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File Name: 17a0180p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

HATTIE TANNER,
Petitioner-Appellant,

v.

JOAN YUKINS,
Respondent-Appellee,

No. 15-1691

Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 2:04-cv-71155—Victoria A. Roberts, District Judge.

Argued: May 4, 2017

Decided and Filed: August 15, 2017

Before: DAUGHTREY, MOORE, and KETHLEDGE, Circuit Judges.

COUNSEL

ARGUED: Matthew R. Cushing, JONES DAY, Columbus, Ohio, for Appellant. Raina I. Korbakis, OFFICE OF THE MICHIGAN ATTORNEY GENERAL,

Lansing, Michigan, for Appellee. **ON BRIEF:** Matthew R. Cushing, Chad A. Readler, Danielle L. Scoliere, JONES DAY, Columbus, Ohio, for Appellant. Raina I. Korbakis, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee.

OPINION

KAREN NELSON MOORE, Circuit Judge. Hattie Mae Tanner, who was convicted of murder in 2000, argues that the district court erred by denying habeas relief on two grounds. First, Tanner argues that the Michigan Supreme Court unreasonably applied *Ake v. Oklahoma*, 470 U.S. 68 (1985), when it held that the trial court properly denied Tanner's trial counsel funding for a serology or DNA expert, and that the district court erred by upholding the Michigan Supreme Court's application of *Ake*. Second, Tanner argues that the Michigan Supreme Court unreasonably applied *Jackson v. Virginia*, 443 U.S. 307 (1979), when it held that there was sufficient evidence to convict Tanner, and that the district court erred by upholding the Michigan Supreme Court's application of *Jackson*. We agree with Tanner that she was convicted based on insufficient evidence and that the Michigan Supreme Court unreasonably applied *Jackson*. We **REVERSE** the district court's judgment denying habeas relief on Tanner's *Jackson* claim. Because we hold that Tanner is entitled to habeas relief on the ground that the Michigan Supreme Court unreasonably applied *Jackson*, we do not address

whether the Michigan Supreme Court also unreasonably applied *Ake*.

I. BACKGROUND

A. The Crime Scene

Sharon Watson, a bartender at Barney's Bar and Grill, was stabbed to death in the basement of Barney's sometime after 1:00 a.m. on March 22, 1995. *People v. Tanner*, 660 N.W.2d 746, 751 (Mich. Ct. App. 2003). Watson's murder appears to have happened during the course of a robbery. *Id.*

Watson's boyfriend, Jerry Dockum, testified that at around 1:30 a.m. on March 22, Watson called him to tell him that she was closing the bar early. *Id.* at 752. When Watson was not home by 2:00 a.m., Dockum grew concerned and called the bar. *Id.* No one answered. *Id.* Dockum contacted Watson's sister, Gloria Loring, who eventually went to Barney's accompanied by Maria Coller, a former Barney's employee who had keys, and Maria Coller's husband, Ron Coller. *Id.* at 753. Loring and the Collers arrived at Barney's around 5:30 a.m. *Id.* When they arrived, the lights were on, the television was blaring, the outside doors were locked, and Watson's car was in the parking lot behind the bar. *Id.* A pack of Budweiser was on the floor near the side door with a napkin on top of it. *Id.* A note for a takeout order of beer was on the cash register behind the bar. Watson's coat was on the back of a chair, and Watson's purse was on the back of the bar. *Id.* There was a knife behind the bar. *Id.*

Shortly after arriving, the Collers called 911 and Barney's owners. After Mr. Coller opened the door to

the basement and observed loose cash at the bottom of the stairs, Mrs. Coller called 911 a second time. When they noticed that the door to the basement office was closed, Mrs. Coller called 911 a third time. *Id.* After one of Barney's owners, Tom Bliler, arrived, they opened the door to the basement office. *Id.* They found Watson's body in the basement. *Id.* Bliler estimated that $1,009 had been stolen from the safe, suggesting robbery. *Id.*

Detective Michael VanStratton, who at the time was the crime lab supervisor of the Battle Creek Police Department, arrived at the scene. He testified that Watson had blood stains smeared across her body, an excessive amount of blood on her neck and chest, and stab wounds to her chest. *Id.* at 753–54. Because of the disarray in the office and the wounds to Watson's arms, VanStratton concluded that there had been a struggle. *Id.* Crime-scene technicians found "diluted bloodstains on the stainless steel sink area directly behind the bar." *Id.* In addition to the items the Collers had already noticed—namely, the six pack of beer with the napkin on it, the note about the take-out beer order, the knife, and Watson's purse—technicians also found two drinking glasses and a cash register receipt. *Id.* In the basement, technicians found a bloodstain on the wall at the bottom of the stairs. *Id.* at 754.

VanStratton had originally arrived at Barney's around 7:00 a.m. without the necessary equipment to process the crime scene. *Id.* at 753. VanStratton testified that when he returned to Barney's with the necessary equipment around 8:00 a.m., "'some of the ar-

eas which [he] thought might be critical for investigation'"—including the area behind the bar—"'had already been occupied by people that came in that morning.'" *Id.* There were about seven non-law-enforcement people in Barney's, including Watson's friends and Barney's employees. *Id.* at 754. People were making coffee behind the bar and were in the area where the bloodstains, knife, and takeout beer were found. *Id.* "Detective VanStratton testified that because 'there was some important evidence behind the bar,' it was the first area that was isolated," although people had gathered and made coffee in that area earlier in the morning, before law enforcement isolated it. *Id.* at 753–54.

B. Witness Accounts

Detective David Walters of the Battle Creek Police Department focused the investigation on Tanner, Dion Paav, and Robert Cady. *Id.* at 751, 755. On May 24, 1995, Walters interrogated Tanner and made an audio recording of the interrogation. *Id.* at 755. According to Walters's trial testimony, Walters showed Tanner a photograph of the knife recovered from the crime scene. Walters testified that Tanner said the knife was hers and that she recognized it by the alteration she had made to the blade for cleaning crack pipes. *Id.* On cross-examination, Walters acknowledged that the transcript of the audio recording shows Tanner saying that the knife was not hers. *Id.* at 757. Walters conceded that Tanner's answers to many questions were inaudible in the recording. *Id.* Walters also testified that although the thirty-two page transcript included 261 instances where Tanner's response is transcribed as "inaudible[]" Walters did not

send the tape to the Michigan State Police Crime Laboratory to enhance the sound quality. *Id.*

Walters testified that he interviewed Tanner about Watson's murder again on June 7, 1995. *Id.* at 756. This interview took place in a police car, with Detective David Adams also present. *Id.* According to Walters, during this interview Tanner admitted to accompanying Cady to Barney's around the time of Watson's murder. *Id.* Walters testified that Tanner said she stayed in the car while Cady went inside, and that after she and Cady left Barney's, they bought beer, cashed a check, and purchased crack. *Id.* Walters testified that he asked Tanner whether she was responsible for killing Watson, and she shook her head no. *Id.* Walters testified that he asked what circumstances might have led her to commit that sort of murder, Tanner responded that she might have done so "'if that bitch had treated her bad.'" *Id.* There is no audio recording of this interview, and Detective Adams, who was also in the police car during the interview, did not testify.

Tanner also testified at trial, and characterized her answers about the knife differently than Walters did. *Id.* at 760. Tanner testified that she told Walters that the knife in the photo looked like a knife she used to have but was not her knife. *Id.* She testified that she told Walters it could not be hers because it was a straight-bladed knife and her knife was a folding knife. *Id.*

Additionally, a friend of Watson, Catherine Huskins, testified that Watson had found a nonfolding knife before she was murdered. *Id.* Watson told Huskins's husband that she was going to keep the

nonfolding knife in her purse. *Id.* Huskins never saw the knife that Watson apparently carried in her purse; she only heard about it from Watson. *Id.*

According to Cady's trial testimony, on March 21, 1995 he got off work at approximately 10:55 p.m. *Id.* at 751. He had planned to meet Paav after work, but could not reach him. *Id.* After midnight on March 22, Cady called Tanner, drove to her house, and went with her to purchase crack cocaine. Cady and Tanner returned to Tanner's house and smoked the crack. *Id.* Approximately a half hour later, Cady left, without Tanner, to cash a check at Barney's. *Id.* He arrived at Barney's around 1:00 a.m. *Id.* Barney's appeared to be closed, but Cady entered through the open side door. *Id.* at 751–52. Watson was at the bar working, and there was a white male who Cady did not recognize in the bar. *Id.* Watson told Cady that she could not cash his check because she had already closed out her cash register. *Id.* at 752. Cady indicated that Watson would close out her cash register with customers in the bar only if they were trusted regular customers, and that Watson would close out her cash register with Cady in the bar. *Id.* at 752–53.

Cady then went to Green's Tavern, where he was able to cash the check. *Id.* at 752. He also had a beer while at Green's Tavern. *Id.* At around 1:30 a.m., Cady called Tanner to tell her he was going to return to her house. *Id.* Cady went to buy more crack and then returned to Tanner's house, arriving around 2:30 a.m. *Id.* He drove home around 2:45 a.m. *Id.* On his way home, he passed by Barney's and noticed that the lights were on. *Id.* He found it unusual for Barney's

light to be on at that time, but he continued driving home without stopping. *Id.*

Tanner's trial testimony about the night of March 21 mirrored Cady's. *Id.* at 760. She testified that Cady came to her house where they smoked crack together and then he left to go cash a check. *Id.* She testified that he returned to her house after cashing the check and then left again around 2:30 or 3:00 a.m. *Id.* She testified that she did not go anywhere with Cady except to purchase crack around 12:00 a.m. *Id.* She specifically said she did not go to Barney's. *Id.*

Other witnesses also corroborated aspects of Cady's and Tanner's accounts of that night. Tanner's mother testified that Cady was at her house when she woke up in the morning, and that neither Cady nor Tanner had any blood on them. *Id.* Todd Green testified that Cady did go to Green's Tavern after midnight, where he cashed a check, drank a beer, and made a telephone call. *Id.*

Two witnesses spotted a truck and unidentified individuals outside of Barney's. Kevin Sage testified that he saw a light-colored truck with a wooden cap at Barney's around 1:15 a.m. Sage said that the driver appeared to be a white man with a beard, and that there was a passenger who Sage did not get a good look at. *Id.* Nancy Chantrene testified that at 2:47 a.m. she passed Barney's on her way to work and she saw a light-colored truck with a cap parked at the bar. *Id.* at 760–61.

C. Charges

The Battle Creek Police Department sought warrants for Tanner, Paav, and Cady. *Id.* at 751. In the fall of 1995, the prosecutor refused to issue the warrants because, in the prosecutor's view, there was insufficient evidence. *Id.* at 751. A new prosecutor took office in 1997. *Id.* In May 2000, a warrant was issued for Tanner, but not for Paav or Cady. *Id.* The warrant charged Tanner with open murder, felony murder, and armed robbery. *Id.* As far as the record in this case reveals, neither Cady nor Paav was ever charged with any crime related to Watson's murder.

