Table of Contents Appendix-A

ORDER of the 3rd Circuit Court of Wayne County.

Transcripts from Ginther Hearing Motion (exerts included.) Motion Denied. – "Mr. Aubrey Stanley's testimony, along with his trial counsel Ms. Castka's regarding ineffective assistance of counsel, private investigator, etc."

Transcripts from 'Verdict of Jury & Jury Polled'. (exerts included.) - "explains what prosecution said in regards to obituary photos that he posted on screen."

No. 23-1742

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AUBREY JILES STANLEY, JR.,

Petitioner-Appellant,

v.

BRYAN MORRISON, Warden,

Respondent-Appellee.

ORDER

Before: NALBANDIAN, Circuit Judge.

Aubrey Jiles Stanley, Jr., a Michigan prisoner proceeding pro se, appeals the district court's judgment denying his petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Stanley applies for a certificate of appealability (COA). *See* Fed. R. App. P. 22(b). He also moves to proceed in forma pauperis on appeal. Because reasonable jurists could not disagree with the district court's resolution of Stanley's claims, his application for a COA is denied.

In 2019, a jury convicted Stanley of two counts of first-degree premeditated murder, in violation of Michigan Compiled Laws § 750.316(1)(a); being a felon in possession of a firearm, in violation of Michigan Compiled Laws § 750.224f; and possessing a firearm during the commission of a felony, in violation of Michigan Compiled Laws § 750.227b. Stanley was convicted, along with his brother, of shooting to death two men, one of whom Stanley believed had previously broken into his home. The trial court sentenced Stanley to an effective term of life imprisonment without the possibility of parole. After the trial court held an evidentiary hearing on Stanley's ineffective-assistance claims and denied Stanley's motion for a new trial, the Michigan Court of Appeals affirmed. *See People v. Stanley*, Nos. 348240 & 348474, 2021 WL 3233923, at *1, *8 (Mich. Ct. App. July 29, 2021), *perm. app. denied*, 967 N.W.2d 624 (Mich. 2022).

Stanley then filed a § 2254 petition, claiming that trial counsel performed ineffectively by failing to advance a self-defense theory at trial, move to sever his trial from his brother's, and investigate and subpoena a witness who would have supported a self-defense theory. He also argued that the prosecutor committed misconduct by appealing to the jurors' sympathies during closing arguments. The district court denied the petition, concluding that the Michigan Court of Appeals reasonably rejected these claims.

Stanley now seeks a COA from this court. To obtain a COA, an applicant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a petition is denied on the merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When the district court has applied 28 U.S.C. § 2254(d) to a state court's merits adjudication, this court asks whether reasonable jurists could debate whether the district court erred in concluding that the state-court adjudication neither (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," nor (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); *see Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

A defendant claiming ineffective assistance of counsel must establish that (1) counsel performed deficiently and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel's performance is considered deficient if it falls "below an objective standard of reasonableness." *Id.* at 688. To establish 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." *Id.* at 694. "The question under § 2254(d) is not whether counsel's actions were reasonable, but whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

Stanley argues that trial counsel should have moved to sever his trial so that he could pursue a self-defense theory without having it conflict with his brother's defense of mistaken identification. He also references jail phone calls that were admitted at trial, which Stanley claims would show that their defense theories were irreconcilable.[1] The Michigan Court of Appeals rejected this argument because it credited counsel's testimony at the evidentiary hearing that Stanley insisted on not pursuing a self-defense theory. It also noted that record undermined a theory of self-defense because the victims were unarmed, and Stanley initially told counsel and law enforcement that he was not present at the shootings, not that he acted in self-defense. *Stanley*, 2021 WL 3233923, at *8-9. We defer to the state court's credibility determination regarding counsel's testimony that Stanley did not want to pursue a self-defense theory. *See Miller-El*, 537 U.S. at 339. Given that testimony and that Stanley's statement to the police would have undermined a self-defense theory, the Michigan Court of Appeals reasonably concluded that trial counsel did not perform deficiently by declining to pursue a self-defense theory or to move to sever the trial on that basis.

