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No. 17-1409

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Oct 26, 2017

DEBORAH S. HUNT, Clerk

GREGORY CARTER,

Petitioner-Appellant,

V.

BLAINE LAFLER, Warden,

Respondent-Appellee.

ORDER

Before: ROGERS, SUTTON, and BUSH, Circuit Judges.

Gregory Carter, a Michigan prisoner proceeding through counsel, petitions the court for a rehearing of its August 30, 2017, order denying his construed application for a certificate of appealability. We have reviewed the petition and conclude that we did not overlook or misapprehend any material point of law or fact when we entered our previous order. *See* Fed. R. App. P. 40(a)(2).

Accordingly, the petition for rehearing is **DENIED**.

ENTERED BY ORDER OF THE COURT

Wm L. Hunt

Deborah S. Hunt, Clerk

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In 2003, Carter filed a motion seeking relief from judgment in the trial court, arguing that he was denied his right to a fair trial due to flaws in the jury-selection system of Kent County, Michigan. The trial court outlined the factual basis for Carter's claim as follows:

In 2001 Kent County's jury selection process came under intense media scrutiny. It was alleged that the system was fundamentally flawed, leading to a systematic exclusion of minority jurors from the jury pool. Following media coverage of this problem, the County determined that a flaw in the random computer process could, in fact, lead to the disproportionate exclusion of minorities from the jury pool. The system was subsequently corrected.

People v. Michigan, No. 01-0091-FC, slip op. at 2 (Kent Cty. Cir. Ct. Oct. 27, 2003). The system defect was not discovered until after Carter's trial. Carter, who is African-American, was convicted by an all-white jury. In his post-conviction motion, Carter alleged that he was denied a fair trial due to Kent County's exclusion of minorities from jury pools. He also argued that counsel was ineffective for failing to investigate an alibi defense and that he was entitled to resentencing. The trial court dismissed Carter's jury-pool claim because he failed to raise the issue before trial and rejected his remaining claims on the merits. The Michigan Court of Appeals and the Michigan Supreme Court denied him leave to appeal.

In 2006, Carter filed a § 2254 petition in the United States District Court for the Eastern District of Michigan, arguing that he was denied due process due to the flaws that existed in the jury-pool selection system of Kent County. The district court referred the petition to a magistrate judge. The magistrate judge found that, although Carter's claim was procedurally defaulted, Carter had cause to excuse his procedural default because neither Carter nor his counsel had any reason to suspect before trial that there was a flaw in Kent County's jury-pool selection practices. The magistrate judge recommended that Carter be appointed counsel and granted an evidentiary hearing on his claim. The district court adopted the report and transferred Carter's action to the United States District Court for the Western District of Michigan for an evidentiary hearing. The Western District referred Carter's petition to a magistrate judge, who concluded that Carter's petition was procedurally defaulted and that, in contrast to the Eastern District's earlier determination, Carter had not shown cause to excuse his procedural default. The magistrate

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judge reasoned that, while Carter and his counsel were unaware of the flaws in Kent County's jury-pool selection practices, they were aware that Carter's jury pool had no African-Americans and could have objected to the jury-pool composition before trial. The district court adopted the report and denied the petition but granted a COA on the issue of whether Carter could overcome his procedural default.

We consolidated Carter's appeal with the appeals of Joseph Ambrose and Carl Wellborn, two similarly situated petitioners, and concluded that all three petitioners had cause to excuse the procedural default of their jury pool claims. *See Ambrose v. Booker*, 684 F.3d 638, 645-49 (6th Cir. 2012) ("*Ambrose II*"); *see also Ambrose v. Booker*, 781 F. Supp. 2d 532 (E.D. Mich. 2011) ("*Ambrose I*"). We therefore reversed and remanded the cases for a determination of whether the petitioners could establish prejudice. *See Ambrose II* at 652. We instructed the lower courts to assess the petitioners' claims using the prejudice standard for ineffective-assistance-of-counsel claims put forward in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Ambrose II*, 684 F.3d at 652.

On remand, the same counsel was appointed to represent all three petitioners, and, although the three cases proceeded on separate tracks, petitioner Ambrose's case became the de facto lead case. The Eastern District of Michigan granted Ambrose habeas relief. *Ambrose v. Booker*, 24 F. Supp. 3d 626 (E.D. Mich. 2014) ("*Ambrose III*"), *rev'd*, 801 F.3d 567 (6th Cir. 2015) ("*Ambrose IV*"), *cert. denied sub nom. Ambrose v. Romanowski*, 136 S. Ct. 2461 (2016). The court found that Ambrose had demonstrated prejudice, observing that, had Kent County's jury pool selection process worked properly, "there is a reasonable probability that [Ambrose] would have been tried before a more diverse jury. And there is a reasonable probability that a more diverse jury would have been less likely to convict him." *Id.* at 630. The court also found that Ambrose had made a prima facie showing of the violation of his Sixth Amendment right to be represented by a fair cross-section of his community. *See id.* at 657-58. The court's decision was based, in part, on the testimony of Dr. Samuel Sommers, a psychologist, who "essentially testified that a more diverse jury would have been less likely to convict Ambrose because

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African-American jurors are statistically less likely to convict than their Caucasian counterparts.” *Id.* at 640. During Ambrose’s appeal, Carter’s remanded case remained pending in district court.

On the government’s appeal in Ambrose’s case, we again reversed. *Ambrose IV*, 801 F.3d 567. We found that the district court erred in relying on the testimony of Dr. Sommers. *See id.* at 579-80. We also found that the district court erroneously applied the prejudice standard of *Hollis v. Davis*, 941 F.2d 1471, 1482 (11th Cir. 1991), rather than the more stringent prejudice standard of *Strickland*. *See Ambrose IV*, 801 F.3d. at 577-78. We observed that the *Strickland* standard, in the context of Ambrose’s claim, required the district court to “consider whether, in light of the underrepresentation of African Americans in the jury venire, ‘there is a reasonable probability that . . . the result of the proceeding would have been different.’” *Id.* at 578 (quoting *Strickland*, 466 U.S. at 694). We concluded that, under the *Strickland* prejudice standard, Ambrose failed to show prejudice, and therefore we reversed the judgment of the district court and remanded Ambrose’s case for the entry of judgment denying habeas relief. *See id.* at 580-82. The Supreme Court denied Ambrose’s subsequent petition for a writ of certiorari. *Ambrose*, 136 S. Ct. 2461.

“[A]pplying the actual prejudice standard announced in *Ambrose II*, as clarified in *Ambrose IV*,” a magistrate judge issued a report recommending denying Carter’s petition as procedurally defaulted on the basis that Carter had failed to show prejudice. Over Carter’s objections, the district court adopted the report, denied the petition, and declined to issue a COA. Carter filed a motion to alter or amend the judgment, which the district court denied.

To obtain a COA, an applicant must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). To satisfy this standard, the applicant must demonstrate “that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). To obtain a certificate of appealability from the denial of a habeas petition on procedural grounds, an applicant must show that reasonable jurists would find it “debatable whether the petition states a

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valid claim of the denial of a constitutional right” and that reasonable jurists “would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

To show prejudice, Carter must demonstrate a “reasonable probability that a different (e.g., properly selected) jury would have reached a different result, ‘a probability sufficient to undermine confidence in the outcome of the trial.’” *Ambrose IV*, 801 F.3d at 578 (quoting *Strickland*, 466 U.S. at 694). “The most important aspect to the inquiry is the strength of the case against the defendant.” *Ambrose II*, 684 F.3d at 652. “[A] transcript could show a case against [petitioner] so strong, and defense so weak, that a court would consider it highly improbable that an unbiased jury could acquit.” *Id.* (quoting *Hollis*, 941 F.2d at 1483).

Reasonable jurists would not debate the district court’s conclusion that Carter failed to demonstrate prejudice. At trial, prosecutors played video surveillance tape footage from the gas station that was robbed showing the robbery and introduced still photographs from the tape into evidence. Jessie Adrianson, the manager of the gas station, testified that she was able to observe the robber and positively identified Carter as the robber and as the individual depicted in the photographs. Adrianson’s in-court identification followed her earlier positive identification of Carter in a police line-up as the robber. Adrianson’s description of the robber to police following the incident matched a later police description of Carter at the time he was arrested. Detective Erica Clark testified specifically that Carter was found with a black fleece coat, two gold hoop earrings, and a pack of Kool cigarettes, items which were consistent with Adrianson’s description of the robber. Following Carter’s arrest, his conversations were monitored and he was recorded saying, among other things, that his wife should dispose of a gun that was needed to make the “case” against him.

In opposition, the defense did not present any witnesses or evidence. The defense instead attempted to argue that Carter was misidentified and that the prosecution’s other evidence did not establish Carter’s culpability. “[T]o successfully argue that it is reasonably probable that a different jury would have accepted the defense theory, and thus have reached a different result, a

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defendant must show that there is some support for that theory.” *Ambrose II*, 801 F.3d at 581. Carter did not produce any evidence in support of his theory of misidentification. Accordingly, reasonable jurists would not debate whether the district court was correct in its procedural reasoning. *Slack*, 529 U.S. at 484.

Reasonable jurists would also not debate whether the district court was correct in denying Carter’s motion to alter or amend the judgment. In that motion, Carter sought a COA on the issue of whether “prejudice should be presumed in cases involving underlying structural error.” However, as the district court correctly observed, this court had already decided that issue, requiring Carter to show “actual prejudice to excuse [his] procedural default, even if the error is structural.” 684 F.3d at 649. Carter based his request on the Supreme Court’s grant of certiorari in the case of *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017). The Supreme Court has since decided *Weaver*, and the holding of *Weaver* is unavailing for Carter. See *Weaver*, 137 S. Ct. at 1913-14 (holding that prejudice is not presumed in cases involving claims of ineffective assistance of counsel that result in structural error). Accordingly, reasonable jurists would not debate whether the district court was correct in its procedural reasoning. See *Slack*, 529 U.S. at 484.

For the foregoing reasons, Carter’s application for a COA is **DENIED**.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

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

Deborah S. Hunt
Clerk

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Filed: August 30, 2017

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Re: Case No. 17-1409, *Gregory Carter v. Blaine Lafler*
Originating Case No. : 1:09-cv-00215

Dear Counsel,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Robin Baker
Case Manager
Direct Dial No. 513-564-7027

cc: Mr. Thomas Dorwin

Enclosure

No mandate to issue

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GREGORY CARTER,

Petitioner,

v.

BLAINE LAFLER,

Respondent.

CASE NO. 1:09-CV-215

HON. ROBERT J. JONKER

ORDER DENYING MOTION TO AMEND JUDGMENT

This is a habeas corpus action brought by a state prisoner under 28 U.S.C. § 2254. On January 19, 2017, this Court issued an opinion and judgment (ECF Nos. 92, 93) dismissing the application for habeas relief. The matter is presently before the Court on Petitioner's motion to alter or amend the judgment (ECF No. 94).

To establish a basis for relief under Rule 59, a plaintiff must show an "error of law" by the Court, "newly discovered evidence," or an "intervening change in controlling law." *GenCorp, Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 833-34 (6th Cir. 1999). Alternatively, the plaintiff must establish that relief is warranted to prevent "manifest injustice." *Id.*

Petitioner requests relief in the form of a certificate of appealability to the Sixth Circuit to decide whether "prejudice should be presumed in cases involving underlying structural error." (ECF No. 94, PageID.1013). But the Sixth Circuit has already decided that issue in the context of this case, where Plaintiff has been procedurally barred from raising his Sixth Amendment fair cross-section claim on collateral review by failing to object to what was a structural error at trial. In *Ambrose v. Booker*, 684 F.3d 638, 640-41 (6th Cir. 2012), the Sixth Circuit held that "[h]aving shown cause,

petitioners must [also] show actual prejudice to excuse their default, even if the error is structural.” *Id.* at 649. And the Supreme Court denied certiorari to hear Petitioner’s appeal of the Sixth Circuit’s holding in that case. *See Ambrose v. Booker*, 133 S. Ct. 993, No. 12-7784, (Jan. 22, 2013). The Supreme Court previously highlighted the difference between direct review and collateral attack in assessing the need for actual prejudice. “In a collateral attack upon a conviction . . . [Supreme Court precedent] requires . . . not only a showing of ‘cause’ for the defendant’s failure to challenge the composition of the grand jury before trial, but also a showing of actual prejudice.” *Francis v. Henderson*, 425 U.S. 536, 542 (1976).¹

Petitioner cites to the Supreme Court’s grant of certiorari in *Weaver v. Massachusetts*, ___ U.S. ___, 137 S. Ct. 809 (2017), claiming the outcome in that case may affect the Court’s holding here. Perhaps, though, that case will decide whether prejudice is presumed in an entirely different context: namely, a defendant’s claim, raised on direct review, of ineffective assistance of counsel that results in structural error. As the Supreme Court has emphasized, “[t]he principle that collateral review is different from direct review resounds throughout our habeas jurisprudence.” *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993). “When the process of direct review . . . comes to an end, a presumption of finality and legality attaches to the conviction and sentence.” *Id.* “To hold that the presumption of prejudice applies not only when properly preserved structural errors are raised on appeal but also when related . . . claims are raised in a collateral proceeding would diminish the difference between direct and collateral review.” *Purvis v. Crosby*, 451 F.3d 734, 743

¹The error raised in the *Francis* case was the unconstitutional systematic exclusion of African-Americans from the grand jury, a structural error. In a footnote, the Supreme Court stated that “[t]he presumption of prejudice which supports the existence of the right is not inconsistent with a holding that actual prejudice must be shown in order to obtain relief from a statutorily provided waiver for failure to assert it in a timely manner.” *Id.* at 542 n.6 (citing *Davis v. United States*, 411 U.S. 233, 245 (1973)).

(11th Cir. 2006). In any event, if the outcome in *Weaver* demands a different analysis from the Sixth Circuit, the impetus should come from the Supreme Court or the Circuit Court.

Under current settled authority, there is no reason for altering or amending the judgment in this case.

IT IS ORDERED that Petitioner's motion to alter or amend the judgment (ECF No. 94) is **DENIED**.

Dated: March 24, 2017

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

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GREGORY CARTER,

Petitioner,

CASE NO. 1:09-CV-215

v.

HON. ROBERT J. JONKER

BLAINE LAFLER,

Respondent.

_____ /

JUDGMENT

In accordance with the Opinion and Order Approving and Adopting Report and Recommendation entered this day, Judgment is entered in favor of the named Respondent and against Petitioner Gregory Carter.

Dated: January 19, 2017

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

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GREGORY CARTER,

Petitioner,

CASE NO. 1:09-CV-215

v.

HON. ROBERT J. JONKER

BLAINE LAFLER,

Respondent.

**ORDER APPROVING AND ADOPTING
REPORT AND RECOMMENDATION**

The Court has reviewed Magistrate Judge Kent's Report and Recommendation in this matter (ECF No. 88) and Petitioner Carter's Objection to it (ECF No. 91). Under the Federal Rules of Civil Procedure, where, as here, a party has objected to portions of a Report and Recommendation, "[t]he district judge . . . has a duty to reject the magistrate judge's recommendation unless, on de novo reconsideration, he or she finds it justified." 12 WRIGHT, MILLER, & MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3070.2, at 381 (2d ed. 1997). Specifically, the Rules provide that:

The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

FED R. CIV. P. 72(b)(3). De novo review in these circumstances requires at least a review of the evidence before the Magistrate Judge. *Hill v. Duriron Co.*, 656 F.2d 1208, 1215 (6th Cir. 1981). The Court has reviewed de novo the claims and evidence presented to the Magistrate Judge; the Report and Recommendation itself; and Petitioner's Objection to it. After its review, the Court

finds that Magistrate Judge Kent's Report and Recommendation is factually sound and legally correct.

The Magistrate Judge recommends denying the habeas petition on the basis that Petitioner has failed to establish the actual prejudice necessary to overcome his procedural default. In his Objection, Petitioner fails to address the compelling evidence of Petitioner's guilt presented at trial. The Report and Recommendation carefully, thoroughly, and accurately discusses this evidence. For example, Petitioner Carter's sentencing judge found that "Mr. Carter was convicted by . . . overwhelming evidence," including "a videotape of the robbery" that was of "excellent" quality and "showed very clearly Mr. Carter robbing this particular convenience store." (ECF No. 11, Sent. Trans. at 4). Additionally, the Magistrate Judge describes the victim's unwavering description and identification of Petitioner as the robber, the details of which were corroborated by the black fleece jacket, hoop earrings, and pack of Kool cigarettes in the robber's possession at the time of his arrest. The Court agrees with the Magistrate Judge's conclusion that Petitioner's habeas petition should be dismissed, for the very reasons the Report and Recommendation delineates.

ACCORDINGLY, IT IS ORDERED that the Report and Recommendation of the Magistrate Judge (ECF No. 88) is approved and adopted as the opinion of the Court.

IT IS FURTHER ORDERED that the habeas petition (ECF No. 1) is **DENIED** and this case is **DISMISSED**.

Dated: January 19, 2017

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

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GREGORY CARTER,

Petitioner,

Case No. 1:09-cv-215

v.

Hon. Robert J. Jonker

BLAINE C. LAFLER,

Respondent.

REPORT AND RECOMMENDATION

This is a habeas corpus action brought by a state prisoner pursuant to 28 U.S.C. § 2254. The petition was dismissed and is now before the Court on remand from the Sixth Circuit Court of Appeals.

I. Background

This case arose from the September 28, 2000 robbery of a Speedway gas station in Grand Rapids, Michigan. On May 9, 2001, after a trial in the Kent County Circuit Court, a jury convicted petitioner of armed robbery, M.C.L. § 750.529, and possession of a firearm during the commission of a felony, M.C.L. § 750.227b. *People v. Gregory Carter*, No. 235590, 2003 WL 1795513 at *1 (Mich. App. April 3, 2003). Petitioner was sentenced to two years incarceration for the felony firearm charge, to be served consecutive “to the term of incarceration which he’s currently serving and for which he was on parole at the time of this offense.” Sent. Trans. (docket no. 11, PageID.190). In addition, petitioner was sentenced to a term of 15 to 40 years in prison for the armed robbery conviction, consecutive to the felony firearm sentence. *Id.*

Petitioner presented three issues in his direct appeal to the Michigan Court of Appeals:

- I. Did the court err by allowing a police officer to testify as to her impressions of alleged statements made by [petitioner] in tape-recorded statements from the jail without a proper foundation for admission and in violation of the best evidence rule, denying [petitioner] his due process right to a fair trial?
- II. Was [petitioner] denied the effective assistance of counsel where counsel failed to file an alibi notice or to investigate and prepare an alibi defense?
- III. Did the trial court abuse its discretion in denying counsel's motion to withdraw?

See Brief on Appeal (docket no. 15). The Michigan Court of Appeals affirmed the conviction. *People v. Gregory Carter*, No. 235590. Petitioner did not appeal any of these issues to the Michigan Supreme Court. *See* Corbin R. Davis Affidavit (docket no. 12).

On October 27, 2003, the state trial court entered an opinion and order denying petitioner's motion for relief from judgment, identifying petitioner's three claims as follows:

In his pleadings, Defendant seeks Relief from Judgment pursuant to MCR 6.501 on the grounds that he was denied his right to a fair trial due to flaws in the Kent County jury selection which he alleges "systematically excluded" minorities from the jury pool, ineffective assistance of counsel, and resentencing.

Opinion and Order at 1 (docket no. 13).

Petitioner's first two claims are relevant to this habeas action. The trial court set forth the following analysis with respect to the jury issue:

1. Systematic Exclusion of Minorities from the Jury Pool

In 2001, Kent County's jury selection process came under intense media scrutiny. It was alleged that the system was fundamentally flawed, leading to a systematic exclusion of minority jurors from the jury pool. Following media

coverage of this problem, the County determine that a flaw in the random computer process could, in fact, lead to the disproportionate exclusion of minorities from the jury pool. The system was subsequently corrected.

Following this revelation many defendants requested new trials on the basis that they were denied their constitutional right to a fair trial by virtue of this flawed system. The Court of Appeals addressed this issue recently in *People v. McKinney*, ___ Mich App ___; ___ NW2d ___ (2003) (Slip copy). In this case the defendant claimed that African-Americans were “systematically excluded from Kent County’s jury venires when her trial was conducted.” *Id.* at ___. The defendant in this case cites the same newspaper articles that the defendant in the instant matter has attached as exhibits. The Court of Appeals stated:

Questions concerning the systemic exclusion of minorities in jury venires are generally reviewed de novo. *People v. Hubbard (After Remand)*, 217 Mich.App. 459, 472, 552 N.W.2d 493 (1996). “A criminal defendant is entitled to an impartial jury drawn from a fair cross section of the community.” *Id.*, citing *Taylor v. Louisiana*, 419 U.S. 522, 526-531, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). To establish a prima facie violation of the fair cross-section requirement, the defendant bears the burden of proving “that a distinctive group was underrepresented in his venire or jury pool, and that the underrepresentation was the result of systematic exclusion of the group from the jury selection process.” *People v. Smith*, 463 Mich. 199, 203, 615 N.W.2d 1 (2000), citing *Duren v. Missouri*, 439 U.S. 357, 364, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979).

The Court of Appeals went on to deny the request for a new trial because defendant had not raised the issue before the jury was empannelled and sworn. *Id.* at ___. See also *People v. Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996). Likewise, the defendant in the instant matter failed to raise this as an objection during his trial, and the motion for a new trial should similarly be dismissed.

Id. at 2-3.¹

The trial court also denied petitioner’s ineffective assistance of counsel claim, providing in pertinent part as follows:

¹ The Michigan Court of Appeals decision in *McKinney* has since been published as *People v. McKinney*, 258 Mich. App 157; 670 NW2d 254 (2003).

The Defendant's argument, in sum, is that his trial counsel was ineffective due to his failure to investigate a possible alibi defense. The defendant alleges that he was at a treatment facility in Illinois at the time of the incident. However, this defense was raised on the evening following the first day of the trial. Furthermore, the defense counsel did contact the treatment facility and was informed that the Defendant had not been admitted to the program. Additionally, the defense counsel attempted to contact the Defendant's parole officer, but was unable to do so. The Defendant, therefore, has failed to establish that the defense counsel acted unreasonably under the circumstances, and his claim of ineffective assistance of counsel must fail. *People v. Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

Id. at 4.

The court summarized its decision denying petitioner's claims as follows:

During his trial, the Defendant did not object to the composition of the jury, and therefore, this issue was not properly preserved and can not constitute grounds for a new trial pursuant to MCR 6.500. Likewise, Defendant has not met the burden necessary under *People v. Pickens*, 446 Mich 298, 314; 531 NW2d 797 (1994) which adopted the test for ineffective assistance of counsel that was articulated in *Strickland v. Washington*, 446 US 668, 694; 104 Sct 2052; 80 LE2d 674 (1984). Furthermore, Defendant's allegations of error relating to his sentence are without merit.

Id. at 1.

Petitioner filed a delayed application for leave to appeal this order to the Michigan

Court of Appeals, raising two issues (in his words):

- I. Did the trial court rule erroneously, when it ruled that by defendant counsel failure to object to the composition of the jury at trial, therefore, his issue was not properly preserved and can not constitute ground for a new trial pursuant to MCR 6.500.
- II. Was the defendant denied his United States Sixth and Fourteenth Amendments rights to representation by a jury from a fair cross-section of the community. Whereas, there was a serious flaw in the Kent County computerized jury selection system which systematically excluded minority jurors from the jury pool.