D. Forensic Experts

Prior to trial, Tanner's trial counsel requested funds for an expert to help him understand the prosecution's DNA and blood evidence against Tanner. Specifically, the prosecution had evidence that the blood sample from the sink matched Tanner's blood type. The Michigan Court of Appeals quoted the following colloquy that took place at the hearing on Tanner's motion:

> The Court: Can't you do that through your cross-examination of the DNA person that the People bring?
>
> Mr. Sullivan [defense counsel]: Imagine if the government had to—the only way they could prepare their case and be informed and develop their defense or their government's strategy is to wait for the defense witness to take the stand and cross them to learn. I'm not asking for a lot of money, Judge. I would think

most of the DNA experts wouldn't charge very much for an indigent defendant.

The Court: Well, I beg to differ with you, Mr. Sullivan. That's a fairly sophisticated area of expertise.

Mr. Sullivan: I'm not asking that there be re-analysis, Judge. I'm just asking for consultation with them about what these results would mean to them. I'm not asking for them to analyze blood, any of that. I'm not—I'm not asking for money for lab work or anything like that.

The Court: You only want to consult with someone and have them review what the People have?

Mr. Sullivan: Yes.

The Court: And be able to talk with them, is that it?

Mr. Sullivan: Then—right, and then based upon the conversation that I would have, maybe call them as a witness for the defense.

The Court: That opens a door to a lot more money, Mr. Sullivan. Mr. Kabot, what's your position as it relates to this request?

Mr. Kabot [assistant prosecutor]: My position is this, Judge—and Mr. Sullivan knows this full well—the blood stain that was on the sink

upstairs in the bar, that was tested for serology. There is a breakdown of that—of that blood along with the blood samples that were submitted by a number of other people, because again they were tested serologically to see—they were tested for PGM enzymes and there is a breakdown. And as Mr. Sullivan knows[,] the report came back indicated that Ms. Hattie—Ms. Tanner's blood was included within the specified group that could have been a donor of that blood. DNA-wise there really isn't anything that links this defendant to anything that was found in that bar through DNA.

The Court: Even in the basement?

Mr. Kabot: Even in the basement and I think Mr. Sullivan understands that also. That what we're talking about in the basement and the blood in the basement every report that we received back where DNA was performed excluded Hattie Tanner.

The Court: So the point—I took it from Mr. Sullivan's argument we were going in a different direction—at this point in time the only thing you have apparently that by inference would link Ms. Tanner to the crime scene is she has the same blood type as was found on the stain in the kitchen and there is nothing in the basement in terms of the DNA analysis that at all links Hattie Tanner to that scene, is that it, Mr. Kabot?

Mr. Kabot: That's my understanding, Judge. Now understand I just got this case the other day and I had it at home over the weekend and I was reading it. But from each of the reports that we received back—forensic reports concerning DNA I saw on each of those that Ms. Tanner was excluded by way of DNA as being the donor for whatever blood sample they were testing.

The Court: Would you even call this person as a prosecution witness then?

Mr. Kabot: The only thing that I'm going to do, your Honor, as far as Megan Clement[] is concerned or anyone else as far as DNA is concerned is—there are some questions I have to ask them, but I mean as far as Mr. Sullivan's cross-examination of them I'm not sure how much there'll even be for the DNA people because again the bottom line is the results of the testing says right there. You know, Hattie Tanner's excluded from being the donor of blood on the victim's clothing and the blood stains that they recovered in the immediate area of the victim's body which was in the basement. So how much cross-examination is there really going to be concerning that issue, only Mr. Sullivan knows.

The Court: Mr. Sullivan.

Mr. Sullivan: Can I offer a middle position here?

> The Court: Sure. Mr. Sullivan: How you [sic] about you approve enough money to me to consult the DNA expert, and then based on that consultation if I can persuade you that some money should be kicked in for him to testify then we can revisit that area, and that wouldn't put off the trial.
>
> The Court: Well, Mr. Sullivan, the thing that occurs to me is that—and I'm not saying this would happen—but potentially you would confer with this expert and that expert would say I think the prosecution's expert is all wrong, it really doesn't link the defendant with the blood in the basement. Why do you need someone when you already have the prosecution witnesses saying it excludes your client?

Id. at 765–66. Determining that "the prosecution's expert would exonerate and exculpate the defendant from the evidence found at the scene," the trial court denied defendant's request for funds to hire a DNA or serology expert. *Id.* at 766.

At trial, the prosecution presented two forensic experts. Nibedita Mahanti testified as an expert in DNA analysis. *Id.* at 759. She testified that the DNA on the knife and napkin (and a few other items) matched Watson. *Id.* She testified that the DNA in the blood on Watson's shirt came from an unknown female. *Id.*; R. 16-3 (Trial Tr. at 230) (Page ID #427). The blood on Watson's shirt did not match Watson, and it also did not match Tanner, Cady, or Paav. *Tanner*, 660 N.W.2d at 759.

Megan Clement testified as an expert in DNA and serology. *Id.* at 758. Like Mahanti, Clement testified that the blood stains on Watson's shirt came from an unknown person. *Id.* Clement testified that the blood found on the sink behind the bar did not contain enough DNA to develop a profile. *Id.*

Clement also testified generally about serological testing, although she did not testify about the results of the serological testing conducted on the evidence in this case. Clement explained that there are four common bloodtypes, A, B, AB, and O, and there are ten types of the enzyme phosphoglucomutase (PGM). *Id.* It is possible to analyze a sample of blood for ABO type and PGM subtype. Clement testified that "if you type for ABO and PGM, you look at the frequency of ABO times the frequency [of] the PGM to come up with what percentage of the population would have both of the characteristics in the sample detected." *Id.*; R. 16-2 (Trial Tr. at 163) (Page ID #479). Regarding the frequency of blood types, Clement testified that,

> In the Caucasian population a type B blood is approximately ten percent and a PGM two plus one plus is approximately 20 percent, actually 21 percent. If you multiply the two for a person to have type B blood and be a two plus one plus it would be approximately two percent of the population of the Caucasian population. . . . In the African-American population a type B is much higher. It's approximately 20 percent. And the PGM two plus one plus is about 19.8 percent, so approximately 20 percent as well. So a person who [has] blood type B and PGM two plus one plus in the African-

> American population would be approximately four percent so it would be twice as common in the African- American population as the Caucasian.

Tanner, 660 N.W.2d at 758; R. 16-2 (Trial Tr. at 165) (Page ID #480).

On cross-examination, Clement was asked how many people in the United States would have blood type B and PGM two plus one plus. In response, Clement testified that because African Americans comprise twenty-six percent of the United States population of 280 million, "26% of 280 million people times four percent of that" means that "possibly millions" of people were blood type B two plus one plus. *Tanner*, 660 N.W.2d at 759; R-16-2 (Trial Tr. at 174) (Page ID #482).

The demographic information Clement provided is wrong. According to US Census data, in 1995, the year of Watson's murder, the US population was approximately 263 million people and African Americans comprised 12.6% of the total US population. *See* Resident Population Estimates of the United States by Sex, Race, and Hispanic Origin, CENSUS.GOV (Jan. 2, 2001), https://www.census.gov/population/estimates/nation/intfile3-1.txt. In 2000, the US population was approximately 276 million people and African Americans comprised 12.8% of the total US population. *Id.*; *see also Tanner*, 660 N.W.2d at 769 n.7.

Additionally, Clement's testimony implied that the blood must have come from an African-American person, but Clement had no way of knowing the contributor's race. Clement was asked, "Just based upon

your projected statistical information how many people have type B two plus one plus?" She responded by saying "I think it's about 26 percent of the overall U.S[.] population is African-American so if you -- 26 percent of 280 million people times four percent of that." After this response, defense counsel added "And same with Caucasian?" to which Clement responded, "That's correct," and "And then you throw some other millions in there for some of these mixed races all the other categories that we haven't talked about here today?" to which Clement responded "Yes." R. 16-2 (Trial Tr. at 174–75) (Page ID #482). As a result of these follow up questions, Clement's testimony was not outright false. But Clement's response was potentially misleading because it suggested that Clement had reason to believe that the blood came from an African-American person, and she had no basis to believe that.

Similarly, Clement noted that type B two plus one plus blood is twice as common in the African-American population as the Caucasian population, but she failed to note that because the United States' Caucasian population is more than twice the size of the United States' African- American population, there are more Caucasian people than African-American people who are type B two plus one plus. In other words, Clement failed to note that there were more than twice as many Caucasian people as African-American people who could have left blood near the sink at Barney's. In sum, there were millions of people who could have contributed the blood found on the sink and most are not African American. Clement's possible suggestion that the contributor was more

likely to be African American is relevant because Tanner is African American. *Tanner*, 660 N.W.2d at 759.

Marie Bard-Curtis testified as a serology expert. *Id.* Other than the blood on the sink, the samples she tested were insufficient to produce results. *Id.* The blood on the sink was sufficient to produce results; it was ABO type B and PMG subtype two plus one plus. *Id.* According to Bard-Curtis, "The ABO type determined on the blood on the bar sink was type B. Hattie Mae Tanner was blood type B. The PGM subtyping detected on the sample from the bar sink was two plus one plus and Hattie Mae Tanner was also two plus one plus." *Id.* at 759; R. 16-2 (Trial Tr. at 240–41) (Page ID #429–30). Bard-Curtis was not asked about the frequency of various blood types in the population, and she did not mention that millions of people would have the same ABO type and PMG subtype as the blood on the sink.

Throughout his cross-examination of both Bard-Curtis and Clement, Tanner's counsel indicated that he was confused about the subject matter. At one point he asked Bard-Curtis whether "there was a homogenous sample" and then, when Bard-Curtis responded that she did not know, he says "I apologize, Judge. I'm not positive I know what that word means." R. 16-3 (Trial Tr. at 244–45) (Page ID #430–31). Before starting re-cross, in which Tanner's counsel tried to ask the expert about whether the blood on the sink could have come from more than one person, counsel noted, "This might be beyond my expertise." *Id.* at 250 (Page ID #432). Similarly, during his cross-examination of Clement, Tanner's counsel said, "I want to go back to serology for a minute. When blood is tested for

serology for the—I'm just talking about something I know nothing about" before proceeding to ask her general questions about how labs conduct serological testing. *Id.* at 172–73 (Page ID #481–82).

Tanner's trial counsel brought up the blood found on Watson's shirt in his cross-examination of Dr. Mahanti. He asked, "With regard to shirt item No. H . . . excuse me . . . [y]our number 140.98G, you said that came from an unknown contributor, correct? . . . Specifically your conclusion is that the donor of that blood on that submitted piece of evidence came from a female contributor, correct? . . . But neither Ms. Watson nor Ms. Tanner?" R. 16-3 (Trial Tr. at 230) (Page ID #427). Dr. Mahanti responded to these questions in the affirmative. *Id.* In his closing argument, trial counsel mentioned in passing that the blood on Watson's shirt belonged to an unidentified woman. He said,

> The results as to the shirt listed on this evidence is that there was blood on that shirt that was not the victim's. It was not Dion Paav's, Rob Cady's, or Hattie Tanner's, but it was blood from somebody else. A female contributor was the testimony of the doctor on the shirt. How does that fit into their theory? And is that blood? Do we know it -- did they check? Is B, two plus one plus, all that kind of stuff? Interesting that shirt though.

R. 18-2 (Trial Tr. at 109–10) (Page ID #540). Trial counsel did not emphasize, either in his cross-examination of Dr. Mahanti or in his closing argument, that the blood of an unknown person was on the shirt the victim was wearing while she was stabbed multiple

times during a struggle. That is, he does not emphasize for the jury the likelihood that the blood came from Watson's murderer.

