female.

THE COURT: Oh, then it doesn't apply.

(ECF No. 6-7 at Pg ID 426-28.)

“In criminal trials, trial judges possess the primary responsibility to enforce *Batson* and prevent racial discrimination from seeping into the jury selection process.” *Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019). In this instance, the trial court failed to shoulder this burden.

Although the trial court directed the prosecutor to explain her strikes “specifically one by one,” the prosecutor offered race-neutral explanations for her strikes against only three jurors: Margie Stinson, Perrice Williams, and Kimberly Jones. (ECF No. 6-7 at Pg ID 426-27.) The trial court provided the race-neutral explanation for the prosecutor’s excusal of a fourth juror, Donald Smith. (*Id.* at Pg ID 427.) And no race-neutral explanations were ever proffered for the prosecutor’s strikes of Latrice Wilborn and Pamela Jones. (*Id.* at Pg ID 426-28.) Finally, rather than properly evaluating the prosecutor’s explanations for any indications of pretext, as required by *Batson*, the trial court found that there had been no discrimination merely because “the Prosecutor ha[d] given some explanation other than race being challenged.” (*Id.* at Pg ID 427.) These errors warrant habeas relief.

Batson itself makes clear that a trial court cannot “flatly reject[] [an] objection [to a peremptory strike] without *requiring* the prosecutor to give an explanation for [her] action.” 476 U.S. at 100 (emphasis added). However, that is precisely what the trial court did with respect to Wilborn and Pamela Jones. (ECF No. 6-7 at Pg ID 427-28.)

In addition, with respect to Smith, the trial court irreparably tainted the *Batson* inquiry by supplying the prosecutor with a race-neutral reason the court would find acceptable: that Smith had relatives in prison. (ECF No. 6-7 at Pg ID 427); *see Flowers*, 139 S. Ct. at 2243-44 (“[T]he prosecutor must provide race-neutral reasons for the strikes). The trial court must consider *the prosecutor’s* race-neutral explanations in light of all of the relevant facts and circumstances,

and in light of the arguments of the parties.”) (emphasis added). Although the prosecutor implicitly adopted the trial court’s explanation by offering him thanks, the damage was done. (ECF No. 6-7 at Pg ID 427.) “[W]hen a trial court offers its own speculation as to the prosecutor’s reasons for striking minority jurors, it essentially disregards its own core function under *Batson*—to evaluate the reasons offered by the prosecutor, including the prosecutor’s demeanor and other contextual information, in order to determine the prosecutor’s true intent.” *Johnson v. Martin*, 3 F.4th 1210, 1227 (10th Cir. 2021) (citing *Flowers*, 139 S. Ct. at 2243-44); *see Paulino v. Castro*, 371 F.3d 1083, 1089-90 (9th Cir. 2004) (“[I]t does not matter that the prosecutor might have had good reasons to strike the prospective jurors. What matters is the *real* reason they were stricken.”). In suggesting a race-neutral reason before the prosecutor could supply one herself, the trial court impermissibly signaled to the prosecutor that this was a reason the court was prepared to find credible and never explored the prosecutor’s *real* reason.

Finally, with respect to Stinson, Williams, and Kimberly Jones, those jurors for whom the prosecutor actually articulated a race-neutral explanation, the trial court decided the ultimate question of discrimination without conducting the analysis “constitutionally required” at step three. *Rice*, 660 F.3d at 258. “The third step is important; *Batson* imposes upon the trial court a strict constitutional ‘duty to determine if the defendant has established purposeful discrimination.’” *Id.* at 250 (quoting *Batson*, 476 U.S. at 98). “[T]he critical question” at step three is “the persuasiveness of the prosecutor’s justification for [her]

peremptory strike.” *Cockrell*, 537 U.S. at 338-39. Here, although the trial court briefly alluded to pretext, it is clear from the record that the court did not actually focus on that issue. Instead, the court summarily concluded that there had been no discrimination purely because “the Prosecutor . . . [gave] *some* explanation other than race being challenged.” (ECF No. 6-7 at Pg ID 427 (emphasis added).)

A trial court’s determination at step three is a “historical fact” that may be overturned only if “clearly erroneous.” *Hernandez*, 500 U.S. at 367-69; *see Rice*, 660 F.3d at 242 (citing *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008)); *Lancaster*, 324 F.3d at 429 (internal quotation marks and citations omitted) (“Under AEDPA, primary or historical facts found by state courts are presumed correct and are rebuttable only by clear and convincing evidence.”). Here, the trial court’s step three determination was clearly erroneous for three reasons. First, the court did not “require[e] the prosecutor to give an explanation for [two of her peremptory] action[s.]” *Batson*, 476 U.S. at 100. Second, the trial court suggested a race-neutral reason for one of the strikes that the prosecutor could adopt. *See Flowers*, 139 S. Ct. at 2243-44; *Johnson*, 3 F.4th at 1227. Third, the court considered only whether “the Prosecutor ha[d] given some explanation other than race being challenged” (ECF No. 6-7 at Pg ID 427), as opposed to “the persuasiveness of [her] justification for [the] peremptory strike[s.]” *Cockrell*, 537 U.S. at 338-39.¹⁴

¹⁴ Even if the trial court conducted a proper step three inquiry as to Stinson, Williams, and Kimberly Jones, Upshaw would be entitled to habeas relief based on the other errors addressed

Respondent argues that “Upshaw’s counsel only challenged two of [the prosecutor’s] explanations as pretextual” and that “because he failed to argue that the remaining challenged jurors were dismissed for discriminatory reasons, he has failed to meet his burden to succeed on his *Batson* claim.” (ECF No. 5 at Pg ID 186.) Although Respondent is correct that Upshaw carries the final “burden of proving purposeful discrimination,” *Johnson*, 545 U.S. at 171, Respondent’s argument ultimately lacks merit. True, the Sixth Circuit has “held that once the proponent of the peremptory strike proffers a race-neutral explanation, the opposing party has the burden to rebut those reasons on the record,” and that “[f]ailure to rebut race-neutral explanations or the district court’s conclusion will result in a plain error review.” *United States v. McAllister*, 693 F.3d 572, 582 (6th Cir. 2012) (citing *United States v. Jackson*, 347 F.3d 598, 605 (6th Cir. 2003)). But even assuming that this plain error rule is valid,¹⁵

above—namely, the prosecutor’s failure to advance a race-neutral explanation for her strikes against Wilborn and Pamela Jones and the trial court’s impermissible suggestion of a race-neutral reason for Smith’s excusal. For this reason, the Court does not attempt to review the prosecutor’s explanations for Stinson, Williams, and Kimberly Jones using only the cold record.

¹⁵ The Court questions whether this interpretation of the plain error doctrine is consistent with precedent. See *United States v. Davis*, 809 F.2d 1194, 1202 (6th Cir. 1987) (“*Batson* does not require rebuttal of the Government’s explanation by defense counsel. . . . Once the defendants had established a *prima facie* case of racial motivation sufficient for the district court to make an inquiry of the Government, there was nothing more defendants were required to do.”); *see also Salmi v. Sec’y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985) (explaining that “prior decision[s] [of the Sixth Circuit] remain[] controlling authority” unless abrogated by the Supreme Court or the Sixth Circuit sitting en banc). The “failure to rebut” rule appears to stem from a

Respondent's logic *at most* applies to the prosecutor's explanations for Stinson, Williams, Kimberly Jones, and Smith.

Respondent ignores that the prosecutor never offered race-neutral explanations for striking Wilborn and Pamela Jones, and that accordingly, there was "no race-neutral evidence [for the trial court] to weigh," *Paulino v. Harrison*, 542 F.3d 692, 703 (9th Cir. 2008), and nothing for Blake to rebut, *see Johnson*, 545 U.S. at 171 n.6 (citation omitted) ("[Where] the prosecutor declines to respond to a trial judge's inquiry regarding [her] justification for making a strike, the evidence before the judge . . . consist[s] not only of the original facts from which the *prima facie* case was established, but also the prosecutor's refusal to justify [her] strike in light of the court's request. Such a refusal . . . provide[s] additional support for the inference of discrimination raised by a defendant's *prima facie* case."). Furthermore, despite the prosecutor's failure to come forward with race-neutral explanations, Upshaw's counsel reiterated that he was

footnote in *United States v. Wilson*, 11 F. App'x 474, 476 n.3 (6th Cir. 2001), which cited neither *Batson* nor its progeny and instead focused on the doctrine of plain error more generally. But this was contrary to the Sixth Circuit's earlier holding in *Davis*, and the Supreme Court's *Batson* cases suggest no such rule. *See, e.g., Cockrell*, 537 U.S. at 326 ("[I]f [a *prima facie*] showing is made, the prosecutor must then offer a race-neutral basis for striking the juror in question. Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination."). In any case, because the trial court's summary denial of Upshaw's motion in the absence of two race-neutral explanations from the prosecutor could not withstand even plain error review, the Court need not resolve this conflict.

challenging the strike of Pamela Jones, essentially renewing his *Batson* objection. (ECF No. 6-7 at Pg ID 428.) The prosecutor offered no response. (*Id.*) Consequently, even if Respondent's plain error argument had merit with respect to the other jurors stricken by the prosecutor, the record still supports an inference of purposeful discrimination as to Pamela Jones. Respondent has made no arguments to the contrary.

4) Remedy

Because "even a single instance of race discrimination against a prospective juror is impermissible," *Flowers*, 139 S. Ct. at 2242, the only remaining question is the proper remedy. "District courts have 'broad discretion in conditioning a judgment granting habeas relief.'" *Morrell v. Wardens*, 12 F.4th 626, 631 (6th Cir. 2021) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987)); *see also* 28 U.S.C. § 2243 (directing habeas courts to "dispose of the matter as law and justice require").

The Sixth Circuit has not addressed this precise situation.¹⁶ The Second, Seventh, and Tenth Circuits

¹⁶ The Sixth Circuit addressed a similar situation in *Ewing v. Horton*, 914 F.3d 1027 (6th Cir. 2019), which involved a claim of extraneous influence on the jury requiring an evidentiary hearing "to afford the defendant the opportunity to establish actual bias" pursuant to *Remmer v. United States*, 347 U.S. 227, 229-30 (1954). The *Ewing* court acknowledged "that the passing of time since [the defendant]'s conviction eight years ago may make it difficult to conduct a suitable *Remmer* hearing at this stage," but concluded that it would not be impossible. 914 F.3d at 1033-34. Its decision, however, was largely based upon the fact that the defendant had not shown actual prejudice, and that a hearing to determine prejudice was the Supreme Court's well-established remedy for "allegations of juror partiality." *Id.* at 1031. Here, in

have indicated that a district court presented with these circumstances must remand for a new trial if the passage of time since jury selection renders it “impossible or unsatisfactory” for the state court to conduct a hearing attempting “to reconstruct the prosecutor’s state of mind at the time of jury selection.” *Jordan v. Lefevre*, 206 F.3d 196, 202 (2d Cir. 2000); *accord Johnson v. Martin*, 3 F.4th at 1227 (“If the district court concludes that a *Batson* reconstruction hearing is impossible or unsatisfactory, it must grant habeas relief in the form of an order that [the petitioner] be released from custody unless the State grants him a new trial within 120 days from the entry of the district court’s order.”); *United States v. McMath*, 559 F.3d 657, 666 (7th Cir. 2009) (same). This is the approach the Supreme Court took in *Snyder v. Louisiana*, albeit not in a habeas posture. *See* 552 U.S. at 486 (declining to remand for judicial factfinding because roughly eleven years had passed since the petitioner’s trial).