Application for leave to appeal (docket no. 13).

The Michigan Court of Appeals denied the delayed application “for failure to meet the burden of establishing entitlement to relief under MCR 6.508(D).” *People v. Gregory Carter*, No. 254482 (Mich. App. Aug. 20, 2004) (docket no. 13). Petitioner raised the same two issues in his application for leave to appeal to the Michigan Supreme Court, which denied the application “because defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).” *People v. Gregory Carter*, No. 127081 (Mich. May 31, 2005).

Petitioner filed a federal habeas petition in the Eastern District of Michigan on February 9, 2006, raising the following issue (in his words):

Whether or not petitioner was denied due process of law in violation of his Sixth and Fourteenth Amendments of the United States Constitution to be represented by a jury from a fair cross section of the community, whereas, there was a serious flaw in the selection process of the Kent County jury selection pool which was programmed to systematically exclude minorities from the jury selection process.

Petition at ¶ 13 (docket no. 1). In his attached memorandum of law, petitioner also argued that the trial court “ruled erroneously when it ruled that by petitioner’s counsel’s failure to object to the composition of the [jury] at trial, therefore, the issue was not properly preserved and cannot constitute grounds for a new trial pursuant to MCR 6.500.” *Id.* at p. 17. In his answer, respondent asserted that petitioner’s claim regarding the systematic exclusion of minorities from the jury pool was barred from habeas review by procedural default in the state court. In petitioner’s reply, he referred to a Grand Rapids Press newspaper article from October 20, 2002, in which the Kent County Circuit Court’s Chief Judge acknowledged the problem. Petitioner also asserted that a competent attorney could not have provided assistance under these circumstances, because the flaw in the jury selection procedure was discovered long after his trial.

In reviewing the petition, a magistrate judge in the Eastern District summarized two newspaper articles from the *Grand Rapids Press* which addressed the “computer glitch” which resulted in the omission of eligible jurors with certain ZIP codes in Kent County. *See* Report and Recommendation (“R&R”) (July 2, 2008) (docket no. 26, PageID.338-339). The magistrate judge concluded that while petitioner’s jury selection claim was procedurally defaulted, the procedural default should be excused because “neither petitioner nor his counsel had any reason to suspect that the fair cross-section requirement had been violated, nor any reason to conduct an investigation into Kent County’s jury selection practices.” *Id.* at PageID.341. In excusing the procedural default, the magistrate judge did not address the issue of prejudice. *Id.* *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991) (review of a federal habeas claim can be excused where “the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law”). Nevertheless, the magistrate judge concluded that an evidentiary hearing was necessary. R&R (July 2, 2008) at PageID.344.

In its order adopting the R&R, the district court adopted the recitation of facts as set forth by the magistrate judge and expressed its belief that an evidentiary hearing was proper because petitioner had not had an opportunity to show his prima facie case under *Duren v. Missouri*, 439 U.S. 357. Opinion and Order (docket no.29, PageID.359, 367). The court concluded that the claim was procedurally defaulted, but found that there was cause for the default:

Here, as set forth by the Magistrate Judge, the factual basis of petitioner’s fair cross-section claim was reasonably unknown to Petitioner and his counsel at the time the jury was sworn. The alleged systematic exclusion resulted from an unknown computer glitch that was not discovered until several months after Petitioner’s conviction. Petitioner may assert ineffective assistance of counsel as cause for his procedural default.

Id. at PageID.363. After ruling on these issues, the district court transferred this habeas action to the Western District “for an evidentiary hearing and determination on the Sixth Amendment claim.” *Id.* at PageID.367.

After transfer to the Western District, a magistrate judge entered a report which respectfully disagreed with the previous order for an evidentiary hearing. *See* R&R (Dec. 18, 2009) (docket no. 39). While the magistrate judge concluded that petitioner’s habeas claim was procedurally defaulted, he recommended that this Court reconsider the previous determination that petitioner had demonstrated cause for the procedural default:

Where “a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claim is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice.” *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). A procedural default “provides an independent and adequate state-law ground for the conviction and sentence, and thus prevents federal habeas corpus review of the defaulted claim, unless the petitioner can demonstrate cause and prejudice.” *Gray v. Netherland*, 518 U.S. 152, 162 (1996). Not every state procedural rule will warrant application of the procedural default doctrine. Only a procedural rule that was “‘firmly established and regularly followed’ by the time as of which it [was] to be applied,” *Ford v. Georgia*, 498 U.S. 411, 424 (1991), will support application of the doctrine. “For a habeas claim to be procedurally defaulted on the basis of a state procedural rule, the petitioner must have violated a procedural rule, but the state court must also have based its decision on the procedural default.” *Simpson v. Jones*, 238 F.3d 399, 407 (6th Cir. 2000). MCR 6.508(D) is a valid procedural bar for habeas purposes. *See Canty v. Cason*, No. 02-2030, 2003 WL 152322 (6th Cir. Jan. 16, 2003); *Burroughs v. Makowski*, 282 F.3d 410, 414 (6th Cir. 2002); *Luberda v. Trippett*, 211 F.3d 1004, 1008 (6th Cir. 2000).

The Kent Circuit Court was the first state court to review petitioner’s habeas claims, which were raised in his motion for relief from judgment under MCR 6.500 *et seq.* Both the Michigan Court of Appeals and the Michigan Supreme Court denied petitioner’s application for leave to appeal the trial court’s order denying post-judgment relief because he failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). As the last state court rendering judgment in the case,

the Michigan Supreme Court's decision denying petitioner's claims on the basis of the state procedural bar of MCR 6.508(D) prevents habeas review. *See Burroughs*, 282 F.3d at 414; *Simpson v. Jones*, 238 F.3d 399, 407 (6th Cir. 2000). Accordingly, petitioner's claims are procedurally defaulted. *See Order of Transfer* at pp. 4-5.

However, the undersigned concludes that this court should re-consider the Order of Transfer to the extent that order found that petitioner had shown good cause to excuse the procedural default. The "good cause" determination is inconsistent with previous decisions entered in this district in similar cases. *See, e.g., Wellborn v. Berghuis*, No. 1:05-cv-346, 2009 WL 891708 at *21-27 (W.D. Mich. March 31, 2009), appeal pending, No. 09-1539 (6th Cir.); *Burros v. Curtin*, 1:05-cv-701, 2009 WL 736066 at *5-12 (W.D. Mich. March 18, 2009).

Since petitioner procedurally defaulted this claim in state court, the claim is barred unless he demonstrates either: (1) cause for his failure to comply with the state procedural rule and actual prejudice flowing from the violation of federal law alleged in his claim, or (2) that a lack of federal habeas review of the claim will result in a fundamental miscarriage of justice. *See House v. Bell*, 547 U.S. 518, 536-37 (2006); *Murray v. Carrier*, 477 U.S. 478, 495 (1986); *Hicks v. Straub*, 377 F.3d 538, 551-52 (6th Cir. 2004).

To show cause sufficient to excuse a failure to raise claims on direct appeal, petitioner must point to "some objective factor external to the defense" that prevented him from raising the issue in his first appeal. *McCleskey v. Zant*, 499 U.S. 467, 497 (1991); *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

Petitioner's claim arises from the Sixth Amendment's guarantee that a criminal defendant shall have an impartial jury drawn from a fair cross-section of the community. *Duren v. Missouri*, 439 U.S. 357, 358-59 (1979); *Taylor v. Louisiana*, 419 U.S. 522, 526-31 (1975). The petit jury does not have to mirror the community, but distinct groups cannot be systematically excluded from the venire. *See, United States v. Jackman*, 46 F.3d 1240, 1244 (2nd Cir. 1995). To establish a *prima facie* violation of the fair cross-section requirement, petitioner bore the burden of proving "that a distinctive group was under-represented in his venire or jury pool, and that the under-representation was the result of systematic exclusion of the group from the jury selection process." *People v. Smith*, 463 Mich. 199 (2000), citing *Duren v. Missouri*, *supra*.

While petitioner bases the present habeas claim on the ground that he "was found guilty by an all white jury," Petition at p. 4, he did not challenge the jury array at trial. If petitioner felt the jury venire was unbalanced, he did not say so. Rather, at the close of the jury voir dire, petitioner's counsel stated that "the defense is satisfied." Trial Trans. at 72 (May 7, 2001) (docket no. 8). The jury was then

empaneled and sworn. There were no objections regarding the composition of the jury array at any time during the trial, much less the voir dire, and trial counsel's statement constituted an express waiver of the issue. Petitioner did not raise this issue in his direct appeal. Rather, he first raised it in his motion for relief from judgment. At that time, petitioner apparently relied on a newspaper article from October 20, 2002 to support his claim that Kent County's jury selection process "was programmed in a manner that it would systematically exclude minorities from the jury selection pool." Petitioner's Memorandum of Law at 4.

For cause, petitioner contends that the error was not procedurally defaulted because the flaw in the jury selection process, i.e., the under-representation of African Americans, was not discovered until after he filed his appeal of right. The court disagrees. Simply seeing an array when the deficiency is apparent provides a defendant and his attorney with adequate notice. Petitioner did not need to know the precise nature of the computer problem to object to the lack of African Americans on the jury array.

R&R (Dec. 18, 2009) at PageID.423-426. Ultimately, the magistrate judge concluded that petitioner did not demonstrate cause for the procedural default. *Id.* at PageID.426-429.

After finding no cause, the magistrate judge concluded that the procedural default was not excused:

Petitioner's failure to demonstrate cause for his procedural default prevents federal review of his habeas claims unless the court's failure to do so will result in a "fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. The miscarriage-of-justice exception only can be met in an "extraordinary" case where a prisoner asserts a claim of actual innocence based upon new reliable evidence. *House*, 547 U.S. at 537. A habeas petitioner asserting a claim of actual innocence must establish that, in light of new evidence it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt. *Id.* (citing *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). Petitioner has made no such claim or showing of actual innocence in this case.

Accordingly, petitioner's claim is procedurally barred on habeas review.

Id. at PageID.429 (footnote omitted).

The district judge adopted the recommended disposition and dismissed the petition.

See Order Approving R&R (docket no. 42); Judgment (docket no. 43). However, the Court issued

a certificate of appealability on whether petitioner's due process claim was barred by procedural default. Order Approving R&R at PageID.446-447.

Petitioner appealed the decision to the Sixth Circuit, where his case was joined with two other cases, *Ambrose v. Booker*, 781 F. Supp.2d 532 (E.D. Mich. 2011) ("*Ambrose I*"), and *Wellborn v. Berghuis*, 1:05-cv-346 (W.D. Mich. March 31, 2009), which involved the same alleged computer problem in the jury selection. See *Ambrose v. Booker*, 684 F.3d 638 (6th Cir. 2012) ("*Ambrose II*"). However, the three cases reached different results, i.e., the habeas petition was granted in *Ambrose* and denied in *Carter* and *Wellborn*. As discussed, *infra*, the Sixth Circuit reversed and remanded all three cases in *Ambrose II*.

As an initial matter, the Sixth Circuit summarized petitioner's claim as follows:

These habeas petitions involve the far-reaching effects of an unintentional computer glitch that caused the systematic underrepresentation of African-Americans in the jury pools of Kent County, Michigan. The three petitioners received separate jury trials in Kent County in either 2001 or 2002. At jury selection, the petitioners did not object to the racial composition of their respective jury venires, and were subsequently convicted. A few months later, the Grand Rapids Press published a story detailing how Kent County's jury selection software had a computer glitch that had systematically excluded African-Americans from the jury pool. In light of these revelations, the petitioners each filed motions for post-conviction relief in state court. The state court found that the petitioners had waived these claims by failing to object to the racial composition of the jury venire during voir dire.

* * *

Gregory Carter's habeas petition was reviewed by both the Eastern and Western Districts of Michigan, which came to opposite conclusions. A jury convicted Carter of armed robbery of a convenience store in Kent County, Michigan. At trial, the prosecution presented "overwhelming" evidence of the robbery, including a videotape which showed Carter robbing the store. *Carter v. Lafler*, No. 1:09-cv-215, 2010 WL 160814, at *1 (W.D. Mich. Jan. 8, 2010). Petitioner was sentenced to two years' incarceration for a felony firearm charge to be served consecutively with a term of 15 to 40 years' imprisonment for the armed robbery.

Id. Carter did not object to the venire panel at trial, and did not challenge the panel's composition at any stage of his direct appeal.

In light of the revelations about the problems with Kent County's jury selection system, Carter initiated state post-conviction proceedings under M.C.R. 6.501. In his motion, Carter challenged the composition of the jury based on flaws in the Kent County jury selection system, and raised an ineffective assistance of counsel claim. The trial court denied the motion, reasoning that Carter had defaulted by failing to object to the venire's composition before the jury was empaneled. Further, the trial court found that Carter's ineffective assistance of counsel claim failed under Michigan's version of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Carter applied for leave to appeal, but both the Michigan Court of Appeals and Michigan Supreme Court denied the application "for failure to meet the burden of establishing entitlement to relief under MCR 6.508(D)." *People v. Carter*, No. 254482 (Mich. App. Aug. 20, 2004); *People v. Carter*, 472 Mich. 912, 696 N.W.2d 714 (2005) (table opinion).

Carter filed a habeas petition in the United States District Court for the Eastern District of Michigan. The district court held that there was cause and prejudice to excuse Carter's procedural default. *Carter v. Lafler*, No. 06-cv-10552, 2009 WL 649889, at *3 (E.D. Mich. Mar. 10, 2009). The district court recognized that Carter had procedurally defaulted by failing to object at trial to the composition of the venire panel. The default was excused, however, because the district court found that Carter could not have known about the systematic exclusion caused by the computer glitch at the time the jury was sworn. *Id.* Having excused the default, the court determined that an evidentiary hearing was necessary to determine whether Carter's jury was empaneled during the period impacted by the computer glitch. *Id.* at *4-5. Because Carter was imprisoned in the Western District of Michigan, and because the trial had occurred in the Western District, the court transferred the action "for an evidentiary hearing and determination on the Sixth Amendment claim." *Id.* at *5.

Upon receiving the case, the Western District of Michigan assigned the case to a magistrate judge. The magistrate judge recommended that the district court deny the habeas petition as procedurally defaulted without an evidentiary hearing. *Carter v. Lafler*, No. 1:09-cv-215, 2010 WL 160814, at *4-13 (W.D. Mich. Jan. 8, 2010). The district court adopted this recommendation because the court determined that Carter had not shown good cause for his procedural default. *Id.* at *3. Although Carter was unaware of the computer glitch at the time of his trial, the district court held that the racial composition of the jury venire gave him notice of his claim. *Id.* Carter timely appeals.

Ambrose II, 684 F.3d at 640, 643-44 (6th Cir. 2012).

Ultimately, the Sixth Circuit found that this Court erred in finding that petitioner did not demonstrate cause to excuse the procedural default, stating in pertinent part:

There is no dispute that petitioners defaulted their claims by failing to object to the jury venire at trial, in violation of Michigan's contemporaneous objection rule. *See, e.g., People v. Dixon*, 217 Mich. App. 400, 552 N.W.2d 663, 667 (1996). However, petitioners have shown "cause and prejudice" sufficient to excuse the default under *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). The cause inquiry "ordinarily turn[s] on whether . . . some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule," and is satisfied by "a showing that the factual or legal basis for a claim was not reasonably available to counsel." *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). As discussed below, petitioners have shown cause because the factual basis for the claim -- the computer glitch -- was not reasonably available to counsel, and petitioners could not have known that minorities were underrepresented in the jury pool by looking at the venire panel. Moreover, the Supreme Court has found cause to excuse a procedural default in a factually similar case. *See Amadeo v. Zant*, 486 U.S. 214, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988).

Id. at 645.

However, the Sixth Circuit did not address whether petitioners met the "prejudice" prong sufficient to excuse a procedural default. Rather, that court remanded the cases to their respective trial courts for a determination of whether actual prejudice existed, instructing the courts to utilize the prejudice standard for ineffective assistance of counsel claims set forth in *Strickland v. Washington*, 466 U.S. 668 (1984):

Because the district courts here did not address actual prejudice, a remand is necessary. We are then left with the question of the proper standard on remand. We are guided in part by the Eleventh Circuit's analysis of a similar question in *Hollis v. Davis*, 941 F.2d 1471, 1480 (11th Cir.1991). In that case, the petitioner claimed that his counsel was ineffective for failing to object to Alabama's systematic exclusion of African-American jurors from grand and petit juries. To excuse this default, the *Hollis* court required that petitioner show actual prejudice, which involved determining whether there was a reasonable probability that "a properly selected jury [would] have been less likely to convict." *Id.* at 1482. The Eleventh Circuit's analysis is persuasive. The most important aspect to the inquiry is the strength of the case against the defendant. As the Eleventh Circuit reasoned, "a

transcript could show a case against [petitioner] so strong, and defense so weak, that a court would consider it highly improbable that an unbiased jury could acquit.” *Id.* at 1483 (internal quotation marks omitted). In that circumstance, actual prejudice would not be shown.

Although the instant petitions do not involve a *Strickland* claim, this standard is appropriate because it balances the competing demands of constitutionally protected equal protection interests and comity toward the state courts. We recognize that the application of the actual prejudice standard in cases such as these presents a particularly challenging charge to the district courts below to answer the question, “what would have happened?” The law nonetheless requires that the question be answered – with a careful look at the transcripts involved, and with judgment that takes into account a fair balance of the competing interests of comity toward the final judgments of the state’s criminal processes and the protection of constitutional equal protection interests.

Ambrose II, 684 F.3d at 652 (footnote omitted).

On remand, this Court appointed as petitioner’s counsel, Attorney Bradley R. Hall of the Federal Defender Office for the Eastern District of Michigan, who was also counsel for the petitioner in the Eastern District case of *Ambrose v. Booker*. The Eastern District case proceeded as the *de facto* lead case on remand. Order (docket no. 60); *see* Order granting “Stipulation to adjourn briefing schedule in anticipation of evidentiary hearing in *Ambrose v. Booker*” (docket no. 68). This Court also appointed Attorney Hall as counsel for petitioner in *Wellborn v. Berghuis*, 1:05-cv-346 (Order, docket no. 57). On September 16, 2013, the court held an evidentiary hearing in *Ambrose v. Booker*, in which petitioner called an expert witness, Samuel Sommers, Ph.D., who “essentially testified that a more diverse jury would have been less likely to convict Ambrose because African-American jurors are statistically less likely to convict than their Caucasian counterparts.” *Ambrose v. Booker*, 24 F. Supp. 3d 626, 640 (E.D. Mich. 2014) (“*Ambrose III*”).² Ultimately, the court concluded that “[b]ased on Dr. Sommers’s testimony, and the fact that there

² The Court notes that a transcript of Dr. Sommers’ testimony appears as docket no. 72-3.

is a reasonable probability that a properly selected jury in Ambrose’s case would have included at least one African American, Ambrose has demonstrated actual prejudice to excuse his default so long as the evidence against him was not overwhelming.” *Id.* at 653. The court went on to address the merits of the claim and found that “Ambrose has satisfied his prima facie showing of a violation of the fair cross-section requirement; a showing that has not been rebutted by the State. His habeas petition will be granted.” *Id.* at 658.

Respondent appealed and, once again, the Sixth Circuit reversed. *See Ambrose v. Booker*, 801 F.3d 567 (6th Cir. 2015) (“*Ambrose IV*”). In *Ambrose IV*, the Sixth Circuit found that the district court applied the wrong prejudice standard on remand and reiterated that the actual prejudice standard in *Strickland* applied:

As an initial matter, the district court on remand should not have applied a less stringent *Hollis* – rather than the *Strickland* – prejudice standard to determine whether to excuse Ambrose’s procedural default. The “actual prejudice” inquiry outlined in *Ambrose v. Booker*, 684 F.3d 638, 652 (2012), was intended to mirror the inquiry required by *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts must consider whether, in light of the underrepresentation of African Americans in the jury venire, “there is a reasonable probability that . . . the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. Stated another way, courts must ask, is there a reasonable probability that a different (e.g., properly selected) jury would have reached a different result, “a probability sufficient to undermine confidence in the outcome of the trial.” *Id.*

Ambrose IV, 801 F.3d at 577-78.

Next, the Sixth Circuit stated that the district court in *Ambrose III* should not have relied on Dr. Sommers’ testimony in reaching its result:

The district court also should not have relied on Dr. Sommers’ expert testimony – in which Dr. Sommers stated that racially diverse juries are less likely to convict than all-white juries – in making the court’s “actual prejudice” determination. Dr. Sommers’ testimony is not relevant to the “actual prejudice”

determination because it: (1) does not support a finding that a different jury would have reached a different result; (2) lacks any individualized assessment of the case against Ambrose; and (3) relies on impermissible racial stereotypes.

Id. at 579 (6th Cir. 2015).

Then, the Sixth Circuit found that petitioner did not demonstrate actual prejudice, stating in pertinent part:

Ultimately, under the stricter *Strickland* standard, and without consideration of Dr. Sommers' testimony, Ambrose has failed to show actual prejudice to excuse his procedural default. Though a careful review of the record reveals some inconsistencies in the trial testimony of the two victims, and the prosecution, admittedly, failed to explain why Ambrose – after carjacking the victims at gunpoint and stealing their possessions – would later abandon the car with a cell phone, gold and silver jewelry, and a watch still inside, these issues on their own do not create a reasonable probability that a different jury would have reached a different result, a probability sufficient to undermine confidence in the outcome. “The most important aspect to the [actual prejudice] inquiry is the strength of the case against the defendant,” which requires courts to take a “careful look at the transcripts involved.”

Id. at 580. After reviewing the record, the Sixth Circuit concluded that “[b]ecause Ambrose failed to show actual prejudice to excuse his procedural default, his petition for writ of habeas corpus should have been denied.” *Id.* at 582. Finally, petitioner sought a writ of certiorari, which the Supreme Court denied on June 13, 2016. *See Ambrose v. Romanowski*, 136 S. Ct. 2461 (2016). Based on this record, the Court is to evaluate petitioner's claim by applying the actual prejudice standard announced in *Ambrose II*, as clarified in *Ambrose IV*.

II. Evidence presented at trial

A. Prosecution's case in chief

1. Testimony of Jessie Adrianson

On September 28, 2000, Ms. Adrianson (sometimes referred to as the “victim”) was managing a Speedway gas station in Grand Rapids, Michigan. Trial Trans. II (docket no. 9,

PageID.143).³ At approximately 9:40 p.m., petitioner walked in holding a pistol, held the pistol up to her and said, “Give me the money.” *Id.* Adrianson gave him all of the cash in the drawer. *Id.* Petitioner told her to lift the drawer out. *Id.* She complied, but there was nothing underneath it. *Id.* Then, petitioner told her, “That’s not all you have.” *Id.* Ms. Adrianson, being afraid that petitioner was going to shoot her, opened up the second drawer and gave him all of the cash out of that register. *Id.* She gave petitioner approximately \$200.00 total from two cash registers. *Id.* at PageID.144. After she gave him the money, petitioner wanted a carton of Kool cigarettes, which she gave him. *Id.* Petitioner shoved the money in his pocket and put the pistol down into his pants, in the waistband. *Id.* When petitioner left, “he just kind of waived [sic] the cigarettes, and said, ‘Don’t call the police.’” *Id.*

Ms. Adrianson saw him walk around the back of the building, towards a park. *Id.* at PageID.144-145. She made eye contact with him again through the windows. *Id.* at PageID.145. In Ms. Adrianson’s words, “I watched him -- watched his face as he walked around the building.” *Id.* As soon as petitioner walked around the building, she “locked the door and pushed the panic button.” *Id.* It was unnecessary for her to call the police, who arrived a couple of minutes later. *Id.* When the police arrived, she gave the following description to an officer:

I told him it was a black male, 5’9”, 5’10”; he had a light mustache; he had braids in his hair closely braided to his head; he had earrings in his ears, small hoop earrings; he had a black -- like a fleece zip-up shirt, blue jeans and tennis shoes.