Stanley also claims that trial counsel performed ineffectively by failing to secure Joseph Taylor as a witness to support his self-defense theory. The Michigan Court of Appeals rejected this claim because trial counsel made objectively reasonable, albeit unsuccessful, efforts to locate Taylor by assigning an investigator and by seeking help from the prosecution. It also noted that Stanley could not show prejudice because he did not demonstrate that any potential testimony from Taylor would be favorable. *Stanley*, 2021 WL 3233923, at *9. Stanley argues in his application that trial counsel performed deficiently by relying on her investigator's word that he could not locate Taylor rather than having a report prepared, but he does not show that counsel was required to do so or that relying on the investigator was unreasonable. In any case, Stanley does not

[1] These jail phone calls were not raised in Stanley's initial petition, but he noted them in his reply brief as well as before the Michigan Court of Appeals. He does not elaborate on the content of the calls.

demonstrate prejudice because he did not present any exculpatory statements from Taylor. *See Tinsley v. Million*, 399 F.3d 796, 810 (6th Cir. 2005).

Turning next to Stanley's prosecutorial-misconduct claim, "[t]he relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). Stanley claims that the prosecutor improperly appealed to the jurors' sympathies during closing arguments by stating that "[The victims] can't tell us who killed them. They can't tell us. But the evidence left behind tells us," and by referencing "the unimaginable loss of the mother . . . who you heard from, who had lost both of her sons on the same night." The Michigan Court of Appeals rejected this claim because the remarks were not pervasive and the trial court instructed the jury to base its verdict on the evidence, not the statements of counsel during closing arguments or their own sympathies. *Stanley*, 2021 WL 3233923, at *5. This was not unreasonable. The prosecutor's comments, to the extent that they might elicit the juror's sympathies, were brief and isolated and, as noted by the state court, were made to introduce the prosecutor's theory that the evidence pointed to Stanley and his brother as the shooters. These isolated comments did not so infect the trial that it resulted in a denial of due process.

Reasonable jurists would not debate the district court's resolution of the claims raised in Stanley's § 2254 petition.

For these reasons, the application for a COA is **DENIED**. The motion to proceed in forma pauperis is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

United States Court of Appeals for the Sixth Circuit

U.S. Mail Notice of Docket Activity

The following transaction was filed on 02/21/2024.

Case Name: Aubrey Stanley, Jr. v. Bryan Morrison
Case Number: 23-1742

Docket Text:
ORDER filed: For these reasons, the application for a COA [7051378-2] is DENIED. The motion to proceed in forma pauperis [7051370-2] is DENIED as moot. John B. Nalbandian, Circuit Judge.

The following documents(s) are associated with this transaction:
Document Description: Order

Notice will be sent to:

Aubrey Jiles Stanley Jr.
Lakeland Correctional Facility
141 First Street
Coldwater, MI 49036

A copy of this notice will be issued to:

Ms. Andrea M. Christensen-Brown
Ms. Kinikia D. Essix
Mr. Scott Robert Shimkus

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AUBREY JILES STANLEY, JR.,

Petitioner,

Case No. 4:22-cv-10517
Hon. F. Kay Behm

v.

GARY MINIARD,

Respondent.
_____/

OPINION AND ORDER (1) DENYING PETITION FOR WRIT OF HABEAS CORPUS, (2) DENYING A CERTIFICATE OF APPEALABILITY, (3) DENYING PERMISSION TO APPEAL IN FORMA PAUPERIS, AND (4) GRANTING MOTIONS TO EXTEND TIME TO FILE REPLY BRIEF

Aubrey Jiles Stanley, Jr. filed this petition for a writ of habeas corpus under 28 U.S.C. § 2254. After a jury trial held in the Wayne Circuit Court, Stanley was convicted of two counts of first-degree murder, MICH. COMP. LAWS § 750.316(a), felon in possession of a firearm, MICH. COMP. LAWS § 750.224f, and felony-firearm. MICH. COMP. LAWS § 750.227b. The habeas petition challenges these convictions on claims of ineffective assistance of trial counsel and prosecutorial misconduct. The Court denies the petition because the claims do not merit relief.