Here, like *Snyder*, there is no “realistic possibility that [*Batson*’s] subtle question of causation could be profitably explored further” due to the eight-year lapse since Upshaw’s trial. *Id.* The trial court judge is no longer on the bench but, even if he were, conditioning the writ upon a reconstruction hearing at this late juncture would place an unreasonable burden on both

contrast, Upshaw’s “*Batson* error is structural, requiring automatic reversal without a showing of prejudice.” *United States v. Whiteside*, 747 F. App’x 387, 396 n.6 (6th Cir. 2018) (citing *McAlister*, 693 F.3d at 582 n.5). And the Supreme Court has recognized that improper *Batson* factfinding cannot realistically be explored if too much time has passed between jury selection and remand. *See Snyder*, 552 U.S. at 486. Accordingly, *Ewing* is not controlling.

the prosecutor and the judge with unreliable results. *See Jones v. Butler*, 864 F.2d 348, 370 (5th Cir. 1988) (“Years after trial, the prosecutor cannot adequately reconstruct his reasons for striking a venireman. Nor can the judge recall whether he believed a potential juror’s statement that any alleged biases would not prevent him from being a fair and impartial juror.”); *see also United States v. Biaggi*, 909 F.2d 662, 679 (2d Cir. 1990) (“Postponing consideration of a *Batson* claim until the trial is . . . completed, as in this case, risks infecting what would have been the prosecutor’s spontaneous explanations with contrived rationalizations, and may create a subtle pressure for even the most conscientious [trial] judge to accept explanations of borderline plausibility to avoid . . . a new trial.”); *see generally* William H. Burgess & Douglas G. Smith, *The Proper Remedy for a Lack of Batson Findings: The Fall-Out from Snyder v. Louisiana*, 101 J. Crim. L. & Criminology 1, 24 (2011) (“In addition to the unreasonableness of asking trial courts to make retroactive findings on *Batson* challenges, such requests invite post hoc justifications on remand from prosecutors for making peremptory challenges and from trial judges in allowing them.”).

For these reasons, the Court concludes that Upshaw is entitled to relief based on Claim III, as well, and a new trial is the only way to cure the violation of Upshaw’s Fourteenth Amendment rights.

C. Trial Court’s Denial of an Adjournment (Claim II)

In his second claim, Upshaw argues that he was denied due process when the trial court denied his

request for an adjournment to give Blake the opportunity to prepare for trial. (ECF No. 1 at Pg ID 7.)

The Supreme Court has cautioned that “broad discretion must be granted [to] trial courts on matters of continuances.” *Morris v. Slappy*, 461 U.S. 1, 11 (1983). Nevertheless, “a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality.” *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964) (citing *Chandler v. Fretag*, 348 U.S. 3 (1954)). To warrant habeas relief under due process principles, the “petitioner must show that [the trial court’s] error was so egregious as to deprive him of a fundamentally fair adjudication” and that “the denial of his request resulted in actual prejudice to his defense.” *Powell v. Collins*, 332 F.3d 376, 396 (6th Cir. 2003) (citation omitted). “Actual prejudice may be demonstrated by showing that additional time would have made relevant witnesses available or otherwise benefited the defense.” *Id.* (citation omitted).

As set forth above, Upshaw requested an adjournment a week before trial. (ECF No. 6-5 at Pg ID 321-22.) Upshaw explained to the trial court that he recently had to replace Paige and wanted Blake, who had neither reviewed the video of the incident nor acquired the preliminary examination transcript, to have more time to prepare for trial. (*Id.* at Pg ID 322.)¹⁷ Upshaw did not delve into the alibi issue because he was worried about letting the prosecutor in

¹⁷ The trial transcript reflects that Blake ultimately did familiarize himself with those items prior to trial, even if he had not yet reviewed them at the time of the pre-trial conference. (ECF No. 6-8 at Pg ID 534, 567.)

on his defense strategy and “[didn’t] really know how . . . this stuff works.” (ECF No. 23 at Pg ID 1578.) The trial court denied Upshaw’s request without explanation, stating, “I’m not granting an adjournment at this point. We’ll see what happens.” (ECF No. 6-5 at Pg ID 322.)

Although the Court strongly disapproves of this “[w]e’ll see what happens” approach, the trial judge’s decision ultimately did not amount to a denial of due process. That is because Blake, who had authority to make strategic decisions for Upshaw, *see Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988), represented that a continuance was unnecessary (ECF No. 6-5 at Pg ID 322). This significantly undercut Upshaw’s claim that Blake needed extra time to prepare for trial, especially in the absence of any information about Upshaw’s alibi witnesses. (*Id.*). Accordingly, while Blake’s statement that additional time would not be necessary underscores his ineffectiveness, it also shows that the trial court’s denial of Upshaw’s request was not an “error . . . so egregious as to deprive [Upshaw] of a fundamentally fair adjudication.” *Powell*, 332 F.3d at 396. Habeas relief is thus unwarranted on Claim II.

V. Conclusion

In summary, the Court concludes that Upshaw is entitled to the writ of habeas corpus based on Claims I, III, and VI.

Accordingly,

IT IS ORDERED that Upshaw’s application for the writ of habeas corpus pursuant to 28 U.S.C. § 2254 is **GRANTED** and his Michigan convictions for

felony-firearm, armed robbery, and carrying a dangerous weapon are **VACATED**.

IT IS FURTHER ORDERED that the State of Michigan must grant Upshaw a new trial within 120 days of the date of this Opinion and Order or discharge him from any further punishment related to these convictions.

IT IS SO ORDERED.

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

Dated: July 14, 2022

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LAFAYETTE DESHAWN

UPSHAW,

Petitioner, Case No. 20-cv-12560
Honorable Linda V. Parker

V.

GEORGE STEPHENSON,
Respondent.

JUDGMENT

Petitioner filed an application for the writ of habeas corpus under 28 U.S.C. § 2254, challenging his state court conviction for armed robbery. In an Opinion and Order issued on this date, the Court concluded that Petitioner is entitled to habeas relief.

Accordingly,

IT IS ORDERED that Upshaw's application for the writ of habeas corpus pursuant to 28 U.S.C. § 2254 is **GRANTED** and his Michigan convictions for felony-firearm, armed robbery, and carrying a dangerous weapon are **VACATED**.

IT IS FURTHER ORDERED that the State of Michigan must grant Upshaw a new trial within 120 days of the date of this Opinion and Order or discharge him from any further punishment related to these convictions.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LAFAYETTE DESHAWN
UPSHAW,
Petitioner,

v. Case No. 20-cv-12560
Honorable Linda V. Parker
GEORGE STEPHENSON,
Respondent.

OPINION AND ORDER GRANTING AN EVIDENTIARY HEARING AND PETITIONER'S MOTION FOR SUMMARY JUDGMENT [8]

Petitioner, Lafayette Deshawn Upshaw, is currently serving between twenty and forty-two years in state prison for convictions arising out of an armed robbery and a home invasion in May of 2014. In September 2020, Upshaw filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. (ECF No. 1). His Petition [1] raises seven grounds for relief, all of which relate solely to the armed robbery case. Respondent agrees that partial habeas relief is warranted on at least one of these claims. (ECF No. 5, PageID.193). Upshaw has moved for summary judgment on that claim. (ECF No. 8).

For the reasons articulated below, the Court will **ORDER** an evidentiary hearing on Upshaw's first and second claims, and **GRANT** his Motion for Summary Judgment [8].

BACKGROUND

I. Upshaw's Crimes and Sentence

Shortly after 8:00 AM on May 28, 2014, Upshaw and Darrell Miles Walker “were arrested in the process of committing a home invasion at a residence” located at 19475 Washburn Street in Detroit. (ECF No. 6-9, PageID.623; ECF No. 6-14, PageID.863). They “were caught as they exited separate windows of the house,” from which they “had attempted to steal several items of jewelry.” (ECF No. 6-14, PageID.863). Upshaw was charged with second-degree home invasion, in violation of MICH. COMP. LAWS § 750.110a(3); larceny in a building, in violation of MICH. COMP. LAWS § 750.360; and resisting and obstructing, in violation of MICH. COMP. LAWS § 750.81d(1). (ECF No. 6-6, PageID.327).

Several hours before Upshaw and Walker were arrested, an armed robbery took place at 1920 West Fischer Service Drive, a gas station approximately ten miles south of the invaded home. (ECF No. 6-2, PageID.231-32; ECF No. 6-14, PageID.862-63).¹ Tina Williams was the only employee working at the time. (ECF No. 6-8, PageID.523). She reported that around 3:30 AM, just after she had returned to her bullet-proof cashier booth from attempting to help a strangely behaving man with the gas station’s coffee

¹ The distance between the house and the gas station is a fact of which the Court may take judicial notice. *See Livingston Christian Sch. v. Genoa Charter Twp.*, 858 F.3d 996, 1008 (6th Cir. 2017); *see also*, e.g., *Hund v. Hund*, No. 334313, 2017 Mich. App. LEXIS 1082, at *14 (Ct. App. July 6, 2017) (taking judicial notice of distance and extrapolating travel time).

machine, another man entered the station and robbed a female customer at gunpoint. (ECF No. 6-14, PageID.863). The second man then demanded that Williams give him the money in her cash register. (*Id.*). When Williams refused, the man tried to kick open the door of the cashier booth and fired several shots in her direction, which were blocked by the bullet-proof glass. (*Id.*). The first man “shouted at her to open the access door, indicating that . . . [she] should do so in order to simply end the situation and get [the shooter] out of the gas station,” but Williams “stood her ground and did not comply.” (*Id.*). The shooter eventually “gave up and ran out of the gas station.” (*Id.*). After the altercation, the first man, who had remained at the coffee machine and had not run when the shooter’s gun was pointed in his direction, approached the booth and told Williams that she should call the police. (*Id.*). He “then fled in the same direction as the shooter.” (*Id.*).

On June 3, 2014, Williams identified Walker as the coffee machine man and Upshaw as the shooter. (*Id.*; ECF No. 6-8, PageID.500-04). Upshaw was charged with five additional crimes: armed robbery, in violation of MICH. COMP. LAWS § 750.529; carrying a dangerous weapon with unlawful intent, in violation of MICH. COMP. LAWS § 750.226; possession of a firearm during the commission of a felony (“felony-firearm”), in violation of MICH. COMP. LAWS § 750.227b; assault with intent to commit murder, in violation of MICH. COMP. LAWS § 750.83; and assault with intent to do great bodily harm less than murder, in violation of MICH. COMP. LAWS § 750.84. (ECF No. 6-2, PageID.229).

Upshaw ultimately pleaded guilty to second-degree home invasion but elected to go to trial on the gas station robbery charges. (ECF No. 6-7, PageID.340-41; ECF No. 6-11, PageID.757). At a motion hearing on October 2, 2014, one week before trial, Upshaw requested an adjournment. (ECF No. 6-5, PageID.322). He explained to the Honorable Michael J. Callahan that he had been dissatisfied with his attorney, Ray Paige, who had failed to appear at an August 5, 2014, motion hearing,² and had just retained a new attorney, Wright Blake. (ECF No. 6-4, PageID.314-15; ECF No. 6-5, PageID.322). The full colloquy proceeded as follows:

MR. BLAKE: And we're going to talk some more. Mr. Upshaw wants an adjournment. He doesn't feel that we're quite ready. I told him that I would bring myself up to speed by the time for the trial date. Is that correct, Mr. Upshaw?

MR. UPSHAW: Yes, but as you can see, your Honor, I have retained a new lawyer because of my insufficient counsel for not showing up and not coming and telling me the information. So I feel like my lawyer hasn't, my lawyer hasn't saw the DVD. He hasn't retained the transcript or anything and I feel like it's best grounds of adjournment right there, your Honor, just to get him caught up on what's going on with the case cause I just

² In a letter to the State of Michigan's Attorney Grievance Commission, Upshaw's mother, Toya Greene, alleged that Paige had, in fact, failed to appear on *four* separate occasions. (ECF No. 6-14, PageID.950).

retained him like a week and a half ago, probably not even that.

THE COURT: Well, I'm not granting an adjournment at this point. We'll see what happens. Okay.

MR. BLAKE: Thank you, your Honor.

(ECF No. 6-5, PageID.321-22).

The trial lasted three days, and on October 16, 2014, Upshaw was found guilty of armed robbery, carrying a dangerous weapon with unlawful intent, and felony-firearm. (ECF No. 6-10, PageID.743). He was acquitted of the assault charges. (*Id.*).

On November 14, 2014, Judge Callahan sentenced Upshaw to a two-year term of imprisonment for felony-firearm followed by concurrent sentences of eighteen to forty years imprisonment for armed robbery, one to five years imprisonment for carrying a dangerous weapon, and one to fifteen years imprisonment for second-degree home invasion. (ECF No. 6-11, PageID.756-57).

II. Upshaw's State Appellate and Post-Conviction Efforts

On December 17, 2014, Upshaw commenced an appeal as of right. (ECF No. 6-14, PageID.905). Jonathan B.D. Simon was appointed to represent Upshaw in his appeal. (*Id.*). On April 6, 2015, Simon filed a brief arguing 1) that "the trial court abused its discretion in granting the prosecutor's motion to endorse a key witness [sic] on the second day of trial over

[Upshaw's] timely objection;" 2) that "the trial court denied [Upshaw] a fair trial by admitting irrelevant and unduly prejudicial testimony that he refused to participate in a lineup;" and 3) that "[Upshaw] was denied his Sixth Amendment right to the effective assistance of counsel [because] his trial attorney failed to investigate potential alibi witnesses, . . . failed to file the required notice of intent to present an alibi defense[,] and [failed to] present . . . alibi witnesses." (*Id.* at 970, 973, 975) (capitalization omitted).