Id. at PageID.148.

³ The Court notes that the transcript from the first day of trial is designated “Transcript of Trial - Volume II,” while the transcript from the second day of trial is designated as “Transcript of Trial - Volume I.”

At trial, Ms. Adrianson positively identified petitioner as the robber. *Id.* at PageID.143. After eliciting testimony from Ms. Adrianson about the use of security cameras at the store, the prosecution played a videotape of the robbery for the jury, with explanations provided by the victim, and still photographs from the videotape were admitted into evidence. *Id.* at PageID.145-147.⁴ Ms. Adrianson identified petitioner as the person depicted in the photographs robbing the store. *Id.* at PageID.145-148.

Ms. Adrianson was shown a photographic line-up on October 10, 2000, but did not identify anyone from the six photographs shown to her on that date. Trial Trans. II at PageID.150; Trial Trans. I (docket no. 10, PageID.167). Petitioner's picture was not among the photographs shown to her at that time. Trial Trans. II at PageID.151. Then, on December 21, 2000, police contacted Ms. Adrianson to view a line-up. *Id.* at PageID.148. The police brought between six and eight men into a room where they could be seen but could not see the witness. *Id.* The detectives told Ms. Adrianson they thought they had a suspect, but needed her to identify the suspect if he was present in the lineup. *Id.* All of the individuals in the lineup were also asked to speak. *Id.* at PageID.150. Ms. Adrianson identified petitioner in the lineup and was "absolutely positive" that he was the man who robbed her. *Id.* at PageID.149.

2. Testimony of Grand Rapids Police Department (GRPD) Officer Jonathan Baak

GRPD Officers Baak and William Nowicki were dispatched to the scene of the robbery on September 28, 2000. *Id.* at PageID.151-152; *see also*, Officer Nowicki's testimony at PageID.156. Officer Baak interviewed Ms. Adrianson, who described the robber as a black male in his mid-30's; 5'8-to-5'9; 160-to-170 pounds; with hair braided close to the scalp and longer in the

⁴ The photographs appear in this Court's record as docket no. 81.

back; and, wearing a black long sleeved fleece pull-over, blue jeans, and white tennis shoes. *Id.* at PageID.152. She also described the robber as having “light mustache bumps on the face, and an earring in both ears.” *Id.* She described the weapon as “a large, silver colored handgun.” *Id.*

3. Testimony of GRPD Officer Nowicki

GRPD Officer Nowicki, who secured the scene with Officer Baak, received information concerning a car that may have been used in the robbery. *Id.* at PageID.156. A Kent County Sheriff’s Department Detective met them at the scene and told Nowicki that a suspicious vehicle had been seen that evening casing another gas station in Ada, Michigan. *Id.* at PageID.156-157. Nowicki reported the description of the vehicle, and sent two officers to the address listed on the car’s registration at 1211 Beamus Street. *Id.* Nowicki went to the address when the officers on the scene reported that the car had arrived. *Id.* The car was registered to Irene Carter (petitioner’s mother). *Id.*; *see* Trans. I at PageID.166. There were two occupants of the car, a man and a woman, Mario Shanklin and Shakerva Mack, neither of whom matched the appearance of the person who was on the gas station videotape. Trans. II at PageID.156-157. On cross-examination, Officer Nowicki admitted that he did not take a picture of Shanklin or have any further contact with him. *Id.* at PageID.157-158. However, Officer Nowicki testified that he had previously watched the videotape of the robbery, that he knew what the suspect looked like, and that he knew that Shanklin was not that person. *Id.* at PageID.158.

4. GRPD Officer Kim Hartuniewicz

Officer Hartuniewicz, a canine handler for the police, was called to the robbery scene to determine if the police dog could pick up a scent and track it. *Id.* at PageID.153. The police dog picked up a scent and followed it to a parking lot south of the gas station, where he lost the scent.

Id. Officer Hartuniewicz testified that a dog will generally lose a scent if the person that is the subject of the track either got into a car or on a bike. *Id.* On cross-examination, Hartuniewicz admitted that there was nothing belonging to the robber to give the police dog a basis for a scent; she took the police dog to the suspect's last known location, then followed the scent from that point. *Id.* at PageID.154.

5. Testimony of GRPD Officer David Kiddle

Officer Kiddle testified that on December 18, 2000, he was on patrol when he stopped a car for having a license plate that did not belong on that vehicle. *Id.* at PageID.155. Petitioner, his wife, Linda Carter, and his daughter were in the car. *Id.* Petitioner did not have a license, and told Officer Kiddle that his name was Donald Brown. *Id.* Petitioner's wife told Kiddle that petitioner was her nephew, Donald Brown. *Id.* When Kiddle checked for a driving record on Donald Brown, he found none. *Id.* He arrested petitioner for driving without a license and gave him a ticket for improper registration. *Id.* After petitioner was transported to jail and the car towed, Officer Kiddle received information that the car might have been used in a robbery that took place "approximately" a month earlier. *Id.* On cross-examination, Kiddle acknowledged that people driving without a license or suspended licenses give false names "a lot." *Id.* at PageID.156.

6. Testimony of GRPD Officer William Corner

GRPD Officer Corner arrived at the scene of the robbery to assist in securing the area. Trial Trans. I (docket no. 10, PageID.162). He interviewed a bystander, Cassandra Butler, who told him that she was afraid that her ex-boyfriend, Roderick Jones, was possibly the person who committed the robbery. *Id.* Office Corner had Ms. Butler examine the videotape, and after doing so, Butler said that the person in the videotape was not Roderick Jones. *Id.* at PageID.162-163. On

cross-examination, Corner testified that he tried to get an address for Roderick Jones, but Butler could not provide him with one. *Id.* at PageID.163. In addition, the police department had no information on Roderick Jones or his location. *Id.* Officers went to several locations that night to locate suspects, but had no success. *Id.*

7. Testimony of GRPD Officer William Wolz

GRPD Officer Wolz, a fingerprint examiner, testified that he checked a number of finger and palm prints that were found on the north entry door. *Id.* at PageID.163-164. However, none of the prints were identified. *Id.*

8. Testimony of GRPD Detective Erica Clark

Detective Clark was assigned to investigate the robbery within a day after it occurred. *Id.* at PageID.165. Initially, she had no suspects. *Id.* However, after petitioner was arrested in December 18, 2000, Detective Clark received information that he was part of the family that lived at 1211 Beamus, the house police had gone to the night of the robbery. *Id.* at PageID.165-166. Clark noted that petitioner gave a false name when he was stopped by police, that his real name was Gregory Carter, and that she “recognized the name as being the Carter’s living at that address.” *Id.* at PageID.166. Given this information, Detectives Clark and Fannon interviewed petitioner at the jail. *Id.* at PageID.165-166. At that time, petitioner stated that he was not involved in the robbery. *Id.* at PageID.166. However, Clark noticed that Carter was wearing a black fleece coat that zipped in the front; the coat matched the description of the coat worn by the person who robbed the Speedway. *Id.* In addition, Clark checked the property found on petitioner when he was arrested, finding two gold hoop earrings and a partial pack of Kool cigarettes. *Id.* These items were

consistent with the victim's statement that the robber wore earrings in both ears and took a carton of Kool cigarettes. *Id.*

Detective Clark arranged for live lineups. *Id.* at PageID.167. In the first lineup, conducted on October 10, 2000, in which petitioner did not appear, the victim did not identify anyone as the robber. *Id.* In the second lineup, in which petitioner appeared, the victim identified him as the robber. *Id.* At that point, Clark sought a warrant to charge petitioner with armed robbery. *Id.*

After petitioner was charged and placed in jail, the prosecutor's office asked Detective Clark to monitor petitioner's incoming and outgoing mail. *Id.* at PageID.167-168. In one letter, dated January 3, 2001, addressed to "whom it may concern," petitioner stated that "this letter is to inform the judge, as well as the state's attorney that may be assigned to prosecute any cases against Mrs. Linda Carter or Mrs. Linda Abrams, I Gregory Carter take full responsibility, and, that any charges pending against Mrs. Carter or Abrams is not true." *Id.* at PageID.168. Petitioner's phone calls were also monitored, resulting in between six and nine hours of taped calls. *Id.* at PageID.168-169. Clark testified that petitioner spoke to several people in these taped calls, including Linda Carter (his wife), Irene Carter (his mother), and Mario Shanklin (cousin). *Id.* at PageID.169. The tapes included some conversations relevant to the investigation of the robbery. For instance, when discussing his arrest, petitioner told his wife that "[t]hey don't know nothing about you" and asked his wife if she had "move[d] those things." *Id.* at PageID.170-171. When petitioner's wife asked petitioner if there was anything else she needed to get rid of "at home," she inquired "No shells? None of that?" *Id.* at PageID.171. Petitioner then stated:

"Let him come tear the motherfucker up. They gonna do that anyway. The reason why, they lookin' for a gun, they ain't got shit. They trying' to make a motherfuckin'

case. That's why they need the gun. Hey, try to cash and -- or -- and go get rid of that."

Id.

Detective Clark testified that the telephone conversations mentioned a person named Kenny, and that petitioner talked his cousin, Mario Shanklin about going and getting some stuff from Kenny. *Id.* When speaking to Mario, petitioner said, "you give them people what they want, I Goddamn guarantee you'll go to jail." *Id.* at PageID.172. In another conversation, petitioner threatened to kill his wife stating:

"When I get out, I'm going to kill yo mother fuckin' ass, you know that; don't you . . . Who gonna take care of your baby? Keep you mother fuckin' mouth closed."

Id.

Petitioner also spoke to a woman named Joyce (his sister), asking her for a favor regarding Linda (his wife):

"This bitch, Linda, the state's attorney, they gonna bring charges against this bitch. I don't want this whoe to know none of my business. Tell Mario he get in. I said in. Go over to Kenny's house and get that shit."

Id.

On cross-examination, Detective Clark acknowledged that petitioner never mentioned hiding the gun used in the robbery and that the police did not search petitioner's wife's house. *Id.* at PageID.173. The detective explained that all the information from the phone conversations indicated that evidence was left at "Kenny's house." *Id.* Clark also acknowledged that the quality of the audiotapes was not good, and that at times, a listener could not make out full sentences. *Id.*

B. The defense

The defense did not present any witnesses or evidence. *Id.* at PageID.175. During closing argument, petitioner’s trial counsel argued, among other things: that the prosecution had not met its burden; that the victim mis-identified petitioner as the robber; that the man on the video tape was not petitioner; that petitioner knew his telephone conversations were being monitored; that petitioner’s telephone conversations did not refer to a gun as evidence in an armed robbery; that the “stuff” referred to in the telephone conversations probably did not mean “a gun” but could have meant drugs or “evidence of an affair”; that there was no fingerprint evidence linking petitioner to the crime; and, that there were other suspects. *Id.* at PageID.176-179.

III. Discussion

To determine whether petitioner demonstrated actual prejudice sufficient to excuse the procedural default, “courts must ask, is there a reasonable probability that a different (e.g., properly selected) jury would have reached a different result, a probability sufficient to undermine confidence in the outcome of the trial.” *Ambrose IV*, 801 F.3d at 578 (internal quotation marks omitted). “The most important aspect to the actual prejudice inquiry is the strength of the case against the defendant, which requires courts to take a careful look at the transcripts involved.” *Id.* at 580 (internal quotation marks and brackets omitted). Actual prejudice does not exist where the trial transcript showed that the prosecution’s case against the petitioner was so strong, and the defense was so weak, “that a court would consider it highly improbable that an unbiased jury could acquit.” *Id.* at 575, quoting *Ambrose II*, 684 F.3d at 652.

After reviewing the trial transcript in detail, the Court concludes that petitioner has failed to demonstrate actual prejudice necessary to excuse his procedural default. The prosecution’s

case against petitioner was strong. At sentencing, the trial judge described the evidence against petitioner as “overwhelming”:

I presided at the trial. It was a trial in which Mr. Carter was convicted by, I think you’d have to say overwhelming evidence. There was, among other things, a videotape of the robbery, and while such videotapes tend to be of rather poor quality, this one was excellent, and it showed very clearly Mr. Carter robbing this particular convenience store.

Sent. Trans. at PageID.190.

In addition to the videotape, the victim did not waver in her description or identification of petitioner as the robber. As discussed, the victim clearly saw the robber, heard him speak, and watched him leave the store. The government’s other evidence was consistent with the victim’s eyewitness identification of petitioner as the robber. When arrested, petitioner possessed a black fleece coat which zipped in front and two hoop earrings as described by the victim. Trial Trans. I at PageID.166; Trial Trans. II at PageID.148. In addition, petitioner had a pack of Kool cigarettes, the same brand which the robber stole from the store. Trial Trans. I at PageID.166; Trial Trans. II at PageID.144. Finally, petitioner’s jail conversations indicated that he did not want the authorities to discover a gun, which they needed to make their “case” against him. Trial Trans. I at PageID.171. Given the other evidence, the jury could infer that petitioner was referring to the pistol used to rob the victim. Trial Trans. II at PageID.134.

In contrast to the prosecution, defendant presented no evidence. In closing argument, petitioner’s counsel presented a defense theory that the victim incorrectly identified petitioner as the robber, that petitioner was not the man in the Speedway videotape, and that the prosecutor’s other evidence proved nothing. “[T]o successfully argue that it is reasonably probable that a different jury would have accepted the defense theory, and thus have reached a different result, a defendant must

show that there is some support for that theory.” *Ambrose IV*, 801 F.3d at 581. Here, petitioner presented no evidence to support his theory of misidentification. The thrust of petitioner’s claim is that the victim’s identification was wrong because it involved cross-racial identification. Petitioner’s Supplemental Brief (docket no. 72, PageID.577). However, petitioner presented no evidence to support this claim, admitting that “Mr. Carter’s trial did not include testimony from an expert on the unreliability of cross-racial identifications.” *Id.*

In summary, the evidence presented at trial does not create a reasonable probability that a different jury would have reached a different result. *Ambrose IV*, 801 F.3d at 578, 581. Petitioner has failed to demonstrate actual prejudice sufficient to excuse the procedural default. Accordingly, the petition should be denied.

IV. Recommendation

I respectfully recommend that the habeas petition be **DENIED**. Rule 8, Rules Governing § 2254 Cases in the United States District Courts.

Dated: December 14, 2016

/s/ Ray Kent

RAY KENT

United States Magistrate Judge

ANY OBJECTIONS to this Amended Report and Recommendation must be served and filed with the Clerk of the Court within fourteen (14) days after service of the report. All objections and responses to objections are governed by W.D. Mich. LCivR 72.3(b). Failure to serve and file written objections within the specified time waives the right to appeal the District Court’s order. *Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

A-7

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 12a0200p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

11-1430

JOSEPH AMBROSE,
Petitioner-Appellee,
v.
RAYMOND D. BOOKER,
Respondent-Appellant.

Nos. 11-1430/10-1247/09-1539

10-1247

GREGORY CARTER,
Petitioner-Appellant,
v.
BLAINE LAFLER,
Respondent-Appellee.

09-1539

CARL BURNIE WELLBORN,
Petitioner-Appellant,
v.
MARY BERGHUIS,
Respondent-Appellee.

Appeals from the United States District Court
for the Eastern District of Michigan at Bay City
and the Western District of Michigan at Grand Rapids.
No. 06-13361—Thomas L. Ludington; District Judge;
Nos. 09-215; 05-346—Robert J. Jonker, District Judge.

Argued: February 28, 2012

Decided and Filed: June 28, 2012

Before: MERRITT and ROGERS, Circuit Judges, and POLSTER, District Judge.*

* The Honorable Dan Aaron Polster, United States District Judge for the Northern District of Ohio, sitting by designation.

COUNSEL

ARGUED: B. Eric Restuccia, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellant in 11-1430. Bradley R. Hall, FEDERAL PUBLIC DEFENDER OFFICE, Detroit, Michigan, for Appellee in 11-1430. Bradley R. Hall, FEDERAL PUBLIC DEFENDER OFFICE, Detroit Michigan, for Appellants in 10-1247 and 09-1539. John S. Pallas, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellees in 10-1247 and 09-1539. **ON BRIEF:** B. Eric Restuccia, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellant in 11-1430. Bradley R. Hall, Kenneth R. Sasse, FEDERAL PUBLIC DEFENDER OFFICE, Detroit, Michigan, for Appellee in 11-1430. Bradley R. Hall, James R. Gerometta, FEDERAL PUBLIC DEFENDER OFFICE, Detroit Michigan, for Appellants in 10-1247 and 09-1539. John S. Pallas, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellees in 10-1247 and 09-1539. Debra M. Gagliardi, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee in 10-1332. Gregory Carter, Manistee, Michigan, pro se.

OPINION

ROGERS, Circuit Judge. These habeas petitions involve the far-reaching effects of an unintentional computer glitch that caused the systematic underrepresentation of African-Americans in the jury pools of Kent County, Michigan. The three petitioners received separate jury trials in Kent County in either 2001 or 2002. At jury selection, the petitioners did not object to the racial composition of their respective jury venires, and were subsequently convicted. A few months later, the Grand Rapids Press published a story detailing how Kent County's jury selection software had a computer glitch that had systematically excluded African-Americans from the jury pool. In light of these revelations, the petitioners each filed motions for post-conviction relief in state court. The state court found that the petitioners had waived these claims by failing to object to the racial composition of the jury venire during *voir dire*.

The petitioners each filed a § 2254 habeas petition. The Western District of Michigan denied two of the petitions—*Carter v. Lafler*, No. 10-1247, and *Wellborn v. Berghuis*, No. 09-1539—holding that the petitioners had not shown cause to excuse their

procedural default. In *Ambrose v. Booker*, No. 11-1430, the Eastern District of Michigan granted habeas relief. The *Ambrose* court held that the petitioner could not have known of the computer glitch, presumed prejudice because the glitch caused a structural error, and then granted the petition on the merits. Remand in all three cases is appropriate because the petitioners have shown cause to excuse their defaults, but federal-state comity requires that the district court find actual prejudice before granting relief.

I.

1. Ambrose

On April 19, 2001, a Kent County jury convicted Joseph Ambrose of two counts of armed robbery, one count of carjacking, and one count of felony-firearm possession. *Ambrose v. Booker*, 781 F. Supp. 2d 532, 535 (E.D. Mich. 2011). Ambrose sought leave to appeal; however, his appointed counsel withdrew and the Michigan Court of Appeals determined that Ambrose's appeal was frivolous. *Id.* Ambrose did not appeal to the Michigan Supreme Court.

On July 30, 2002, the Grand Rapids Press reported that a computer glitch had an impact on Kent County's system for selecting jury venires. The glitch was introduced accidentally by the county when it assumed control of the jury selection computer program from a private vendor in April 2001. The problem came to light in 2002, when a local high school teacher, Wayne Bentley, completed a study of minority representation on Kent County juries. Bentley found that the underrepresentation of minorities was statistically significant, and shared his findings with county officials. The county subsequently conducted an internal study that revealed that "nearly 75 percent of the county's 454,000 eligible residents were excluded from potential jury pools since spring 2001" and that "[m]any blacks were excluded from . . . jury pools due to a computer glitch that selected a majority of potential candidates from the suburbs." The chief judge of the Kent County Circuit Court, George Buth, stated, "There has been a mistake—a big mistake."

In light of these revelations, Ambrose initiated state post-conviction proceedings. Ambrose requested relief from judgment, claiming he was denied his right to be tried by a jury drawn from a fair cross-section of the community. The trial court denied Ambrose's motion because, among other things, Ambrose failed to object to the venire panel before the jury was empaneled. The Michigan Court of Appeals denied leave to appeal, as did the Michigan Supreme Court. *See People v. Ambrose*, 706 N.W.2d 16 (Mich. 2005) (unpublished table decision).

Ambrose then filed this habeas petition in the United States District Court for the Eastern District of Michigan. The district court referred the matter to a magistrate judge, who held an evidentiary hearing at which four items of evidence were introduced. First, the magistrate judge heard the testimony of Wayne Bentley, the teacher that uncovered the disparate representation. Second, the magistrate judge heard testimony from Terry Holtrop, the case manager for the Kent County Circuit Court. *Ambrose*, 781 F. Supp. 2d at 537-38. Holtrop explained how Bentley's evidence spurred an internal investigation by the County, culminating in the Kent County Jury Management System Report (hereafter "the Report") dated August 1, 2002. The Report described how a transfer of control over a database—from a private vendor to the County in an effort to cut costs—caused the error :

[I]n the initial set-up of the Oracle database to accommodate the driver's license and State ID data from the State file, an error was made in one parameter. Whether this was a programming error, the carry-over of a setting that existed within the Sybase database, misinterpreting instructions, or simply human error, that is now almost impossible to determine. The parameter that was entered within the database was 118,169. What should have been inserted within this setting was the total number of records in the State File, or 453,981 in 2001.

The net effect of this incorrect parameter is that the Jury Management System performed a random selection against the first 118,169 jurors on the file. The percentage of jurors selected per Zip Code was proportional to the Zip Code composition of the first 118,169 records—but not Kent County as a whole. The total pool of prospective jurors from the State File is of course 3.8 times larger than the 118,169 and hence the type of jury pull data as is evidenced in the various tables included in this report, for the second half of 2001 and the first half of 2002.

The next logical question being, why then did the jury pull from Zip Code 49341 jump so dramatically for 2001, from an average of 3.8% up to 10.24% . . . and why did the jury pulls from Zip Code 49507 decline from an average of 8.56% to 2.13%?

The answer being that in 1998 (as was mentioned previously) the State File did not come in random order, but rather in Zip Code order . . . lowest numbers to highest numbers. In subsequent years, new prospective jurors (either based on age or having moved to the County) were added to the end of the database. Existing prospective jurors (those that were on file the previous year) would simply have address information updated based on what the State provided. Their position in the dataset would not change. Therefore, the first 118,169 records of the dataset have a high percentage of lower numbered zip codes. As indicated on the map included in his packet, all the Zip Codes with the lower numbers are located outside of the Grand Rapids metro area.

Third, the magistrate judge considered statistical analysis submitted by Dr. Paul Stephenson, a statistician who used different methodologies to evaluate the impact of the glitch. Dr. Stephenson first compared the percentage of eligible African-Americans in Kent County and the actual percentage in the venire. He found an absolute disparity of 6.03% and a comparative disparity of 73.1% fewer African-American members than would be expected.¹ While Dr. Stephenson believed that these disparities were useful “descriptive statistics,” he did not believe they were “viable for inferential purposes.” Stephenson next used both a standard deviation and binomial test, and found that although the tests provided “insufficient evidence to demonstrate that the representation

¹The Tenth Circuit has explained the differences between the measures:

Absolute disparity measures the difference between the percentage of a group in the general population and its percentage in the qualified wheel. For instance, if Asians constitute 10% of the general population and 5% of the qualified wheel, the absolute disparity is 5%.