I

A

The facts surrounding Stanley's conviction stem from allegations that he and his brother shot to death two men who they believed had previously broken into their home.

At the brothers' joint trial, Christopher Taylor testified that his sister Alethia Taylor and her boyfriend Adrian George resided at 20005 Schaefer in Detroit. Alex Stewart and his girlfriend Destini Germany also lived at the address. (Tr. 2/1/19, at 104.) On April 9, 2017, the date of the incident, Alex's brother, Louis Philips was also present. (*Id.* at 121.) Alex Stewart and Louis Philips are the two men who were shot to death.

Taylor arrived at the Schaefer address around 6:40 p.m. that day for his sister's birthday. Taylor knew Petitioner Stanley, who lived in another unit close to his sister on Schaefer. Stanley approached Taylor while he was standing on Alethia's porch. Stanley complained that the men from his sister's unit had broken into his home. (*Id.* at 111.) Taylor replied that Adrian was a "drunk," and that if he broke into Stanley's home, then he should "beat their ass." (*Id.* at 114.)

A little while later, when Taylor went outside to greet his arriving brother, Joseph Taylor, he saw Stanley approaching his sister's residence again. Stanley warned Taylor that it was "about to go down." (*Id.* at 117-18.) Taylor told his sister to leave the house, and then he got into his brother's car and started to drive away. From the car Taylor saw the victims, Alex and Louis, headed on foot towards 20005 Schaefer. (*Id.* at 123.)

As the Alex and Louis neared Stanley's unit, Stanley and his brother Arthur ran inside and came out again carrying guns. (*Id.* at 132-33.) Stanley yelled at the two men, "You all broke into my motherfucking house." Alex replied, "No we didn't,"

and then Taylor heard multiple gunshots. (*Id.* at 135.) Louis fell to the ground and Alex ran. (*Id.* at 143.)

Detroit Police Officer Jeremy Robson testified that he was dispatched to the scene of the shooting. There was one man in the front yard of 20005 Schaefer who appeared to be the deceased victim of gunshot wounds. Another victim appeared to have been trying to crawl through a hole in a fence. (Tr. 2/4/19, at 14-15.) Both victims died as a result of multiple gunshot wounds. (*Id.* at 100.)

Destini Germany testified that on the date of the shooting she was living at 20005 Schaefer with her boyfriend Alex Stewart. She was driving back from errands immediately prior to the shooting. As she drove down her street, she saw Alex walking with his brother Louis. She saw Stanley and his brother come out of their residence with guns. (Tr. 2/4/19, at 241.) Destini saw Stanley holding an assault rifle and pointing it at Alex. She heard Stanley say something and then heard gunshots. (*Id.* at 197.) Germany gave a statement to police at the scene, and she was later shown a photo of Stanley, whom she identified as the shooter. (Tr. 2/5/19, at 127-29; Tr. 2/7/19, at 150.)

Stan Brue, a cellphone data analyst, examined the data for the phones associated with both defendants. (Tr. 2/6/19, at 26.) He testified that Stanley's phone was hitting on a cell tower near 20005 Schaefer at the time of the shooting. (*Id.* at 40.) About two hours later, there were calls between Stanley and his brother. Arthur's phone was in about the same area of Southwest Detroit during the time. (*Id.* at 46.)

Based on this evidence, both defendants were convicted as indicated above.