Trial counsel's closing argument mentioned the truck spotted outside of Barney's— "What about pickup trucks? How's that fit into what the government's told you?"—but he failed to connect the fact that there were unidentified people spotted in a truck outside of Barney's and the blood of an unidentified person found on the victim's shirt. *Id.* at 110 (Page ID #540). Instead, he said simply "whether you can ever find those trucks or not, that's not my client's issue." *Id.*

E. Verdict

After both sides presented their evidence, the trial judge denied Tanner's motion for a directed verdict, relying in part on the serology evidence. The trial judge said, "if the jury believes Mr. Walters . . . a rational trier of fact could find that based on [Tanner's] statement as read by Mr. Walters; to wit, she was there, that it was her knife, and you couple that with the fact that her blood type was found in a stain at the bar that would form the basis where a rational trier of fact could conclude that it was, in fact, Hattie Tanner who committed the crime." *Tanner*, 660 N.W.2d at 772.

The jury convicted Tanner of first-degree felony murder, second-degree murder, and armed robbery. *Tanner*, 660 N.W.2d at 751. She was sentenced to life without parole for the first-degree felony murder conviction. She was initially sentenced to concurrent terms of forty to sixty years and twenty-five to fifty

years for the second-degree murder and armed robbery convictions, but the trial judge sua sponte vacated those sentences. *Id.*

F. Procedural History

After being found guilty by a jury in the Circuit Court for Calhoun County, Michigan, Tanner appealed to the Michigan Court of Appeals. The Michigan Court of Appeals reversed her convictions and her sentence for the first-degree felony murder conviction and remanded for a new trial. *Tanner*, 660 N.W.2d at 751. It ruled that the trial court erred by denying Tanner's counsel's motion for expert funds. *Id.* at 769–70. It also ruled that the trial court erred by denying Tanner's motion for a directed verdict on the charge of first-degree felony murder on the theory that Tanner aided and abetted Cady. *Id.* at 774. The Michigan Court of Appeals determined that the prosecution did not introduce sufficient evidence to prove that Cady murdered Watson, meaning that it did not produce sufficient evidence to prove that Tanner aided and abetted Cady in murdering Watson. It also determined that the prosecution introduced sufficient evidence to prove that Tanner committed felony murder as the principal, as opposed to by aiding and abetting Cady, but noted that the members of the jury were not asked to specify whether they found Tanner guilty of felony murder as the principal or as an aider and abettor. *Id.* at 775 & n.9. Judge Danhof dissented in part, arguing that the trial court was correct to deny Tanner's counsel request for funds to pay for a serologist. *Id.* at 775 (Danhof, J., dissenting).

In a short per curiam opinion, the Michigan Supreme Court reversed the judgment of the Court of

Appeals and reinstated Tanner's felony-murder conviction and sentence. *People v. Tanner*, 671 N.W.2d 728, 731 (Mich. 2003). The Michigan Supreme Court addressed the sufficiency of the evidence supporting Tanner's murder conviction only in a short footnote to the opinion. Justice Kelly dissented from the Michigan Supreme Court's per curiam opinion. *Id.* at 731 (Kelly, J., dissenting).

After exhausting her state remedies, Tanner filed a pro se federal habeas petition, which the district court denied in 2005. *See Tanner v. Yukins*, 776 F.3d 434, 435–36 (6th Cir. 2015). Tanner was unable to file a timely notice of appeal because prison guards refused to let her access the law library to pick up legal papers that she needed to send to the court before the deadline. *Id.* at 436. The district court granted Tanner's certificate of appealability, apparently not realizing that the notice of appeal was filed one day past the deadline. *Id.* at 436–37. The district court permitted Tanner to appeal on two grounds: "that the state trial court violated her right to due process when it denied her request for DNA and serological experts, and that there was insufficient evidence to convict her of felony-murder." *Id.* at 437. By the time the appeal was docketed with this court, it was too late for Tanner to request an extension of time to file the notice of appeal. *Id.* This court's show-cause order was the first notice to Tanner that her notice of appeal was untimely. *Id.* Tanner explained the situation in an affidavit filed in response to the show-cause order, but this court dismissed Tanner's appeal for lack of jurisdiction. *Id.* Tanner then filed a § 1983 case against the

guards who prevented her from timely filing her notice of appeal. *Id.* A jury found in her favor and awarded compensatory and punitive damages. *Id.*

After the verdict finding that prison guards prevented Tanner from filing a timely notice of appeal, Tanner filed in the district court a motion for relief from judgment under Federal Rule of Civil Procedure 60(b)(6), seeking a procedural avenue to appeal the denial of her habeas petition. *Id.* The district court denied the motion for lack of jurisdiction. *Id.* This court granted a certificate of appealability on the issue of whether the district court erred by denying the 60(b)(6) motion. *Id.*

This court then reversed the judgment of the district court and directed the district court to "vacate the judgment, entered on November 8, 2005, that denied Tanner's petition for a writ of habeas corpus and to reenter the judgment, thereby starting anew the 30–day period under Rule 4(a)(1)(A) in which to file a notice of appeal." *Id.* at 444. The district court reinstated its order on May 6, 2015. R. 54 (05/06/2015 Order) (Page ID #1001). The second time around, Tanner timely filed a notice of appeal. R. 59 (06/03/2015 Notice of Appeal) (Page ID #1007– 08).

This case is now before us to address the same issues on which the district court originally granted a certificate of appealability in 2005: first, that the Michigan Supreme Court unreasonably applied *Ake* when it held that the trial court properly denied Tanner's trial counsel funding for a serology or DNA expert, and, second, that the Michigan Supreme Court unreasonably applied *Jackson v. Virginia* when it

held that there was sufficient evidence to convict Tanner.

II. DISCUSSION

A. Legal Standards

"In reviewing a district court order granting an application for a writ of habeas corpus relief, we review legal conclusions *de novo*." *Newman v. Metrish*, 543 F.3d 793, 795 (6th Cir. 2008), *cert. denied*, 558 U.S. 1158 (2010). "Although we generally review the district court's findings of fact for clear error, we review de novo when the district court's decision in a habeas case is based on a transcript from the petitioner's state court trial, and the district court thus makes no credibility determination or other apparent finding of fact." *Id.* at 795–96 (internal quotation marks omitted); *see also Taylor v. Withrow*, 288 F.3d 846, 850 (6th Cir.), *cert. denied*, 537 U.S. 1007 (2002).

The de novo standard of review does not constrain our review of the district court's judgment, but the applicable law tightly constrains our review of the state appellate court and the jury. On a sufficiency-of-the-evidence claim, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) allows a petitioner in state custody to present a federal court with a claim if the claim was adjudicated on the merits in state court, but the federal court may grant a writ of habeas only if the state court's decision was either "contrary to, or involved an

unreasonable application of, clearly established Federal law, as determined by the Supreme Court," 28 U.S.C. § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2); *see also Taylor v. Withrow*, 288 F.3d at 851 (quoting *Williams v. Taylor*, 529 U.S. 362, 405 (2000)). Thus, two layers of deference apply, one to the jury verdict, and one to the state appellate court. *See Brown v. Konteh*, 567 F.3d 191, 204–05 (6th Cir. 2009), *cert. denied*, 558 U.S. 1114 (2010) ("In an appeal from a denial of habeas relief, in which a petitioner challenges the constitutional sufficiency of the evidence used to convict him, we are thus bound by two layers of deference to groups who might view facts differently than we would. First, as in all sufficiency-of-the-evidence challenges, we must determine whether, viewing the trial testimony and exhibits in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime beyond a reasonable doubt. In doing so, we do not reweigh the evidence, re-evaluate the credibility of witnesses, or substitute our judgment for that of the jury. Thus, even though we might have not voted to convict a defendant had we participated in jury deliberations, we must uphold the jury verdict if any rational trier of fact could have found the defendant guilty after resolving all disputes in favor of the prosecution. Second, even were we to conclude that a rational trier of fact could not have found a petitioner guilty beyond a reasonable doubt, on habeas review, we must still defer to the *state appellate court's* sufficiency determination as long as it is not unreasonable." (internal citations omitted)).

B. Sufficiency of the Evidence

Acknowledging the double deference standard that applies in this case, the evidence still leaves us no choice but to conclude that the Michigan Supreme Court unreasonably applied *Jackson*, in violation of 28 U.S.C. § 2254(d)(1). *See Newman*, 543 F.3d at 797; *see also Brown v. Palmer*, 441 F.3d 347, 352 (6th Cir. 2006).

The inculpatory evidence in this case establishes, at best, "reasonable speculation" that Tanner was in the Barney's parking lot around the time of the murder and that she was last in possession of the murder weapon approximately a month before the murder. *Newman*, 543 F.3d at 797. There are three pieces of inculpatory evidence. First, Walters testified that Tanner told him that she was in the Barney's parking lot around the time of the murder. Second, Walters testified that, during a separate interview, he showed Tanner a photograph of the knife recovered from the crime scene, and Tanner said the knife was hers. Third, there was blood near the upstairs sink that matched Tanner's blood type and PGM subtype.

There are several gaps in this evidence. First, Tanner did not tell Walters that she went into Barney's on the night of the murder. Walters testified that Tanner told him that she was in the parking lot outside Barney's on her way to buy crack with Cady, and that she waited in the car while Cady went into Barney's to cash a check. *Tanner*, 660 N.W.2d at 756. Tanner did not say that she entered Barney's. Moreover, even if the evidence placed Tanner in Barney's—which it does not—there is no evidence showing that Tanner murdered Watson while in Barney's. And even

if the prosecution had proved that Cady murdered Watson—although the prosecution did not indict, let alone convict, Cady—there is no evidence showing that Tanner helped him, either from within Barney's or from the parking lot. Walters even testified that when he asked Tanner whether she was responsible for Watson's murder, she answered in the negative. *Id.*

Second, even accepting that Tanner told Walters that the murder weapon was her knife does not advance the prosecution's case very far. We note that there are several problems with Walters's testimony about the knife. One problem is that the transcript of Walters's conversation with Tanner flatly contradicts Walters's testimony. In the transcript, Tanner's answer to the question whether the knife was hers was "no." *Id.* at 757. A related problem is that, like the transcript, Tanner's trial testimony also contradicts Walters's. Tanner testified that she actually told Walters that the pictured knife looked like a knife she used to own, but was not hers; her knife was a folding knife, not a straight-bladed knife like the one pictured. *Id.* at 760. Yet another problem with Walters's testimony is that Catherine Huskins's testimony casts doubt on it. Huskins testified that Watson found a nonfolding knife and said she was going to keep it in her purse. *Id.* at 760. Huskins's testimony suggests that there is at least a possibility that Watson's own knife was the murder weapon. Despite these problems, a jury was entitled to credit Walters's testimony, and this court is not entitled to question the jury's credibility finding. *See Brown v. Konteh* 567 F.3d at

205. As a result, we must accept that Tanner told Walters that the photo of the murder weapon was a photo of her knife.

But accepting that Tanner told Walters that the murder weapon was her knife still does not advance the prosecution's case very far. According to Walters's testimony, Tanner told him that she had last handled the knife three or four weeks before Watson's murder. *Tanner*, 660 N.W.2d at 756. Tanner also made clear that other people, including Paav, had access to the knife. *Id.* Even if the knife used to murder Watson was in Tanner's possession at one point, there is no indication that it was in her possession close to the time of the murder.