Comparative disparity measures the decreased likelihood that members of an underrepresented group will be called for jury service, in contrast to what their presence in the community suggests it should be. This figure is determined by dividing the absolute disparity of the group by that group's percentage in the general population. In the example above, the comparative disparity is 50%: Asians are half as likely to be on venires as they would be if represented in proportion to their numbers in the community.

United States v. Shinault, 147 F.3d 1266, 1272 (10th Cir. 1998) (formatting altered).

of Blacks or African-Americans in [a specific] venire is biased, this is in part due to the size of the venire.” Stephenson also noted “while it would be less likely, one also could expect approximately 2% of all venires to contain no . . . African-American members.” Stephenson then employed a “Chi-square Goodness-of-fit test.” Using this test, Dr. Stephenson found that “there is essentially no chance of acquiring the results we obtained if the selection process for potential jurors is unbiased. As a result, there is overwhelming evidence to conclude that the selection process for terms during the first months of 2002 was biased.” Dr. Stephenson concluded that “the analysis presented in this report demonstrates that a systematic bias did exist in the selection of individuals summoned for jury duty during the first three months of 2002. This bias would have inevitably led to under representation of . . . African-Americans in the terms during this period of time.”

Fourth, the magistrate judge considered a report by Dr. Edward Rothman, who analyzed the composition of the Kent County Jury Pool between January 1998 and December 2002. Dr. Rothman used the census figures from the 2000 census, at which time African-Americans comprised 8.24% of the population of Kent County. Dr. Rothman applied these figures to the period April 2001 to August 2002, and concluded that there was a 3.45% absolute disparity between jury-eligible African-Americans and those who appeared on jury venires. Rothman found a comparative disparity of 42%. Based on these four pieces of evidence, the magistrate judge concluded that Petitioner had proven a prima facie case of a fair cross-section claim.

The district court adopted the magistrate judge’s report and recommendation. *Ambrose*, 781 F. Supp. 2d at 545-46. First, the district court held that Ambrose had not procedurally defaulted his claim. The court acknowledged that district courts had split on the issue of procedural default with regard to the Kent County computer glitch, but the court concluded that Ambrose had shown good cause to excuse his default because he could not have known of the glitch. *Id.* at 542-43. Second, the district court found that the number of African-Americans in the jury pool was not “fair and reasonable in relation to the number of such persons in the community.” *Id.* at 543-44. The district

court recognized that the absolute disparity of 3.45% fell below the 10% mark established by *Swain v. Alabama*, 380 U.S. 202, 208-09 (1965). However, this 10% mark was not a bright-line rule; to hold otherwise would prevent fair cross-section claims in areas where the minority population was less than 10%. *Ambrose*, 781 F. Supp. 2d at 543-44. Finally, the district court held that the systematic exclusion did not need to be intentional. *Id.* at 545. The district court granted a conditional writ of habeas corpus and respondents timely appealed.

2. Carter

Gregory Carter's habeas petition was reviewed by both the Eastern and Western Districts of Michigan, which came to opposite conclusions. A jury convicted Carter of armed robbery of a convenience store in Kent County, Michigan. At trial, the prosecution presented "overwhelming" evidence of the robbery, including a videotape which showed Carter robbing the store. *Carter v. Lafler*, No. 1:09-cv-215, 2010 WL 160814, at *1 (W.D. Mich. Jan. 8, 2010). Petitioner was sentenced to two years' incarceration for a felony firearm charge to be served consecutively with a term of 15 to 40 years' imprisonment for the armed robbery. *Id.* Carter did not object to the venire panel at trial, and did not challenge the panel's composition at any stage of his direct appeal.

In light of the revelations about the problems with Kent County's jury selection system, Carter initiated state post-conviction proceedings under M.C.R. 6.501. In his motion, Carter challenged the composition of the jury based on flaws in the Kent County jury selection system, and raised an ineffective assistance of counsel claim. The trial court denied the motion, reasoning that Carter had defaulted by failing to object to the venire's composition before the jury was empaneled. Further, the trial court found that Carter's ineffective assistance of counsel claim failed under Michigan's version of *Strickland v. Washington*, 466 U.S. 668 (1984). Carter applied for leave to appeal, but both the Michigan Court of Appeals and Michigan Supreme Court denied the application "for failure to meet the burden of establishing entitlement to relief under MCR

6.508(D).” *People v. Carter*, No. 254482 (Mich. App. Aug. 20, 2004); *People v. Carter*, 696 N.W.2d 714 (Mich. 2005) (table opinion).

Carter filed a habeas petition in the United States District Court for the Eastern District of Michigan. The district court held that there was cause and prejudice to excuse Carter’s procedural default. *Carter v. Lafler*, No. 06-cv-10552, 2009 WL 649889, at *3 (E.D. Mich. Mar.10, 2009). The district court recognized that Carter had procedurally defaulted by failing to object at trial to the composition of the venire panel. The default was excused, however, because the district court found that Carter could not have known about the systematic exclusion caused by the computer glitch at the time the jury was sworn. *Id.* Having excused the default, the court determined that an evidentiary hearing was necessary to determine whether Carter’s jury was empaneled during the period impacted by the computer glitch. *Id.* at *4-5. Because Carter was imprisoned in the Western District of Michigan, and because the trial had occurred in the Western District, the court transferred the action “for an evidentiary hearing and determination on the Sixth Amendment claim.” *Id.* at *5.

Upon receiving the case, the Western District of Michigan assigned the case to a magistrate judge. The magistrate judge recommended that the district court deny the habeas petition as procedurally defaulted without an evidentiary hearing. *Carter v. Lafler*, No. 1:09-cv-215, 2010 WL 160814, at *4-13 (W.D. Mich. Jan. 8, 2010). The district court adopted this recommendation because the court determined that Carter had not shown good cause for his procedural default. *Id.* at *3. Although Carter was unaware of the computer glitch at the time of his trial, the district court held that the racial composition of the jury venire gave him notice of his claim. *Id.* Carter timely appeals.

3. Wellborn

Carl Wellborn was convicted of sexually abusing his granddaughters by a Kent County Jury in March 2001. *Wellborn v. Berghuis*, No. 05-cv-346, 2009 WL 891708, at *8-14 (W.D. Mich. Mar. 31, 2009) (report and recommendation). On direct appeal, Wellborn claimed that he was denied a jury drawn from a fair cross-section of the

community based on the Kent County computer glitch. The Michigan Court of Appeals found that Wellborn had defaulted his fair cross-section claim because he failed to raise it before the jury was sworn. *Id.* at *14. The Michigan Court of Appeals affirmed Wellborn's convictions, and the Michigan Supreme Court denied leave to appeal. *Id.*

Wellborn raised a variety of claims in his habeas petition, but only appeals his fair cross-section claim. The district court found that this claim was procedurally defaulted, and held that there was no cause to excuse the default. *Id.* at *3. Because the petitioner observed the juror array, the court reasoned, he was on notice of a potential underrepresentation. *Id.* The court found that the petitioner must show evidence that the underrepresentation was intentionally concealed, a showing Wellborn did not make. *Id.* at *3-4. The court acknowledged that the Eastern District had addressed the computer glitch and excused procedural default, but found Wellborn's case distinguishable on two grounds: Wellborn was white and there was overwhelming evidence of Wellborn's guilt. *Id.* at *3-4. Wellborn filed this timely appeal.

II.

As an initial matter, the parties disagree on the standard of review. The Antiterrorism and Effective Death Penalty Act ("AEDPA") requires federal courts to grant considerable deference to state courts and presume the correctness of state court fact finding. 28 U.S.C. § 2254(d), (e)(1). However, this deferential standard applies only to claims that state courts have adjudicated on the merits. Respondents admit that "the State court . . . refus[ed] to examine the merits of Petitioner's claim." Even without this concession, it is evident that the state courts rejected petitioners' fair cross-section claims on procedural grounds, based on the failure to object to the jury panel at trial. For this reason, AEDPA deference does not apply and the court reviews legal conclusions *de novo* and findings of fact for clear error. *See, e.g., Dyer v. Bowlen*, 465 F.3d 280, 283–84 (6th Cir. 2006).

1. Cause for Procedural Default

There is no dispute that petitioners defaulted their claims by failing to object to the jury venire at trial, in violation of Michigan’s contemporaneous objection rule. *See, e.g., People v. Dixon*, 552 N.W.2d 663, 667 (Mich. Ct. App. 1996). However, petitioners have shown “cause and prejudice” sufficient to excuse the default under *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). The cause inquiry “ordinarily turn[s] on whether . . . some objective factor external to the defense impeded counsel’s efforts to comply with the State’s procedural rule,” and is satisfied by “a showing that the factual or legal basis for a claim was not reasonably available to counsel.” *Murray v. Carrier*, 477 U.S. 478, 488 (1986). As discussed below, petitioners have shown cause because the factual basis for the claim—the computer glitch—was not reasonably available to counsel, and petitioners could not have known that minorities were underrepresented in the *jury pool* by looking at the *venire panel*. Moreover, the Supreme Court has found cause to excuse a procedural default in a factually similar case. *See Amadeo v. Zant*, 486 U.S. 214 (1988).

It is undisputed that petitioners lacked actual knowledge of the glitch, and the record demonstrates that they could not have reasonably known of the error at the time the jury was sworn. The glitch was a mistyped parameter in the software, buried in a mountain of computer code, that was only discovered after a broad statistical analysis led to an extensive internal investigation. This is not the type of error that would be reasonably discoverable by a defendant at jury selection. The difficulty of detecting this problem is underscored by the fact that the glitch persisted for nearly two years without detection by defendants, judges, or Kent County officials.

Further, looking at the venire panel did not provide petitioners with notice of their claims. Petitioners’ claims arise from the right “to be tried by an impartial jury drawn from sources reflecting a cross section of the community.” *Berghuis v. Smith*, 130 S. Ct. 1382, 1387 (2010) (emphasis added). A petitioner raising this claim is challenging the pool from which the jury is drawn, and not necessarily the venire panel

directly before him. Accordingly, the composition of one panel does not indicate whether a fair cross-section claim exists.

The irrelevance of the composition of a single venire panel is underscored by the fact that a petitioner may bring a claim even if minorities are included in his panel. The Sixth Amendment guarantees only the opportunity for a representative jury, not a representative jury itself. *United States v. Biaggi*, 909 F.2d 662, 678 (2d Cir. 1990). The focus, therefore, is on the procedure for selecting juries, and not the outcome of that process. As the First Circuit eloquently put it:

[T]o hold that a litigant is not entitled to a representative jury when the jury venires are drawn from a fair cross-section of the community but that the cross-section requirement can be dispensed with when the dice fall a particular way in an individual case undermines the analytical foundation upon which the right to a jury drawn from a cross-section of the community is based.

Barber v. Ponte, 772 F.2d 982, 993 (1st Cir. 1985), *vacated on other grounds*, 772 F.2d 996 (1st Cir. 1985) (*en banc*). It may be true that a venire panel's composition may put a petitioner on notice of a procedural irregularity in some instances, for example in areas where the minority population is so high that the probability of an all-white panel is minuscule. However, where the minority population is comparatively small, the actual composition of the venire panel does not provide reasonable notice of the existence or non-existence of a fair cross-section claim. As the district court persuasively stated in *Ambrose*:

[R]equiring a defendant to make a contemporaneous objection based simply on an anecdotal view of the jury's racial composition defies logic; any individual panel could over represent a "distinctive" group even though the group might be underrepresented in the jury venire as a whole. A gaze into the jury gallery tells you nothing and, in fact, can be misleading. To also suggest that an effective defense attorney must investigate the jury assembly process in every case conditioned upon his client's loss of the right is unnecessary and wasteful.

Ambrose v. Booker, No. 06-13361-BC, 2011 WL 1806426, at *2 (E.D. Mich. May 11, 2011). Here, each petitioner saw only one venire panel, which did not alert any

of the petitioners to the systematic underrepresentation. Even the judges and Kent County officials who were confronted with venire panels daily did not notice the underrepresentation. To say that petitioners should have looked at a single venire panel and noticed something that the officials failed to notice for sixteen months rings hollow.²

Even if the composition of one venire panel were relevant, the absence of minorities on a panel would not have alerted petitioners that a fair cross-section claim existed. Due to the small size of the African-American population in Kent County, it is entirely possible that a defendant could receive an all-white juror array even if there were no underrepresentation of African-Americans in the jury pool. Dr. Stephenson concluded as much after conducting a standard deviation test and a binomial test on the Kent County jury pool. Stephenson Report, at 3. Because of Kent County's small African-American population (8.25%) and the small size of venire panels, Dr. Stephenson concluded that one "could expect approximately 2% of all venires to contain no Black or African-American members." *Id.* at 4. Even if the computer had been glitch-free, petitioners could have received a panel without a single African-American panel member. Given the small minority population in Kent County, if petitioners had faced an all-white jury panel, they could have believed that there was no underrepresentation problem.

Moreover, the Supreme Court has found cause to excuse a procedural default in a factually similar case. In *Amadeo v. Zant*, a district attorney conspired with the jury commissioners of a Georgia county to systematically exclude African-Americans and women from the jury pool. 486 U.S. 214 (1988). The wrongdoers purposefully underrepresented minorities, but were careful to keep representation within a presumptively valid statistical range (under 10%). The petitioner did not object at trial

² Respondents contend on the contrary that a fair cross-section claim requires proof that the specific venire underrepresented minorities. However, respondents misstate the holding of the case on which they rely for this proposition. In *United States v. Williams*, 264 F.3d 561, 568 (5th Cir. 2001), the court stated: "[Defendant] must demonstrate . . . not only that [African-Americans] were not adequately represented on his jury but also that this was the general practice in other venires." *Id.* (quoting *Timmel v. Phillips*, 799 F.2d 1083, 1086 (5th Cir. 1986)). This did not establish a requirement that a defendant prove that the venire have actual underrepresentation, but instead was explaining that proving underrepresentation on one venire was insufficient to maintain a fair cross-section claim. *Id.*

to the racial composition of the jury venire. Several months later, the petitioner learned of a memorandum that detailed a scheme “to underrepresent black people and women on the master jury lists from which . . . juries were drawn.” *Id.* at 217. The memorandum was hidden in a public record—intermingled with irrelevant data—and only discovered in unrelated litigation. The Supreme Court excused the procedural default, reasoning that the memorandum was not reasonably available to petitioner’s lawyers. *Id.* at 224. The court based its decision on the fact that petitioner’s lawyers did not deliberately bypass a jury challenge. *Id.* at 226-28. Similarly, in this case, petitioners could not have discovered the computer glitch prior to trial and did not deliberately bypass a jury challenge. Further, the memorandum in *Amadeo* was filed in publicly accessible records whereas here the error was contained in a single line of code in the jury selection software. It would make little sense to excuse a failure to discover a publicly filed memorandum, but require petitioners to scour non-public programming codes of jury selection software. Accordingly, under the reasoning of *Amadeo*, petitioners’ defaults are excused.

Respondents attempt to distinguish *Amadeo*, but are ultimately unsuccessful. Respondents first argue that, unlike in these cases, the officials in *Amadeo* deliberately reduced the minority representation in the juror pool. Although this may be true, the focus of the cause-and-prejudice test is not on the intent of the officials but rather on petitioners’ knowledge of the underrepresentation. For example, if a government official intended to conceal an intentional underrepresentation, there would be no good cause to excuse procedural default if the petitioner discovered the scheme. Therefore, a government official’s lack of intent is irrelevant.

Respondents do not persuasively explain how the disparity in this case was any more detectable than the one in *Amadeo*. Respondents argue that the scheme in *Amadeo* was specifically tailored to avoid detection by keeping the underrepresentation within statistically presumptive levels. They contend that systematic underrepresentation is discoverable unless a scheme exists that was specifically tailored to avoid detection. It is true that the government officials in *Amadeo* endeavored to conceal the

underrepresentation by keeping it to less than 10% absolute disparity. *Amadeo*, 486 U.S. at 218. However, in these cases, the absolute disparity was only 3.45%; the underrepresentation would be at least as difficult to detect.

Policy considerations also support this reasoning. First, finding good cause to excuse the default does not undermine the purpose of the contemporaneous objection rule. The purpose of preservation requirements, such as the objection rule, is to allow the trial court to correct errors and ensure that a trial is fair in the first instance. *See United States v. Young*, 470 U.S. 1, 15 (1985). In the ordinary case, a contemporaneous objection allows a trial court to fix an error at the outset of trial, saving valuable time and resources. *See United States v. Lowry*, No. 91-6169, 1992 WL 92746, at *4 (6th Cir. Apr. 22, 1992). However, in this case, even if petitioners had objected prior to the empanelment of the jury, the trial court could not have remedied the error. Had the trial court granted the hypothetical contemporaneous objection, it would have dismissed the jury panel and asked the Kent County Commissioners to draw a new panel. This panel would have come from the same jury pool, affected by the same yet-to-be discovered computer glitch. The underrepresentation would have persisted even if petitioners had objected at trial.

Second, the procedural default rule was not intended to bar defaults such as petitioners'. The Supreme Court has made clear that the test is intended to prevent defense counsel from defaulting in state court for strategic gain. As the Court stated, "defense counsel may not make a tactical decision to forgo a procedural opportunity—for instance, an opportunity to object at trial or to raise an issue on appeal—and then, when he discovers that the tactic has been unsuccessful, pursue an alternative strategy in federal court." *Reed v. Ross*, 468 U.S. 1, 14 (1984) (internal citations omitted). In this case, respondents do not—nor could they—contend that petitioners tactically declined to raise a pre-trial challenge to their venire panels. Petitioners' claims are premised on the fact that they were unaware of the defects in the challenged jury selection procedure. Respondents would be hard-pressed to argue that petitioners tactically relied on the computer glitch of which they did not know.

Third, were we to hold that petitioners cannot demonstrate cause, we would be instituting a *de facto* requirement that defense attorneys in Kent County automatically raise fair cross-section objections. A prudent lawyer in such a situation would recognize that a failure to raise a fair cross-section claim would bar a later assertion of the right should a computer glitch—or even a scheme such as the one in *Amadeo*—come to light. Such a result would run counter to the lawyer’s duty to avoid frivolous litigation, as well as the procedural default doctrine’s concern with judicial efficiency. Instead, finding cause to excuse petitioners’ failure to object would leave open a critical safety valve to deal with real fair-cross-section claims.

Respondents rely on a number of our cases in this context, but these cases are factually or analytically distinguishable. First, respondents rely on *United States v. Boulding*, a case involving two federal defendants who failed to object to the racial diversity of the jury panel until after the jurors were sworn. 412 F. App’x 798, 800 (6th Cir. 2011). Defendants’ counsel explained that he had not objected during jury selection because he did not want to offend or alienate the jury. *Id.* at 802. We held that “defendants’ counsel had ample opportunity to make an objection, and could have done so in a sidebar or requested a recess if concerned about the objection’s effect on the jury.” *Id.* at 802. This case is distinguishable from the instant case in at least two ways. First, the default in *Boulding* was precisely the type of strategic default contemplated by the court in *Reed*. Counsel wanted to avoid offending the jury, so he withheld his objection until after the jury was empaneled. Here, respondents cannot show that petitioners strategically withheld their objections. Second, the *Boulding* defendant knew of the potential objection but chose to wait to object until it was untimely. Petitioners, by contrast, did not know of the underrepresentation of minorities in the jury pool until months after their trials. This again goes to the motive of the failure to object: in *Boulding* it was strategic, here it was unwitting.

Notwithstanding respondents’ arguments to the contrary, *United States v. Blair*, 214 F.3d 690, 699 (6th Cir. 2000), is also distinguishable. In *Blair*, the defendant “failed to recognize or chose to ignore a potential challenge to the jury selection plan” because

this court had not yet decided that the plan violated the Equal Protection Clause. *Blair* held that a defendant must raise a claim if the factual basis is known, even if no court has ruled on the legal implications of those specific facts. Here, in contrast, petitioners did not know of the factual basis of the claim.

Finally, respondents argue that because other defendants are able to raise fair cross-section claims by looking at the venire panel, petitioners should have too. However, the cases on which respondents rely do not involve a similarly subtle absolute disparity or a hidden cause of underrepresentation. *See United States v. Buchanan*, 213 F.3d 302, 309 (6th Cir. 2000) (overturned on other grounds); *United States v. Jackman*, 46 F.3d 1240, 1243 (2d Cir. 1995). In the ordinary case, fair cross-section claims should be raised at jury selection. However, where the underrepresentation is as obscure as the one in this case—due to a small minority population and a small absolute disparity—a failure to object must be excused.

2. Prejudice for Procedural Default

Having shown cause, petitioners must show actual prejudice to excuse their default, even if the error is structural. The Supreme Court has held that a petitioner must show “actual prejudice” to excuse a default. In *Francis v. Henderson*, 425 U.S. 536 (1976), a defendant was convicted in state court of murder. He first raised a challenge to the racial composition of his grand jury in his § 2254 petition. The Court held that a petitioner must show both cause and “actual prejudice” to excuse the procedural default. The Court stated, “[t]he presumption of prejudice which supports the existence of the right is not inconsistent with a holding that actual prejudice must be shown in order to obtain relief from a statutorily provided waiver for failure to assert it in a timely manner.” *Id.* at 542 n.6 (quoting *Davis v. United States*, 411 U.S. 233, 245 (1973)) (the “*Henderson-Davis* rule”).

This circuit has accordingly declined to presume prejudice for the purposes of procedural default when considering structural error claims, although we have not yet addressed the issue in the context of a fair cross-section claim. For example, in *Keith v. Mitchell*, 455 F.3d 662, 673 (6th Cir. 2006), a defendant failed to object to the

exclusion of three scrupled jurors³ during his murder trial. Defendant relied on *Gray v. Mississippi*, 481 U.S. 648 (1987), in which the Supreme Court stated that the exclusion of a scrupled juror is not subject to the harmless error analysis. The *Keith* defendant sought to extend *Gray*'s holding to "obviate any requirement for him to demonstrate prejudice resulting from his procedural default." *Keith*, 455 F.3d at 674. This court declined in part because *Gray* had not been extended by the Supreme Court or any federal court of appeals to the procedural default context. More importantly, we reasoned that extending *Gray* to the procedural default context would require us to ignore the fundamental differences between direct and collateral review in the federalist system. *Id.* at 675. We concluded that the argument for the "extension of *Gray* is weakened, not because the issue is any less important, but because considerations of federalism and respect for the state trial process demand that it be so." *Id.* The procedural default doctrine is "grounded in concerns of comity and federalism"; therefore, "[w]hen a federal court vacates the judgment of a state trial court, a showing of actual prejudice is required to insure that defaulted claims are considered only when they will have made a difference." *Id.*

This court has expressly found the *Henderson-Davis* rule to apply to a jury selection claim, albeit in dicta on a direct review of a federal appeal. In *United States v. Ovalle*, 136 F.3d 1092 (6th Cir. 1998), four defendants raised challenges to the Eastern District of Michigan's jury selection plan on direct appeal. Two of the defendants raised timely objections to the plan; therefore, we determined that all defendants were entitled to relief because the state court had the opportunity to address the problem. *Id.* at 1108-09. However, we noted that the non-objecting defendants would not have otherwise been entitled to relief because they had failed to show cause and actual prejudice under the *Henderson-Davis* rule, even though the error was structural. Petitioner attempts to distinguish this case by arguing that it was a federal case, applying Federal Rule of Criminal Procedure 12. However, in *Henderson*, the Supreme Court explicitly rejected

³That is, jurors who had expressed reservations about recommending a death sentence.

the notion that the federal courts could strictly impose procedural requirements and then review a state's requirements in a different fashion. The Court stated, in pertinent part:

If, as *Davis* held, the federal courts must give effect to these important and legitimate concerns in §2255 proceedings, then surely considerations of comity and federalism require that they give no less effect to the same clear interests when asked to overturn state criminal convictions.