Simon also moved to remand for an evidentiary hearing pursuant to Mich. Ct. R. 7.211(C)(1) and *People v. Ginther*, 390 Mich. 436 (1973). (*Id.* at 895-96). In support of the Motion, Simon attached an affidavit in which Upshaw stated, among other things, that on May 28, 2014, his aunt, grandmother, and significant other "heard [him] preparing a meal in the kitchen of the home" shortly after 3:30 AM, and that his trial attorney was unable to establish these facts due to inadequate time to prepare a defense. (*Id.* at 897) (capitalization omitted). Also attached was an affidavit from Upshaw's co-defendant, Walker. (*Id.* at 898). On May 6, 2015, the Court of Appeals denied Upshaw's Motion to Remand. (*Id.* at 894).

Upshaw thereafter retained new appellate counsel, Neil J. Leithauser. (*Id.* at 984). On January 25, 2016, Leithauser filed a successive Motion to Remand and moved for leave to file a supplemental brief. (*Id.* at 912-14). In support of the Motion to Remand, Leithauser attached a new affidavit signed by Upshaw and notarized statements from his grandmother, JoAnn Green, and his aunt, Crystal Holloway. (*Id.* at 878-84). Holloway averred:

I was a alibi witness to some events that happened on May [sic]. [Upshaw's] lawyer knew about me being a witness but he choose not to call on me to give my testimony. . . . I am writing this letter in hopes that [Upshaw] will be granted a new trial in which he will be able to have his witness called to the stand to testify on his behalf.

(*Id.* at 882). Green, meanwhile, stated that she lived with Upshaw at 6390 Colfax Avenue, and that on May 28, she had fallen asleep while “watching one of [her] programs and . . . woke up from [Upshaw] knock[ing] on the door.” (*Id.* at 884). She explained that “[she] was mad after seeing what time it was [on the cable box] and let . . . Upshaw know it.” (*Id.*). She “thought [Wright] would call [her] as a witness, because [she] knew [Upshaw] . . . could not have been anywhere else . . . between 3:20 and 3:30 [because] he was getting blessed out by [her for waking her] up.” (*Id.*). “[L]ater, when [she saw Upshaw] le[ave] around 7:45, [she] was still upset” (*Id.*). The Court of Appeals denied Upshaw’s successive Motion to Remand, holding that Upshaw failed to “demonstrate[] that further factual development of the record or an initial ruling by the trial court [was] necessary.” (*Id.* at 874).³

Nevertheless, the Court of Appeals permitted filing of a supplemental brief. (*Id.* at 911). Leithauser’s supplemental brief made three new arguments on Upshaw’s behalf: 1) that “the trial court abused its discretion when it denied [Upshaw’s] request for a

³ Presiding Judge Cynthia Diane Stephens disagreed, and would have granted the motion to remand. (*Id.*).

brief adjournment;” 2) that “Upshaw was denied a fair trial and due process of law [because] the prosecutor improperly dismissed minority venire members” and gave “insufficient [race-neutral reasons] to avoid a finding of purposeful discrimination;” and 3) that “the trial court’s scoring of . . . offense variable 14 [offender’s role] was error which placed . . . Upshaw in a higher grid than supported by the record” and resulted in “an unsupported departure from the guidelines’ range, an abuse of discretion, and an unreasonable sentence.” (*Id.* at 927, 930, 937) (capitalization omitted) (final alteration in original).

On May 19, 2016, the Court of Appeals rejected all six of these arguments and affirmed Upshaw’s convictions and sentence. (*Id.* at 866-72). On April 4, 2017, the Michigan Supreme Court denied leave to appeal. (ECF No. 6-16, PageID.1196). The United States Supreme Court denied certiorari on November 6, 2017. (*Id.* at 1315).

On July 10, 2018, Upshaw filed a *pro se* Motion for Relief From Judgment, arguing 1) that “he was denied his Sixth Amendment right to effective . . . counsel” because his “trial attorney failed to object to the invalid, inaccurate scoring of prior record variable (PRV) five” and his “appellate counsel[] . . . fail[ed] to raise [the issue on] direct appeal;” 2) that he “was denied his Sixth Amendment right to effective assistance of counsel when his appellate attorney . . . fail[ed] to file a motion for a *Crosby* hearing;” 3) that his Sixth Amendment rights were violated by the trial court’s use of judicially found facts to score offense variables one, four, and nine (which increased his mandatory minimum and guidelines range), as well as his

appellate counsel's failure to raise this issue; and 4) that the Michigan Court of Appeals unreasonably applied the Supreme Court's precedent in *Batson*, in violation of the Fourteenth Amendment. (ECF No. 6-12, PageID.760, 778, 791, 796, 806) (capitalization omitted).

On November 27, 2018, the Honorable Wanda A. Evans denied Upshaw's Motion. (ECF No. 6-13, PageID.855). Both the Michigan Court of Appeals and the Michigan Supreme Court denied leave to appeal. (ECF No. 6-15, PageID.1057; ECF No. 6-17, PageID.1316).

III. Upshaw's Habeas Petition [1]

On September 18, 2020, Upshaw filed a Petition for a Writ of Habeas Corpus. (ECF No. 1). Upshaw's Petition [1] raises seven grounds for relief: 1) that his "trial counsel was constitutionally ineffective for failing to investigate potential alibi witnesses and failing to file an alibi notice;" 2) that "the trial court denied [his] motion for a brief adjournment . . . in violation of due process;" 3) that "the prosecutor dismissed African-American potential jurors in a discriminatory manner, in violation of the Equal Protection Clause;" 4) that "the trial court found facts that were not found by the jury to score offense variable 14, which increased the mandatory minimum sentence, in violation of the Sixth and Fourteenth Amendments;" 5) that "appellate counsel was constitutionally ineffective for failing to request a 'Crosby remand' as the remedy for [the offense variable 14] claim;" 6) that "the trial court found facts that were not found by the jury to score offense variables 1, 4, and 9, which increased the mandatory minimum sentence, in

violation of the Sixth and Fourteenth Amendments, and [that] appellate counsel was constitutionally ineffective for failing to raise this claim on direct appeal;” and 7) that “trial and appellate counsel were constitutionally ineffective for failing to argue that prior record variable 5 was [inappropriately] []scored.” (*Id.* at 6-11) (capitalization omitted).

After Respondent conceded that “Upshaw is entitled to partial habeas relief on his judicial factfinding claim with respect to offense variables 1, 4, and 9,” (ECF No. 5, PageID.193), Upshaw filed a Motion for Summary Judgment. (ECF No. 8).

ANALYSIS

Upshaw’s Petition [1] is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Pub. L. 104-132, 110 Stat. 1214, which provides, in pertinent part:

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

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable

determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

I. Claims I and II: Trial Counsel’s Failure to Investigate Alibi Witnesses/File an Alibi Notice and the Trial Court’s Denial of an Adjournment

A. Adjudication on the Merits

Because Upshaw’s first two claims are closely related, the Court addresses them together. The first question is whether these claims were “adjudicated on the merits in State court proceedings.” *Id.*; *see Harrington v. Richter*, 562 U.S. 86, 99 (2011). In answering this question, the Court must scrutinize the May 19, 2016, decision of the Michigan Court of Appeals (“COA”), which was “the last . . . reasoned opinion on thes[se claims].” *Hoffner v. Bradshaw*, 622 F.3d 487, 505 (6th Cir. 2010) (quoting *Payne v. Bell*, 418 F.3d 644, 660 (6th Cir. 2005)).

The COA rejected Upshaw’s ineffective assistance of counsel and adjournment claims as follows:

Next, Upshaw contends that he was deprived of his Sixth Amendment right to the effective assistance of counsel, where counsel failed to investigate potential alibi witnesses and failed to file the required notice of intent to present an alibi defense, MCL 768.20. At trial, Upshaw called to the stand the manager of a restaurant where Upshaw was employed at the time of the robbery, and the manager

testified that he drove Upshaw home at the end of his shift, dropping him off about 15 minutes before the robbery was committed. The manager, however, did not know Upshaw's whereabouts at the exact time of the robbery. On appeal, Upshaw argues that he remained home after being dropped off by the manager and that his aunt, grandmother, and girlfriend were also present at the home at the time. Upshaw attached his own affidavit to his appellate brief in an attempt to support his contention, merely implying that these three individuals could have provided him an alibi defense. However, Upshaw did not attach any affidavits from his aunt, grandmother, or girlfriend attesting to the claims, nor is there anything in the lower court record pertaining to alibis given by these individuals. In a second motion to remand filed with this Court, Upshaw had attached a document purportedly signed by his aunt, which did not meet the requirements of an affidavit, MCR 2.119(B), but his aunt merely asserted, "I was a alibi witness to some events that happened on May." This nonsensical statement did not provide an alibi. Upshaw had further attached a document purportedly signed by his grandmother, which also did not meet the requirements of an affidavit, MCR 2.119(B), and his grandmother asserted that Upshaw had arrived home around the same time as claimed by Upshaw's manager or a few minutes later. The document implied or suggested that Upshaw remained at the home for several hours, but it did not expressly provide so, nor

did his grandmother state that she observed him at the exact time of the robbery. Assuming that it is even proper to consider these flawed documents, Upshaw has simply failed to show that counsel's performance fell below an objective standard of reasonableness relative to alibi witnesses and a notice of alibi, and he has not established the requisite prejudice.

Upshaw next contends that the trial court abused its discretion when it denied his request for an adjournment to accommodate his newly-retained attorney. This argument is premised on the claimed need for time so that new counsel could have investigated and properly presented an alibi defense. Given our previous discussion, the alibi claims are unavailing. Upshaw has not shown that good cause existed as was necessary to grant a continuance or adjournment, and the trial court did not abuse its discretion in denying the adjournment request. *People v Coy*, 258 Mich App 1, 17-18; 669 NW2d 831 (2003).

(ECF No. 6-14, PageID.868-69) (footnote omitted).

The Court agrees with the parties that both of these claims were adjudicated on the merits. (ECF No. 2, PageID.34; ECF No. 5, PageID.172). With respect to Upshaw's ineffective assistance of counsel claim, the COA concluded that Upshaw "failed to show [his] counsel's performance fell below an objective standard of reasonableness relative to alibi witnesses and a notice of alibi, and [that] he has not established the requisite prejudice." (ECF No. 6-14, PageID.869). And with respect to Upshaw's adjournment claim, the

COA's determination that there was no abuse of discretion goes to the heart of the due process claim presently before the Court. *See Mackey v. Dutton*, 217 F.3d 399, 408 (6th Cir. 2000) (“When a denial of a continuance forms a basis of a petition for a writ of habeas corpus, not only must there have been an abuse of discretion but it must have been so arbitrary and fundamentally unfair that it violates constitutional principles of due process.” (quoting *Brown v. O’Dea*, 187 F.3d 572, 580 (6th Cir. 1999))). Consequently, although the version of the adjournment claim before the COA was couched in terms of an abuse of discretion, rather than a denial of due process,⁴ the Court agrees with the parties that it was also adjudicated on the merits. *See Smith v. Warden*, No. 20-3472/3496, 2022 U.S. App. LEXIS 5654, at *10 (6th Cir. Mar. 1, 2022)

⁴ Although parties’ briefing failed to acknowledge this distinction, the Court finds that Respondent has expressly waived any exhaustion or procedural default arguments as to Upshaw’s second claim by explicitly stating that “[t]he Michigan Court of Appeals addressed this claim and denied it on the merits.” (ECF No. 5, PageID.172); *see, e.g., Pirkel v. Burton*, 970 F.3d 684, 693 n.2 (6th Cir. 2020) (noting that “other circuits have held that a state’s concession of exhaustion before the district court is an express waiver of the exhaustion requirement under § 2254(b)(3)” and collecting cases); *Getsy v. Mitchell*, 495 F.3d 295, 317 (6th Cir. 2007) (“[T]he Warden has not raised the issue of procedural default and has thereby waived it.” (citing *Slagle v. Bagley*, 457 F.3d 501, 514 (6th Cir. 2006))). Accordingly, the Court will not raise these defenses for Respondent *sua sponte*. *See Wood v. Millyard*, 566 U.S. 463, 466 (2012) (holding that courts are “not at liberty . . . to bypass, override, or excuse” defenses that are deliberately waived by a State). Critically, however, even if Respondent had not waived these arguments, the Court would still find that Upshaw’s due process claim had been fairly presented to the COA because, as discussed above, the abuse of discretion analysis is a necessary subset of a due process claim.