That leaves the third piece of evidence, the blood. The blood found near Barney's sink matched Tanner's blood type and PMG subtype. Millions of people share Tanner's blood type and PGM subtype. Any one of those people could have contributed the blood. The experts who testified at trial about serology did not provide precise (or even accurate) information about the frequency of type B two plus one plus blood in the population, but they did at least acknowledge that millions of people have type B two plus one plus blood. *Tanner*, 660 N.W.2d at 758; R. 16- 2 (Trial Tr. at 165, 174) (Page ID #480, 482). Further undermining the importance of the blood near the sink, there is no way of knowing whether the blood belonged to the perpetrator or to one of the people who gathered at Barney's the morning after Watson's murder. When VanStratton arrived at Barney's with the equipment necessary to process the crime scene, Barney's employees and friends of Watson were already gathered in the area

behind the bar where officers eventually found the blood. *Tanner*, 660 N.W.2d at 758. One of them could have bled near the sink that morning.

Not only are there gaps in the prosecution's inculpatory evidence, there is also exculpatory evidence. Most crucially, an unidentified woman's blood was on the victim's shirt. The blood did not come from Tanner or from any of her hypothesized accomplices (Cady or Paav). The blood on Watson's shirt is particularly relevant because VanStratton concluded that Watson was killed during a struggle. *Id.* at 754.

Someone who may have been the contributor of this blood was outside of Barney's around the time of the murder. Two different witnesses, Sage and Chantrene, spotted a truck outside Barney's early in the morning of March 22. *Id.* at 760–61. Sage saw two people in the truck. According to Sage, the driver was a man, but the passenger could have been a woman. *Id.* at 760.

The State of Michigan has repeatedly responded to the gaps in the prosecution's case and the existence of potentially exculpatory evidence by pointing out that a jury convicted Tanner. We are mindful that, as a federal habeas court, we are not to substitute our judgment for the jury's judgment. *See Brown v. Konteh*, 567 F.3d at 205. We are also mindful that "a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt . . . ." *Jackson*, 443 U.S. at 317. "[W]hen such a conviction occurs . . . it cannot constitutionally stand." *Id.* at 318.

In this case, the blood on Watson's shirt would have created reasonable doubt for a rational jury. None of the evidence that implicates Tanner is sufficient to overcome the reasonable doubt created by the presence of a unknown woman's blood on the victim's shirt. This is particularly true given that witnesses observed unknown individuals outside of Barney's around the time of the murder. It would be difficult to overestimate the importance of blood on the shirt of a victim who was stabbed in the chest during a struggle. It is hard to imagine any scenario in which the contributor of this blood would not be a key suspect. And it is impossible to see how a rational jury could have found the defendant guilty beyond a reasonable doubt without an explanation for the unknown person's blood on the victim's shirt. Therefore, based on the strength of the potentially exculpatory evidence and the comparative weakness of the incriminating evidence, there is no way to read the record here to support the Michigan Supreme Court's conclusion that a rational trier of fact could have found Tanner guilty of Watson's murder beyond a reasonable doubt. In finding that there was sufficient evidence to convict Tanner, the Michigan Supreme Court unreasonably applied *Jackson*. Because we determine that the Michigan Supreme Court unreasonably applied *Jackson*, we do not consider Tanner's claim that the Michigan Supreme Court unreasonably applied *Ake*.

III. CONCLUSION

For the foregoing reasons, we **REVERSE** the judgment of the district court and remand the case to

the district court with directions to grant the writ, setting aside Tanner's conviction and freeing her unconditionally from state supervision.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HATTIE MAE TANNER,
Petitioner,
CASE NO. 04-CV-71155-DT
v. HONORABLE VICTORIA A. ROBERTS
JOAN YUKINS,
Respondent.
_____/

ORDER GRANTING IN PART AND DENYING IN PART A CERTIFICATE OF APPEALABILITY AND GRANTING LEAVE TO PROCEED ON APPEAL *IN FORMA PAUPERIS*

Petitioner has filed a notice of appeal and an application to proceed on appeal *in forma pauperis* concerning this Court's denial of her petition for writ of habeas corpus under 28 U.S.C. § 2254. Before Petitioner may appeal this Court's dispositive decision, a certificate of appealability must issue. 28 U.S.C. § 2253(c)(1)(a); Fed. R. App. P. 22(b). The Court 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).

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). When a federal district court rejects a habeas claim on the merits, the substantial showing threshold is met

if the petitioner demonstrates that reasonable jurists would find the district court's assessment of the constitutional claim debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). "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, a district court may not conduct a full merits review, but must limit its examination to a threshold inquiry into the underlying merit of the petitioner's claims. *Id*. at 336-37.

When a federal district court denies a habeas claim on procedural grounds without addressing the claim's merits, a certificate of appealability should issue if it is shown that jurists of reason would find it debatable whether the petitioner states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *See Slack*, 529 U.S. at 484-85. When a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petition should be allowed to proceed further. In such a circumstance, no appeal is warranted. *Id.*

This Court determined that Petitioner's first habeas claim concerning the admission of scientific evidence was procedurally defaulted and without merit. The Court concludes that reasonable jurists would not find the Court's procedural ruling debatable. Further, Petitioner has not made a substantial showing of the

denial of a constitutional right concerning that claim. Petitioner has also not made a substantial showing of the denial of a constitutional right concerning her third habeas claim concerning pre-arrest delay. Accordingly, the Court **DENIES** a certificate of appealability as to Petitioner's first and third habeas claims.

The Court, however, concludes that Petitioner has made a substantial showing of the denial of a constitutional right as to her second and fourth habeas claims, which concern the denial of DNA and serological experts and the sufficiency of the evidence. Accordingly the Court **GRANTS** a certificate of appealability as to Petitioner's second and fourth habeas claims.

Lastly, the Court **GRANTS** Petitioner's request for leave to proceed on appeal *in forma pauperis*. *See* Fed. R. App. P. 24(a).

IT IS SO ORDERED.

S/Victoria A. Roberts
Victoria A. Roberts
United States District Judge

Dated: December 23, 2005

The undersigned certifies that a copy of this document was served on the attorneys of record by electronic means or U.S. Mail on December 23, 2005.

s/Carol A. Pinegar
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HATTIE MAE TANNER,
Petitioner,

CASE NO. 04-CV-71155-DT
v. HONORABLE VICTORIA A. ROBERTS

JOAN YUKINS,
Respondent.
_____/

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, an inmate at the Scott Correctional Facility in Plymouth, Michigan, has filed a *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging her first-degree felony murder conviction which was imposed following a jury trial in the Calhoun County Circuit Court in 2000. Petitioner was sentenced to life imprisonment without the possibility of parole on that conviction. In her pleadings, Petitioner raises claims concerning the admission of scientific evidence, the denial her motion for a DNA expert at trial, the denial of her motion for a serological expert on appeal, pre-arrest delay, and the denial of her motion for directed verdict/sufficiency of the evidence. For the reasons stated below, the Court denies the petition for writ of habeas corpus.

I. Facts

Petitioner's conviction stems from the armed robbery and stabbing death of a bartender in Calhoun County, Michigan on March 22, 1995. The Michigan Court of Appeals set forth the relevant facts as follows:

> Defendant's convictions arise from the stabbing death of Sharon Watson, a bartender at Barney's Bar and Grill (Barney's) located in Calhoun County, during the course of a robbery that occurred at the bar after 1:00 a.m. on March 22, 1995. Initially, the Battle Creek Police Department requested warrants for defendant, Dion Paav, and Robert Cady in July 1995 for their alleged involvement in the victim's robbery and murder, but the prosecutor declined to issue the warrants in the fall of 1995 on the ground that there was insufficient evidence to charge these individuals. However, when a new prosecutor took office in 1997, an arrest warrant was eventually issued on May 23, 2000, for defendant only, charging her with open murder, M.C.L. § 750.316; felony murder, M.C.L. § 750.316; and armed robbery, M.C.L. § 750.529.
>
> The case proceeded to trial in November 2000. It was the prosecutor's theory that Cady, a close friend of defendant, used his status as a trusted regular customer of Barney's to gain entrance to the bar while the victim was in the process of closing the bar. The prosecutor further theorized that defendant committed the murder with her own knife, leaving it at the

bar next to a drop of her own blood. Alternatively, the prosecutor argued that defendant aided and abetted Cady in the felony murder by providing the murder weapon.

At trial, Cady was the prosecution's first witness. Cady testified that after getting out of work at 10:55 p.m. on March 21, 1995, he had planned to meet Paav at Nottke's Bowling Alley, Paav's place of work. When Paav did not appear, Cady went to a bar, where he claimed that he attempted to call Paav at home. Cady testified that he then called defendant to arrange for the purchase of crack cocaine. Shortly after midnight on March 22, Cady drove to defendant's house and went with her to purchase crack cocaine. After returning to defendant's house, Cady and defendant smoked crack cocaine together. Cady testified that about one-half hour later, he left to cash a check and eventually went to Barney's at about 1:00 a.m. Cady further testified that although the bar appeared to be closed when he arrived because the sign was off, he entered through an open side door and saw Watson, a friend whom Cady had known for about two years, and an unidentified white male customer in the bar. Cady testified that because Watson had already closed out her cash register, she could not cash his check. Cady then left Barney's and went to another bar, the Green Tavern, where he cashed the check and drank a beer. Cady testified that he called defendant at about 1:30 a.m. to say that he was returning to her house. However, Cady first

went to buy some more crack cocaine before stopping at defendant's house at approximately 2:30 a.m. Shortly thereafter, Cady drove home, passing by Barney's at about 2:45 a.m. According to Cady, while he found it unusual to see the bar's lights on at that hour, he nonetheless continued driving home without stopping.

Cady testified that at about 1:30 p.m. on March 22, 1995, Paav called and informed him that Watson had been found murdered in the basement of Barney's. Although Cady was concerned about talking with the police because of his use of crack cocaine, he and Paav went to talk with the police later that afternoon. According to Cady, defendant had been to Barney's only once during the last five years. Cady further testified that he knew that Barney's would close before the usual 2:00 a.m. closing time if it were a slow night.

Cady admitted that he knew that after cashing out, the victim would take the money toward the back of the bar, where there was a storage area next to the bathrooms and basement stairs. Cady acknowledged that the victim also trusted Cady to watch the bar area while she cashed out. Cady also knew from talking to the victim and other bar employees that there was a safe in the basement.

On cross-examination, Cady testified that he was a friend of the victim and was trying to help the police find her killer when he became a suspect in the case. Cady also testified that he helped the police prepare two composite sketches of the man whom he claimed to have seen in the bar on the night of the homicide and robbery. Cady denied that defendant accompanied him to Barney's when he attempted to cash a check on the night in question. Cady also stated that, with the exception of being shown a picture of it, he had never seen the knife that the police recovered at Barney's.

On redirect examination, Cady testified that the victim had already cashed out by the time of his arrival at about 1:00 a.m. on March 22, 1995. Cady also admitted that, when interviewed by Officer Brad Wise of the Bedford Township Police Department on March 27, 1995, he stated that the victim would cash out early only if there were trusted regular customers in the bar. Cady further testified that during a conversation with the victim after his arrival at Barney's at about 1:00 a.m., he learned that the "stranger" who was sitting at the bar had been there since 12:15 a.m. Cady also admitted that he used a knife to cut up or chip rocks of crack cocaine on the night in question after previously denying it. Cady further admitted that if he ordered beer to go, it would have been a six-pack of "Bud light."