Henderson, 425 U.S. at 541. *Ovalle* reflects this court's "actual prejudice" requirement.

Other circuits have required a petitioner to show "actual prejudice," even where the petitioner claimed a structural error had occurred. In *Purvis v. Crosby*, 451 F.3d 734 (11th Cir. 2006), the Eleventh Circuit refused to presume prejudice where an ineffective assistance of counsel claim arose from a failure to object to a structural error. The court reasoned that allowing the petitioner to dress up a procedural default as an ineffective counsel claim would allow the defendant to circumvent *Henderson* and *Davis*. *Id.* at 742-43. Similarly, the Seventh Circuit declined to presume prejudice for the purposes of procedural default notwithstanding a petitioner's claims that alleged perjured testimony and an alleged *Brady* violation constituted structural error. *Ward v. Hinsely*, 377 F.3d 719, 725 (7th Cir. 2004). The Seventh Circuit reasoned that "[t]he procedural default doctrine is grounded in concerns of comity and federalism. These concerns are in no way diminished if the federal claim raised before the federal habeas court is one of structural error." *Id.* at 726 (internal citations and quotation marks omitted).

Comity requires us to avoid overturning defaulted claims absent a showing of actual prejudice. Given the Supreme Court's express language, and the procedural default rule's roots in comity and federalism, a petitioner must show that he was actually prejudiced regardless of the nature of the underlying constitutional claim. The purpose of the procedural default rule is to protect state court procedures from undue federal intervention. Federal courts are accordingly closely circumscribed in their review of defaulted claims. Although the nature of the procedural right is important, federal courts should not reverse state court decisions unless a petitioner can show that the outcome would have been different.

In arguing for presuming prejudice on habeas in this case, petitioners cite a number of our cases that are distinguishable. *Quintero v. Bell*, 368 F.3d 892 (6th Cir. 2004), is distinguishable because, in that case, counsel's error was so egregious that prejudice could not be reasonably disputed. Trial counsel had failed to object to the inclusion of seven jurors that had served on juries that had convicted petitioner's co-conspirators. *Id.* at 893. We held that failing to object was an "abandonment of 'meaningful adversarial testing' throughout the proceeding," which made "the adversary process presumptively unreliable." *Id.* (quoting *United States v. Cronin*, 466 U.S. 648, 659 (1984)). The same cannot be said about the failure to raise a fair cross-section claim. In *Quintero*, the disputed jurors had already convicted petitioner's co-conspirators. A fair cross-section claim does not present the same danger because there is not the same inevitability of result.

Petitioners also rely on language in *Johnson v. Sherry*, 586 F.3d 439, 444 (6th Cir. 2009), a case in which we addressed a defaulted claim arising from a courtroom closure. We suggested a "strong likelihood" that if the performance was deficient, it would be deemed prejudicial, reasoning in part that the right to a public trial is a structural guarantee. The tentative and conditional nature of this language—in a case that, unlike this one, involved *Strickland* prejudice regarding a court closure claim—is not sufficient to overcome our reading of the clear import of Supreme Court and Sixth Circuit precedent to the jury selection cases we have before us.

Finally, petitioners parse language from three Supreme Court cases, but cannot show how these cases require a different result. In *United States v. Frady*, 456 U.S. 152, 170 (1982), for instance, the Court's holding was that the petitioner had to show actual prejudice to overcome his default in not objecting to a jury instruction, and that he had not done so. The Court rejected Frady's argument that prejudice was not required for the jury instruction claim, without saying anything about whether presumed prejudice for the jury instruction claim would meet the "actual prejudice" requirement for overcoming procedural default. Second, petitioners claim that the Court in *Amadeo v. Zant* declined to impose an "actual prejudice" requirement. However, the *Amadeo* court

declined to reach the issue of prejudice because it was conceded by the government below. 486 U.S. at 228 n.6. Third, petitioners argue that Justice Thomas's dissent from the denial of a writ of certiorari in *Bell v. Quintero*, 125 S. Ct. 2240 (2005), somehow demonstrates *Henderson* is no longer valid. Justice Thomas noted that "[t]he Court of Appeals'[s] holding also rests on a confusion—the idea that the presence of a structural error, by itself, is necessarily related to counsel's deficient performance and warrants a presumption of prejudice." *Id.* at 2242. Because the writ was not granted, petitioner infers that the majority rejected Justice Thomas's opinion. However, there are a multitude of reasons that certiorari may not have been granted. The fact that Justice Thomas reiterated the *Henderson-Davis* rule in his dissent does not mean the majority took the other position.

Because the district courts here did not address actual prejudice, a remand is necessary. We are then left with the question of the proper standard on remand. We are guided in part by the Eleventh Circuit's analysis of a similar question in *Hollis v. Davis*, 941 F.2d 1471, 1480 (11th Cir. 1991). In that case, the petitioner claimed that his counsel was ineffective for failing to object to Alabama's systematic exclusion of African-American jurors from grand and petit juries. To excuse this default, the *Hollis* court required that petitioner show actual prejudice, which involved determining whether there was a reasonable probability that "a properly selected jury [would] have been less likely to convict." *Id.* at 1482. The Eleventh Circuit's analysis is persuasive. The most important aspect to the inquiry is the strength of the case against the defendant.⁴ As the

⁴This is not to say that the race of the jurors, defendant, and victim must be ignored. For example, the Fifth Circuit recognized actual prejudice in a case involving an all-white jury, a black defendant, and a white victim who was allegedly raped. See *Huffman v. Wainwright*, 651 F.2d 347, 350 (5th Cir. 1981). Relying on *Huffman*, the Eleventh Circuit reasoned:

In *Strickland* terms, if we compared the result reached by an all white jury, selected by systematic exclusion of blacks, with the result which would have been reached by a racially mixed jury, we would have greater confidence in the latter outcome, finding much less probability that racial bias had affected it. This principle was recognized in *Huffman*, 651 F.2d at 350:

Huffman was a black man accused of raping a white woman. A mixed-race jury might clearly have a special perception in a mixed race case. His defense was consent. His jury was all white. Although a constitutionally drawn jury may be all white, or all black, depriving *Huffman* of the chance of having a mixed-race jury would seem to meet the prejudice requirements for relief.

Eleventh Circuit reasoned, “a transcript could show a case against [petitioner] so strong, and defense so weak, that a court would consider it highly improbable that an unbiased jury could acquit.” *Id.* at 1483 (internal quotation marks omitted). In that circumstance, actual prejudice would not be shown.

Although the instant petitions do not involve a *Strickland* claim, this standard is appropriate because it balances the competing demands of constitutionally protected equal protection interests and comity toward the state courts. We recognize that the application of the actual prejudice standard in cases such as these presents a particularly challenging charge to the district courts below to answer the question, “what would have happened?” The law nonetheless requires that the question be answered—with a careful look at the transcripts involved, and with judgment that takes into account a fair balance of the competing interests of comity toward the final judgments of the state’s criminal processes and the protection of constitutional equal protection interests.

III.

The district court orders in all three cases are reversed, and the cases are remanded for further proceedings consistent with this opinion.

Hollis, 941 F.2d at 1482 (internal citations and quotation marks omitted).

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 11-1430/10-1247/09-1539

FILED

Jun 28, 2012

LEONARD GREEN, Clerk

11-1430

JOSEPH AMBROSE,
Petitioner-Appellee,
v.
RAYMOND D. BOOKER,
Respondent-Appellant.

10-1247

GREGORY CARTER,
Petitioner-Appellant,
v.
BLAINE LAFLER,
Respondent-Appellee.

09-1539

CARL BURNIE WELLBORN,
Petitioner-Appellant,
v.
MARY BERGHUIS,
Respondent-Appellee.

Before: MERRITT and ROGERS, Circuit Judges; POLSTER, District Judge.

JUDGMENT

On Appeals from the United States District Court
for the Eastern District of Michigan at Bay City
and the Western District of Michigan at Grand Rapids.

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

IN CONSIDERATION WHEREOF, it is ORDERED that the district court orders in all three cases are REVERSED, and the cases are REMANDED for further proceedings consistent with this opinion.

ENTERED BY ORDER OF THE COURT



Leonard Green, Clerk

Case No. 10-1247

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

ORDER

GREGORY CARTER

Petitioner - Appellant

v.

BLAINE LAFLER

Respondent - Appellee

Upon consideration of the motion filed by Mr. Gregory Carter for the appointment of counsel,

It is **ORDERED** that the motion be and it hereby is **GRANTED**. Mr. Bradley Hall has been extended the appointment of counsel under the Criminal Justice Act.

**ENTERED PURSUANT TO RULE 45(a),
RULES OF THE SIXTH CIRCUIT**
Leonard Green, Clerk



Issued: May 24, 2011

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GREGORY CARTER,

Petitioner,

CASE NO. 1:09-CV-215

v.

HON. ROBERT J. JONKER

BLAINE C. LAFLER,

Respondent.

ORDER APPROVING REPORT AND RECOMMENDATION

The Court has reviewed the Magistrate Judge's Report and Recommendation (docket # 39) and Petitioner's objection to it (docket # 41). Under the Federal Rules of Civil Procedure, where, as here, a party has objected to portions of a Report and Recommendation, "[t]he district judge . . . has a duty to reject the magistrate judge's recommendation unless, on de novo reconsideration, he or she finds it justified." 12 WRIGHT, MILLER, & MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3070.2, at 381 (2d ed. 1997). Specifically, the Rules provide that:

The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

FED. R. CIV. P. 72(b)(3); *see also* 28 U.S.C. § 636(b)(1)(C). De novo review in these circumstances requires at least a review of the evidence before the Magistrate Judge. *Hill v. Duriron Co.*, 656 F.2d 1208, 1215 (6th Cir. 1981). After de novo review, the Court concludes that Petitioner Gregory Carter's petition for habeas corpus under 28 U.S.C. § 2254 should be denied.

Following a trial in May 2001, a jury convicted Mr. Carter of armed robbery under Mich. Comp. Laws 750.529 and possession of a firearm during the commission of a felony under Mich. Comp. Laws 750.227b. At Mr. Carter's sentencing, the judge found that "Mr. Carter was convicted by . . . overwhelming evidence," including "a videotape of the robbery" that was of "excellent" quality and "showed very clearly Mr. Carter robbing this particular convenience store." (Docket # 11, Sent. Trans. at 4) The court sentenced Mr. Carter to two years of incarceration for the felony firearm charge, to be served consecutive to the term of incarceration that Mr. Carter was already serving. He was further sentenced to fifteen to forty years of incarceration for the armed robbery conviction, to be served consecutive to the felony firearm sentence. (*Id.*)

After pursuing his direct appeals without success, Mr. Carter filed in state court a motion for relief from judgment on three grounds, including an ineffective assistance of counsel argument and the contention that he was denied his right to a fair trial due to flaws in the Kent County jury selection process, which he alleges systematically excluded minorities from the jury pool. The state court rejected both contentions, in part because Mr. Carter failed to object to the jury before it was sworn in as a panel. Mr. Carter's delayed state-court application for leave to appeal and his application to the Michigan Supreme Court both were denied under Mich. Ct. R. 6.508(D).

In February 2006, Mr. Carter filed in the Eastern District of Michigan this petition under section 2254. He alleged that he was denied due process of law, in violation of the Sixth and Fourteenth Amendments, when he was tried by a jury selected from a jury pool that systematically excluded minorities from the jury selection process. The magistrate judge in the Eastern District of Michigan concluded, and the district judge agreed, that although Mr. Carter had procedurally defaulted his jury selection claim, the default should be excused because the "glitch" had not been

publicly disclosed at the time of Mr. Carter's trial, and "neither petitioner nor his counsel had any reason to suspect that the fair cross-section requirement had been violated, nor any reason to conduct an investigation into Kent County's jury selection process." (Docket # 26, Report and Recommendation at 5) The magistrate concluded that an evidentiary hearing was necessary to determine whether the pool from which Mr. Carter's jury venire was drawn was unrepresentative as a result of the computer glitch. (*Id.* at 8) The district judge adopted the Report and Recommendation, and it further concluded that Mr. Carter could assert ineffective assistance of counsel as cause for his procedural default. (Docket # 29 at 5) The court then transferred this action to the Western District of Michigan "for an evidentiary hearing and determination of the Sixth Amendment claim." (*Id.* at 9)

Discussion

In section 2254 cases, hearings are not mandatory and are held only at the discretion of the court. *See Vroman v. Brigano*, 346 F.3d 598, 606 (6th Cir. 2003); 42 U.S.C. § 2254(e)(2); *see also* Rule 8, Rules Governing Section 2254 Cases in the United States District Courts. *Day v. McDonough*, 547 U.S. 198, 209 (2006). This Court also has discretion to determine if a prior ruling made by the transferor court, including an order to conduct an evidentiary hearing, should be reconsidered. *Gillig v. Advanced Cardiovascular Sys.*, 67 F.3d 586, 590 (6th Cir. 1995). Transfer of a case does not "freeze prior rulings." *Id.* (quotation omitted). A transferee court's reconsideration of a prior order, however, should not be undertaken lightly, but it should be done only for "convincing reasons." *Id.* The magistrate judge in this district has filed a Report and Recommendation articulating the reasons he finds convincing for dismissing the habeas petition without an evidentiary hearing. Mr. Carter has objected to the Report and Recommendation.

The Report and Recommendation recommends that Mr. Carter's section 2254 petition be denied without a hearing. It concludes that Mr. Carter procedurally defaulted his federal claims in state court under an independent and adequate state rule. It further concluded that Mr. Carter's claim was barred because Mr. Carter failed to meet either of the burdens that would permit his defaulted claim to be reviewed in a 2254 motion: (1) he failed to demonstrate cause and prejudice because he did not object to the composition of the jury, and (2) he failed to demonstrate the risk of a fundamental miscarriage of justice because the record established overwhelming evidence of his guilt. *See Hicks v. Straub*, 377 F.3d 538, 551-52 (6th Cir. 2004). The Report and Recommendation finally concluded that, because Mr. Carter's claim is barred by procedural default, the court need not conduct an evidentiary hearing into the substance of Mr. Carter's claim.

Mr. Carter first objects that a transferee court may reconsider a prior order only if the transferor court abused its discretion in promulgating the order. This contention is without merit. On appeal, the Court of Appeals reviews for abuse of discretion the transferee court's reconsideration of the transferor court's order. *See Gillig*, 67 F.3d at 590. Here, however, the Court is not reviewing on appeal the orders of the Eastern District in this case, and the Court is not limited by an appellate standard of review when reconsidering a prejudgment order. Instead, the Court is taking up the case as it left the Eastern District and continuing a "logical progression toward judgment" just as though the case had originated in this Court. *See id.* at 589. And just as with a case that originated in this Court, a prejudgment order remains interlocutory and "can be reconsidered at any time" if reconsideration is in the interest of progressing to final judgment. *See id.*

Mr. Carter also objects on the ground that he cannot establish cause and prejudice without an evidentiary hearing regarding the composition of his jury pool. This contention also is without merit. Mr. Carter cannot establish good cause because he did not object at the close of jury voir dire to the composition of the jury venire. Indeed, defense counsel stated expressly that the defense was “satisfied” with the jury. (Docket # 8, Tr. Trans. at 72). Mr. Carter further did not object to the jury at any time during trial or on his direct appeals. As discussed thoroughly in the Report and Recommendation, Mr. Carter did not need to know about the precise nature of the computer problem in the jury selection to see a deficiency in the jury array. *See also Wellborn v. Berghuis*, — F. Supp. 2d —, No. 1:05-CV-346, 2009 WL 891708, *3 (W.D. Mich. Mar. 31, 2009). The law in Michigan is unequivocal that a defendant is on notice once he has viewed the array, and he must raise timely any objection to it before the jury is empaneled and sworn. *See id.*; *see also People v. Hubbard*, 217 Mich. App. 459, 552 N.W.2d 493 (Mich. Ct. App. 1996); *People v. Oliphant*, 399 Mich. 472, 250 N.W.2d 443 (1976); *People v. Bryant*, No. 21442, 2004 WL 513664 (Mich. Ct. App. Mar. 16, 2004); *People v. Barnes*, No. 244590, 2004 WL 1121901 (Mich. Ct. App. Jan. 15, 2004). As in *Wellborn*, Mr. Carter “absolutely personally observed the racial composition of his jury venire and finally selected jury.” 2009 WL 891708 at *3. Apparently he was content with the venire and his jury because his counsel stated expressly that the defense had no objection to the panel. *See id.* If Mr. Carter “was unhappy with the distribution he could have said so even if he had no reason to know at the time the particulars of a possible computer glitch that contributed to the composition of the array.” *Id.* Accordingly, Mr. Carter cannot establish good cause for his procedural default with or without an evidentiary hearing to determine the actual composition of his jury array. *See id.*

Mr. Carter finally objects to the Report and Recommendation on the basis of *Amadeo v. Zant*, 486 U.S. 214 (1988). His reliance on *Amadeo* is misplaced. *Amadeo* involved a death penalty case in which the district attorney and jury commissioners of Putnam County, Georgia, intentionally engineered a scheme to under-represent African Americans and women in the County's juries, and to conceal the scheme by keeping the under-representation sufficiently subtle to fall within the presumptively acceptable statistical guidelines of prevailing case law. *See id.*; *Wellborn*, 2009 WL 891708 at *3. The very point of the intentional and diabolical scheme was to exclude African Americans and women in a way that made it virtually impossible to detect. A litigant looking at any given venire, intentionally engineered to under-represent African Americans and women, was not automatically on notice of a problem. Under those unique circumstances, the Court refused to set aside that the trial court's factual finding that defense counsel did not intentionally bypass a jury challenge, and permitted the habeas claim to proceed. This case is entirely different. There is no allegation, much less evidence, of any intentional effort to exclude any particular racial or gender group from the jury venire. At most, Mr. Carter claims that, as described in a newspaper article, an inadvertent computer glitch for some undetermined period of time may have had the unintended effect of limiting the number of African Americans summoned for jury duty. A litigant who was actually dissatisfied with the number of available African American jurors in this scenario was on notice of any under-representation of African Americans in the jury pool by his view of the array, which was all he needed to lodge an objection, if he wished to do so. He did not, and he thereby procedurally defaulted the claim.

Certificate of Appealability

Under 28 U.S.C. § 2253(c)(2), the Court must determine whether a certificate of appealability should be granted. A certificate should issue if the petitioner has demonstrated a “substantial showing of a denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The district court must “engage in a reasoned assessment of each claim” to determine whether a certificate is warranted, and each issue must be considered under the standards set forth by the Supreme Court in *Slack v. McDaniel*, 529 U.S. 473 (2000). *Murphy v. Ohio*, 263 F.3d 467 (6th Cir. 2001). Under *Slack*, to warrant a grant of the certificate, “[t]he petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” 529 U.S. at 484. “A petitioner satisfies this standard by demonstrating that . . . jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). In applying this standard, the Court may not conduct a full merits review, but must limit its examination to a threshold inquiry into the underlying merit of Petitioner’s claims. *Id.*

The Court is denying Mr. Carter’s claim concerning the jury venire composition on procedural grounds, but in a unique setting. Reasonable jurists could certainly conclude either that the district court has erred in denying the jury venire composition claim on procedural grounds or that Petitioner should be allowed to proceed further. Indeed, this has already happened in several similar cases. *See, e.g., Parks v. Warren*, 574 F. Supp. 2d 737, 744-47 (E.D. Mich. 2008); *Powell v. Howes*, No. 05-71345, 2007 WL 1266398 (E.D. Mich. May 1, 2007). Because the Court finds that reasonable jurists could conclude that this Court’s dismissal of Mr. Carter’s due process claim as

barred by procedural default was debatable or wrong, the Court will grant Mr. Carter a certificate of appealability on this issue.

ACCORDINGLY, IT IS ORDERED

1. The Report and Recommendation of the Magistrate Judge, filed December 18, 2009, is approved and adopted as the opinion of this Court.
2. Mr. Carter's motion for habeas corpus under section 2254 is **DENIED**.
3. A certificate of appealability is **GRANTED**.

Dated: January 8, 2010

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

A-10

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GREGORY CARTER,

Petitioner,

v.

Case No. 1:09-cv-215
Hon. Robert J. Jonker

BLAINE C. LAFLER,

Respondent.

_____ /

REPORT AND RECOMMENDATION

Petitioner, a prisoner currently incarcerated at a Michigan correctional facility, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner initially filed this action in the Eastern District on February 9, 2006. Three years later, on March 10, 2009, the court in that district entered an opinion and order transferring this action to the Western District (sometimes referred to as the “Order of Transfer”) with directions to perform an evidentiary hearing on petitioner’s Sixth Amendment claim. *See* (docket no. 29).¹ For the reasons stated below, the undersigned concludes that an evidentiary hearing is not warranted and that the petition should be dismissed.

I. Background

On May 9, 2001, a jury convicted petitioner of armed robbery, M.C.L. § 750.529, and possession of a firearm during the commission of a felony, M.C.L. § 750.227b. *People v. Gregory*

¹ The proceedings in the Eastern District appear as docket nos. 1 through 30.

Carter, No. 235590 (Mich. App. April 3, 2003).² The judge made the following findings at petitioner's sentencing:

Well, I note that Mr. Carter is on -- at the time of this offense, was on parole for armed robbery, and, of course, these sentences have to be consecutive.

I presided at the trial. It was a trial in which Mr. Carter was convicted by, I think you'd have to say overwhelming evidence. There was, among other things, a videotape of the robbery, and while such videotapes tend to be of rather poor quality, this one was excellent, and it showed very clearly Mr. Carter robbing this particular convenience store.

Sent. Trans. at 3-4 (docket no. 11). Petitioner was sentenced to two years incarceration at the Michigan Department of Corrections for the felony firearm charge, to be served consecutive "to the term of incarceration which he's currently serving and for which he was on parole at the time of this offense." *Id.* at 4. On the charge of armed robbery, petitioner was sentenced to a term of 15 to 40 years in prison for the armed robbery conviction, consecutive to the felony firearm sentence. *Id.*

Petitioner presented three issues in his direct appeal to the Michigan Court of Appeals:

- I. Did the court err by allowing a police officer to testify as to her impressions of alleged statements made by [petitioner] in tape-recorded statements from the jail without a proper foundation for admission and in violation of the best evidence rule, denying [petitioner] his due process right to a fair trial?
- II. Was [petitioner] denied the effective assistance of counsel where counsel failed to file an alibi notice or to investigate and prepare an alibi defense?
- III. Did the trial court abuse its discretion in denying counsel's motion to withdraw?