(“Nothing requires a state court to conduct its analysis under the heading of a specific federal constitutional right to adjudicate it on the merits. When the substance of a right that the court addresses is ‘generally coextensive’ with another right under the Federal Constitution, that discussion is ‘sufficient’ to be a merits decision of the ‘related federal right.’” (citations omitted) (citing *Bennett v. Brewer*, 940 F.3d 279, 290-91 (6th Cir. 2019)) (quoting *Johnson v. Williams*, 568 U.S. 289, 299 (2013))).

B. AEDPA Deference

Because claims one and two were adjudicated on the merits, the Court next examines whether the COA’s decision “was contrary to, or involved an unreasonable application of, clearly established federal law,” 28 U.S.C. § 2254(d)(1), or “was based on an unreasonable determination of the facts.” *Id.* § 2254(d)(2).

A state-court decision satisfies the “contrary to” clause if it “applies a rule that contradicts the governing law set forth in [the Supreme Court’s] cases” or “confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [its] precedent.” *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). Likewise, where a state court “correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner’s case,’ or . . . ‘either unreasonably extends or unreasonably refuses to extend a legal principle from Supreme Court precedent to a new context,” its decision satisfies the “unreasonable application” clause. *Murphy v. Ohio*, 551 F.3d 485, 494 (6th Cir. 2009) (citations omitted) (first

quoting *Williams*, 529 U.S. at 407-08; then quoting *Seymour v. Walker*, 224 F.3d 542, 549 (6th Cir. 2000)). The Supreme Court has cautioned, however, that “evidence introduced in federal court has no bearing on § 2254(d)(1) review.” *Cullen v. Pinholster*, 563 U.S. 170, 185 (2011). Thus, where, as here, “a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court.” *Id.*

Finally, with respect to the “unreasonable determination” clause, 28 U.S.C. § 2254(d)(2), “the question . . . is not whether a federal court believes the state court’s determination was incorrect but whether that determination was unreasonable—a substantially higher threshold.’ [And] ‘the petitioner must show that the resulting state court decision was “based on” that unreasonable determination.’” *Hill v. Shoop*, 11 F.4th 373, 384 (6th Cir. 2021) (citations omitted) (first quoting *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007); then quoting *Rice v. White*, 660 F.3d 242, 250 (6th Cir. 2011)); *see also* 28 U.S.C. § 2254(e)(1) (explaining that “determination[s] of . . . factual issue[s] made by a State court shall be presumed to be correct” but that “th[is] presumption of correctness [can be rebutted] by clear and convincing evidence”).⁵

⁵ The Sixth Circuit has, on occasion, stacked the requirements imposed by subsections (d)(2) and (e)(1). *See, e.g., Cassano v. Shoop*, 1 F.4th 458, 466 (6th Cir. 2021) (“A state court decision involves ‘an unreasonable determination of the facts in light of the evidence presented in the State court proceeding’ *only if* it is shown that the state court’s presumptively correct factual findings are rebutted by ‘clear and convincing evidence’ and do not have support in the record.” (emphasis added) (quoting *Matthews*

In conducting the § 2254(d) analysis, courts must be mindful “that even a strong case for relief does not mean the state court’s contrary conclusion was unreasonable.” *Richter*, 562 U.S. at 102 (citing *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003)). Rather, under AEDPA, “[a] state court’s determination that a claim lacks merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the correctness of the state court’s decision.” *Id.* at 101 (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

1. Claim I: Ineffective Assistance of Counsel

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 685-86 (1984). To prove ineffective assistance of counsel, Upshaw must satisfy *Strickland*’s familiar two-prong test. *See, e.g., Peoples v. Lafler*, 734 F.3d 503, 512 (6th Cir. 2013).

The first prong assesses counsel’s performance. Under this prong, “the defendant must show that counsel’s representation fell below an objective standard of reasonableness.” *Strickland*, 466 U.S. at 687-88. In other

v. Ishee, 486 F.3d 883, 889 (6th Cir. 2007))). The Supreme Court, however, has explicitly rejected this view. *See Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003) (“It was incorrect for the Court of Appeals, when looking at the merits, to merge the independent requirements of §§ 2254(d)(2) and (e)(1). AEDPA does not require petitioner to prove that a decision is objectively unreasonable by clear and convincing evidence. The clear and convincing evidence standard is found in § 2254(e)(1), but that subsection pertains only to state-court determinations of factual issues, rather than decisions.”).

words, a court assessing an ineffective assistance claim must “determine whether, in light of all the circumstances, the [challenged] acts or omissions were outside the wide range of professionally competent assistance.” *Id.* at 690. When making this assessment, “counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Id.*

Second, in order to amount to a constitutional violation, the error by counsel must have been prejudicial to the defendant. *Id.* at 691-92. To prove prejudice, “[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.” *Id.* at 694. “[T]he question is not whether a court can be certain counsel’s performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. . . . The likelihood of a different result must be substantial, not just conceivable.” *Richter*, 562 U.S. at 111-12.

Stermer v. Warren, 959 F.3d 704, 736 (6th Cir. 2020) (alterations in original). In addition, because “[b]oth the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact[,]” [t]hey are . . . not findings of ‘historical facts’ that are subject to the [§] 2254(e)(1) presumption of

correctness for state court factual findings.” *Ramonez v. Berghuis*, 490 F.3d 482, 487 (6th Cir. 2007) (first alteration in original) (citation omitted) (first quoting *Combs v. Coyle*, 205 F.3d 269, 278 (6th Cir. 2000); then quoting *McGhee v. Yukins*, 229 F.3d 506, 513 (6th Cir. 2000)).

Here, although the COA correctly identified *Strickland* as the proper standard, its application of *Strickland* was unreasonable, 28 U.S.C. § 2254(d)(1), as were its factual determinations regarding Upshaw’s alibi defenses and counsel’s performance. *Id.* § 2254(d)(2). Because the COA’s analysis focused exclusively on the form and strength of Holloway and Green’s statements—or put another way, whether Upshaw was prejudiced by counsel’s failure to present one or both women as alibi witnesses—the Court addresses *Strickland*’s prongs in reverse order. (ECF No. 6-14, PageID.868-69).

a. Prejudice

The COA described Holloway’s statement as “non-sensical” and found that it “did not provide an alibi.” (*Id.* at 868). Upshaw does not challenge this determination, but instead argues that the COA’s factual determinations as to Green’s statement were unreasonable. (ECF No. 2, PageID.56). The Court agrees.

The COA discounted Green’s statement on both technical and substantive grounds. (ECF No. 6-14, PageID.868-69). First, the COA determined that Green’s statement did not meet the requirements of an affidavit under the Michigan Court Rules. (ECF No. 6-14, PageID.868). These Rules require affidavits to “(a) be made on personal knowledge; (b) state with

particularity the facts admissible as evidence establishing or denying the grounds stated in the motion; and (c) show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit.” MCR 2.119(B)(1). No fairminded jurist could find that Green’s statement failed to satisfy any of these requirements.

Green “state[d] with particularity” two facts “made on personal knowledge.” *Id.* First, that she was with Upshaw between 3:20 and 3:30 AM; second, that she saw him leave the house around 7:45 AM. (ECF No. 6-14, PageID.884). And her statement “show[ed] affirmatively” that she would be able to testify competently to each of these facts. MCR 2.119(B)(1)(c).⁶ The COA’s unexplained determination to the contrary was an objectively unreasonable reading of Green’s statement. *See 28 U.S.C. § 2254(d)(2).* Moreover, although the COA ultimately rejected Upshaw’s ineffective assistance claim after “assuming it [was] . . . proper to consider” Green’s statement, its unreasonable determination necessarily impacted the weight it accorded to Green’s proffered testimony and its conclusion that Upshaw was not prejudiced. (ECF No. 6-14, PageID.869); *see Hill*, 11 F.4th at 384.

⁶ Respondent’s contention that Green’s statement was deficient under MCR 2.119(B)(1)(c) because she did not explicitly “state that she was willing and able to testify at trial to the facts she provide[d],” is erroneous. (ECF No. 5, PageID.169). The Michigan Court of Appeals has made clear that “no court rule or statute require[s] specific language” to satisfy the requirements of MCR 2.119(B)(1)(c). *Sova v. Advisacare Healthcare Sols., Inc.*, No. 353912, 2021 Mich. App. LEXIS 4971, at *19-20 (Ct. App. Aug. 19, 2021).

The COA also defied common-sense in failing to consider travel time when evaluating the substance of Green's statement. Indeed, a plain reading of the COA's analysis makes clear that it unreasonably assumed Upshaw could have traveled instantaneously between his home and the gas station.

The uncontradicted testimony at trial established that Walker entered the gas station at 3:35 AM and that the person believed to be Upshaw approached seconds before 3:37 AM. (ECF No. 6-8, PageID.516-17). Both men came to the gas station on foot. (*Id.* at 517). However, the gas station is approximately three-and-a-half miles from Upshaw's home. (ECF No. 6-2, PageID.231-32; ECF No. 6-14, PageID.884); *see supra* note 1. And Green's statement put Upshaw in her immediate presence at home until 3:30 AM. (ECF No. 6-14, PageID.884). Against this backdrop, the COA's focus on whether Green visually "observed [Upshaw] at the exact time of the robbery" was illogical. (ECF No. 6-14, PageID.869). Contrary to the COA's determination, a witness can provide an alibi so long as their testimony, if believed, "plac[es] the defendant elsewhere than at the scene of the crime." *People v. Watkins*, 54 Mich. App. 576, 580 (1974). When travel time is considered, it is highly improbable, if not impossible, that Upshaw could have both been at home at 3:30 AM and arrived on foot at the gas station between 3:35 and 3:37 AM. Accordingly, it was objectively unreasonable for the COA to accord significance to the fact that Green's statement "did not expressly provide"

that Upshaw remained home after 3:30 AM. (ECF No. 6-14, PageID.869); *see* 28 U.S.C. § 2254(d)(2).⁷

b. Performance

The COA's decision offered no substantive analysis of *Strickland*'s performance prong and merely stated, in a conclusory fashion, that "Upshaw has simply failed to show that counsel's performance fell below an objective standard of reasonableness relative to alibi witnesses and a notice of alibi." (ECF No. 6-14, PageID.869). Accordingly, this "[C]ourt must determine what arguments or theories . . . could have supported, the state court's decision; and then . . . ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of th[e Supreme] Court." *Richter*, 562 U.S. at 102. Here, as set forth below, even under AEDPA's "doubly deferential" standard of review for the performance of trial counsel, *Ballinger v. Prelesnik*, 709 F.3d 558, 562 (6th Cir. 2013) (quoting *Jackson v. Houk*, 687 F.3d 723, 741 (6th Cir. 2012)), no fairminded jurist could find

⁷ To illustrate the unreasonableness of the COA's determination, the Court offers the following hypothetical: Defendant D is charged with a crime that took place in City One at 2:00 PM. D offers the affidavit of Alibi Witness A, which states that D was with A in City Two, several hundred miles away from City One, between 12:00 and 1:00 PM that same day. Although A cannot account for D's presence at exactly 2:00 PM, A's testimony, if believed, demonstrates that D could not have been in City One at the time of the crime. It would be objectively unreasonable for any jurist to discount A's alibi testimony merely because A did not observe D at the exact time of the crime. That is what the COA did here.

counsel's failure to even attempt to call alibi witnesses reasonable.