Watson's boyfriend, Jerry Dockum, testified that he received a call from the victim on the night in question and was told that she was closing early at about 1:30 a.m. At about 2:00 a.m., Dockum became concerned about her whereabouts and called the bar. When no one answered the phone, Dockum called his sister, Gloria Loring. According to Dockum, Watson never removed the cash drawer from the cash register in the presence of people whom she did not know. Dockum further testified that he had been present on one previous occasion when Watson, in Cady's presence, removed the cash drawer in the bar and took it downstairs. Dockum also testified that he had never seen defendant at the bar.

According to Maria Coller, a former employee of Barney's, she received a call from Loring after Dockum had called his sister. Maria Coller, who had keys to the bar, and her husband, Ron Coller, then picked up Loring, and they went to Barney's, finding it unusual that the lights were on. In addition, Watson's car was in the parking lot behind the bar, although the outside doors were locked. According to Mr. Coller, they arrived at the bar at approximately 5:30 a.m. on March 22. Upon entering through the side door of the bar, Mr. Coller almost tripped on a six-pack of Budweiser beer in a Michelob pack left on the floor with a napkin on top of it. The television was blaring, and Watson's purse was on the back of the bar. After calling the bar owners and 911, the Collers noticed a knife behind the bar

where the glasses were washed. On the back of a chair was the victim's coat. The Collers also found a note for a take-out order of beer on the cash register behind the bar. After Mr. Coller opened the door to the basement and observed loose cash at the bottom of the basement stairs, his wife called 911 a second time. Going downstairs, the Collers walked all over the basement, looking for the victim. When they discovered that the door to the basement office was closed, Mrs. Coller called 911 a third time at about 6:00 a.m.

Shortly thereafter, Tom Bliler, one of the bar's owners, arrived at the bar and helped Mr. Coller open the door to the office, where they found the victim's body. According to Bliler, $1,009 had been stolen from the safe. Bliler also testified that he had never seen the knife that was found behind the bar and that the knife did not belong to the bar.

Officer John Hancotte, who, at the time of the offenses, was employed by the Bedford Township Police Department, was the first police officer to arrive on the scene at 6:25 a.m. on March 22, 1995. Upon finding that the victim had been dead for some time, Officer Hancotte called for additional help from the Battle Creek Police Department and the Michigan State Police. Reporting to the crime scene were Detective Michael VanStratton, the crime lab supervisor of the Battle Creek Police Department at the time of the murder, who

was employed by the Kansas Bureau of Investigations at the time of trial, and State Trooper Harry O. Zimmerman, a crime-scene technician with the Michigan State Police, who was retired at the time of trial.

Detective VanStratton, who was qualified as an expert witness in the areas of bloodstain-pattern analysis, latent-fingerprint analysis, and crime-scene reconstruction, arrived at Barney's at approximately 7:00 a.m. on March 22, 1995, and determined that his personnel did not have the necessary equipment to process the crime scene. After going back to the Battle Creek Police Department to retrieve additional equipment, Detective VanStratton returned to Barney's but found that "some of the areas which we thought might be critical for investigation had already been occupied by people that came in that morning," including bar employees, and that "[c]offee was being made behind the bar." Detective VanStratton testified that because "there was some important evidence behind the bar," it was the first area that was isolated.

According to Detective VanStratton, the crime-scene technicians began collecting evidence upstairs in the bar, finding a blood-stained napkin stuck inside a six-pack of beer, a knife and diluted bloodstains on the stainless steel sink area directly behind the bar, the victim's purse, two drinking glasses, a cash register receipt, and "a small piece of paper that had to go with five dollars beer to go,

a price of $5.10," which "were in the immediate area behind the bar." Detective VanStratton testified that the crime-scene technicians proceeded downstairs to the basement office where the victim's body was found. Scattered on the floor in front of the basement office door were seven $5 bills, which were collected as evidence. The crime technicians also collected a bloodstain that was found on the plasterboard wall at the bottom of the stairs, along with a piece of the wall containing what appeared to be knife punctures.

Detective VanStratton testified that when he entered the basement office, the victim was found on her back, with bloodstains smeared across her abdomen and "some stab wounds to the chest area." In Detective VanStratton's opinion, it was apparent that a struggle had taken place given the disarray in the office and the scrapes that were found on the victim's arms. Detective VanStratton further testified that there was an excessive amount of blood on the victim's body, "particularly her neck area and chest area." In Detective VanStratton's opinion, the victim's assailant would also have had blood on his or her hands and possibly on his or her clothing because the victim's bloodstains were transferred to the assailant. According to Detective VanStratton, "we did find some blood transfer on the napkin that was found upstairs." Detective VanStratton also testified that three identifiable prints were found on the cash box, one belonging to the victim and the other two to the

bar's owner, but that the police were not able to develop fingerprints from the other crime-scene evidence.

On cross-examination, Detective VanStratton testified that he first arrived at the bar shortly after 7:00 a.m. on March 22, 1995, and returned to it after 8:00 a.m. When he returned to the bar, there were a number of people inside, including the victim's friends and bar employees. In his testimony, Detective VanStratton agreed with Officer Hancotte's estimate that there were about seven people in the bar at that time who were not law-enforcement people. According to Detective VanStratton, people were mingling in the area where the knife, the bloodstains on the sink, and the bloodstained napkin on the six-pack of beer were found. Although people were drinking coffee in this area of the bar, Detective VanStratton did not see anybody eating. Detective VanStratton also testified that because the bloodstains on the sink were diluted, "[t]here's no way to tell if it was fresh or not fresh," in determining how long the bloodstains had been present. Detective VanStratton further testified that blood had been transferred from the victim to the assailant during the physical struggle in the basement office, but he refused to speculate whether there was more than one assailant.

According to Dr. Stephan Cohle, who was qualified as a forensic pathologist, the victim suffered both "blunt force injury" and "sharp

force injury." The blunt-force injuries consisted of scrapes and bruises, while the sharp-force injuries were "primarily stab wounds." Dr. Cohle testified that the victim suffered "a total of six stab wounds, four in the chest, two in the back." Dr. Cohle opined that "[t]he cause of death was [a] stab wound in the chest," which extended into the heart, causing massive bleeding.

George Bliler, the son of one of Barney's owners, also testified for the prosecution. According to George Bliler, Cady arrived at the bar between 8:00 and 9:30 a.m. on March 22, 1995, curious about why all the police were present, but departed after only a few minutes.

Officer Brad Wise, who was employed by the Bedford Township Police Department at the time of the offenses, testified that Cady approached him in the afternoon of March 22 and gave him a description of the white male customer in his thirties whom Cady claimed to have seen the night before when he entered the bar. Officer Wise subsequently interviewed defendant twice about the case, the first time by telephone and the second in person. During the second interview on May 3, 1995, defendant told Officer Wise that Cady came to her house at 11:00 p.m. on March 21, 1995, to drink alcohol and smoke crack cocaine. According to Officer Wise, defendant told him that Cady then left to cash a check and returned with $50, which they used to

purchase more crack cocaine. According to Officer Wise, defendant told him that she and Cady left her mother's home at about 3:00 a.m. after her mother complained that they were making too much noise. Defendant also told Officer Wise that she had not been to Barney's for five or six years.

On cross-examination, Officer Wise acknowledged that Cady assisted the police in preparing a composite sketch of the man whom he claimed was in the bar on the night in question. Officer Wise also acknowledged that after the homicide and robbery, he talked with Dennis Fodor, who originally corroborated Cady's description of the other man in the bar. Officer Wise admitted that after talking to Fodor, he reported that Fodor gave a description of the other man in the bar as looking like Cady. However, Officer Wise disputed whether Fodor's statement corroborated Cady's description of the other man. Officer Wise testified that although Fodor originally stated that he was in the bar until closing time, "the second time I talked to Mr. Fodor he indicated that he was there 'till last call, which was eleven o'clock." Officer Wise, however, explained that "[Fodor] said that it was his last call" because he had had too much to drink by that point, and "the bartender cut him off."

Thereafter, in the middle of May 1995, Detective David Walters of the Battle Creek Police

Department was assigned to the case and, after reviewing the case file and talking with Officer Wise, decided to focus his investigation on Robert Cady, his wife Jennifer Cady, Dion Paav, and defendant. On May 24, 1995, Detective Walters interrogated defendant at the Battle Creek Police Department and showed her a photograph of the knife that was recovered at crime scene. According to Detective Walters, defendant recognized that it was her knife because she had altered "the blade end of the knife" to make it easier "to clean up her crack pipes." However, during the interview, defendant gave no indication that she had been at Barney's during the early morning hours of March 22, 1995.

Detective Walters then interviewed Paav and Jennifer Cady on May 25, 1995, but neither one provided much direction to his investigation. However, after interviewing Robert Cady on May 26, 1995, Detective Walters began to concentrate his attention on Cady as the principal suspect in this case, meeting him in the parking lot of Barney's for a second interview on June 2, 1995. According to Detective Walters, when they approached one another in the parking lot, Cady was wearing sunglasses, even though it was "a dark, dreary day," and "he was visibly shaking, like his body was shaking, his hands were shaking." While inside the bar, Cady acknowledged in response to Detective Walters' questioning that he knew that the safe was kept in the basement

of the bar, although he did not know where the entrance to the basement was in the bar.

Subsequently, on June 7, 1995, Detective Walters, accompanied by Detective David Adams of the Battle Creek Police Department, questioned defendant once again about the homicide that occurred at Barney's on March 22, 1995. During the interview, which took place in a police car, Detective Walters showed defendant a photograph of the knife that was found in the bar. According to Detective Walters, defendant acknowledged that it was her knife, indicating that she had used it at her mother's residence where she lived. Detective Walters further testified that defendant indicated that her fingerprints or those of Paav, who lived at the same residence, would be on the knife because "they had both handled the knife" about "three to four weeks prior to the homicide."

Detective Walters also testified that, during the June 7, 1995, interview, defendant admitted that she accompanied Cady to Barney's after 1:00 a.m. on March 22, 1995. According to Detective Walters, defendant stated that she stayed in the vehicle, while Cady went inside the bar to cash a check, and that there were a couple of cars in the parking lot at the time. Detective Walters testified that defendant stated that after leaving Barney's at approximately 1:30 a.m., she and Cady then went to various other establishments that night to cash a check and buy beer before stopping to

purchase some crack cocaine. When Detective Walters questioned defendant about whether she might have been responsible for killing the victim, she shook her head in denial. When questioned about the circumstances under which she might commit such a homicide, Detective Walters reported that defendant said that "if that bitch had treated her bad she would do something to that effect." Detective Walters further testified that "Defendant said that the person that would have been responsible for this would have been [sic] blood on them and that Rob-- meaning Rob Cady--didn't have any blood on him. And she said what would she have done with the bloody clothes. I think she also said to the effect the person would have had--the victim was moved to the basement so the person would have had to have blood on them that did that."