B

Following his conviction and sentencing, Stanley filed a claim of appeal in the Michigan Court of Appeals. His brief on appeal and supplemental pro se brief raised two claims:

> I. Trial counsel Nicole L. Castka did not provide constitutionally effective assistance of counsel where she: (A) Failed to move to sever Defendant Aubrey Stanley's trial from his brother's trial, especially in light of the jail calls that were ultimately deemed 6 admissible at this joint trial. Alternatively, she should have moved for a mistrial when the jail calls were admitted. (B) Failed to subpoena or even investigate key res gestae witness Joseph Taylor. (C) Failed to present an adequate defense before the jury, specifically self-defense, as that is the defense that the defendant stated he believed was appropriate in recorded jail calls that were admitted as evidence.
>
> II. Was the Appellant deprived of his State and Federal due process rights to a fair trial when the prosecutor during closing arguments improperly appealed to the jurors' sympathy?

The Michigan Court of Appeals affirmed in an unpublished opinion. *People v. Stanley*, No. 348474, 2021 WL 3233923, at *1 (Mich. Ct. App. July 29, 2021). Stanley filed an application for leave to appeal in the Michigan Supreme Court that raised the same claims. The application was denied by standard form order. *People v. Stanley*, 967 N.W.2d 624 (Mich. 2022) (Table).

II

A § 2254 habeas petition is governed by the heightened standard of review set forth in the Anti-Terrorism and Effective Death Penalty Act (AEDPA). 28 U.S.C. § 2254. To obtain relief, habeas petitioners who raise claims previously adjudicated by state courts must "show that the relevant state-court 'decision' (1) 'was contrary to, or involved an unreasonable application of, clearly established Federal law,' or (2)

'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.'" *Wilson v. Sellers*, 138 S. Ct. 1188, 1191 (2018) (quoting 28 U.S.C. § 2254(d)). The focus of this standard "is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). "AEDPA thus imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt." *Renico v. Lett*, 559 U.S. 766, 773 (2010) (internal citations and quotation marks omitted). Ultimately, "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). Additionally, a state court's factual determinations are presumed correct on federal habeas review, 28 U.S.C. § 2254(e)(1), and review is "limited to the record that was before the state court." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

III

A

Stanley first claims that he was denied the effective assistance of trial counsel. He argues that his counsel should have moved to sever his trial from his brother's because he wanted to raise a self-defense claim and his brother wanted to claim mistaken identification. Because of his counsel's failure to secure a separate trial, Stanley claims that he was forced to go along with his brother's weaker defense.

Stanley also claims that his counsel failed to produce Joseph Taylor as a witness who would have supported a self-defense theory.

On direct appeal the case was remanded to the trial court for an evidentiary hearing on these claims. Following the hearing, the Michigan Court of Appeals denied the claims on the merits. With respect to the alleged failure to move for separate trials to present a self-defense claim, the court found that the evidence presented at the hearing belied the allegation that Stanley wanted to present such a defense:

> Aubrey argues that severance was necessary to avoid prejudice because he and Arthur are brothers who wanted to assert different defenses at trial. According to Aubrey, he was unable to argue that he and Arthur acted in self-defense because it would have been "completely inconsistent" with Arthur's defense, which was misidentification. However, trial counsel testified that Aubrey was "adamant" that he did not want to present a self-defense theory and that Aubrey never stated that either victim was armed. Indeed, the record establishes that defendants approached the victims, who were unarmed, on a sidewalk. Moreover, Aubrey initially informed trial counsel that he was not present at the scene of the shootings.
>
> Aubrey also told members of law enforcement after he was arrested in April 2017 that he was not present at the time of the shootings. Trial counsel also testified that she had communicated with Arthur's attorney to coordinate their defense strategies, and she was aware that Arthur's defense theory at trial was that he was not present at the time of the shootings. Given this testimony, trial counsel had no basis for believing that Aubrey's and Arthur's planned defenses would be mutually exclusive or irreconcilable such that separate trials were necessary. Because Aubrey has failed to establish that there is a reasonable probability that a motion for severance of trial would have been granted if counsel had so moved, this claim of ineffective assistance of counsel must fail. *See Buie (On Remand)*, 298 Mich. App. at 66 (counsel is not ineffective for failing to make a futile motion).
>
> ***
>
> Aubrey also argues that trial counsel was ineffective for not presenting a theory of self-defense. As discussed earlier, however, trial counsel testified at the Ginther hearing that Aubrey was "adamant" that