"It is well established that 'the failure to call a known alibi witness generally . . . constitute[s] ineffective assistance of counsel.'" *McQueen v. Winn*, No. 19-2212, 2020 U.S. App. LEXIS 14373, at *17 (6th Cir. May 5, 2020) (quoting *Bigelow v. Williams*, 367 F.3d 562, 570 (6th Cir. 2004)); *see, e.g.*, *Stewart v. Wolfenbarger*, 468 F.3d 338, 355 (6th Cir. 2006) (finding, despite AEDPA deference, that trial counsel's failure to file alibi notice was objectively unreasonable, and granting habeas); *Matthews v. Abramajtys*, 319 F.3d 780, 789 (6th Cir. 2003) (finding, despite AEDPA deference, that trial counsel's failure "to present potential alibi witnesses, whose testimony would have been quite useful, even if not conclusive" was unreasonable, and granting habeas); *see also, e.g.*, *Clinkscale v. Carter*, 375 F.3d 430, 443 (6th Cir. 2004) (noting that "a number of courts have found ineffective assistance of counsel in violation of the Sixth Amendment where . . . a defendant's trial counsel fails to file a timely alibi notice and/or fails adequately to investigate potential alibi witnesses" (citing *Blackburn v. Foltz*, 828 F.2d 1177 (6th Cir. 1987); *Johns v. Perini*, 462 F.2d 1308 (6th Cir. 1972); *Brown v. Myers*, 137 F.3d 1154 (9th Cir. 1998); *Bryant v. Scott*, 28 F.3d 1411 (5th Cir. 1994))).

In this case, the record shows that Upshaw retained his trial counsel about two-and-a-half weeks before trial—after his first attorney failed to appear at one or more proceedings. (ECF No. 6-4, PageID.314-15; ECF No. 6-5, PageID.322; ECF No. 6-14, PageID.950). At trial, counsel called only one

witness: Jeffrey Haugabook, the manager at Tony's Bar and Grill, where Upshaw worked. (ECF No. 6-10, PageID.680-81). Haugabook testified that after work on the morning of the robbery, he gave Upshaw a ride home and dropped him off around 3:15 or 3:20 AM. (*Id.* at 684). Haugabook also described the shoes Upshaw was wearing at the time, which were different from those worn by the armed robber. (ECF No. 6-8, PageID.542; ECF No. 6-10, PageID.682). But as the COA noted, Haugabook's testimony did not provide Upshaw with an alibi. (ECF No. 6-14, PageID.868). Indeed, his testimony was largely consistent with the State's theory of the case. (ECF No. 6-10, PageID.683).

Upshaw had informed his attorney that Green, among others, could provide a true alibi. (ECF No. 6-14, PageID.879, 897). But with only a week remaining before trial, counsel had engaged in little, if any, investigation. (ECF No. 6-5, PageID.322). For example, he had not reviewed the video of the robbery, nor the transcript of Upshaw's preliminary examination. (*Id.*). And although at that point, he had missed the deadline for filing an alibi notice, *see* MICH. COMP. LAWS § 768.20(1), he pushed back against Upshaw's request for an adjournment to the trial court. (ECF No. 6-5, PageID.322). He stressed that it was Upshaw who wanted the adjournment and asserted that he could "bring [himself] up to speed by the time for the trial date." (*Id.*).

In light of the value an alibi would have added to Upshaw's defense that he was elsewhere at the time of the robbery, counsel's complete failure to even attempt to introduce alibi testimony was objectively unreasonable. *See Stewart*, 468 F.3d at 355; *Bigelow*, 367

F.3d at 570; *Clinkscale*, 375 F.3d at 443; *Matthews*, 319 F.3d at 789. As explained above, Haugabook's testimony was simply not a replacement for Green's or Holloway's. *See Stewart*, 468 F.3d at 357-59 (finding similar testimony not cumulative).

Only one witness, Williams, had positively identified Upshaw as the shooter. And her testimony made clear that she had only seen about a quarter of the shooter's face. (ECF No. 6-2, PageID.254). Accordingly, like in *Blackburn*, counsel's "deficiencies left the only credible identifying witness's testimony virtually unchallenged" and "foreclosed the jury from hearing valuable countervailing evidence." 828 F.2d at 1186; *see Caldwell v. Lewis*, 414 F. App'x 809, 818 (6th Cir. 2011) ("[W]hen trial counsel fails to present an alibi witness, '[t]he difference between the case that was and the case that should have been is undeniable.'" (alteration in original) (quoting *Stewart*, 468 F.3d at 361)); *see also Avery v. Prelesnik*, 548 F.3d 434, 439 (6th Cir. 2008) ("[T]he availability of willing alibi witnesses must . . . be considered in light of . . . otherwise flimsy evidence supporting [a petitioner's] conviction." (citing *Strickland*, 446 U.S. at 696)).

The COA's failure to acknowledge these issues was attributable to its unreasonable application of *Strickland*. The COA collapsed *Strickland*'s two-prong inquiry into a single question focused on the strength of Upshaw's alibi testimony. It analyzed Green's and Holloway's statements, and after determining that neither had much value, concluded that counsel's failure to introduce the two women as alibi witnesses was reasonable. (ECF No. 6-14, PageID.868-69). But in doing so, the COA conflated

the question of prejudice with the question of performance. *Cf. Wiggins v. Smith*, 539 U.S. 510, 527-28 (2003) (holding that state court unreasonably applied *Strickland*'s performance prong where it failed to actually "consider the reasonableness of [counsel's] investigation" and instead rested its decision on an "assumption that the investigation was adequate"). To find counsel's performance adequate, the COA would have had to determine 1) that counsel had properly investigated Upshaw's alibi witnesses, and 2) that counsel's decision not to call any of those witnesses was sound trial strategy. *See Stewart*, 468 F.3d at 356 ("Where counsel fails to investigate and interview promising witnesses, . . . [their] inaction constitutes negligence, not trial strategy." (quoting *Workman v. Tate*, 957 F.2d 1339, 1345 (6th Cir. 1992))). The COA did not grapple with these questions at all, nor could it have, given its repeated denials of Upshaw's requests for an evidentiary hearing. (ECF No. 6-14, PageID.874, 894).

Without such a hearing, the COA had no way of determining whether trial counsel adequately investigated Green and Holloway. (ECF No. 6-14, PageID.882, 884). True, there is "a strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance," *Strickland*, 466 U.S. at 689, but given Upshaw's affidavit claiming failure to investigate and counsel's delay in investigating other aspects of Upshaw's case, it seems likely that counsel's investigation into Upshaw's witnesses (to the extent there was any) did not begin until at least a week before trial, after the deadline for filing an alibi notice. *See Williams*, 529 U.S. at 395 (failure to begin mitigation investigation until a week before

trial was unreasonable); *see also, e.g., Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (requiring “a *prompt* investigation” (emphasis added) (quoting 1 STANDARDS FOR CRIMINAL JUSTICE § 4-4.1 (AM. BAR ASS’N 2d ed. Supp. 1982))). Moreover, even assuming that counsel did promptly investigate and nevertheless chose not to pursue an alibi defense, *Strickland* would still have required the COA to determine that counsel’s reasons for doing so were reasonable. *See Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000) (“The relevant question is not whether counsel’s choices were strategic, but whether they were reasonable.” (citing *Strickland*, 466 U.S. at 688)).

The COA, however, did not offer, and this Court cannot conceive, of any sound purpose in counsel’s failure to call a single alibi witness under these circumstances.⁸ Simply put, “there would have been nothing to lose, yet everything to gain, from filing the alibi notice.” *Clinkscale*, 375 F.3d at 443. And without any explanation from counsel, there is no way the COA could have properly “evaluate[d] [counsel’s] conduct from [his] perspective at the time,” as *Strickland* demands. 466 U.S. at 689; *see Panetti v. Quarterman*, 551 U.S. 930, 954 (2007) (holding that AEDPA deference does not apply where “the factfinding procedures upon which the court relied were ‘not adequate for reaching reasonably correct results’ or, at a minimum, resulted in a process that appeared to be ‘seriously inadequate for the ascertainment of the truth’” (quoting

⁸ Respondent’s argument that “[c]ounsel could have reasonably determined that the jury would not have found alibi testimony from Upshaw’s relatives credible” has been rejected by the Sixth Circuit. (ECF No. 5, PageID.170); *see Clinkscale*, 375 F.3d at 444 & n.9.

Ford v. Wainwright, 477 U.S. 399, 423-24 (1986) (Powell, J., concurring in part and concurring in judgment)); *cf. Stermer*, 959 F.3d at 721 (“[W]here a state court makes factual findings without an evidentiary hearing or other opportunity for the petitioner to present evidence, ‘the fact-finding process itself is deficient’ and not entitled to deference.” (quoting *Hurles v. Ryan*, 752 F.3d 768, 790-91 (9th Cir. 2014))).

In sum, not only was the COA’s application of *Strickland* unreasonable, 28 U.S.C. § 2254(d)(1), but the record before the COA makes clear that its decision as to counsel’s performance necessarily relied on unreasonably assumed facts. *Id.* § 2254(d)(2). AEDPA deference is thus inappropriate.

2. Claim II: Denial of an Adjournment

The Supreme Court has cautioned that “broad discretion must be granted [to] trial courts on matters of continuances.” *Morris v. Slappy*, 461 U.S. 1, 11 (1983). Nevertheless, “a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality.” *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964) (citing *Chandler v. Fretag*, 348 U.S. 3 (1954)). To warrant habeas relief under due process principles, the “petitioner must show that [the trial court’s] error was so egregious as to deprive him of a fundamentally fair adjudication” and that “the denial of his request resulted in actual prejudice to his defense. Actual prejudice may be demonstrated by showing that additional time would have made relevant witnesses available or otherwise benefited the defense.” *Powell v. Collins*, 332 F.3d 376, 396 (6th Cir. 2003) (citations omitted) (first citing *United States v. Moreno*, 933 F.2d

362, 372 (6th Cir. 1991); then citing *United States v. Martin*, 740 F.2d 1352, 1361 (6th Cir. 1984)).

Here, a week before trial, Upshaw requested an adjournment. He explained to Judge Callahan that he recently had to replace his lawyer and that he wanted his new attorney, who had neither reviewed the video of the incident nor acquired the preliminary examination transcript, to have more time to prepare for trial. (ECF No. 6-5, PageID.322). Judge Callahan denied this request without explanation, stating, “I’m not granting an adjournment at this point. We’ll see what happens.” (*Id.*).

The COA’s conclusion that Upshaw failed to show that the trial court abused its discretion was predicated solely on the same flawed assessment of Upshaw’s alibi claims discussed above. (ECF No. 6-14, PageID.869). Accordingly, this aspect of the COA’s decision is also not entitled to AEDPA deference.

C. Evidentiary Hearing

Once a petitioner satisfies the 28 U.S.C. § 2254(d) inquiry, *Pinholster*’s limitations on taking new evidence cease to apply. *See Harris v. Haeberlin*, 752 F.3d 1054, 1058 (6th Cir. 2014). Under such circumstances, “a habeas petitioner “is generally entitled to [an evidentiary] hearing if he ‘alleges sufficient grounds for release, relevant facts are in dispute, and the state courts did not hold a full and fair evidentiary hearing.’” *Sawyer v. Hofbauer*, 299 F.3d 605, 610-11 (6th Cir. 2002) (quoting *Stanford v. Parker*, 266 F.3d 442, 459 (6th Cir. 2001)); *see Townsend v. Sain*, 372 U.S. 293, 313 (1963).

As described above, Upshaw has met each of those requirements. An evidentiary hearing on claims one and two is necessary for the Court to reach the ultimate question of whether Upshaw is entitled to habeas relief under 28 U.S.C. § 2254(a). *See Paprocki v. Foltz*, 869 F.2d 281, 287 (6th Cir. 1989); *cf. Pinholster*, 563 U.S. at 205 (Breyer, J., concurring in part and dissenting in part) (“For example, if the state-court rejection assumed the habeas petitioner’s facts (deciding that, even if those facts were true, federal law was not violated), then (after finding the state court wrong on a [§ 2254](d) ground) [a federal evidentiary] hearing might be needed to determine whether the facts alleged were indeed true.”).

II. Claim III: *Batson*

In his third claim, Upshaw argues that the prosecution violated the Equal Protection Clause by using peremptory challenges on six of eight African American potential jurors. (ECF No. 1, PageID.8). Because the Court has ordered an evidentiary hearing on claims one and two, and because unlike claims one and two, this claim is not eligible for a hearing, given that Upshaw did not request such a hearing in state court, *see* 28 U.S.C. § 2254(e)(2) (prohibiting evidentiary hearings where “the applicant . . . failed to develop the factual basis of a claim in State court proceedings”), the Court will wait to address the merits of this claim.