On cross-examination, Detective Walters, who, at the time of trial, was retired from the Battle Creek Police Department after twenty years of service, acknowledged that, at some point during his two-month investigation into the homicide and robbery, the police conducted a search of defendant's residence with her consent and seized her clothes, including her purple jogging suit and nightgown, for any "trace evidence," such as blood and hair fibers, to determine whether they matched the blood and hair fibers that had been found at the crime scene. Detective Walters indicated that the hair and fiber comparison did not reveal any match. The police also searched Cady's

residence with his consent, seizing some articles of his clothing. Cady's car was also searched on May 26, 1995, but the police found no blood or hair evidence linking him to the crime. Although Paav's residence was not searched, the police searched his vehicle, but again found nothing linking Paav to the crime.

In response to defense counsel's questioning about the interrogation conducted on May 24, 1995, at the Battle Creek Police Department, Detective Walters admitted that he experienced "some problems with the audio-visual equipment" that was used to record the interview. Specifically, during the interview, Detective Walters discovered that "[t]he equipment was not working properly," and that at some point the audio started to work properly again, but not the video, which apparently never worked throughout the interrogation. As a result, only about one-half of the lengthy interrogation was audiotaped. A thirty-two-page transcript of the audiotaped portion of the interrogation was thereafter prepared. However, Detective Walters admitted that he had never listened to the audiotape in order to compare it with the transcript that was prepared of the May 24, 1995, interrogation. Detective Walters further admitted that defendant's articulation was "rough at times" and that she was difficult to understand. As a result, there were 261 "inaudibles" in the thirty-two-page transcript, which Detective Walters admitted was a surprisingly high number for a transcript of this length.

Although Detective Walters testified on direct examination that defendant stated in the interrogation at the police station on May 24, 1995, "[t]hat the knife was hers" and that "she recognized the knife by the point on it," he conceded on cross-examination that while she stated that "it looks like one of my knives," her answer to the question whether it was "one of your knives" was transcribed as her "saying no." In addition, defendant's other answers to his questions about the knife were inaudible. Notwithstanding, Detective Walters stood by his testimony given in direct examination that defendant admitted that the knife was hers. Detective Walters acknowledged that despite the high number of inaudibles in the transcript of the May 24, 1995, interrogation, he did not send the tape to the Michigan State Police Crime Laboratory to enhance the sound quality. Detective Walters also acknowledged that at 1:10 a.m. on March 22, 1995, "officially, there was a report of a pickup truck style vehicle being seen leaving the area." According to Detective Walters, the pickup truck was "possibly a light colored pickup" with "[a] homemade box with a box or wooden frame in the back." Detective Walters testified that the police investigated this information, but did not find a pickup truck that matched the description of the vehicle.

On cross-examination, Detective Walters conceded that the police had no direct evidence that defendant was in the basement of Barney's at the time of the murder. Detective

Walters also acknowledged that while Cady and Paav were suspects, they were not charged in this case. Further, while Detective Walters admitted that defendant never told him that the knife found in the bar belonged to Paav, he conceded that he told Paav during an interview on June 7, 1995, that defendant said that the knife was his. Detective Walters admitted that he lied to Paav because he wanted "to see if [he] was telling [ ] the truth." Detective Walters also admitted that he lied to defendant when he told her during an interview that her fingerprints were on the knife. Detective Walters further admitted that defendant denied going with Cady to cash a check at Barney's on the night in question and also denied being in the bar that night.

Dion Paav testified that he knew the victim as a bartender at Barney's and found out about her death on the morning of March 22, 1995, when a cook at Barney's called to tell him that she had been murdered. Paav, then forty-five years old, testified that he had been friends with Cady since he was ten years old. Paav testified that he planned on meeting Cady at Barney's on the evening of March 21, 1995, because both of them lived near Barney's, where they were regular customers. However, after getting off work at 4:00 p.m., Paav went straight home and did not go to Barney's. Paav testified that he did not receive a call from Cady or anyone else that night. Paav also testified that he could not recall telling Detective Walters about a telephone conversation

that he had with defendant while house-sitting for Cady after the murder. However, when presented with a previous statement he made to the police, Paav admitted that he did have a conversation with defendant at some point, although he claimed that he could barely understand her and that she said something about fingerprints and the knife.

On the final day of the trial, Detective Walters was recalled by the prosecution and testified that Paav told him that when he was housesitting for Cady over the Memorial Day weekend in 1995, he received a telephone call from defendant. According to Walters, "[Paav] said that she thought the police had found her fingerprints on the knife at Barney's and also that the police had gotten her--taken her tennis shoes."

The prosecution also called Megan Clement, an employee of Laboratory Corporation of American (LabCorp), a DNA-testing company based in North Carolina, who was qualified as an expert witness in DNA and serological analyses. Clement testified that she was unable to obtain DNA results from the blood found on the sink behind the bar because there was an insufficient amount of DNA from which to develop a profile for the purpose of comparing it with defendant's blood sample. According to Clement, she tested six bloodstains from the victim's shirt and that "the profile on all six strains were consistent with one other, and all six stains were consistent with originating

from the same individual; however, it could not have been Ms. Tanner. Her profile was different than the profile on these six stains." However, Clement did not identify whose profile was contained on the six bloodstains.

Clement also testified about the process of serological testing, explaining that there are four common blood types--A, B, AB, and O--and that there were ten different types of the enzyme phosphoglucomutase (PGM) found in human blood, thus permitting subtyping with regard to blood type and PGM. According to Clement, "if you type for ABO and PGM, you look at the frequency of ABO times the frequency [of] the PGM to come up with what percentage of the population would have both of the characteristics in the sample detected." Clement then explained:

> In the Caucasian population a type B blood is approximately ten percent and a PGM two plus one plus is approximately 20 percent, actually 21 percent. If you multiply the two for a person to have type B blood and be a two plus one plus it would be approximately two percent of the population of the Caucasian population.

Clement added:

> In the African-American population a type B is much higher. It's approximately 20 percent. And the PGM two plus one plus is about 19.8 percent, so

> approximately 20 percent as well. So a person who have [sic] blood type B and PGM two plus one plus in the African-American population would be approximately four percent so it would be twice as common in the African-American population as the Caucasian.

On cross-examination, Clement acknowledged that there was insufficient blood to obtain DNA results from the bloodstain that was found near the sink in the bar. In addition, Clement testified that the DNA analysis of the six bloodstains exculpated defendant. During cross-examination, defense counsel also questioned Clement about how many people in the United States have type B and PGM two plus one plus. In response, Clement stated that considering that African-Americans constituted twenty-six percent of the United States population of 280 million people, "26% of 280 million people times four percent of that" resulted in "[p]ossibly millions" matching this serological profile. Defendant is African-American.

Nibedita Mahanti, who was employed by the Michigan State Police, also testified as an expert witness in DNA analysis for the prosecution. Mahanti testified that she performed DNA analysis on blood samples from the victim, defendant, Cady, and Paav and from the evidence items that were submitted to her. In Mahanti's opinion, the DNA profile of the blood samples from the knife, the napkin, and

a stained cloth matched the DNA profile of the victim. The DNA profile of the victim was also found on one napkin from the bar, a blood sample that was taken from next to the knife, and a section of cardboard from a box. The blood sample from the bar sink, however, had insufficient DNA to produce a reliable result. In addition, blood found on the section of the victim's shirt contained the DNA profile of an unknown donor, because it was not contributed by the victim, defendant, Cady, or Paav. Defense counsel stipulated the admission of Mahanti's DNA report and moved, without objection, that Mahanti be recognized as an expert in DNA analysis.

The prosecution also called Marie Bard-Curtis to testify as an expert in the area of serology. Bard-Curtis, who was employed by the Michigan Department of State Police Forensic Science Division Microchem Subunit, testified that she performed serological testing on the following evidence items received from the Battle Creek Police Department: "a white folded paper packet identified as containing a sample from the bar sink"; "a control sample from that area"; "a sample from the bar top near the beer taps; a "[s]ample from a napkin in a beer six pack"; "[a] sample from the bar and the sink next to the knife"; "[a] sample portion of wallboard with a blood stain"; "a portion of a box lid"; and blood samples of the victim whose first name was incorrectly recorded as Susan. Bard-Curtis also obtained ABO blood typing for the victim, defendant,

Cady, and Paav, as well as PGM typing of the blood of the victim and defendant.

Bard-Curtis testified that the victim had blood type B and PGM subtype of 2+, 1-, while defendant had the blood type B and PGM subtype of 2+, 1+. Cady and Paav both had blood type A. The samples from the bar top, the bar and sink next to the knife, the wallboard and cardboard box were tested and showed the presence of human blood, but insufficient protein was available to perform PGM subtyping. Testing performed on the articles of clothing seized from defendant's residence did not disclose the presence of human blood. However, with regard to the sample of blood taken from the bar sink that was found next to the knife, Bard-Curtis testified: "The ABO type determined on the blood on the bar sink was type B. Hattie Mae Tanner was blood type B. The PGM subtyping detected on the sample from the bar sink was two plus one plus and Hattie Mae Tanner was also two plus one plus."

On cross-examination, Bard-Curtis testified that no results were obtained from the control sample, indicating that contamination had not affected the results. However, Bard-Curtis admitted that she did not know if "whole blood samples" were submitted to her for analysis, and that it was possible that the bloodstains could have been the mixture of more than one person's blood. On redirect examination, Bard-Curtis clarified her testimony. Assuming that two individuals contributed to a blood

sample, Bard-Curtis testified that both individuals would have to have type B blood if the result were a type B sample and both would also have the same PGM enzyme subtyping.

After the prosecution rested, defendant's first witness was Catherine Huskins, who testified that she knew the victim and that she and her husband informed the police that before the murder the victim had found a nonfolding knife and that the victim had told her husband that she was going to keep it in her purse. However, on cross-examination, Huskins, after being shown the knife, admitted that she had never seen the knife before.

Defendant next called Dale Crum, who worked at Barney's in 1995 and at the time of the trial. According to Crum, the door to the basement at Barney's was kept shut but unlocked during business hours so that employees could access the basement for food and supplies.

Defendant also called her mother, Hattie Mae Tanner, to testify in her behalf. Mrs. Tanner testified that on the evening of March 21, 1995, defendant was home and that Cady, who was a frequent visitor to her house, was also present. According to Mrs. Tanner, Cady was sitting at her dining-room table drinking beer when she woke up in the morning. Mrs. Tanner did not see any blood on defendant's clothing.

Todd Green, whose family owns Green's Tavern, testified as a defense witness that Cady was at the bar for about fifteen minutes after midnight on March 22, 1995. Green testified that Cady, after cashing a check at the bar, drank a beer and made a telephone call before leaving.

Defendant testified in her own behalf that Cady was at her mother's house on March 22, 1995, and that they smoked crack cocaine together before Cady left to cash a check. According to defendant, Cady returned to her mother's house after cashing a check, but left again around 2:30 a.m. or 3:00 a.m. Defendant denied that she went anywhere with Cady that night except to purchase crack cocaine with him shortly after midnight. Specifically, defendant denied that she went with Cady to Barney's on the night in question, that she killed the victim, that the knife in question was hers, and that she told Detective Walters that the knife was hers. Defendant testified that she could not remember having ever gone to Barney's, although she acknowledged that Cady told her that she had been there once about ten years previously. According to defendant, any indication in the tape recording that she told Detective Walters that she had been to Barney's a couple of times was incorrect. As for the knife, defendant testified that when she was questioned by Detective Walters at the police station, "I told him yes, [it] looked like a knife I used to have. I asked him did it bend or fold. He said no. I said it couldn't

> have been my knife because it's not allowed on the job, straight bladed knife." Defendant also denied giving any statement to Detective Walters in his police car on June 7, 1995.
>
> Defendant also called Kevin Sage, who testified that while passing by Barney's between 1:15 and 1:25 a.m. on March 22, 1995, he saw "a light colored truck with a pickup--or a wooden cap on it" that "looked like ... a house." According to Sage, he saw "a driver that looked white, Caucasian with a beard and there was a passenger."
>
> Defendant's final witness was Nancy Chantrene, who testified that at 2:47 a.m. on March 22, 1995, she passed Barney's en route to work at the post office when she noticed that the outside sign was on, which was unusual. According to Chantrene, a light colored truck "that had a cap on it" was parked along the west end of the bar.