² The portion of the trial transcript containing the announcement of the jury verdict (i.e., pages 100-102) is missing. See docket no. 10.

See Brief on Appeal (docket no. 15). The Michigan Court of Appeals affirmed the conviction. *People v. Gregory Carter*, No. 235590. Petitioner did not appeal any of these issues to the Michigan Supreme Court. See Corbin R. Davis Affidavit (docket no. 12).

On October 27, 2003, the state trial court entered an opinion and order denying petitioner's motion for relief from judgment.³ The trial court's opinion and order summarized petitioner's three claims as follows:

In his pleadings, Defendant seeks Relief from Judgment pursuant to MCR 6.501 on the grounds that he was denied his right to a fair trial due to flaws in the Kent County jury selection which he alleges "systematically excluded" minorities from the jury pool, ineffective assistance of counsel, and resentencing.

Opinion and Order at 1 (docket no. 13).

The court summarized its conclusions as follows:

During his trial, the Defendant did not object to the composition of the jury, and therefore, this issue was not properly preserved and can not constitute grounds for a new trial pursuant to MCR 6.500. Likewise, Defendant has not met the burden necessary under *People v. Pickens*, 446 Mich298, 314; 531 NW2d 797 (1994) which adopted the test for ineffective assistance of counsel that was articulated in *Strickland v. Washington*, 446 US 668, 694; 104 Sct 2052; 80 LE2d 674 (1984). Furthermore, Defendant's allegations of error relating to his sentence are without merit.

Id.

Petitioner's first two claims are relevant to this habeas action. The trial court set forth the following analysis with respect to the jury issue:

1. Systematic Exclusion of Minorities from the Jury Pool

In 2001, Kent County's jury selection process came under intense media scrutiny. It was alleged that the system was fundamentally flawed, leading to a systematic exclusion of minority jurors from the jury pool. Following media

³ The state court docket sheet does not reflect a filing date for this motion. See docket no. 16.

coverage of this problem, the County determine that a flaw in the random computer process could, in fact, lead to the disproportionate exclusion of minorities from the jury pool. The system was subsequently corrected.

Following this revelation many defendants requested new trials on the basis that they were denied their constitutional right to a fair trial by virtue of this flawed system. The Court of Appeals addressed this issue recently in *People v. McKinney*, ___ Mich App ___; ___ NW2d ___ (2003) (Slip copy). In this case the defendant claimed that African-Americans were “systematically excluded from Kent County’s jury venires when her trial was conducted.” *Id.* At ___. The defendant in this case cites the same newspaper articles that the defendant in the instant matter has attached as exhibits. The Court of Appeals stated:

Questions concerning the systemic exclusion of minorities in jury venires are generally reviewed de novo. *People v. Hubbard (After Remand)*, 217 Mich.App. 459, 472, 552 N.W.2d 493 (1996). “A criminal defendant is entitled to an impartial jury drawn from a fair cross section of the community.” *Id.*, citing *Taylor v. Louisiana*, 419 U.S. 522, 526-531, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). To establish a prima facie violation of the fair cross-section requirement, the defendant bears the burden of proving “that a distinctive group was underrepresented in his venire or jury pool, and that the underrepresentation was the result of systematic exclusion of the group from the jury selection process.” *People v. Smith*, 463 Mich. 199, 203, 615 N.W.2d 1 (2000), citing *Duren v. Missouri*, 439 U.S. 357, 364, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979).

The Court of Appeals went on to deny the request for a new trial because defendant had not raised the issue before the jury was empannelled and sworn. *Id.* at ___. See also *People v. Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996). Likewise, the defendant in the instant matter failed to raise this as an objection during his trial, and the motion for a new trial should similarly be dismissed.

Id. at 2-3.⁴

The trial court also denied petitioner’s ineffective assistance of counsel claim, providing in pertinent part as follows:

⁴ The Michigan Court of Appeals decision in *McKinney* has since been published as *People v. McKinney*, 258 Mich. App 157; 670 NW2d 254 (2003).

The Defendant's argument, in sum, is that his trial counsel was ineffective due to his failure to investigate a possible alibi defense. The defendant alleges that he was at a treatment facility in Illinois at the time of the incident. However, this defense was raised on the evening following the first day of the trial. Furthermore, the defense counsel did contact the treatment facility and was informed that the Defendant had not been admitted to the program. Additionally, the defense counsel attempted to contact the Defendant's parole officer, but was unable to do so. The Defendant, therefore, has failed to establish that the defense counsel acted unreasonably under the circumstances, and his claim of ineffective assistance of counsel must fail. *People v. Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

Id. at 4.

Petitioner filed a delayed application for leave to appeal this order to the Michigan Court of Appeals, raising two issues (in his words):

- I. Did the trial court rule erroneously, when it rule that by defendant counsel failure to object to the composition of the jury at trial, therefore, his issue was not properly preserved and can not constitute ground for a new trial pursuant to MCR 6.500.
- II. Was the defendant denied his United States Sixth and Fourteen Amendments rights to representation by an jury from a fair cross-section of the community. Whereas, there was a serious flaw in the Kent County computerized jury selection system which systematically excluded minority jurors from the jury pool.

Application for leave to appeal (docket no. 13).

The Michigan Court of Appeals denied the delayed application "for failure to meet the burden of establishing entitlement to relief under MCR 6.508(D)." *People v. Gregory Carter*, No. 254482 (Mich. App. Aug. 20, 2004) (docket no. 13). Petitioner raised the same two issues in his application for leave to appeal to the Michigan Supreme Court, which denied the application "because defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D)." *People v. Gregory Carter*, No. 127081 (Mich. May 31, 2005).

Petitioner raised the following issue in his habeas petition filed in the Eastern District on February 9, 2006 (in his words):

Whether or not petitioner was denied due process of law in violation of his Sixth and Fourteenth Amendments of the United States Constitution to be represented by a jury from a fair cross section of the community, whereas, there was a serious flaw in the selection process of the Kent County jury selection pool which was programmed to systematically exclude minorities from the jury selection process.

Petition at ¶ 13 (docket no. 1). In his attached memorandum of law, petitioner also argued that the trial court “ruled erroneously when it ruled that by petitioner’s counsel’s failure to object to the composition of the [jury] at trial, therefore, the issue was not properly preserved and cannot constitute grounds for a new trial pursuant to MCR 6.500.” *Id.* at p. 17. In his answer, respondent asserted that petitioner’s claim regarding the systematic exclusion of minorities from the jury pool was barred from habeas review by procedural default in the state court. In petitioner’s reply, he points to a Grand Rapids Press article from October 20, 2002, in which the Kent County Circuit Court’s Chief Judge acknowledged the problem. Petitioner further contends that a competent attorney could not have provided assistance under these circumstances, because the flaw in the jury selection procedure was discovered long after his trial.

In reviewing the petition, the magistrate judge in the Eastern District summarized two newspaper articles from the *Grand Rapids Press* which purportedly explained the “computer glitch” which resulted in the omission of eligible jurors with certain ZIP codes in Kent County. *See* Report and Recommendation at 2-3 (docket no. 26).⁵ The magistrate judge concluded that while petitioner’s jury selection claim was procedurally defaulted, the procedural default should be

⁵ The newspaper articles summarized in the magistrate judge’s report were not part of the court record.

excused because “neither petitioner nor his counsel had any reason to suspect that the fair cross-section requirement had been violated, nor any reason to conduct an investigation into Kent County’s jury selection practices.” *Id.* at 5. The magistrate judge did not address the issue of prejudice with respect to the procedural default claim,⁶ but nevertheless determined that the court should reject respondent’s procedural default defense. *Id.* The magistrate judge concluded that an evidentiary hearing was necessary:

Although this evidence [of systematic exclusion] exists in the abstract, what is lacking here is evidence specifically directed at the manner in which the jury venires were composed at the time of petitioner’s trial. In order to resolve this claim, the court “must compare the difference between the percentage of the distinctive group among the population eligible for jury service and the percentage of the distinctive group” in the pool from which the jury was drawn. *United States v. Grisham*, 63 F.3d 1074, 1078 (11th Cir. 1995). For example, even assuming that the computer error occurred in the compiling of the venires, if the percentage of African-Americans in the pool from which the venires were drawn was nonetheless representative of the percentage of African-Americans in the county, there would be no fair cross-section claim notwithstanding that some individual African-Americans may have been improperly excluded. The circumstances relevant to petitioner’s own case -- namely, the composition of the pool from which the jurors were drawn and the composition of petitioner’s venire -- are simply not reflected in the record before the Court. Further, to the extent there was any systematic underrepresentation, the record does not establish whether this underrepresentation resulted from the computer glitch or from factors attributable to the actions of private citizens. Thus, an evidentiary hearing is necessary to resolve this claim.

Id. at 8 (footnote omitted).

In the Order of Transfer entered on March 10, 2009, the court expressed its belief that petitioner did not have an opportunity to make a showing of a prima facie case under *Duren v. Missouri*, 439 U.S. 357. Order of Transfer at p. 9. The court adopted the newspaper summaries and recitation of facts as set forth in the magistrate judge’s report because neither party objected to the

⁶ See § II.B., *infra*.

report. *Id.* at p. 1. The court rejected petitioner's objection to the magistrate judge's finding that this claim was procedurally defaulted, but concluded there was cause for failure because the alleged flaw in the computer had not yet been discovered:

Here, as set forth by the Magistrate Judge, the factual basis of petitioner's fair cross-section claim was reasonably unknown to Petitioner and his counsel at the time the jury was sworn. The alleged systematic exclusion resulted from an unknown computer glitch that was not discovered until several months after Petitioner's conviction. Petitioner may assert ineffective assistance of counsel as cause for his procedural default.

Id. at 5. Because petitioner was both convicted and incarcerated in the Western District and the potentially relevant witnesses are located in the Western District (i.e., Kent County), the court transferred this action to this district "for an evidentiary hearing and determination on the Sixth Amendment claim." *Id.*

II. Evidentiary hearing

A. Background

Evidentiary hearings are not mandatory in § 2254 cases, but are held at the discretion of the court. *See Vroman v. Brigano*, 346 F.3d 598, 606 (6th Cir. 2003). 42 U.S.C. § 2254(e)(2) limits a federal court's discretion to grant an evidentiary hearing. *Id.* In this regard, Rule 8 of the Rules Governing Section 2254 Cases in the United States District Courts ("Rule 8") provides that:

the judge, after the answer and the transcript and record of state court proceedings are filed, shall . . . determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require.

In this case, the undersigned respectfully disagrees with the March 10, 2009 order for an evidentiary hearing in this action. *See Gillig v. Advanced Cardiovascular Systems, Inc.*, 67 F.3d 586, 589 (6th Cir. 1995) ("[p]rejudgment orders remain interlocutory and can be reconsidered

at any time”) (quoting 1b James W. Moore et al., *Moore’s Federal Practice* ¶ 0.401 (2d ed. 1994)). As a general rule, a transferee court should be cautious in disturbing orders previously issued by the transferring court. See *Gillig*, 67 F.3d at 589-90 (observing that the utility of transferring cases would be seriously compromised if a transferee judge hastily disturbed the rulings of the transferor judge). *Id.* Nevertheless, because “[i]t is within the sole discretion of the court to determine if a prior ruling should be reconsidered,” the Sixth Circuit does not impose any conditions or limitations upon this court’s power to review a prior ruling of another district court. *Id.* at 590, quoting *United States v. Todd*, 920 F.2d 399, 403 (6th Cir. 1990). Certainly, of course, the court in the Eastern District did not presume to order this court to conduct a hearing, but felt such a hearing was appropriate. With due respect, I find for reasons not addressed in that order (but discussed below) that an evidentiary hearing is not necessary because petitioner’s claim is, in fact, barred by the doctrine of procedural default.

B. Procedural default

Where “a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claim is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice.” *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). A procedural default “provides an independent and adequate state-law ground for the conviction and sentence, and thus prevents federal habeas corpus review of the defaulted claim, unless the petitioner can demonstrate cause and prejudice.” *Gray v. Netherland*, 518 U.S. 152, 162 (1996). Not every state procedural rule will warrant application of the procedural default doctrine. Only a procedural rule that was

“‘firmly established and regularly followed’ by the time as of which it [was] to be applied,” *Ford v. Georgia*, 498 U.S. 411, 424 (1991), will support application of the doctrine. “For a habeas claim to be procedurally defaulted on the basis of a state procedural rule, the petitioner must have violated a procedural rule, but the state court must also have based its decision on the procedural default.” *Simpson v. Jones*, 238 F.3d 399, 407 (6th Cir. 2000). MCR 6.508(D) is a valid procedural bar for habeas purposes. *See Canty v. Cason*, No. 02-2030, 2003 WL 152322 (6th Cir. Jan. 16, 2003); *Burroughs v. Makowski*, 282 F.3d 410, 414 (6th Cir. 2002); *Luberda v. Trippett*, 211 F.3d 1004, 1008 (6th Cir. 2000).

The Kent Circuit Court was the first state court to review petitioner’s habeas claims, which were raised in his motion for relief from judgment under MCR 6.500 *et seq.* Both the Michigan Court of Appeals and the Michigan Supreme Court denied petitioner’s application for leave to appeal the trial court’s order denying post-judgment relief because he failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). As the last state court rendering judgment in the case, the Michigan Supreme Court’s decision denying petitioner’s claims on the basis of the state procedural bar of MCR 6.508(D) prevents habeas review. *See Burroughs*, 282 F.3d at 414; *Simpson v. Jones*, 238 F.3d 399, 407 (6th Cir. 2000). Accordingly, petitioner’s claims are procedurally defaulted. *See Order of Transfer* at pp. 4-5.

However, the undersigned concludes that this court should re-consider the Order of Transfer to the extent that order found that petitioner had shown good cause to excuse the procedural default. The “good cause” determination is inconsistent with previous decisions entered in this district in similar cases. *See, e.g., Wellborn v. Berghuis*, No. 1:05-cv-346, 2009 WL 891708 at *21-

27 (W.D. Mich. March 31, 2009), appeal pending, No. 09-1539 (6th Cir.); *Burros v. Curtin*, 1:05-cv-701, 2009 WL 736066 at *5-12 (W.D. Mich. March 18, 2009).

Since petitioner procedurally defaulted this claim in state court, the claim is barred unless he demonstrates either: (1) cause for his failure to comply with the state procedural rule and actual prejudice flowing from the violation of federal law alleged in his claim, or (2) that a lack of federal habeas review of the claim will result in a fundamental miscarriage of justice. *See House v. Bell*, 547 U.S. 518, 536-37 (2006); *Murray v. Carrier*, 477 U.S. 478, 495 (1986); *Hicks v. Straub*, 377 F.3d 538, 551-52 (6th Cir. 2004).

To show cause sufficient to excuse a failure to raise claims on direct appeal, petitioner must point to “some objective factor external to the defense” that prevented him from raising the issue in his first appeal. *McCleskey v. Zant*, 499 U.S. 467, 497 (1991); *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

Petitioner’s claim arises from the Sixth Amendment’s guarantee that a criminal defendant shall have an impartial jury drawn from a fair cross-section of the community. *Duren v. Missouri*, 439 U.S. 357, 358-59 (1979); *Taylor v. Louisiana*, 419 U.S. 522, 526-31 (1975). The petit jury does not have to mirror the community, but distinct groups cannot be systematically excluded from the venire. *See, United States v. Jackman*, 46 F.3d 1240, 1244 (2nd Cir. 1995). To establish a *prima facie* violation of the fair cross-section requirement, petitioner bore the burden of proving “that a distinctive group was under-represented in his venire or jury pool, and that the under-representation was the result of systematic exclusion of the group from the jury selection process.” *People v. Smith*, 463 Mich. 199 (2000), citing *Duren v. Missouri*, *supra*.

While petitioner bases the present habeas claim on the ground that he “was found guilty by an all white jury,” Petition at p. 4, he did not challenge the jury array at trial. If petitioner felt the jury venire was unbalanced, he did not say so. Rather, at the close of the jury voir dire, petitioner’s counsel stated that “the defense is satisfied.” Trial Trans. at 72 (May 7, 2001) (docket no. 8). The jury was then empaneled and sworn. There were no objections regarding the composition of the jury array at any time during the trial, much less the voir dire, and trial counsel’s statement constituted an express waiver of the issue. Petitioner did not raise this issue in his direct appeal. Rather, he first raised it in his motion for relief from judgment. At that time, petitioner apparently relied on a newspaper article from October 20, 2002 to support his claim that Kent County’s jury selection process “was programmed in a manner that it would systematically exclude minorities from the jury selection pool.” Petitioner’s Memorandum of Law at 4.

For cause, petitioner contends that the error was not procedurally defaulted because the flaw in the jury selection process, i.e., the under-representation of African Americans, was not discovered until after he filed his appeal of right. The court disagrees. Simply seeing an array when the deficiency is apparent provides a defendant and his attorney with adequate notice. Petitioner did not need to know the precise nature of the computer problem to object to the lack of African Americans on the jury array.

In *People v. Hubbard*, 217 Mich. App. 459, 465-66 (1996), the court emphasized the significance of viewing the array. The court in that case held that the defendant was not required to challenge the juror allocation process “before defendant actually viewed the array.” (Emphasis added.) Once the defendant viewed the array he raised his objection. The difference between

Hubbard and the present case is that the defendant in *Hubbard* made his challenge after viewing the array and *prior* to the jury being sworn, and petitioner did not.

Similarly, in *People v. Oliphant*, 399 Mich. 472, 501 (1976), the defendant waited until after the jury selection and until the first day of trial to challenge the jury array, alleging that it deprived him of his right to an impartial jury drawn from a fair cross section of the community because of the absence of persons between the ages of 18 and 21. The Michigan Supreme Court held the challenge to be untimely because the claim was based “on the fact that no persons between the ages of 18 and 21 *appeared on the array*.” (Emphasis added.)

By contrast, in *People v. Bryant*, No. 241442, 2004 WL 513664 (Mich. App. March 16, 2004), the defendant was convicted in Kent County during the time period affected by the “computer glitch” in this case, but *did* make a timely objection during the voir dire process that he had been deprived of his Sixth Amendment right to an impartial jury drawn from a fair cross-section of the community. As a result of his timely objection, he was determined to have preserved his claim and was afforded an evidentiary hearing by the Michigan Court of Appeals.

Thus, the law in Michigan is unequivocal that you are considered to be on notice once you have viewed the array and you must raise a timely objection before the jury is empaneled and sworn.

The Michigan Court of Appeals, in addressing the argument that some criminal defendants could not have known the reason for the purported discrepancy in the venire panel at the time of trial, has been careful to make the distinction between (1) the opportunity defendants had to notice the fact of a discrepancy and raise the issue, and (2) not knowing the reason why it

occurred. In *People v. Barnes*, No. 244590, 2004 WL 1121901 (Mich. App. Jan. 15, 2004), the court observed:

We recognize that perhaps the alleged unconstitutional jury selection *process* could not have been specifically identified at the time of trial. *But, in light of the all-white jury, it was incumbent on defendant to make a timely challenge or raise an objection. A concern on defendant's part about the racial makeup of the venire should have arisen, and a timely challenge may very well have led to discovery of possible problems in the selection process. . . . [B]ecause one of the elements is under-representation in a specific defendant's jury array or venire, defendant, when faced with an all-white jury, could have, minimally, raised an objection below.*

People v. Barnes, 2004 WL 1121901 at *3 (emphasis added).⁷

Here, both petitioner and his counsel were satisfied with the racial composition of the jury, which included only white jurors. If petitioner had observed that the array did not represent a fair cross-section of the community, it is, of course, not necessary to know the reason why in order to object. Rather, it is by raising the question that a court has the opportunity to inquire and determine if there has been a constitutional violation. For the federal courts to ignore the established state requirement of a timely objection is not only an affront to the state courts, but it gives a petitioner (and presumably countless other unhappy defendants convicted in Kent County during this same period) a second bite at the apple, because of the possibility of a constitutional violation that could have been investigated at the time and was not. Since the Order of Transfer did not directly address this issue, and since a decision on this question in favor of respondent would

⁷ For a discussion on the general proposition that a challenge to the array must be made in a timely fashion or it is deemed waived, see 50A CJS *Juries* § 361 (“Generally, the challenge should be raised before various events, such as the start of jury selection, or the start of voir dire. While it has been held that a motion made prior to the impaneling and swearing in of the jury is timely, a motion generally is untimely if it is made after the jury has been impaneled and sworn, or after the trial has been entered on, or after the verdict.”) (citations omitted).

preclude the need for what would be a very costly and complex evidentiary hearing, I believe that requiring such a hearing without resolving the issue would be premature.

Petitioner's failure to demonstrate cause for his procedural default prevents federal review of his habeas claims unless the court's failure to do so will result in a "fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. The miscarriage-of-justice exception only can be met in an "extraordinary" case where a prisoner asserts a claim of actual innocence based upon new reliable evidence. *House*, 547 U.S. at 537. A habeas petitioner asserting a claim of actual innocence must establish that, in light of new evidence it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt. *Id.* (citing *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). Petitioner has made no such claim or showing of actual innocence in this case.

Accordingly, petitioner's claim is procedurally barred on habeas review.⁸

⁸ Recently, the Sixth Circuit decided the case of *Smith v. Berghuis*, 543 F.3d 326 (2008), cert. granted, ___ S. Ct. ___ (2009 WL 1370175) (Sept. 30, 2009), which held that a trial court in Kent County violated a defendant's Sixth Amendment right to a jury drawn from a fair cross-section of the community. I mention the case only to distinguish it. In *Smith*, the Sixth Circuit held that the petitioner's Sixth Amendment right to a trial by a jury drawn from a fair cross-section of the community was violated when the underrepresentation of African Americans in the venire panel occurred as a result of systematic exclusion due to circumstances entirely unrelated to the present case. *Smith* was tried in 1993, when Kent County assigned jurors to district court panels prior to assigning them to circuit court panels. *Id.* at 331-32. Kent County also excused jury duty absences for several social and economic reasons such as lack of transportation, child care or inability to take time off from work. *Id.* at 332, 340. *Smith*, an African American, argued that both of those practices resulted in the underrepresentation of African Americans on the venire panels in the circuit courts. *Id.* at 339. The practice at issue in *Smith* ended in 1993.

Petitioner's trial occurred eight years later, in 2001, and involved a completely different problem, namely the purported computer glitch referenced in this case.

In stark contrast to the present case, *Smith* properly objected to the composition of the jury venire panel and petit jury prior to the jury being sworn. *Id.* at 330. After denying *Smith*'s request, the trial court found that "there's nothing to indicate to me that . . . the manner of selecting jurors is anything other than impartial and that there's been any type of subjective selection of jurors to create a problem in terms of representation." *Id.* Because the issue was properly preserved, the habeas court did not need to address

III. Recommendation

I respectfully recommend that the evidentiary hearing be cancelled and that the habeas petition be **DENIED**. Rule 8, Rules Governing § 2254 Cases in the United States District Courts.