III. Claims IV-VII and Upshaw’s Motion for Summary Judgment [8]

Upshaw has also moved for summary judgment as to Claim VI. (ECF No. 8). The Supreme Court has long

recognized the possibility that in some habeas cases, “it may appear that, as a matter of law, the [petitioner] is entitled to the writ” based solely “on the facts admitted” by the respondent. *Walker v. Johnston*, 312 U.S. 275, 284 (1941); *see also Browder v. Dir.*, 434 U.S. 257, 266 n.10 (1978) (acknowledging the power of “federal district court[s] to discharge a habeas corpus petitioner from state custody . . . when the facts are undisputed and establish a denial of petitioner’s constitutional rights”). And courts in the Sixth Circuit have confirmed the continuing applicability of summary judgment motions even after AEDPA. *See, e.g., Redmond v. Jackson*, 295 F. Supp. 2d 767, 770 (E.D. Mich. 2003) (“The summary judgment rule applies to habeas proceedings.” (citing *Harris v. Stegall*, 157 F. Supp. 2d 743, 746 (E.D. Mich. 2001))).⁹

Summary judgment is appropriate where “there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a). “To defeat a motion for summary judgment, the non-moving party must set forth specific facts sufficient to show that a reasonable fact-finder could return a verdict in his favor.” *Sanders v. Freeman*, 221 F.3d 846, 851 (6th Cir. 2000) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

With respect to Claim VI, the parties agree on three major points: First, that “[t]he facts [Judge Callahan] used to score offense variables 1, 4, and 9 were

⁹ Its application in such cases, however, must be consistent with the Rules Governing Proceedings in the United States District Courts under 28 U.S.C. § 2254 (“Habeas R.”) and AEDPA. *See* Habeas R. 12.

not submitted to the jury and found beyond a reasonable doubt, nor [admitted by] Upshaw.” (ECF No. 5, PageID.193).¹⁰ Second, that this clearly violated Upshaw’s Sixth Amendment rights for the reasons stated in *Alleyne v. United States*, 570 U.S. 99, 103 (2013)—i.e., because any fact which increases the mandatory minimum penalty for a crime must be submitted to a jury. *See Robinson v. Woods*, 901 F.3d 710, 716 (6th Cir. 2018); *People v. Lockridge*, 498 Mich. 358, 374 (2015). And third, that Upshaw is entitled to some form of habeas relief even though he did not explicitly raise this claim on direct appeal. *See Chase v. MaCauley*, 971 F.3d 582, 591-97 (6th Cir. 2020) (holding that, even prior to *Lockridge*, appellate counsel was constitutionally ineffective for failing to raise an *Alleyne* claim).¹¹ Where the parties disagree, however, is on the nature of relief to which Upshaw is entitled.

According to Upshaw, the remedy for an *Alleyne* violation of this nature is a full resentencing within a reasonable period. (ECF No. 8, PageID.1442-45). According to Respondent, the proper form of relief is a

¹⁰ “[OV one] is aggravated use of a weapon.” MICH. COMP. LAWS § 777.31(1). Judge Callahan found that “a firearm was discharged at or toward a human being,” *id.* § 777.31(1)(a), and scored OV one at twenty-five points. (ECF No. 6-12, PageID.779). “[OV four] is psychological injury to a victim.” MICH. COMP. LAWS § 777.34(1). Judge Callahan found that there was “[s]erious psychological injury . . . to a victim” that required, or might require, “professional treatment,” *id.* § 777.34(1)(a), (2), and scored OV four at ten points. (ECF No. 6-12, PageID.779). “[OV nine] is number of victims.” MICH. COMP. LAWS § 777.39(1). Judge Callahan found that “[t]here were 2 to 9 victims who were placed in danger of physical injury or death,” *id.* § 777.39(1)(c), and scored OV nine at ten points. (ECF No. 6-12, PageID.779).

¹¹ The Court agrees with each of these conclusions.

more limited remand to the trial court for a determination of whether Upshaw warrants a full resentencing. (ECF No. 5, PageID.197).

In *Lockridge*, the Michigan Supreme Court held that Michigan's sentencing guidelines were "constitutionally deficient" because they "require[d] judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that mandatorily increase[d] the floor of the guidelines minimum sentence range." 498 Mich. at 364 (2015) (emphasis omitted). The *Lockridge* court remedied this deficiency by "Booker-iz[ing] the Michigan sentencing guidelines, i.e., render[ing] them advisory only." 498 Mich. at 391. *See generally United States v. Booker*, 543 U.S. 220, 245 (2005). Its decision made clear that OVs could still be "scored on the basis of facts not admitted by the defendant or found beyond a reasonable doubt by the jury," but that sentencing courts were no longer required to "articulat[e] substantial and compelling reasons for" departing from the guidelines. *Lockridge*, 498 Mich. at 391-92 (footnote omitted).

For defendants like Upshaw, whose sentences were imposed prior to July 29, 2015, the *Lockridge* court expressed a preference for "remand[] to the trial court [for a] determin[ation] [of] whether that court would have imposed a materially different sentence but for the constitutional error." *Id.* at 397. In these "Crosby remands," resentencing would be required only when the trial court determined that it would have imposed a different sentence had the guidelines been advisory. *Id.* (citing *United States v. Crosby*, 397 F.3d 103, 118 (2d Cir. 2005)).

Respondent argues that the Court should remand for a *Crosby* hearing using the language from *Robinson*. (ECF No. 9, PageID.1448). *See Robinson*, 901 F.3d at 718 (instructing the district court to “remand to the state sentencing court for sentencing proceedings consistent with this opinion and the Constitution”). “[A] full resentencing hearing,” according to Respondent, would not be “narrowly tailored and [would] unnecessarily infringe[] on the State’s interest in imposing its own remedy—a *Crosby* proceeding—when violations of this nature occur.” (ECF No. 9, PageID.1449).

However, the Sixth Circuit recently clarified that district courts “are not bound by the Michigan Supreme Court’s choice of remedy in *Lockridge*.” *Morrell v. Wardens*, 12 F.4th 626, 633 (6th Cir. 2021) (citing *Robinson*, 901 F.3d at 716). *Morrell* was a consolidated appeal of district court decisions by Judges Cox, Edmunds, Berg, and Steeh, all of whom granted habeas conditioned upon resentencing rather than a *Crosby* proceeding. *Id.* at 627. The Sixth Circuit noted that “[t]here are valid reasons why a court may decide that a full resentencing hearing, which allows a defendant to appear in court and make new arguments based on the advisory guideline range, more effectively cures the constitutional violation than a more limited *Crosby* hearing.” *Id.* at 634 (citing *Reign v. Gidley*, 929 F.3d 777, 781 (6th Cir. 2019) (“[B]y depriving him of a full resentencing hearing, the sentencing court deprived [the petitioner] of the chance to make an argument that the court should depart from the guidelines under a sentencing scheme where such departures were more likely.”)). The *Morrell* court also rejected arguments similar to those made by

Respondent regarding the increased burden of a full resentencing on the State's judicial resources. *See id.*

Against this backdrop of judicial discretion, the Court concludes that a full resentencing would best cure the *Alleyne* violation detailed in Upshaw's sixth claim. *See Edmonds v. Rewerts*, No. 2:18-CV-11691, 2020 U.S. Dist. LEXIS 258192, at *7 (E.D. Mich. Feb. 27, 2020) (noting that "the *Crosby* remand procedure is increasingly 'unpopular' with the federal courts" (citing *Morrell v. Burton*, No. 2:17-CV-10961, 2020 U.S. Dist. LEXIS 25744, at *5-6 (E.D. Mich. Feb. 14, 2020))); *accord Reign v. Gidley*, 929 F.3d 777, 783 (6th Cir. 2019) (acknowledging the "unpopularity of the *Crosby* remand"); *see also, e.g.*, *United States v. Milan*, 398 F.3d 445 (6th Cir. 2005) (explicitly rejecting *Crosby* in the context of *Booker* violations and concluding that the proper remedy is remand to the district court for resentencing); *United States v. Fagans*, 406 F.3d 138, 140-41 (2d Cir. 2005) (rejecting *Crosby* remands for preserved errors). In addition, because the Court concludes that resentencing is warranted on claim six, it need not address claims IV, V, or VII of Upshaw's Petition [1], all of which allege sentencing-related errors and become moot in light of resentencing. *See, e.g.*, *Thompson v. Winn*, No. 2:18-cv-13959, 2020 U.S. Dist. LEXIS 64065, at *13-14 (E.D. Mich. Apr. 13, 2020) (granting resentencing pursuant to *Alleyne* and declining to reach the petitioner's ineffective assistance of counsel claims related to sentencing).

Nevertheless, just because the Court has concluded that a remand for resentencing is appropriate does not mean the case needs to be remanded before Upshaw's other claims are resolved. *See FED. R. CIV.*

P. 54(b). Indeed, because Upshaw may require a new trial if successful on one or more of his other claims, the Court agrees with Respondent that it would be judicially inefficient to remand prior to resolving those other claims. (ECF No. 9, PageID.1451).

Instead, the Court will hold relief on Upshaw's sixth claim in abeyance pending the evidentiary hearing on claims one and two. If, following that hearing, Upshaw has failed to demonstrate that he is entitled to relief on any of his other claims, the Court will issue a Writ conditioned upon a resentencing in accordance with this opinion.

CONCLUSION

IT IS ORDERED that an evidentiary hearing will be held on claims one and two of the Petition [1] at a time suitable for the Court.

IT IS FURTHER ORDERED that Upshaw's Motion for Summary Judgment [8] is **GRANTED**. Relief will be held in abeyance pending the resolution of Upshaw's remaining claims.

IT IS SO ORDERED.

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

Dated: May 2, 2022

Order

**Michigan Supreme Court
Lansing, Michigan**

Stephen J. Markman,
Chief Justice

Robert P. Young, Jr.

Brian K. Zahra

Bridget M. McCormack

David F. Viviano

Richard H. Bernstein

Joan L. Larsen,
Justices

April 4, 2017

154101 & (69)(71)

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 154101
COA: 325195
Wayne CC: 14-006199-FC

LAFAYETTE DESHAWN UPSHAW,
Defendant-Appellant.

/

On order of the Court, the application for leave to appeal the May 19, 2016 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. The motions to remand and to expand the record are DENIED.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

April 4, 2017

Larry S. Royster
Clerk

**STATE OF MICHIGAN
COURT OF APPEALS**

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
May 19, 2016

v

No. 324672
Wayne Circuit Court
LC No. 14-006199-FC

DARRELL MILES WALKER,
Defendant-Appellant.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

No. 325195
Wayne Circuit Court
LC No. 14-006199-FC

LAFAYETTE DESHAWN UPSHAW,
Defendant-Appellant.

Before: MURPHY, P.J., AND CAVANAGH AND RONAYNE
KRAUSE, JJ.

PER CURIAM.

In Docket No. 324672, defendant Darrell Miles Walker appeals as of right his jury trial conviction of armed robbery, MCL 750.529. The trial court

sentenced Walker as a fourth habitual offender, MCL 769.12, to 25 to 50 years' imprisonment for the conviction. In Docket No. 325195, defendant Lafayette Deshawn Upshaw appeals as of right his jury trial convictions of armed robbery, carrying a dangerous weapon with unlawful intent, MCL 750.226, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced Upshaw to 18 to 40 years' imprisonment for the armed robbery conviction, 1 to 5 years' imprisonment for the dangerous weapon conviction, and 2 years' imprisonment for the felony-firearm conviction. We affirm.

I. FACTS

This case stems from the armed robbery of a gas station. In that business establishment, the cashier's work station was enclosed by a wall that had bullet proof glass built into it and a door, which the cashier could utilize to access the customer area of the gas station. Walker entered the gas station around 3:30 a.m. on May 28, 2014, and asked the cashier for help locating the coffee machine. The cashier testified that Walker was behaving strangely and that he did not go straight to the coffee machine when she pointed to its location; instead, Walker circled around some coolers and then made his way to the coffee machine. According to the cashier, Walker then just stood at the coffee machine, so the cashier opened her access door, stepped out into the customer area, and asked Walker if he needed assistance. Walker stood there silently, and the cashier explained to him how to use the coffee machine. She then went back to her work station, closing and locking the access door behind her.