People v. Tanner, 255 Mich. App. 369, 372-93, 660 N.W.2d 746 (2003).

At the close of trial, the jury found Petitioner guilty of first-degree felony murder, second-degree murder, and armed robbery. The trial court ultimately vacated the second-degree murder and armed robbery convictions and sentenced Petitioner to life imprisonment without parole on the felony murder conviction.

II. Procedural History

Following sentencing, Petitioner filed an appeal as of right with the Michigan Court of Appeals essentially raising the same claims presented in the instant petition. The Michigan Court of Appeals reversed her conviction and remanded the case for a new trial, concluding that the trial court's denial of her motion for a DNA and serological expert denied her a fair trial and that the trial court erred in denying her motion for directed verdict as to the prosecution's theory that she aided and abetted felony murder. *People v. Tanner*, 255 Mich. App. 369, 660 N.W.2d 746 (2003). The Michigan Supreme Court, however, reversed the Michigan Court of Appeals' decision and remanded the case to the trial court for reinstatement of Petitioner's felony murder conviction and sentence. *People v. Tanner*, 469 Mich. 437, 671 N.W.2d 728 (2003).

Petitioner thereafter filed the present habeas petition asserting the following claims:

I. She was denied due process when evidence of serological testing was admitted without a determination that such evidence met the *Davis-Frye* standard for admissibility: that it has been accepted by the scientific community.

II. She was denied due process when the court denied trial counsel's motion for a DNA expert.

III. She was denied due process when the court denied appellate counsel's motion for funds to retain a serological expert.

IV. She was denied due process because of the unconscionable delay in arresting her.

V. She was denied due process when the court denied her motion for a directed verdict. Her conviction for murder violates her state and federal rights to be free from conviction in the absence of proof of guilt beyond a reasonable doubt.

Respondent has filed an answer to the petition asserting that the claims should be denied based upon procedural default and/or for lack of merit.

III. Standard of Review

The provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), codified at 28 U.S.C. § 2241 *et seq*., govern this case because Petitioner filed this habeas petition after the AEDPA's effective date. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997). The AEDPA provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

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

28 U.S.C. §2254(d) (1996).

"A state court's decision is 'contrary to' . . . clearly established law if it 'applies a rule that contradicts the governing law set forth in [Supreme Court cases]' or if it 'confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [this] precedent.'" *Mitchell v. Esparza*, 540 U.S. 12, 15-16 (2003) (per curiam) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)); *see also Bell v. Cone*, 535 U.S. 685, 694 (2002). "[T]he 'unreasonable application' prong of § 2254(d)(1) permits a federal habeas court to 'grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court but unreasonably applies that principle to the facts' of petitioner's case." *Wiggins v. Smith*, 539 U.S. 510, 520 (2003) (quoting *Williams*, 529 U.S. at 413); *see also Bell*, 535 U.S. at 694. "In order for a federal court find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous. The state court's application must have been 'objectively unreasonable.'" *Wiggins*, 539 U.S. at 520-21 (citations omitted); *see also Williams*, 529 U.S. at 409.

Section 2254(d)(1) limits a federal habeas court's review to a determination of whether the state court's decision comports with clearly established federal law as determined by the Supreme Court at the time the state court renders its decision. *See Williams*, 529 U.S.

at 412; *see also Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). Section 2254(d) "does not require citation of [Supreme Court] cases–indeed, it does not even require *awareness* of [Supreme Court] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8 (2002); *see also Mitchell*, 540 U.S. at 16. While the requirements of "clearly established law" are to be determined solely by the Supreme Court's holdings, the decisions of lower federal courts are useful in assessing the reasonableness of the state court's resolution of an issue. *See Williams v. Bowersox*, 340 F.3d 667, 671 (8th Cir. 2003); *Dickens v. Jones*, 203 F. Supp. 354, 359 (E.D. Mich. 2002) (Tarnow, J.).

Lastly, this Court must presume that state court factual determinations are correct. *See* 28 U.S.C. § 2254(e)(1). A habeas petitioner may rebut this presumption only with clear and convincing evidence. *See Warren v. Smith*, 161 F.3d 358, 360-61 (6th Cir. 1998).

IV. Analysis

A. Evidentiary Claim

Petitioner first claims that she is entitled to habeas relief because the trial court admitted evidence of serological testing without determining that such evidence met the *Davis-Frye* standard for admissibility of being accepted by the scientific community. Respondent contends that this claim is barred by procedural default and lacks merit.

Habeas relief may be precluded on claims that a petitioner has not presented to the state courts in ac-

cordance with the state's procedural rules. In *Wainwright v. Sykes*, 433 U.S. 72, 85 (1977), the United States Supreme Court explained that a petitioner's procedural default in the state courts will preclude federal habeas review if the last state court rendering a judgment in the case rested its judgment on the procedural default. In such a case, a federal court must determine not only whether a petitioner has failed to comply with state procedures, but also whether the state court relied on the procedural default or, alternatively, chose to waive the procedural bar. "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 a state procedural bar." *Harris v. Reed*, 489 U.S. 255, 263-64 (1989). The last *explained* state court judgment should be used to make this determination. *Ylst v. Nunnemaker*, 501 U.S. 797, 803-05 (1991). If the last state judgment is a silent or unexplained denial, it is presumed that the last reviewing court relied upon the last reasoned opinion. *Id.*

Here, the Michigan Court of Appeals rendered the last reasoned opinion on this issue. In denying relief on this claim, the court relied upon a state procedural bar -- Petitioner's failure to object to the admission of the evidence on the same basis at trial. *See Tanner*, 255 Mich. App. at 394. The failure to make a contemporaneous objection is a recognized and firmly established independent and adequate state law ground for refusing to review trial errors. *See People v. Carines*, 460 Mich. 750, 763, 597 N.W.2d 130 (1999); *see also Coleman v. Thompson*, 501 U.S. 722, 750-51 (1991). Moreover, a state court does not waive a procedural

default by looking beyond the default to determine if there are circumstances warranting review on the merits. *See Paprocki v. Foltz*, 869 F.2d 281, 285 (6th Cir. 1989). Plain error review does not constitute a waiver of state procedural default rules. *See Hinkle v. Randle*, 271 F.3d 239, 244 (6th Cir. 2001); *Seymour v. Walker*, 224 F.3d 542, 557 (6th Cir. 2000). Nor does a state court fail to sufficiently rely upon a procedural default by ruling on the merits in the alternative. *See McBee v. Abramajtys*, 929 F.2d 264, 267 (6th Cir. 1991). In this case, the Michigan Court of Appeals denied this claim based upon Petitioner's failure to make the same objection at trial.

A state prisoner who fails to comply with a state's procedural rules waives the right to federal habeas review absent a showing of cause for noncompliance and actual prejudice resulting from the alleged constitutional violation, or a showing of a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 753; *Gravley v. Mills*, 87 F.3d 779, 784-85 (6th Cir. 1996).

In this case, Petitioner neither alleges nor establishes cause to excuse her default. A federal habeas court need not address the issue of prejudice when a petitioner fails to establish cause to excuse a procedural default. *See Smith v. Murray*, 477 U.S. 527, 533 (1986); *Long v. McKeen*, 722 F.2d 286, 289 (6th Cir. 1983). Nonetheless, the Court notes that Petitioner cannot establish prejudice as this claim lacks merit.

Alleged trial court errors in the application of state evidentiary law are generally not cognizable as grounds for federal habeas relief. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Serra v. Michigan Dept. of Corrections*, 4 F.3d 1348, 1354 (6th Cir. 1993).

Only when an evidentiary ruling is "so egregious that it results in a denial of fundamental fairness," may it violate due process and warrant habeas relief. *Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003); *Clemmons v. Sowders*, 34 F.3d 352, 356 (6th Cir. 1994). Such is not the case here. As noted by the Michigan Court of Appeals, the Michigan courts have accepted the reliability of serological electrophoresis to identify blood types and PGM markers such that the admission of the challenged evidence was proper and did not render Petitioner's trial fundamentally unfair. *See Tanner*, 255 Mich. App. at 395-96.

Lastly, Petitioner has not established that a fundamental miscarriage of justice has occurred. The miscarriage of justice exception requires a showing that a constitutional violation probably resulted in the conviction of one who is actually innocent. *Schlup v. Delo,* 513 U.S. 298, 326-27 (1995). "'[A]ctual innocence" means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 624 (1998). To be credible, a claim of actual innocence requires a petitioner to support her allegations of constitutional error with "new reliable evidence–whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence–that was not presented at trial." *Schlup*, 513 U.S. at 324. Petitioner has made no such showing. Her evidentiary claim is thus barred by procedural default, otherwise lacks merit, and does not warrant habeas relief.

B. DNA and Serological Experts Claim

Petitioner next asserts that she is entitled to habeas relief because the trial court failed to provide her with a DNA expert at the time of trial. She relatedly

asserts that she is entitled to habeas relief because the state courts failed to provide her with a serological expert on direct appeal. Respondent contends that these claims lack merit.

Petitioner has identified no clearly established federal law as determined by the United States Supreme Court which entitles her to independent experts as necessary to obtain habeas relief under 28 U.S.C. § 2254(d)(1). The only case arguably on point is *Ake v. Oklahoma*, 470 U.S. 77 (1985). The Supreme Court's holding in *Ake*, however, was limited:

> We therefore hold that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

Id. at 83. The Supreme Court did not discuss a defendant's entitlement to other court-appointed experts outside the context of an insanity defense. Subsequent to *Ake*, the Supreme Court has explicitly declined to answer this question. *See Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985).

In light of the language of *Ake* and the Court's reservation in *Caldwell*, there is disagreement over whether *Ake* requires the provision of expert services beyond psychiatric services necessary to present an insanity defense. *Cf. Terry v. Rees*, 985 F.2d 283, 284 (6th Cir. 1993) (petitioner denied opportunity to pre-

sent an effective defense by failure to appoint independent pathologist), *with McKenzie v. Jones*, 100 Fed. Appx. 362, 364-65 (6th Cir. 2004) (petitioner did not have a constitutional right to the appointment of an expert of his personal liking or to receive funds to hire his own) *and Baxter v. Thomas*, 45 F.3d 1501, 1511 n.24 (11th Cir. 1995) (declining to extend *Ake* to non-psychiatric experts).