> he did not want to present a self-defense theory and that he had never stated that the victims were armed. Although Aubrey testified differently at the evidentiary hearing, the trial court discredited Aubrey's testimony because he had offered inconsistent defense theories and had informed law enforcement that he was not present at the time of the shootings. Under these circumstances, trial counsel's decision not to pursue a claim of self-defense was not objectively unreasonable. Furthermore, given the facts of this case, we conclude that Aubrey cannot demonstrate that there is a reasonable probability that the outcome of trial would have been different if that theory had been presented.

Stanley, 2021 WL 3233923, at *8-9 (footnotes omitted).

The court of appeals rejected the claim regarding defense counsel's failure to locate Joseph Taylor for a similar reason. It found that the evidence presented at the hearing undermined the allegation:

> Aubrey also argues that trial counsel was ineffective for failing to interview, produce, and call Joseph Taylor (Joseph), who was present at the scene of the shooting, as a witness at trial. We disagree. Trial counsel testified at the Ginther hearing that a defense investigator attempted to locate Joseph "well before trial" to determine what information he could provide, but the efforts to find him were unsuccessful.7 Trial counsel also requested assistance from the prosecution, but those efforts were also unsuccessful. Because Aubrey has not shown that trial counsel could have done anything more to find and produce Joseph for trial or that counsel's efforts to locate Joseph were objectively unreasonable, this argument must fail.
>
> Furthermore, Aubrey has not demonstrated that he was prejudiced by the failure to locate and produce Joseph as a witness at trial. At the evidentiary hearing, Aubrey indicated that Joseph's testimony "could have shown that the victims ... had weapons and [that] they were shooting at [Aubrey]." However, upon questioning by the trial court, Aubrey admitted that he did not know what testimony Joseph would have provided if he had been called as a witness. Indeed, the record supports that Joseph would not have benefitted Aubrey's defense given that Joseph told members of law enforcement that he was unable to see the shooting because he was driving away from the scene. Accordingly, Aubrey has not demonstrated a reasonable 16 probability

> that the failure to produce and call Joseph as a witness affected the outcome of his trial.

Id.

The state court decision regarding these claims involved a reasonable application of the clearly established Supreme Court standard. The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to the effective assistance of counsel. In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court set forth a two-prong test for determining whether a habeas petitioner has received the ineffective assistance of trial counsel. First, a petitioner must prove that counsel's performance was deficient. This requires a showing that counsel made errors so serious that he or she was not functioning as counsel guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 687. Second, a petitioner must establish that counsel's deficient performance prejudiced the defense. Counsel's errors must have been so serious that they deprived the petitioner of a fair proceeding. *Id.*

To satisfy the performance prong, a petitioner must identify acts that were "outside the wide range of professionally competent assistance." *Id.* at 690. A reviewing court's scrutiny of counsel's performance is highly deferential. *Id.* at 689. There is a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* at 690. The petitioner bears the burden of overcoming the presumption that the challenged actions were sound strategy.