The cashier testified that two women were also in the gas station at the time and that one of them came up to the counter, as Walker remained at the coffee machine. The cashier next heard a man's voice demanding money. The man, later identified as Upshaw, robbed the female customer, who proceeded to run and hide behind some shelving. Upshaw then turned his attention to the cashier, yelling at her to give him the money from the cash register, but she did not comply. During the next few moments, Upshaw discharged his firearm six times in the direction of the cashier and the enclosure and tried to knock and kick open the access door. The cashier was shielded by the bullet proof glass, and Upshaw was unsuccessful in his attempt to break into the cashier's work station. The cashier noticed that during this intense altercation, Walker remained standing at the coffee machine. She further observed that when Upshaw pointed his gun in Walker's general direction, Walker did not run. The cashier testified that Walker shouted at her to open the access door, indicating that the cashier should do so in order to simply end the situation and get Upshaw out of the gas station. The cashier, however, stood her ground and did not comply. Upshaw gave up and ran out of the gas station. Walker then ran up to the counter, told the cashier that she needed to call the police, and then fled in the same direction as the shooter.

A few hours later, Walker and Upshaw were arrested in the process of committing a home invasion at a residence in Detroit. The pair were caught as they exited separate windows of the house. Walker and Upshaw had attempted to steal several items of jewelry. The cashier later identified both Walker and Upshaw in separate photographic lineups, indicating

that Walker had been the man standing at the coffee machine and that Upshaw had been the person who brandished and discharged the firearm in the gas station. The gas station's surveillance cameras produced footage of the armed robbery, which was displayed to the jury. Defendants were charged with the armed robbery and related crimes, but were not charged in these proceedings with the home invasion offense. Evidence of defendants' participation in the home invasion, however, was presented at trial. At the trial, Walker's defense was that he had merely been present at the gas station during the armed robbery and thus was not guilty as an aider and abettor, while Upshaw's defense challenged the evidence placing him at the gas station during the armed robbery.

I. DOCKET NO. 324672

On appeal, Walker first argues that the evidence was insufficient to support his armed robbery conviction on an aiding and abetting theory, given that he was merely present at the gas station when the robbery occurred. Because we find the issues interrelated, we will also address, in the context of the sufficiency argument, Walker's second argument on appeal, which is that the trial court erred under MRE 401-403 by failing to exclude evidence of Walker's participation in the home invasion.

We review *de novo* the issue regarding whether there was sufficient evidence to sustain a conviction. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In reviewing the sufficiency of the evidence, this Court must view the evidence – whether direct or circumstantial – in a light most favorable to the prosecutor and determine whether a rational trier of fact

could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012); *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). A jury, and not an appellate court, observes the witnesses and listens to their testimony; therefore, an appellate court must not interfere with the jury's role in assessing the weight of the evidence and the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514- 515; 489 NW2d 748 (1992). Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). The prosecution need not negate every reasonable theory of innocence, but need only prove the elements of the crime in the face of whatever contradictory evidence is provided by the defendant. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). We resolve all conflicts in the evidence in favor of the prosecution. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

“Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.” MCL 767.39. “The phrase ‘aids or abets’ is used to describe any type of assistance given to the perpetrator of a crime by words or deeds that are intended to encourage, support, or incite the commission of that crime.” *People v Moore*, 470 Mich 56, 63; 679 NW2d 41 (2004) (citation omitted). To show that a defendant engaged in aiding or

abetting the commission of a crime, the prosecution must establish the following elements:

“(1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement.” [Carines, 460 Mich at 757 (citation omitted); see also *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006).]

However, “[m]ere presence, even with knowledge that an offense is about to be committed or is being committed, is not enough to make a person an aider or abettor; nor is mere mental approval, passive acquiescence or consent sufficient.” *People v Turner*, 125 Mich App 8, 11; 336 NW2d 217 (1983); see also *People v Norris*, 236 Mich App 411, 419-420; 600 NW2d 658 (1999).

In the instant case, the evidence was sufficient to show that Walker was not merely present in the gas station at the time of the armed robbery but that he aided or abetted in the robbery. Walker’s odd behavior in the gas station before and during the robbery, described above, his lack of a normal reaction to the robbery, his attempt to convince the cashier to open the access door, and his quick departure upon Upshaw’s exit from the gas station, all suggested that Walker played a role in the armed robbery and was not merely present at the scene. The evidence that removes any lingering doubt on the issue is Walker and Upshaw’s

joint participation in the home invasion a few short hours later. This evidence revealed that a relationship existed between the two men, rendering any conduct by Walker at the gas station that arguably may have outwardly appeared innocent, damning and inculpatory. Taking into consideration the evidence of Walker's conduct at the gas station in conjunction with the home invasion evidence, there existed sufficient circumstantial evidence that Walker encouraged, supported, and assisted in the armed robbery, i.e., that he aided and abetted Upshaw in the robbery. Reasonable inferences arising from the evidence include that Walker was "casing" or surveilling the gas station, that he was attempting to distract the cashier, that his conduct had been designed to lure the cashier from her work station and open the access door, which did briefly occur, that he was there to help contain or address any unexpected interference with the robbery, and/or that he was there to assist in completion of the robbery if Upshaw needed assistance. Indeed, Walker's attempt to convince the cashier to open the access door, in and of itself, was evidence of him providing aid and assistance to Upshaw, as had Walker been successful in essentially tricking the cashier into opening the door, Upshaw in all likelihood would have been able to empty the cash register. In sum, the evidence, when viewed in a light most favorable to the prosecution, with all conflicting evidence being resolved in favor of the prosecution, was more than sufficient to support Walker's conviction for armed robbery under an aiding and abetting theory.¹

¹ In a brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, defendant also presents a sufficiency argument regarding the armed robbery conviction, effectively

Next, in light of the importance of the evidence of the home invasion in showing a relationship between Walker and Upshaw, said evidence was relevant, as it made it more probable that Walker had aided and abetted Upshaw relative to the armed robbery – a disputed fact that was of consequence to the determination of the armed robbery charge. MRE 401. Moreover, the probative value of the home invasion evidence, which was high, was not substantially outweighed by the danger of unfair prejudice. MRE 403.² Accordingly, the evidence concerning the home invasion was admissible. MRE 402. We note that Walker does not argue that MRE 404(b) barred admission of the evidence and that, had he made the argument, it would fail, because the evidence was not admitted to show Walker's character or his propensity to engage in

raising the same issues that we have just rejected. Defendant further maintains that counsel was ineffective for failing to move for a directed verdict on the armed robbery charge because of the insufficiency of the evidence; however, counsel is not ineffective for failing to raise a meritless or futile motion. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

² Although all relevant evidence is prejudicial to some extent, *People v Murphy (On Remand)*, 282 Mich App 571, 582-583; 766 NW2d 303 (2009), evidence may be considered unfairly prejudicial only if the evidence injects “considerations extraneous to the merits of the lawsuit, e.g., the jury’s bias, sympathy, anger, or shock.” *People v Pickens*, 446 Mich 298, 337; 521 NW2d 797 (1994) (citation and quotation marks omitted). Unfair prejudice exists when there is a probability that the evidence, which is minimally damaging in logic, will be weighed by the jurors substantially out of proportion to its logically damaging effect, or when it would be inequitable to allow the prosecution to utilize the evidence. *Murphy*, 282 Mich App at 583. Here, there is no indication that the evidence injected considerations extraneous to the merits of the case, or that the jury gave it undue or preeminent weight.

criminal activity. *People v Jackson*, 498 Mich 246, 258-259; 869 NW2d 253 (2015). Rather, the home invasion evidence was introduced for the proper purpose of showing the existence of a connection or relationship between Walker and Upshaw.³ The trial court did not abuse its discretion or otherwise err in admitting the evidence of the home invasion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

Walker finally contends, in his standard 4 brief, that the trial court deprived him of a fair trial by failing to properly instruct the jury on prior inconsistent statements used to impeach witnesses. The trial court rejected Walker's request to instruct the jury pursuant to M Crim JI 4.5, which addresses prior inconsistent statements made by witnesses and directs jurors to only consider such statements with respect to deciding whether a witness testified truthfully in court and not as substantive evidence. On appeal, defendant fails to actually identify any prior inconsistent statements made by the cashier or any other witness used for impeachment, nor can we locate any. The trial court is not required to give a requested instruction when it is unsupported by the evidence or

³ In *People v Mardlin*, 487 Mich 609, 615-616; 790 NW2d 607 (2010), the Michigan Supreme Court stated:

Evidence relevant to a noncharacter purpose is *admissible* under MRE 404(b) *even if* it also reflects on a defendant's character. Evidence is *inadmissible* under this rule *only* if it is relevant *solely* to the defendant's character or criminal propensity. Stated another way, the rule is not exclusionary, but is inclusionary, because it provides a nonexhaustive list of reasons to properly admit evidence that may nonetheless also give rise to an inference about the defendant's character. [Citations omitted.]

record. *People v Mills*, 450 Mich 61, 81; 537 NW2d 909 (1995). Accordingly, the trial court did not abuse its discretion in determining that the omitted instruction concerning prior inconsistent statements was inapplicable to the facts of the case. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

III. DOCKET NO. 325195

Upshaw first argues that the trial court abused its discretion in granting the prosecutor's motion to endorse a key witness – the owner of the house involved in the home invasion – on the second day of trial over Upshaw's objection. Assuming that the prosecutor lacked good cause to add the witness at such a late date, MCL 767.40a(4), and that the trial court abused its discretion in allowing the late endorsement and the home owner to testify, Upshaw has not demonstrated that the court's ruling resulted in any prejudice, *People v Callon*, 256 Mich App 312, 328; 662 NW2d 501 (2003). Upshaw has failed to meet that burden, presenting only a vague argument that he was "deprived of a fair trial and denied the opportunity to develop an adequate defense." The home owner briefly testified about the condition of her house as damaged by the intruders and the items taken in the home invasion, indicating that defendants did not have her permission to enter the house. Prior to her testimony, two police officers who responded to the home invasion testified about observing a broken window, apprehending Walker and Upshaw after they climbed out of or leaped from windows, and finding jewelry on Walker, which evidence plainly revealed that a home invasion had occurred. The home owner's testimony added little and certainly did not prejudice Upshaw in

light of the untainted and unchallenged police testimony about the home invasion.

Upshaw next contends that he was denied a fair trial when the trial court allowed the admission of testimony that Upshaw had refused to participate in a live lineup. We first hold that Upshaw's refusal to participate in the lineup did not implicate his Fifth Amendment privilege against self-incrimination. *United States v Wade*, 388 US 218, 222-223; 87 S Ct 1926; 18 L Ed 2d 1149 (1967); *People v Benson*, 180 Mich App 433, 437; 447 NW2d 755 (1989), rev'd in part on other grounds 434 Mich 903 (1990). In *Wade*, 388 US at 222-223, the United States Supreme Court observed:

We have no doubt that compelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance. It is compulsion of the accused to exhibit his physical characteristics, not compulsion to disclose any knowledge he might have. It is no different from compelling . . . a blood sample or [a defendant] to wear the blouse, and, as in those instances, is not within the cover of the privilege. Similarly, compelling Wade to speak within hearing distance of the witnesses, even to utter words purportedly uttered by the robber, was not compulsion to utter statements of a "testimonial" nature; he was required to use his voice as an identifying physical characteristic, not to speak his guilt. We [have] held . . . that the distinction to be drawn under the

Fifth Amendment privilege against self-incrimination is one between an accused's "communications" in whatever form, vocal or physical, and compulsion which makes a suspect or accused the source of real or physical evidence. We recognized that both federal and state courts have usually held that . . . the privilege[] offers no protection against compulsion to submit to fingerprinting, photography, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. None of these activities becomes testimonial within the scope of the privilege because required of the accused in a pretrial lineup. [Citations, quotation marks, and ellipsis omitted.]

Upshaw, however, maintains that the evidence was irrelevant and unduly prejudicial. We find Upshaw's reliance on drunk driving cases inapposite, considering that statutory language played a role in those decisions. See, e.g., *People v Reeder*, 370 Mich 378; 121 NW2d 840 (1963); *People v Duke*, 136 Mich App 798; 357 NW2d 775 (1984); MCL 257.625a(9). We tend to believe that evidence of a refusal to participate in a lineup is akin to evidence of flight from a crime scene, which is admissible to support an inference of consciousness of guilt. See *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003) (addressing flight); see also *United States v Ashburn*, 76 F Supp 3d 401, 445 (ED NY, 2014); *People v Alexander*, 49 Cal 4th 846, 924-925; 113 Cal Rptr 3d 190; 235 P2d 873 (2010) (evidence that the defendant refused to participate in a lineup was admissible to show his

consciousness of guilt). Regardless, we agree with the prosecution that, assuming error, Upshaw has not established prejudice, where the cashier identified him in a photographic array, where the jury observed video surveillance footage of the robbery, and where Upshaw was caught with Walker a few hours later during the home invasion. MCL 769.26; *Lukity*, 460 Mich at 495.