Dated: December 18, 2009

/s/ Hugh W. Brenneman, Jr.
HUGH W. BRENNEMAN, JR.
United States Magistrate Judge

ANY OBJECTIONS to this Amended Report and Recommendation must be served and filed with the Clerk of the Court within fourteen (14) days after service of the report. All objections and responses to objections are governed by W.D. Mich. LCivR 72.3(b). Failure to serve and file written objections within the specified time waives the right to appeal the District Court's order. *Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

whether Smith had procedurally defaulted his claim. The Sixth Circuit, therefore, was able to address the merits of Smith's claim. Here, petitioner never objected to the composition of the jury venire panel, and never gave the trial court an opportunity to address the issue while it was still feasible to do so.

A-11

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GREGORY CARTER,

Petitioner,

Civil Case No. 06-CV-10552

-VS-

PAUL D. BORMAN
UNITED STATES DISTRICT JUDGE

BLAINE C. LAFLER,

Respondent.

PAUL J. KOMIVES
UNITED STATES MAGISTRATE JUDGE

OPINION AND ORDER

**(1) ADOPTING REPORT AND RECOMMENDATION IN FAVOR OF REJECTING
RESPONDENT'S ARGUMENT THAT PETITIONER'S CLAIM IS BARRED BY
PROCEDURAL DEFAULT AND HOLDING AN EVIDENTIARY HEARING;
(2) TRANSFERRING THE CASE TO THE WESTERN DISTRICT OF MICHIGAN FOR
AN EVIDENTIARY HEARING AND DETERMINATION**

Before the Court is Magistrate Judge Paul J. Komives July 2, 2008 Report and Recommendation ("Report") in favor of denying Respondent's argument that Petitioner's claim is procedurally defaulted and concluding an evidentiary hearing is necessary to resolve Petitioner's claims. (Dkt. No. 26). On July 14, 2008, Respondent filed objections to the Report (Dkt. No. 27), and Petitioner filed a Response on July 21, 2008. (Dkt. No. 28).

The Court now reviews the Objections, the Report and pertinent parts of the record *de novo* pursuant to 28 U.S.C. § 636(b).

I. BACKGROUND

The factual background underlying Petitioner's claim was accurately summarized in Magistrate Judge Komives Report. Because neither party objects to that part of the magistrate judge's Report, the Court adopts that portion as follows:

Petitioner Gregory Carter is a state prisoner currently confined in the Carson

City Correctional Facility in Carson City, Michigan. On May 9, 2001, petitioner was convicted of armed robbery, MICH. COMP. LAWS § 750.529, and possession of a firearm during the commission of a felony, MICH. COMP. LAWS § 750.227b, following a jury trial in the Kent County Circuit Court. On July 5, 2001, petitioner was sentenced to a term of 15-40 years' imprisonment on the armed robbery conviction, and to a mandatory consecutive term of two years' imprisonment on the felony firearm conviction. Petitioner filed a direct appeal in the Michigan Court of Appeals, raising claims not relevant to the instant petition. His claims were rejected on appeal.

On July 30, 2002, the Grand Rapids Press reported on a story involving a computer glitch in Kent County's system for selecting jury venires [("Article")]. County officials conceded that their own review of their computer system revealed that "nearly 75 percent of the county's 454,000 eligible residents were excluded from potential jury pools since spring 2001" and that "[m]any blacks were excluded from . . . jury pools due to a computer glitch that selected a majority of potential candidates from the suburbs." The chief judge of the Kent County Circuit Court, George Buth, was quoted as saying, "There has been a mistake – a big mistake." The Grand Rapids Press articles explain that the error came to light after a Grand Rapids high school teacher and his students conducted a study of underrepresentation of minorities on Kent County juries. When the teacher reported the class findings to county officials they publicly insisted that the class's calculations were wrong, but when county officials finally conducted an internal study, they were startled to find

that those calculations were exactly right. The teacher was quoted as saying that he finally went public with his complaints because “nobody wanted to do anything” about the problem. An article of August 2, 2002, explains how the error occurred:

Although 453,981 names and addresses of eligible jurors from Kent County were on the list provided by the Michigan Secretary of State from driver’s license rolls, the computer got instruction to consider only 118,169 names.

After proportionately selecting from all ZIP codes, the computer routinely still needed more jurors. The additional names then were automatically taken from the same abbreviated list, starting at the lowest numbered ZIP codes – which are in the suburbs.

The second search process almost never went further than 49505 – leaving out areas where most of the county’s minority population lives: Grand Rapids, Kentwood, Wyoming and Walker.

The report [Kent County Jury Management Report] says the decision to have county workers take over updating the computerized operation in April of 2001 [from private contractors] was made to save time and money.

In light of these revelations, petitioner filed in the trial court a motion for relief from judgment pursuant to MICH. CT. R. 6.500-.508, claiming that he was denied his Sixth and Fourteenth Amendment right to jury drawn from a fair cross-section of the community. Relying on *People v. McKinney*, 258 Mich. App. 161-62, 670 N.W.2d 254, 258 (2003), the trial court denied the motion based on petitioner’s failure to object to the jury array at trial, before the jury was sworn. *See People v. Carter*, No. 01- 00091-FC (Kent County, Mich., Cir. Ct. Oct. 27, 2003). The Michigan Court of Appeals and the Michigan Supreme Court denied petitioner’s applications for leave to appeal in standard orders. *See People v. Carter*, 472 Mich. 912, 696 N.W.2d 714 (2005); *People v. Carter*, No. 254482 (Mich. Ct. App. Aug. 20, 2004).

On February 9, 2006, petitioner filed this application for the writ of habeas corpus pursuant to 28 U.S.C. § 2254. As grounds for the writ, petitioner raises the fair cross-section claim that he raised in his state court motion for relief from judgment. Respondent filed an answer on August 22, 2006. Respondent argues that petitioner's claim is barred by his procedural default in the state courts.

Petitioner filed a reply to respondent's answer on November 13, 2006. For the reasons that follow, the Court should conclude that petitioner's claim is not barred by a procedural default, and that an evidentiary hearing is necessary to resolve the claim.

II. OBJECTIONS

Respondent filed objections to the Report on July 14, 2008. Respondent asserts that the "glitch" in the Kent County computer program did not impact the selection of Petitioner's jury. Respondent also contends that Petitioner cannot establish his Sixth Amendment claim because the only evidence that Petitioner can offer to show systematic exclusion of jurors is the admitted error in the Kent County computer program. Thus, Respondent appears to be arguing that an evidentiary hearing is not necessary because Petitioner's Sixth Amendment claim is fatally deficient. Lastly, Respondent argues that because Petitioner did not raise his claim of ineffective assistance of counsel for failure to challenge the jury selection in the trial court, he may not assert ineffective assistance of counsel as cause for his procedural default.¹

A. Ineffective Assistance of Counsel as Cause for Procedural Default

¹ Respondent merely repeats verbatim its argument from Respondent's Answer in Opposition to Petition for Writ of Habeas Corpus. (Dkt. No. 5 at 13–14).

The Court addresses Petitioner's last objection first. A procedural default is "a critical failure to comply with state procedural law." *Trest v. Cain*, 522 U.S. 87, 89 (1997). "When a habeas petitioner fails to obtain consideration of a claim by a state court . . . due to a state procedural rule that prevents the state courts from reaching the merits of the petitioner's claim, that claim is procedurally defaulted and may not be considered by the federal court on habeas review." *Seymour v. Walker*, 224 F.3d 542, 549-50 (6th Cir. 2000) (citing *Wainwright v. Sykes*, 433 U.S. 72, 80, 84-87, (1977) and *Picard v. Connor*, 404 U.S. 270, 275-80 (1971)). A petitioner may still obtain habeas review of a procedurally defaulted claim if he can establish cause and prejudice for his default. Constitutionally ineffective assistance of counsel may constitute "cause" for a procedural default. *McCleskey v. Zant*, 499 U.S. 467, 494 (1991). Under this standard, cause may be established by "a showing that the factual or legal basis for a claim was not reasonably available to counsel, or that 'some interference by officials' made compliance impracticable." *Amadeo v. Zant*, 486 U.S. 214, 222 (1998) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). That is, cause may be shown where "the factual basis of the claim was 'reasonably unknown' to the [petitioner's] counsel." *Jamison v. Collins*, 291 F.3d 380, 388 (6th Cir. 2002) (quoting *Amadeo*, 486 U.S. at 222).

Here, as set forth by the Magistrate Judge, the factual basis of petitioner's fair cross-section claim was reasonably unknown to Petitioner and his counsel at the time the jury was sworn. The alleged systematic exclusion resulted from an unknown computer glitch that was not discovered until several months after Petitioner's conviction. Petitioner may assert ineffective assistance of counsel as cause for his procedural default.

B. Fair Cross-Section Claim

Under the Sixth Amendment, the jury venire from which a jury is selected must represent

a “fair cross-section” of the community. *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975). To establish a prima facie fair cross-section violation, a defendant must show:

- (1) that the group alleged to be excluded is a “distinctive” group in the community;
- (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community;
- and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren v. Missouri, 439 U.S. 357, 364 (1979).

First, Respondent claims that the programming error resulted in jury pools assembled between July 2001 and July 2002 being disproportionately underrepresented . Respondent argues that because Petitioner’s trial was concluded before the glitch even occurred, Petitioner cannot establish a systematic underrepresentation of African Americans as a result of the flawed selection process.

Respondent’s objection is not well-taken. According to Respondent’s own brief, the Article states that eligible residents were excluded from potential jury pools since the spring of 2001, not the summer of 2001, as would be the case if the glitch began in July 2001. In addition, Respondent’s brief goes on to cite the Article as stating that troubleshooters detected the error in mid-July of 2002, and that the error had gone undetected for sixteen months. Sixteen months before mid-July 2002 is mid-March 2001, not the July 2001 figure that Respondent’s argument is based upon. Therefore, under Respondent’s own recitation of the facts, there is a strong possibility that Plaintiff’s jury, which convicted him on May 9, 2001, was selected through the flawed computer program. An evidentiary hearing is necessary to determine the exact date that Petitioner’s jury pool was selected.

Respondent also contends that Petitioner fails the third prong of the *Duren* test because he

has not pointed to anything in the selection process that indicates that the alleged underrepresentation of African-Americans was due to the system itself. Respondent cites *United States v. Cecil*, 836 F.2d 1431, 1445 (4th Cir. 1988), for the proposition that “[a] panel of prospective jurors represents a fair cross -section of the community if it is gathered without *active* discrimination.” (Obj. 5) (emphasis added). According to Respondent, since Kent County used a voter registration list, which is specifically sanctioned by Congress in 28 U.S.C. § 1863(b)(2), as the source of its jury selection process, Petitioner’s panel was gathered without active discrimination.

Again, Respondent’s objection is not well-taken. Contrary to Respondent’s assertion, the mere use of a voter registration list does not mean that Kent County selected jury panels from April 2001 to July 2002 without active discrimination. Several courts, including the Sixth Circuit, have held that the relevant inquiry is not whether the underrepresentation of a distinctive group came as a result of intentional discrimination but rather whether the underrepresentation was systematic. *Smith v. Berghuis*, 543 F.3d 326, 335–36 (6th Cir. 2008); *see also Randolph v. California*, 380 F.2d 1133, 1141 (9th Cir. 2004) (“[D]isproportionate exclusion of a distinctive group from the venire need not be intentional to be unconstitutional, but it must be systematic.”); *United States v. Jackman*, 46 F.3d 1240, 1242-43 (2d Cir. 1995).² “Systematic exclusion” “means[s] exclusion ‘inherent in

² In *Jackman*, the Second Circuit, found systematic exclusion in circumstances very similar to those alleged in the instant action. There, the jury clerk for the District Court for the District of Connecticut adopted a procedure in an attempt to remedy a previous jury selection process that a district court there had found had inadvertently, but systematically, excluded from petit jury venires all residents of two counties with large minority populations. *Id.* at 1241. The exclusion of the residents from the two counties was the result of a computer error. Under the new procedure, the jury clerk selected names using a combination of the qualified names selected under the old procedure and names selected from the entire jurisdiction, including the two previously excluded counties. *Id.* at 1244. The Second Circuit found that the resulting underrepresentation was “‘systematic -- that is, inherent in the particular jury-selection process utilized.’” *Id.* at 1244 (quoting *Duren*, 439 U.S. at 366). Accordingly, the Court concluded that

the particular-jury selection process utilized.” *Smith*, 543 F.3d at 339 (quoting *Duren*, 439 U.S. at 366). The proof offered in support of “systematic exclusion” need not be unequivocal; it need only be “sufficient to support an inference that a particular process results in the underrepresentation of a distinctive group.” *Id.* at 342–43.

Here, the Article and Respondent’s own admissions point to the computer glitch as the source of the alleged underrepresentation. Because this fact is in dispute and because the state court did not hold a full and fair evidentiary hearing even though Petitioner could not have discovered the error until over a year after he was convicted, an evidentiary hearing in this Court is necessary. *See Sawyer v. Hofbauer*, 299 F.3d 605, 610–611 (6th Cir. 2002) (recognizing that “a habeas petitioner is generally entitled to such a 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.’”) (quoting *Stanford v. Parker*, 266 F.3d 442, 459 (6th Cir. 2001). Furthermore, in *Parks v. Warren*, 574 F. Supp. 2d 737 (E.D. Mich. 2008), Judge Lawson ordered an evidentiary hearing under nearly identical circumstances, involving the exact same computer glitch at issue in this case.

Respondent finally argues that Plaintiff fails the second element of the *Duren* test because he failed to present verifiable statistical data of racial underrepresentation.

This circuit follows the “absolute disparity” method for determining whether “the representation of African-Americans on venires is not ‘fair and reasonable in relation to the number of [African-Americans eligible for jury service] in the community.’” *United States v. Forest*, 355 F.3d 942, 954 (6th Cir. 2004). “In the context of jury selection, one way to evaluate the fairness of

the appellant had established a prima facie fair cross-section violation. *Id.* at 1248.

representation is by calculating ‘absolute disparity,’ which refers to ‘the difference between the percentage of a certain population group eligible for jury duty and the percentage of that group who actually appear in the venire.’” *Id.* (quoting *United States v. Greene*, 971 F. Supp. 1117, 1128, n.11 (E.D. Mich. 1997)).

Again, the Court believes that an evidentiary hearing is proper here because Petitioner has not yet had the opportunity to make a showing of his prima facie case under *Duren*. Accordingly, the Court denies Respondent’s objections to the Magistrate Judge’s Report and grants Petitioner an evidentiary hearing on Petitioner’s fair cross-section of the community claim is warranted. Insofar as Petitioner is incarcerated in the Western District of Michigan, was convicted in that district, and since the potentially relevant witnesses are in that District (Kent County), this Court, pursuant to 28 U.S.C. § 2241(d), transfers Petitioner’s application for hearing and determination to the Western District of Michigan.

III. CONCLUSION

For these reasons, the Court

- (1) **DENIES** Respondent’s Objections (Dkt. No. 27) and **ADOPTS** the Report and Recommendation (Dkt. No. 26) and
- (2) **TRANSFERS** the case to the Western District of Michigan for an evidentiary hearing and determination on the Sixth Amendment claim.

SO ORDERED.

s/Paul D. Borman

PAUL D. BORMAN

UNITED STATES DISTRICT JUDGE

Dated: March 10, 2009

CERTIFICATE OF SERVICE

Copies of this Order were served on the attorneys of record by electronic means or U.S. Mail on March 10, 2009.

s/Denise Goodine
Case Manager

A-12

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GREGORY CARTER,

Petitioner,

v.

BLAINE C. LAFLER,

Respondent.¹

CASE NO. 2:06-CV-10552

JUDGE PAUL D. BORMAN

MAGISTRATE JUDGE PAUL J. KOMIVES

REPORT AND RECOMMENDATION

I. **RECOMMENDATION:** The Court should reject respondent's argument that petitioner's claim is barred by petitioner's procedural default in the state courts, and should conclude that an evidentiary hearing is necessary to resolve the merits of petitioner's claim. Accordingly, the Court should order an evidentiary hearing and appoint counsel to represent petitioner for this purpose. If the Court accepts this recommendation, it may either conduct the evidentiary hearing or refer the matter to me for that purpose pursuant to Rule 8, 28 U.S.C. foll. § 2254.

II. **REPORT:**

A. *Background*

Petitioner Gregory Carter is a state prisoner currently confined in the Carson City Correctional Facility in Carson City, Michigan. On May 9, 2001, petitioner was convicted of armed robbery, MICH. COMP. LAWS § 750.529, and possession of a firearm during the commission of a felony, MICH. COMP. LAWS § 750.227b, following a jury trial in the Kent County Circuit Court. On July 5, 2001, petitioner was sentenced to a term of 15-40 years' imprisonment on the armed robbery conviction, and to a

¹By Order entered this date, Blaine C. Lafler has been substituted for Cindi Curtin as the proper respondent in this action.

mandatory consecutive term of two years' imprisonment on the felony firearm conviction. Petitioner filed a direct appeal in the Michigan Court of Appeals, raising claims not relevant to the instant petition. His claims were rejected on appeal.

On July 30, 2002, the *Grand Rapids Press* reported on a story involving a computer glitch in Kent County's system for selecting jury venires. County officials conceded that their own review of their computer system revealed that "nearly 75 percent of the county's 454,000 eligible residents were excluded from potential jury pools since spring 2001" and that "[m]any blacks were excluded from . . . jury pools due to a computer glitch that selected a majority of potential candidates from the suburbs." The chief judge of the Kent County Circuit Court, George Buth, was quoted as saying, "There has been a mistake – a big mistake." The *Grand Rapids Press* articles explain that the error came to light after a Grand Rapids high school teacher and his students conducted a study of underrepresentation of minorities on Kent County juries. When the teacher reported the class findings to county officials they publicly insisted that the class's calculations were wrong, but when county officials finally conducted an internal study, they were startled to find that those calculations were exactly right. The teacher was quoted as saying that he finally went public with his complaints because "nobody wanted to do anything" about the problem. An article of August 2, 2002, explains how the error occurred:

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The second search process almost never went further than 49505 – leaving out areas where most of the county's minority population lives: Grand Rapids, Kentwood, Wyoming and Walker.

The report [Kent County Jury Management Report] says the decision to have county workers take over updating the computerized operation in April of 2001 [from private contractors] was made to save time and money.

In light of these revelations, petitioner filed in the trial court a motion for relief from judgment pursuant to MICH. CT. R. 6.500-.508, claiming that he was denied his Sixth and Fourteenth Amendment right to jury drawn from a fair cross-section of the community.² Relying on *People v. McKinney*, 258 Mich. App. 161-62, 670 N.W.2d 254, 258 (2003), the trial court denied the motion based on petitioner's failure to object to the jury array at trial, before the jury was sworn. See *People v. Carter*, No. 01-00091-FC (Kent County, Mich., Cir. Ct. Oct. 27, 2003). The Michigan Court of Appeals and the Michigan Supreme Court denied petitioner's applications for leave to appeal in standard orders. See *People v. Carter*, 472 Mich. 912, 696 N.W.2d 714 (2005); *People v. Carter*, No. 254482 (Mich. Ct. App. Aug. 20, 2004).

On February 9, 2006, petitioner filed this application for the writ of habeas corpus pursuant to 28 U.S.C. § 2254. As grounds for the writ, petitioner raises the fair cross-section claim that he raised in his state court motion for relief from judgment. Respondent filed an answer on August 22, 2006. Respondent argues that petitioner's claim is barred by his procedural default in the state courts. Petitioner filed a reply to respondent's answer on November 13, 2006. For the reasons that follow, the Court should conclude that petitioner's claim is not barred by a procedural default, and that an evidentiary hearing is necessary to resolve the claim.

B. *Procedural Default*

Respondent first contends that petitioner's claim is barred by petitioner's procedural default in the state courts, because petitioner failed to object to the composition of the jury array at trial. The

²Petitioner also raised a claim relating to his sentence. That claim is not at issue here.

Court should disagree. Under the procedural default doctrine, a federal habeas court will not review a question of federal law if the state court's decision rests on a substantive or procedural state law ground that is independent of the federal question and is adequate to support the judgment. See *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). However, "a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on the procedural bar." *Harris*, 489 U.S. at 263. Furthermore, "only a 'firmly established and regularly followed state practice' may be interposed by a State to prevent subsequent review . . . of a federal constitutional claim." *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991) (quoting *James v. Kentucky*, 466 U.S. 341, 348-51 (1984)); see also, *Calderon v. United States Dist. Ct. for the E. Dist. of Cal.*, 96 F.3d 1126, 1129 (9th Cir. 1996) (internal quotation omitted) ("For the procedural default doctrine to apply, a state rule must be clear, consistently applied, and well-established at the time of the petitioner's purported default.").

Here, there is no question that the state courts relied on an adequate and independent state procedural rule to bar petitioner's claim. Nevertheless, petitioner can still obtain habeas review of his claim if he can establish "cause" for his default—that is, if he can "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986); see also, *Coleman*, 501 U.S. at 753. Cause may be established by "a showing that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials made compliance impracticable, would constitute cause[.]" *Amadeo v. Zant*, 486 U.S. 214, 222 (1988) (quoting *Murray*, 477 U.S. at 488 (internal quotation and citations omitted)). Under *Murray* and *Amadeo*, it is therefore clear that "[c]ause is shown when the factual basis of the claim was 'reasonably unknown' to the defendant's counsel." *Jamison v. Collins*, 291 F.3d 380, 388 (6th Cir. 2002) (quoting *Amadeo*, 486 U.S. at 222).

Here, the factual basis of petitioner's fair cross-section claim was reasonably unknown to petitioner and his counsel at the time the jury was sworn. This is not a case where a publicly available jury selection plan itself systematically excluded minorities such that counsel could have known about that problem in advance of trial. Rather, the alleged systematic exclusion here resulted from an unknown glitch in the otherwise valid jury selection plan. It is undisputed that the computer error which allegedly resulted in systematic exclusion was unknown at the time of trial. Nor is there any indication that counsel should have been on notice of the error such that he should have challenged the composition of the jury venire sooner. The composition of petitioner's venire alone should not have spurred counsel to lodge an objection, because it is clear that this fact alone would be insufficient to support a fair cross-section claim. It is well established that "[e]vidence of a discrepancy on a single venire panel cannot demonstrate systematic exclusion." *United States v. Horne*, 4 F.3d 579, 588 (8th Cir. 1993); *accord United States v. Williams*, 264 F.3d 561, 568 (5th Cir. 2001); *United States v. Hill*, 197 F.3d 436, 445 (10th Cir. 1999); *United States v. DeFries*, 129 F.3d 1293, 1301 (D.C. Cir. 1997).

In short, until the computer glitch was publicly disclosed well after petitioner's trial, neither petitioner nor his counsel had any reason to suspect that the fair cross-section requirement had been violated, nor any reason to conduct an investigation into Kent County's jury selection practices. This is sufficient to establish cause to overcome petitioner's procedural default in failing to object at trial and in failing to raise the claim on direct appeal. Accordingly, the Court should reject respondent's procedural default defense.