As to the prejudice prong, 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." *Id.* at 694. A reasonable probability is one that is sufficient to undermine confidence in the outcome of the proceeding. *Id.* "On balance, the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the [proceeding] cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

The Supreme Court has confirmed that a federal court's consideration of ineffective assistance of counsel claims arising from state criminal proceedings is quite limited on habeas review due to the deference accorded trial attorneys and state appellate courts reviewing their performance. "The standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Harrington*, 562 U.S. at 105 (internal and end citations omitted). "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Id.*

Here, the decision of the state court is reasonably supported by the evidence presented at trial and at the post-conviction evidentiary hearing. The trial court accepted trial counsel's testimony that she reasonably chose to avoid severance and a self-defense theory because it was at odds with Stanley's statement to the police that he was not present at the scene of the shooting. (Tr. 2/18/20, at 63-65.) The trial

court also found that counsel performed reasonably in her attempts to locate Joseph Taylor, and, in any event, there was no evidence presented to indicate that his testimony would have been favorable to the defense. (*Id.*)

Trial counsel testified at the hearing that she met with Stanley numerous times to discuss trial strategy. Contrary to his claims, Stanley told her that he did not want to pursue a self-defense claim. (*Id.* at 40-42.) Stanley told counsel that he was not present at the scene despite his inability to present corroborating evidence to run an alibi defense. (*Id.*) The state appellate court reasonably rejected this allegation in light of this record evidence. It was not objectively unreasonable to accept the testimony of Stanley's trial counsel as true over Stanley's own testimony regarding his discussions with counsel.

The same applies to the failure to present Joseph Taylor as a defense witness. Counsel testified that not only did she request assistance from the trial court to locate Joseph, but she also hired a private investigator to search for him. (*Id.* at 45-46.) This testimony is corroborated by defense counsel's statements during trial, when she requested further assistance from the prosecutor and police to locate Joseph. (*Id.* at 12-14.) On this record, the state court reasonably found that counsel did not perform deficiently in her attempts to locate Joseph Taylor.

Moreover, because Stanley presents no offer of proof that Joseph would have testified favorably to the defense, the state court reasonably found that he failed to demonstrate prejudice under *Strickland*. *See Dunn v. Reeves*, 141 S. Ct. 2405, 2407 (2021).

Stanley therefore fails to demonstrate entitlement to habeas relief based on his ineffective assistance of trial counsel claims.

B

Stanley next claims that the prosecutor committed misconduct during closing arguments by appealing to the jury's sympathies for the victims.[1] The Michigan Court of Appeals found that the complained-of remarks were not improper:

> Arthur challenges the following emphasized portions of the prosecutor's closing argument:
>
> > Ladies and gentlemen, I want to first thank you for your time and attention during this case. I know it has been a longer case then you anticipated.
> >
> > I know everyone was paying attention and we certainly appreciate it.
> >
> > And I know the family in this case and I am sure the defense attorneys as well appreciate your time and attention.
> >
> > *[The victims] can't tell us who killed them. They can't tell us. But the evidence left behind tells us.*
> >
> > Christopher Taylor tells us. And Destini Germany also told us. And there [are] only two people ever in this entire trial that have been the people accused of killing [the victims]; and they are sitting right here. (Indicating.) Aubrey Stanley and Arthur Stanley.
> >
> > The crux of this case, ladies and gentlemen as you may well know is identification. And I want to talk about that. Identification of the people that killed [the victims] ....

[1] Stanley's habeas petition itself does not explicitly raise any of the claims of prosecutorial misconduct presented on direct appeal. His reply brief, however, seems to reflect an intent to include this one allegation of misconduct as part of his petition. (*See* ECF No. 21, PageID.3154-56.)

> *And the unimaginable loss of the mother ... who you heard from, who had to lose both of her sons on the same night.*
>
> How do we know that these two individuals killed these two individuals[?]
>
> Identification and corroboration. Identification. You are going to get an instruction by the judge, ladies and gentlemen, about identification. [Emphasis added.]
>
> And when you think about identification you should think about it in these terms because this is what the law tells us. That you should examine the witnesses' identification testimony carefully. You may consider whether other evidence supports the identification.