Next, Upshaw contends that he was deprived of his Sixth Amendment right to the effective assistance of counsel, where counsel failed to investigate potential alibi witnesses and failed to file the required notice of intent to present an alibi defense, MCL 768.20.⁴

⁴ Whether counsel was ineffective presents a mixed question of fact and constitutional law, which we review, respectively, for clear error and *de novo*. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles governing a claim of ineffective assistance of counsel, stated:

To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). “First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the ‘counsel’ guaranteed by the Sixth Amendment.” *Strickland*, *supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy. *Id.* at 690. “Second, the defendant must show that the deficient performance prejudiced the defense.” *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel’s

At trial, Upshaw called to the stand the manager of a restaurant where Upshaw was employed at the time of the robbery, and the manager testified that he drove Upshaw home at the end of his shift, dropping him off about 15 minutes before the robbery was committed. The manager, however, did not know Upshaw's whereabouts at the exact time of the robbery. On appeal, Upshaw argues that he remained home after being dropped off by the manager and that his aunt, grandmother, and girlfriend were also present at the home at the time. Upshaw attached his own affidavit to his appellate brief in an attempt to support his contention, merely implying that these three individuals could have provided him an alibi defense. However, Upshaw did not attach any affidavits from his aunt, grandmother, or girlfriend attesting to the claims, nor is there anything in the lower court record pertaining to alibis given by these individuals. In a second motion to remand filed with this Court, Upshaw had attached a document purportedly signed by his aunt, which did not meet the requirements of an affidavit, MCR 2.119(B), but his aunt merely asserted, "I was a alibi witness to some events that happened on May." This nonsensical statement did not

error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

An attorney's performance is deficient if the representation falls below an objective standard of reasonableness. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

provide an alibi. Upshaw had further attached a document purportedly signed by his grandmother, which also did not meet the requirements of an affidavit, MCR 2.119(B), and his grandmother asserted that Upshaw had arrived home around the same time as claimed by Upshaw's manager or a few minutes later. The document implied or suggested that Upshaw remained at the home for several hours, but it did not expressly provide so, nor did his grandmother state that she observed him at the exact time of the robbery. Assuming that it is even proper to consider these flawed documents, Upshaw has simply failed to show that counsel's performance fell below an objective standard of reasonableness relative to alibi witnesses and a notice of alibi, and he has not established the requisite prejudice.

Upshaw next contends that the trial court abused its discretion when it denied his request for an adjournment to accommodate his newly-retained attorney. This argument is premised on the claimed need for time so that new counsel could have investigated and properly presented an alibi defense. Given our previous discussion, the alibi claims are unavailing. Upshaw has not shown that good cause existed as was necessary to grant a continuance or adjournment, and the trial court did not abuse its discretion in denying the adjournment request. *People v Coy*, 258 Mich App 1, 17-18; 669 NW2d 831 (2003).

Upshaw additionally argues that the prosecutor improperly exercised peremptory challenges, dismissing African-American members of the jury pool in violation of *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). "Under the Equal Protection

Clause of the Fourteenth Amendment, a party may not exercise a peremptory challenge to remove a prospective juror solely on the basis of the person's race." *People v Knight*, 473 Mich 324, 335-336; 701 NW2d 715 (2005) (citations omitted). Our Supreme Court in *Knight* stated that *Batson* "announced a three-step process for determining the constitutional propriety of a peremptory challenge." *Knight*, 473 Mich at 336. "First, the opponent of the peremptory challenge must make a *prima facie* showing of discrimination." *Id.* With respect to this first step, we review for clear error any underlying factual findings, while related questions of law are subject to *de novo* review. *Id.* at 343. "Second, if the trial court determines that a *prima facie* showing has been made, the burden shifts to the proponent of the peremptory challenge to articulate a race-neutral explanation for the strike." *Id.* at 337. "[T]he *de novo* standard governs appellate review of . . . [this] second step." *Id.* at 344. "Finally, if the proponent provides a race-neutral explanation as a matter of law, the trial court must then determine whether the race-neutral explanation is a pretext and whether the opponent of the challenge has proved purposeful discrimination." *Id.* at 337-338. "[T]he clear error standard governs appellate review of a trial court's resolution of . . . [this] third step." *Id.* at 345.

In the instant case, after the prosecutor exercised multiple peremptory challenges, Upshaw's attorney informed the trial court that he had a motion to make. The trial court excused the veniremembers and those remaining in the jury pool. Upshaw's counsel then presented a *Batson* challenge, arguing that six of the eight peremptory challenges exercised by the prosecutor pertained to African-Americans; both defendants

are African-American. Walker's attorney indicated that he would join in the motion. Other than noting the number of peremptory challenges exercised by the prosecutor and the race of those excused veniremembers, the defense attorneys did not provide any additional argument in support of making a *prima facie* case of discrimination. The trial court, failing to indicate whether defendants had made the required *prima facie* showing of discrimination, asked the prosecutor whether she had any response as to why the African-American veniremembers were excused. The prosecutor then provided race-neutral explanations for the strikes in regard to four of the African-American veniremembers. Before the prosecutor could continue with her explanations concerning the remaining two African-American veniremembers, the trial court interjected, asking Upshaw's counsel whether he had any response. Upshaw's attorney then began addressing and challenging the race-neutral explanation given by the prosecutor in regard to one of the stricken veniremembers. The trial court quickly chimed in, "Yes, but are you saying that's a pretext to get her off the jury because she's black?" Upshaw's counsel replied in the affirmative, at which point the trial court queried, "Anything else?" Upshaw's attorney replied, "No, your Honor." Walker's attorney also indicated that he had nothing to add.

Next, the trial court ruled:

Well, the [p]rosecutor has given some explanation other than race being challenged. I don't think the *Batson* motion can be sustained. I don't have any further comments on whether it's good or bad. . . .

After some further discussion on the matter, Upshaw's attorney began challenging the race-neutral explanation given by the prosecutor regarding another veniremember, but the trial court interrupted, making clear that it had denied the *Batson* motion.

In *Knight*, 473 Mich at 339, our Supreme Court counseled the bench with respect to *Batson* challenges, stating that "trial courts must meticulously follow *Batson*'s three-step test, and we *strongly* urge our courts to *clearly* articulate their findings and conclusions on the record." The Court further noted that "[w]hen a trial court methodically adheres to *Batson*'s three-step test and clearly articulates its findings on the record, issues concerning what the trial court has ruled are significantly ameliorated." *Id.* at 338-339. Here, unfortunately, the trial court failed to adhere to the directive announced by the *Knight* Court a decade earlier.

With respect to the first step, i.e., whether defendants made a *prima facie* showing of discrimination, actual proof of discrimination is not required. *Id.* at 336. And, given that there is no dispute that the veniremembers at issue in this case were members of a cognizable racial group and that peremptory challenges were exercised to exclude them from the jury, the question in regard to step one becomes whether all of the relevant circumstances raised *an inference* that the prosecutor struck the excluded veniremembers on the basis of race. *Id.* The trial court's statements on the bench failed to expressly indicate whether it found that defendants had made a *prima facie* case of discrimination. Although such a finding might be implied because the court asked the prosecutor to articulate

explanations for why veniremembers were stricken, the court's ruling is ultimately unclear and muddled on the matter. We cannot conclude, on the existing record, that defendants made a *prima facie* showing or case of racial discrimination. While not binding precedent, we find persuasive the following discussion by the United States Court of Appeals for the Eleventh Circuit in *United States v Ochoa-Vasquez*, 428 F3d 1015, 1044 (CA 11, 2005):

In order to determine whether a *Batson* objector . . . has established a *prima facie* case of discrimination, courts must consider all relevant circumstances. This Court has cautioned that the mere fact of striking a juror or a set of jurors of a particular race does not necessarily create an inference of racial discrimination. While statistical evidence may support an inference of discrimination, it can do so only when placed in context. For example, the number of persons struck takes on meaning *only* when coupled with other information such as the racial composition of the venire, the race of others struck, or the voir dire answers of those who were struck compared to the answers of those who were not struck. [Citations and quotation marks omitted.]

The Eleventh Circuit observed that pertinent circumstances to consider include the racial composition of remaining potential jurors, "the percentage of jurors of a particular race or ethnicity struck and the percentage of their representation on the venire," whether members of the relevant racial group served unchallenged on the jury, and whether the prosecutor

used all or nearly all of his or her challenges to strike veniremembers of a particular race. *Id.* at 1044-1045. Here, the only argument posed by defense counsel during voir dire was that six of eight peremptory challenges exercised by the prosecutor concerned veniremembers of the same race as defendants. Neither Walker nor Upshaw's attorney made a record regarding any other surrounding circumstance, such as those alluded to in *Ochoa-Vasquez*, nor are we able to discern from the existing record whether additional relevant facts or circumstances were present, e.g., information regarding the percentage of African-American jurors on the venire. Assuming that the trial court found that defendants had made a *prima facie* case of discrimination, it erred in that part of its analysis. Absent a *prima facie* showing of discrimination, the remaining two steps in the *Batson* analysis are rendered moot.⁵ Reversal is unwarranted.

Finally, Upshaw maintains that the trial court erred when it assessed offense variable (OV) 14, MCL 777.44, at 10 points, which is the proper score when “[t]he offender was a leader in a multiple offender situation,” MCL 777.44(1)(a). The trial court assessed 10 points because “[t]he proofs showed that Mr. Upshaw entered the gas station and began firing multiple shots.” Upshaw argues that this evidence did not support the conclusion that he was the leader, as between himself and Walker. Although Upshaw alludes to our Supreme Court’s ruling in *People v Lockridge*, 498

⁵ That said, we do note that the prosecutor provided race-neutral explanations with respect to four of the struck African-American veniremembers before being cut off by the trial court, and the defense attorneys only spoke in regard to one or two of those veniremembers for purposes of claiming pretext.

Mich 358; 870 NW2d 502 (2015), he ultimately does not contend that he is entitled to a *Crosby* remand⁶ under *Lockridge*. With respect to OV 14, in *People v Rhodes (On Remand)*, 305 Mich App 85, 90; 849 NW2d 417 (2014), the trial court relied on the fact that the defendant had the gun and not the codefendant in assessing 10 points, and this Court reversed, ruling:

The Legislature did not define by statute what constitutes a leader for the purposes of OV 14. We have not found any binding caselaw defining “leader” in this context. Consequently, we turn to the dictionary. According to *Random House Webster’s College Dictionary* (2001), a “leader” is defined in relevant part as “a person or thing that leads” or “a guiding or directing head, as of an army or political group.” To “lead” is defined in relevant part as, in general, guiding, preceding, showing the way, directing, or conducting. The evidence unequivocally supports the trial court’s factual determination that defendant possessed a gun and the only other person involved in the criminal transaction did not. However, the evidence does not show that defendant acted first, gave any directions or orders to [the codefendant], displayed any greater amount of initiative beyond employing a more dangerous instrumentality of harm, played a precipitating role in [the codefendant’s] participation in the criminal

⁶ This is a reference to *United States v Crosby*, 397 F3d 103 (CA 2, 2005).

transaction, or was otherwise a primary causal or coordinating agent.

We remain of the opinion that defendant's exclusive possession of a gun during the criminal transaction is *some* evidence of leadership, however it does not meet the preponderance of the evidence standard . . . [Citation omitted.]

The instant case can be distinguished from *Rhodes*. Here, Upshaw not only possessed a gun, he repeatedly and violently discharged the weapon. Further, while Walker may have been surveilling the gas station, it was Upshaw who ultimately acted first with respect to actually perpetrating and committing the armed robbery. Also, it was Upshaw who made demands of and robbed the female customer, it was Upshaw who ordered the cashier to give him the money from the cash register, and it was Upshaw who attempted to kick or break down the access door, all while Walker, for the most part, sat back and observed from a distance. And, Walker followed Upshaw out of the gas station after the partially foiled robbery, as opposed to taking any independent steps upon Upshaw's departure to somehow complete the crime. For purposes of actually carrying out the robbery, Upshaw outwardly displayed the greater amount of initiative. Although there are unknowns regarding the nature of the relationship between the two defendants, we cannot conclude on the basis of the evidence and reasonable inferences arising therefrom that the trial court clearly erred in finding by a preponderance of the evidence that Upshaw was the leader with

respect to the armed robbery. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

Affirmed.

/s/ William B. Murphy
/s/ Mark J. Cavanagh
/s/ Amy Ronayne Krause