C. *Evidentiary Hearing*

Turning to the fair cross-section claim, the Court should conclude that an evidentiary hearing is necessary to resolve this claim. In addressing whether an evidentiary hearing is appropriate in a habeas corpus case, a court must consider two separate issues: (1) is an evidentiary hearing necessary

under Rule 8 of the Rules Governing Section 2254 Proceedings in United States District Courts, 28 U.S.C. foll. § 2254; and (2) whether a hearing is permitted under 28 U.S.C. § 2254(e)(2). Taking the second issue first, an evidentiary hearing is permitted in this case under § 2254(e)(2). That section provides that, “[i]f the applicant has failed to develop the factual basis of the a claim in State court proceedings, the court shall not hold an evidentiary hearing on a claim unless” one of two exceptions is met. 28 U.S.C. § 2254(e)(2). Here, an evidentiary hearing is permissible because petitioner has not “failed to develop the factual basis” of his newly discovered evidence and ineffective assistance claims. In *Michael Williams v. Taylor*, 529 U.S. 420 (2000),³ the Court explained that Congress’ use of the term “‘failed to develop’ implies some lack of diligence[.]” *Id.* at 430. Thus, “[u]nder the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner’s counsel.” *Id.* at 432. Here, it is true, petitioner did not seek an evidentiary hearing on direct appeal, but as explained above he had good cause for this failure. Petitioner did seek an evidentiary hearing in connection with his motion for relief from judgment. Thus, petitioner did not “fail to develop” the evidence in support of his claim. See *Mayes v. Gibson*, 210 F.3d 1284, 1288 n.2 (10th Cir. 2000) (*Michael Williams* standard satisfied where petitioner “raised the need for an evidentiary hearing” on direct appeal and in collateral review proceedings); *Morales v. Coyle*, 98 F. Supp. 2d 849, 893 (N.D. Ohio 2000) (*Michael Williams* standard satisfied where petitioner “sought an evidentiary hearing in state court, which was denied[.]”).

Further, the Court should conclude that an evidentiary hearing is necessary to resolve

³This case should not be confused with the *Williams v. Taylor* case discussed in part C, *supra*, in which the Court explained the standard of review under § 2254(d). Although both cases bear the same caption and were decided on the same date, the petitioners differed in the two cases. For clarity, I refer to the case discussing § 2254(e)(2) by the petitioner’s full name—“Michael Williams”—rather than just by “Williams” as is the ordinary citation convention. See *Watkins v. Miller*, 92 F. Supp. 2d 824, 828 n.1 (S.D. Ind. 2000) (taking same approach).

petitioner's claim. In making the determination of whether an evidentiary hearing is necessary under Rule 8, "courts focus on whether a new evidentiary hearing would be meaningful, in that a new hearing would have the potential to advance the petitioner's claim." *Campbell v. Vaughn*, 209 F.3d 280, 287 (3d Cir. 2000) (discussing *Cardwell v. Greene*, 152 F.3d 331, 338 (4th Cir. 1998)); *see also*, *Alcorn v. Smith*, 781 F.2d 58, 59-60 (6th Cir. 1986) (applying pre-AEDPA law); *cf. Townsend v. Sain*, 372 U.S. 293, 312-13 (1963). A brief discussion of the law governing petitioner's fair cross-section claim demonstrates the necessity of an evidentiary hearing in this case.

The Sixth Amendment guarantees a criminal defendant the right to be tried before a jury drawn from a fair cross-section of the community. *See Duren v. Missouri*, 439 U.S. 357, 359 (1979); *Taylor v. Louisiana*, 419 U.S. 522, 526-31 (1975).

In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.

Duren, 439 U.S. at 364.

The newspaper articles relied upon by petitioner in the state courts and here—themselves containing statements of the court's judicial officers—provide some evidence that a distinctive group in the community—African-Americans—was systematically excluded in general by Kent County's computer error. That there is no evidence that this exclusion was the intentional result of racial animus is irrelevant to petitioner's fair cross-section claim. "In a fair cross-section analysis, purposeful discrimination is irrelevant since the emphasis is purely on the structure of the jury venire." *United States v. Perez-Hernandez*, 672 F.2d 1380, 1384 n.5 (11th Cir. 1982). Thus, "disproportionate exclusion of a distinctive group from the venire need not be intentional to be unconstitutional, but it

must be systematic.” *Randolph v. California*, 380 F.3d 1133, 1141 (9th Cir. 2004); *see also, Duren*, 439 U.S. at 366 (systematic exclusion shown by exclusion “inherent in the particular jury selection process utilized”); *id.* at 368 n.26; *United States v. Weaver*, 267 F.3d 231, 244 (3d Cir. 2001); *United States v. Royal*, 174 F.3d 1, 6 n.2 (1st Cir. 1999); *United States v. Jackman*, 46 F.3d 1240, 1246 (2d Cir. 1995). Indeed, in *Jackman* the court found systematic exclusion in circumstances strikingly similar to those involved here. *See Jackman*, 46 F.3d at 1242-48. Although this evidence exists in the abstract, what is lacking here is evidence specifically directed at the manner in which the jury venires were composed at the time of petitioner’s trial. In order to resolve this claim, the court must “compare the difference between the percentage of the distinctive group among the population eligible for jury service and the percentage of the distinctive group” in the pool from which the jury was drawn. *United States v. Grisham*, 63 F.3d 1074, 1078 (11th Cir. 1995). For example, even assuming that the computer error occurred in the compiling of the venires, if the percentage of African-Americans in the pool from which the venires were drawn was nonetheless representative of the percentage of African-Americans in the county, there would be no fair cross-section claim notwithstanding that some individual African-Americans may have been improperly excluded. The circumstances relevant to petitioner’s own case—namely, the composition of the pool from which the jurors were drawn and the composition of petitioner’s venire—are simply not reflected in the record before the Court. Further, to the extent that there was any systematic underrepresentation, the record does not establish whether this underrepresentation resulted from the computer glitch or from factors attributable to the actions of private citizens.⁴ Thus, an evidentiary hearing is necessary to resolve this claim.

⁴“If [a distinctive group is] underrepresented on the jury list because of legitimate juror qualifications, . . . then the . . . jury selection system does not unconstitutionally exclude [that group].” *Davis v. Warden, Joliet Correctional Inst. at Statesville*, 867 F.2d 1003, 1015 (7th Cir. 1989). For example, the courts are unanimous that a state may draw its jurors using voter

Accordingly, the Court should conclude that petitioner's jury composition claim is not barred by petitioner's procedural default in the state court, and that an evidentiary hearing is necessary to resolve this claim. If the Court agrees with this recommendation, the Court must appoint counsel to represent petitioner, *see* Rule 8(c), 28 U.S.C. foll. § 2254, and the Court may either conduct the hearing itself or refer the matter back to me for that the purpose, *see* Rule 8(b). Because all of the witnesses presumably reside in the Western District of Michigan, and petitioner is now incarcerated in that District, the Court may also wish to consider whether the case should be transferred to the Western District in accordance with 28 U.S.C. § 2241(d) (providing that, when two district courts have concurrent jurisdiction over a habeas application, "[t]he district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district for hearing and determination.").

D. *Conclusion*

In view of the foregoing, the Court should conclude that petitioner's claim is not barred by a procedural default, and that an evidentiary hearing is necessary to resolve petitioner's claim. If the Court agrees with this recommendation, the Court should appoint counsel to represent petitioner, and should either conduct an evidentiary hearing or refer the matter back to me for that purpose.

III. NOTICE TO PARTIES REGARDING OBJECTIONS:

registration lists, even when a distinctive group is underrepresented on such lists, *see id.* (citing cases), because "[d]iscrepancies resulting from private sector influences rather than affirmative governmental action do not reflect the constitutional infirmities contemplated by the systematic exclusion prong of *Duren*." *United States v. Rioux*, 930 F. Supp. 1558, 1572 (D. Conn. 1995), *aff'd*, 97 F.3d 648, 658 (2d Cir. 1996). Similarly, if a disparity resulted from the failure of minorities to return jury questionnaires, there would be no systematic exclusion. *See United States v. Ortiz*, 897 F. Supp. 199, 205 (E.D. Pa. 1995) (no systematic exclusion of Hispanics where "it was the unfortunate failure of Hispanics either to register to vote or to return the jury questionnaires, through no fault or encouragement of the court's jury selection procedures, which may have produced any underrepresentation of Hispanics on grand juries.").

The parties to this action may object to and seek review of this Report and Recommendation, but are required to act within ten (10) days of service of a copy hereof as provided for in 28 U.S.C. § 636(b)(1) and E.D. Mich. LR 72.1(d)(2). Failure to file specific objections constitutes a waiver of any further right of appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985); *Howard v. Secretary of Health & Human Servs.*, 932 F.2d 505 (6th Cir. 1991); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). Filing of objections which raise some issues but fail to raise others with specificity, will not preserve all the objections a party might have to this Report and Recommendation. *See Willis v. Secretary of Health & Human Servs.*, 931 F.2d 390, 401 (6th Cir. 1991). *Smith v. Detroit Federation of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

Within ten (10) days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall be not more than five (5) pages in length unless by motion and order such page limit is extended by the Court. The response shall address specifically, and in the same order raised, each issue contained within the objections.

s/Paul J. Komives
PAUL J. KOMIVES
UNITED STATES MAGISTRATE JUDGE

Dated: 7/2/08

The undersigned certifies that a copy of the foregoing order was served on the attorneys of record by electronic means or U.S. Mail on July 2, 2008.

s/Eddrey Butts
Case Manager

A-13

Order

May 31, 2005

127081

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

GREGORY CARTER,
Defendant-Appellant.

SC: 127081
COA: 254482
Kent CC: 01-000091-FC

Michigan Supreme Court
Lansing, Michigan

Clifford W. Taylor
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Justices

On order of the Court, the application for leave to appeal the August 20, 2004 order of the Court of Appeals is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

p0524

I, CORBIN R. DAVIS, 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.

May 31

, 2005

Corbin R. Davis

APP 107

Clerk



A-14

2006015503 46

Court of Appeals, State of Michigan

ORDER

People of MI v Gregory Carter

Docket No. 254482

LC No. 01-000091-FC

FILE
AUG 24 2006CLERK'S OFFICE
DETROITE. Thomas Fitzgerald
Presiding Judge

Michael J. Talbot

Patrick M. Meter
Judges

The Court orders that the motion to waive fees is GRANTED for this case only.

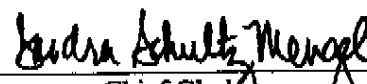
The delayed application for leave to appeal is DENIED for failure to meet the burden of establishing entitlement to relief under MCR 6.508(D).


Presiding Judge

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

AUG 20 2004

Date


Chief Clerk

Gregory Carter v. Millicent Warren
USDC Number 2:06-cv-10082
HONORABLE PAUL D. BORMAN

A-15

STATE OF MICHIGAN
IN THE CIRCUIT FOR THE COUNTY OF KENT

THE STATE OF MICHIGAN,

Plaintiff,

v.

CASE NO. 01-00091-FC

GREGORY CARTER,

Defendant.

OPINION AND ORDER DENYING MOTION FOR
RELIEF FROM JUDGMENT

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SANDRA SCHULTZ MENDEL
CHIEF CLERK

In his pleadings, Defendant seeks Relief from Judgment pursuant to MCR 6.501 on the grounds that he was denied his right to a fair trial due to flaws in the Kent County jury selection which he alleges "systematically excluded" minorities from the jury pool, ineffective assistance of counsel, and resentencing.

During his trial, the Defendant did not object to the composition of the jury, and therefore, this issue was not properly preserved and can not constitute grounds for a new trial pursuant to MCR 6.500. Likewise, Defendant has not met the burden necessary under *People v Pickens*, 446 Mich 298, 314; 531 NW2d 797 (1994) which adopted the test for ineffective assistance of counsel that was articulated in *Strickland v Washington*, 446 US 668, 694; 104 SCt 2052; 80 LEd2d 674 (1984). Furthermore, Defendant's allegations of error relating to his sentence are without merit.

Analysis

1. Systematic Exclusion of Minorities from the Jury Pool

In 2001 Kent County's jury selection process came under intense media scrutiny. It was alleged that the system was fundamentally flawed, leading to a systematic exclusion of minority jurors from the jury pool. Following media coverage of this problem, the County determined that a flaw in the random computer process could, in fact, lead to the disproportionate exclusion of minorities from the jury pool. The system was subsequently corrected.

Following this revelation many defendants requested new trials on the basis that they were denied their constitutional right to a fair trial by virtue of this flawed system. The Court of Appeals addressed this issue recently in *People v McKinney*, ___ Mich App ___, ___ NW2d ___ (2003) (Slip copy). In this case the defendant claimed that African-Americans were "systematically excluded from Kent County's jury venires when her trial was conducted." *Id.* At ___. The defendant in this case cites the same newspaper articles that the defendant in the instant matter has attached as exhibits. The Court of Appeals stated:

Questions concerning the systemic exclusion of minorities in jury venires are generally reviewed de novo. *People v Hubbard* (after rem), 217 Mich App 459, 472; 552 NW2d 493 (1996). "A criminal defendant is entitled to an impartial jury drawn from a fair cross section of the community." *Id.* Citing *Taylor v Louisiana*, 49 US 522, 526-531; 95 S Ct 692, 42 L.Ed. 2d 690 (1975). To establish a prima facie violation of the fair cross-section requirement, the defendant bears the burden of proving "that a distinctive group was underrepresented in his venire or jury pool, and that the underrepresentation was the result of systematic exclusion of the group from the jury selection process." *People v Smith*, 463 Mich 199, 203; 615 NW2d 1 (2000) citing *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664, 58 L.Ed.2d 579 (1979).

The Court of Appeals went on to deny the request for a new trial because the defendant had not raised the issue before the jury was empanelled and sworn. *Id.* at _____. See also *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996). Likewise, the defendant in the instant matter failed to raise this as an objection during his trial, and the motion for a new trial should similarly be dismissed.

2. Ineffectiveness of Counsel

Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) that the resultant proceedings were fundamentally unfair or unreliable. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843, 152 LEd2d 914 (2002); *People v Toma*, 472 Mich 281, 302; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). The deficiency must be prejudicial to the defendant. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). To demonstrate prejudice, a "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." *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed2d 674 (1984); *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

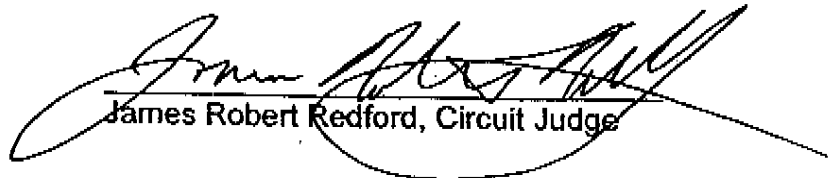
The Defendant's argument, in sum, is that his trial counsel was ineffective due to his failure to properly investigate a possible alibi defense. The defendant alleges that he was at a treatment facility in Illinois at the time of the incident. However, this defense was raised on the evening following the first day of the trial. Furthermore, the defense counsel did contact the treatment facility and was informed that the Defendant had not been admitted to the program. Additionally, the defense counsel attempted to contact the Defendant's parole officer, but was unable to do so. The Defendant, therefore, has failed to establish that the defense counsel acted unreasonably under the circumstances, and his claim of ineffective assistance of counsel must fail. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

Defendant finally argues that he is entitled to resentencing. The Defendant fails to comprehend that the sentencing guideline range directs a trial judge as to what the minimum sentence must be. In the instant case, Defendant's minimum sentence was well within the allowable range. Therefore, Defendant's assignment for error with respect to the sentence he received is erroneous.

Wherefore, for the reasons stated above, Defendant's Motion for Relief under MCR 6.500 is **DENIED** with prejudice.

IT IS SO ORDERED.

27th Day of October, 2003


James Robert Redford, Circuit Judge

A-16

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CURTIS PARKS,

Petitioner,

v.

Case Number 05-10036

Honorable David M. Lawson

Magistrate Judge Charles E. Binder

MILLICENT WARREN,

Respondent.

_____ /

ORDER GRANTING CERTIFICATE OF APPEALABILITY

Petitioner Curtis Parks filed a petition under 28 U.S.C. § 2254 on February 2, 20015. On July 31, 2008, the Court denied all of the petitioner's claims but one, and referred the matter to the assigned magistrate judge for an evidentiary hearing on his fair cross-section claim. On February 28, 2011, the Court denied relief on the fair cross-section (*Duren*) claim as well. The petitioner appealed, and the court of appeals remanded the case for reconsideration of the petitioner's fair cross-section and *Batson* claims. On September 28, 2017, after reviewing the full record of the proceedings in the state trial court and the supplemental evidentiary record developed in this matter, the Court found that the petitioner had failed to establish prejudice sufficient to excuse the procedural default of his *Duren* claim, and had failed to show either cause or prejudice to excuse the default of his *Batson* claim.

Pursuant to Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts:

The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. . . . If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, a party may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate

Procedure 22.

Rule 11 of the Rules Governing Section 2254 Cases.

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). Courts must either issue a certificate of appealability indicating which issues satisfy the required showing or provide reasons why such a certificate should not issue. 28 U.S.C. § 2253(c)(3); Fed. R. App. P. 22(b); *In re Certificates of Appealability*, 106 F.3d 1306, 1307 (6th Cir. 1997). To receive a certificate of appealability, “a petitioner 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.” *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotes and citations omitted).

The Court finds that reasonable jurists could debate whether relief should be granted on each of the petitioner’s remaining live claims, and the Court therefore will grant a certificate of appealability as to both of the *Duren* and *Batson* claims.

Accordingly, it is **ORDERED** that a certificate of appealability is **GRANTED** as to the petitioner’s fair cross-section (*Duren*) claim and *Batson* claims.

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

Dated: September 28, 2017

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on September 28, 2017.

s/Susan Pinkowski
SUSAN PINKOWSKI

A-17

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CARL WELLBORN,

Petitioner,

CASE NO. 1:05-CV-346

v.

HON. ROBERT J. JONKER

MARY BERGHUIS,

Respondent.

_____ /

ORDER DENYING MOTION TO AMEND JUDGMENT

This is a habeas corpus action brought by a state prisoner under 28 U.S.C. § 2254. The Magistrate Judge recommended that the habeas corpus petition be denied. (ECF No. 88.) Overruling Petitioner's objections, the Court approved and adopted the Report and Recommendation. (ECF No. 93.) Judgment entered in January 2017. (ECF No. 94.) Petitioner moves to amend the Judgment under FED. R. CIV. P. 59(a)(2) and for a certificate of appealability to be granted. (ECF No. 95.)

Rule 59(a)(2) permits a court, after a non-jury trial, to "open the judgment if one has been entered, take additional testimony, amend findings of facts and conclusions of law, and direct the entry of a new judgment." Rule 59(e) provides that a motion to alter or amend a judgment must be filed no later than 28 days after the entry of judgment. As the Sixth Circuit summarized in *GenCorp, Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 833-34 (6th Cir. 1999), motions to alter or amend judgment under Rule 59(e) may be granted if there is a clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent manifest injustice. *See also ACLU v. McCreary County*, 607 F.3d 439, 450 (6th Cir. 2010).

Petitioner premises his motion on what he describes as a potential change in controlling law. (ECF No. 95, PageID.924.) He points out that his habeas petition failed because he could not meet the actual prejudice requirement necessary to excuse procedural default detailed in *Ambrose v. Booker*, 801 F.3d 567, 577-78 (6th Cir. 2015). (*Id.*) He notes that at the time he filed his motion to amend, the Supreme Court had recently granted certiorari in a case that might alter controlling law applicable to his case, *Weaver v. Massachusetts*, No. 16-240, Pet. for Cert.; Order List, 580 U.S. ____ (2017). (*Id.*) Petitioner asserts that “[i]f the Supreme Court [in *Weaver*] finds that prejudice should be presumed in cases involving an underlying structural error, the Sixth Circuit’s approach to the resolution of cases involving structural error must be fundamentally altered.” (ECF No. 95, PageID.924.) Petitioner’s motion to amend hinges upon the outcome of the decision in *Weaver*.

The Supreme Court has since issued a merits decision, *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017). The Court determined that actual prejudice is not presumed in an ineffective assistance case based on counsel’s failure to object to an underlying structural error. *Id.* To succeed on an ineffective assistance claim, even if there is underlying structural error, a defendant must show prejudice. *Weaver*, 137 S. Ct. at 1912-23. Nothing about *Weaver* suggests the Sixth Circuit’s approach to Petitioner’s case must change. In light of the *Weaver* decision, Petitioner’s motion fails.

ACCORDINGLY, IT IS ORDERED:

Petitioner’s Motion to Amend Judgment (ECF No. 95) is **DENIED**.

Dated: August 15, 2017

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

A-18

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ERIC POWELL,

Petitioner-Appellant,

v.

Sixth Cir. Case No. 16-2410

CAROL HOWES,

Respondent-Appellee.

PETITIONER-APPELLANT’S MOTION TO DISMISS APPEAL

Petitioner-Appellant Eric Powell moves to dismiss his appeal. In support, he states the following:

- (1) Mr. Powell’s appeal is scheduled for oral argument on March 7, 2018.
- (2) The Attorney General and Mr. Powell have resolved the issue in this case by way of a plea agreement.
- (3) On December 28, 2017, Mr. Powell pleaded nolo contendere to one count of armed robbery. The Kent County Prosecutor’s Office moved to dismiss the other two counts for assault with intent to murder and felony firearm. Kent County Circuit Judge Mark A. Trusock accepted the plea.
- (4) On January 19, 2018, Judge Trusock sentenced Mr. Powell to the agreed-upon term of time served.
- (5) Mr. Powell’s nolo plea renders his 28 U.S.C. § 2254 petition moot because

- the alleged constitutional errors no longer played a role in his conviction.
- Cf. Spencer v. Kemna*, 523 U.S. 1, 7–8 (1998) (explaining that a case and controversy must exist during all stages of proceedings in federal court).
- (6) In accordance with the parties' agreement, Mr. Powell now voluntarily moves to dismiss his appeal.
- (7) The Attorney General agrees to the relief requested in this motion.

Respectfully Submitted,

FEDERAL DEFENDER OFFICE

s/Colleen P. Fitzharris
s/James Gerometta
Co-Counsel for Eric Powell
Federal Defender Office
613 Abbott St., 5th Floor
Detroit, Michigan 48226
(313) 967-5542
Email: colleen_fitzharris@fd.org

Dated: January 19, 2018

CERTIFICATE OF SERVICE

Counsel certifies that on the above date, the foregoing was filed with the Clerk of the Court using the ECF system, which will send notification to all attorneys of record.

A-19

Case No. 16-2410

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

ORDER

ERIC POWELL

Petitioner - Appellant

v.

CAROL R. HOWES, Warden

Respondent - Appellee

Upon consideration of the appellant's motion to voluntarily dismiss the appeal herein pursuant to Rule 42(b), Federal Rules of Appellate Procedure,

It is **ORDERED** that the motion is **GRANTED** and the appeal is dismissed.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk



Issued: January 23, 2018

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

Deborah S. Hunt
Clerk

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

Tel. (513) 564-7000
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Filed: January 23, 2018

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Mr. Bernard Eric Restuccia
Office of the Attorney General
of Michigan
P.O. Box 30217
Lansing, MI 48116

Re: Case No. 16-2410, *Eric Powell v. Carol Howes*
Originating Case No. : 2:05-cv-71345

Dear Counsel,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Michelle M. Davis
Case Manager
Direct Dial No. 513-564-7025

cc: Mr. David J. Weaver

Enclosure