We conclude that the prosecutor's challenged remarks did not involve attempts to secure convictions by appealing to the jury's sympathy for the victims and their mother. The challenged comments were brief, and they were made to serve as the introduction to the prosecutor's theory of the case. Even to the extent that some of the remarks, when viewed in isolation, could be perceived as comments that 35 evoked sympathy for the victims, this was not a theme that was repeated or emphasized throughout the prosecutor's closing argument. Rather, in arguing that defendants were guilty, the prosecutor focused on the evidence and addressed why the evidence established defendants' guilt. Importantly, the prosecutor did not urge the members of the jury to ignore the evidence or to suspend their powers of judgment to convict on the basis of sympathy. *See Lane*, 308 Mich. App. at 66. Therefore, when considering the prosecutor's arguments in context, we conclude that the prosecutor did not abandon his responsibility to seek justice. *See id.* at 62. Consequently, Arthur has failed to establish plain error.

Furthermore, to the extent that the prosecutor's remarks could be perceived as an appeal for sympathy, the standard jury instructions provided to the jury lessened any prejudicial effect of the prosecutor's comments.

Stanley, 2021 WL 3323923, at *9-10 (emphasis in original).

Under clearly established Supreme Court law, a prosecutor's misconduct violates a criminal defendant's constitutional rights if it "'so infected the trial with

unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)(quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). Prosecutorial misconduct entails much more than conduct that is "undesirable or even universally condemned." *Id.* at 181 (internal quotation omitted). To constitute a due process violation, the conduct must have been "so egregious so as to render the entire trial fundamentally unfair." *Byrd v. Collins*, 209 F.3d 486, 529 (6th Cir. 2000) (citations omitted).

The *Darden* standard "is a very general one, leaving courts 'more leeway ... in reaching outcomes in case-by-case determinations.'" *Parker v. Matthews*, 567 U.S. 37, 48 (2012)(quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)(alteration in original). "That leeway increases in assessing a state court's ruling under AEDPA," because the court "'cannot set aside a state court's conclusion on a federal prosecutorial-misconduct claim unless a petitioner cites ... other Supreme Court precedent that shows the state court's determination in a particular factual context was unreasonable.'" *Stewart v. Trierweiler*, 867 F.3d 633, 638-39 (6th Cir. 2017) (quoting *Trimble v. Bobby*, 804 F.3d 767, 783 (6th Cir. 2015)).

The state appellate court did not unreasonably apply these principles in rejecting Stanley's claim. It was reasonable for the Michigan Court of Appeals to find that the remarks did not rise to the level of comments designed to incite prejudice in the jury. *See Puertas v. Overton*, 168 F. App'x. 689, 701 (6th Cir. 2006). The prosecutor's brief, isolated comments about a mother losing two sons and the victims not being able to say who murdered them could reasonably be viewed as connected to

the prosecutor's main theme that the evidence presented at trial indicated that it was Stanley and his brother who were the perpetrators. Both of the complained-of comments were prefaces to a discussion of the evidence indicating the defendants' guilt. At a minimum, "fairminded jurists could disagree" whether the remarks crossed the line, and as such, this Court must defer to the state court decision. *Harrington*, 562 U.S. at 101.

Because none of Stanley's claims merit relief, his habeas petition is denied.

IV

Before Stanley may appeal this decision, the Court must determine whether to issue a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(A); FED. R. APP. P. 22(b). A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy § 2253(c)(2), Stanley must show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citation and internal quotation marks omitted). The Court finds that reasonable jurists would not debate the resolution of any of Stanley's claims. The Court will therefore deny a certificate of appealability.

The Court also finds that because any appeal of this order would be frivolous, permission to appeal in forma pauperis will likewise be denied. FED. R. APP. P. 24(a).

V

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

IT IS FURTHER ORDERED that a certificate of appealability is **DENIED**.

IT IS FURTHER ORDERED that permission to appeal in forma pauperis is **DENIED**.

IT IS FURTER ORDERED that Stanley's motions for an extension of time to file his reply brief are **GRANTED**.

s/F. Kay Behm
Hon. F. Kay Behm
United States District Judge

Dated: July 18, 2023

Additional material from this filing is available in the Clerk's Office.