Under the AEDPA, however, the question is not whether this Court, or the United States Court of Appeals for the Sixth Circuit, would extend *Ake* to require the provision of non psychiatric experts. Rather, the question is whether *Ake* clearly establishes Petitioner's right to the appointment of such experts. In pre-AEDPA cases, courts have held that extending *Ake* to non-psychiatric experts would amount to a "new rule" of constitutional law which could not be applied on collateral review under the Supreme Court's decision in *Teague v. Lane*, 489 U.S. 288 (1989). *See Gray v. Thompson*, 58 F.3d 59, 66 (4th Cir. 1995), *vacated on other grounds*, 518 U.S. 152 (1996); *Jackson v. Ylst*, 921 F.2d 882, 885-86 (9th Cir. 1990). The *Teague* rule is "the functional equivalent" of the clearly established law requirement of § 2254(d)(1), *see Williams*, 529 U.S. at 379 (opinion of Stevens, J.), and thus a rule which fails to satisfy *Teague* also fails to satisfy § 2254(d)(1). *Id*. at 380 (opinion of Stevens, J.); *id*. at 412 (opinion of O'Connor, J., for the Court); *see generally Williams v. Cain*, 229 F.3d 468, 474-75 (5th Cir. 2000) (discussing relationship between *Teague* and § 2254(d)(1)). Thus, Petitioner's asserted right to the appointment of DNA or serological experts (*i.e*, non-psychiatric experts) was not clearly estab-

lished law under § 2254(d)(1) at the time of her conviction. *See Weeks v. Angelone*, 4 F. Supp. 2d 497, 521-22 (E.D. Va. 1998), *aff'd*, 176 F.3d 249, 264-65 (4th Cir. 1999), *aff'd on other grounds*, 528 U.S. 225 (2000). Accordingly, Petitioner is not entitled to federal habeas relief on this claim.

Furthermore, even if *Ake* could be viewed as establishing a right to DNA or serological expert witnesses in cases such as this one, Petitioner has not established that the trial court's refusal to appoint a DNA or serological expert deprived her of a substantial defense or otherwise rendered her criminal proceedings fundamentally unfair. As discussed by the Michigan Supreme Court, the DNA evidence presented by the prosecution excluded Petitioner as the source of blood found in the bar and on the victim's shirt. Thus, Petitioner cannot establish that she was prejudiced by any failure to appoint an expert with respect to this exculpatory evidence. As to the serological evidence, the bloodstain by the sink implicated Petitioner in the crime, albeit as one of a millions of persons who shared her bloodtype and PGM subtype. Petitioner, however, has not shown how the appointment of a serological expert would have likely benefitted the defense. She has not challenged the testing methods or the testifying expert's conclusions. In the state courts and in this Court, Petitioner has only speculated that the appointment of an expert witness would have provided some unidentified assistance to her case. Such conclusory allegations are insufficient to justify federal habeas relief. *See, e.g., Workman v. Bell*, 160 F.3d 276, 287 (6th Cir. 1998). Petitioner has thus failed to establish that the Michigan Supreme Court's decision is contrary to United States Supreme

Court precedent or that it constitutes an unreasonable application of the law or the facts. Habeas relief is not warranted on this claim.

C. Pre-Arrest Delay Claim

Petitioner next asserts that she is entitled to habeas relief based upon pre-arrest delay. Respondent contends that this claim lacks merit. The Due Process Clause prohibits unjustified pre-indictment or pre-arrest delay. *See United States v. Lovasco*, 431 U.S. 783, 789 (1977); *United States v. Marion*, 404 U.S. 307, 324-26 (1971). To prevail on such a claim, a defendant must show substantial prejudice to her right to a fair trial and intent by the prosecution to gain a tactical advantage. *Marion*, 404 U.S. at 324.

The Michigan Court of Appeals rejected this claim, finding that Petitioner had alleged "only vague claims of faded memories and lost witnesses without specifically showing how these alleged deficiencies actually and substantially impaired her defense." *Tanner*, 255 Mich. App. at 415. The court also found that the trial court did not clearly err in finding that the delay resulted from further police investigation and the prosecution's need to have sufficient evidence to proceed. *Id*. This Court agrees and finds that the Michigan Court of Appeals' decision is neither contrary to Supreme Court precedent nor an unreasonable application of federal law or the facts. Petitioner has failed to show that she was substantially prejudiced by any pre-arrest delay. Conclusory allegations, without evidentiary support, do not provide a basis for habeas relief. *See Workman*, 160 F.3d at 287. Petitioner has also offered no evidence to show that the delay was intended to secure a tactical advantage by

the prosecution. To the contrary, the evidence indicated that the delay was caused by the need for further investigation into the case. She is thus not entitled to habeas relief on this claim.

D. Directed Verdict/Sufficiency of the Evidence Claim

Lastly, Petitioner asserts that she is entitled to habeas relief because the trial court erred in denying her motion for directed verdict where the evidence was insufficient to support her conviction. Respondent contends that this claim lacks merit.

To the extent that Petitioner relies upon state law to assert that she was entitled to a directed verdict on the felony murder charge, she fails to state a claim for habeas relief. It is well-settled that habeas relief may not be granted for alleged violations of state law. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *see also Shacks v. Tessmer*, 2001 WL 523533, *6 (6th Cir. May 8, 2001) (unpublished) (finding no merit in petitioner's claim that the trial court erred in denying his motion for directed verdict of acquittal on first-degree murder charge based upon alleged state law violations).

Petitioner, however, also contends that the prosecution presented insufficient evidence to support her felony murder conviction. In *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), the United States Supreme Court established that a federal court's review of a sufficiency of the evidence claim must focus on whether "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319; *see also*

DeLisle v. Rivers, 161 F.3d 370, 389 (6th Cir. 1998). The Court must view this standard through the framework of 28 U.S.C. § 2254(d). *See Martin v. Mitchell*, 280 F.3d 594, 617 (6th Cir. 2002). The *Jackson* standard must be applied "with explicit reference to the substantive elements of the criminal offense as defined by state law." *Jackson*, 443 U.S. at 324 n. 16. "The mere existence of sufficient evidence to convict therefore defeats a petitioner's claim." *Matthews v. Abramajtys*, 319 F.3d 780, 788-89 (6th Cir. 2003) (citation omitted).

Under Michigan law, a person who commits murder during the perpetration of a felony is guilty of first-degree murder. *See* Mich. Comp. L. § 750.316. The elements of felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in the statute. *People v. Carines*, 460 Mich. 750, 759, 597 N.W.2d 130 (1999). The facts and circumstances of the killing may give rise to an inference of malice, including evidence that the defendant used a deadly weapon. *Id*. The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's person or presence, and (3) while armed with a weapon described in the statute. *People v. Johnson*, 215 Mich. App. 658, 671, 547 N.W.2d 65 (1996). To convict a defendant under an aiding and abetting theory, the prosecution must establish that the crime was committed by the defend-

ant or some other person, that the defendant performed acts or gave encouragement that aided or assisted in the commission of the crime, and that the defendant either intended to commit the crime or knew that the principal intended to commit the crime at the time he or she gave the aid or encouragement. *Carines*, 460 Mich. at 757-58.

In this case, the Michigan Court of Appeals concluded that the prosecution presented sufficient evidence to establish Petitioner's guilt of felony murder as a principal. *See Tanner*, 255 Mich. App. at 418-19. The Michigan Supreme Court agreed with this determination and further concluded that the prosecution presented sufficient evidence to establish Petitioner's guilt of felony murder under the alternate theory that she was an aider and abetter to the crime. *See Tanner*, 469 Mich. at 444 n. 6.

Having reviewed the record, this Court concludes that the state courts' respective decisions are neither contrary to *Jackson, supra*, nor an unreasonable application of federal law or the facts. Detective Walters' testimony regarding Petitioner's statements, the bloodstain which matched Petitioner's bloodtype and PGM subtype found on the bar sink next to the knife, and the testimony that the knife may have belonged to Petitioner implicated Petitioner in the crime. Testimony also placed Petitioner and Mr. Cady together at or outside the bar on the night of the murder. Additionally, the wounds inflicted upon the victim and the state of the crime scene supported a finding that a robbery occurred and that the perpetrator acted with sufficient intent to support a first-degree murder conviction. While the evidence was not overwhelming, it was

sufficient to support Petitioner's conviction when viewed in a light favorable to the prosecution. This Court cannot conclude that the state courts' decisions in this regard are contrary to Supreme Court precedent or an unreasonable application of the law or the facts. Petitioner's insufficient evidence claim essentially challenges the inferences that the jury drew from the testimony presented at trial and challenges the weight to be accorded certain pieces of evidence. However, it is well-settled that "[a] federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume - even if it does not affirmatively appear in the record - that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Walker v. Engle*, 703 F.2d 959, 969-70 (6th Cir. 1983). Given the evidence at trial, a rational trier of fact could find that Petitioner participated in the crime and acted with sufficient intent to kill so as to support her felony murder conviction beyond a reasonable doubt. Habeas relief is not warranted on this claim.

V. Conclusion

For the reasons stated, this Court concludes that Petitioner is not entitled to federal habeas relief on the claims presented in her petition.

Accordingly;

IT IS ORDERED that the petition for writ of habeas corpus is **DENIED WITH PREJUDICE**.

S/Victoria A. Roberts
Victoria A. Roberts
United States District Judge

Dated: November 7, 2005

The undersigned certifies that a copy of this document was served on the attorneys of record by electronic means or U.S. Mail on November 7, 2005.

s/Carol A. Pinegar
Deputy Clerk

Michigan Supreme Court
Lansing, Michigan 48909

Opinion

Chief Justice
Maura D. Corrigan

Justices
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman

NOVEMBER 25, 2003

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v No. 123414

HATTIE MAE TANNER,
Defendant-Appellee.

PER CURIAM

This case concerns when, under MCL 775.15, a defendant is entitled to have expert assistance appointed at public expense in a criminal proceeding. Defendant sought expert assistance regarding deoxyribonucleic acid (DNA) and serology evidence, even though the DNA evidence excluded defendant and the

serology evidence suggested only that defendant was one of 2.9 million people who could have been the source of the blood found at the crime scene. Further, defendant failed to give any specific reason why this expert assistance was necessary. The trial court refused defendant's request, ruling that the appointment of an expert was not necessary for defendant to safely proceed to trial. The Court of Appeals reversed defendant's conviction on the ground that she could not have safely proceeded to trial without expert assistance.[1] We agree with the trial court; therefore, we reverse the decision of the Court of Appeals and remand this case to the circuit court for reinstatement of defendant's conviction and sentence.

I. Facts

A. The DNA and Serological Evidence

In the early hours of March 22, 1995, bartender Sharon Watson was stabbed to death during a robbery at a bar. Hattie Mae Tanner first became a suspect in the case when the police learned that she spent the evening with a man who was one of the last people to see the victim alive.

When questioned by the police, defendant implicated herself. She admitted that a knife found at the bar "look[ed] like one of [her] knives" because of its unique characteristics. She also explained that her fingerprints would be on the knife because she had handled it three or four weeks before the homicide.

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[1] 255 Mich App 369; 660 NW2d 746 (2003).

Also, defendant admitted that she was on the bar premises that evening.

The physical evidence collected from the bar included the knife, a bloodstained napkin, a diluted bloodstain on the sink directly behind the bar, a bloodstained cloth, and, on the victim's shirt, six bloodstains. The prosecutor arranged for DNA and serological analyses of this evidence.

The DNA evidence excluded defendant.[2] Some evidence that could not be tested for DNA was subjected to serological testing for both blood type and phosphoglucomutase (PGM), an enzyme found in human blood.[3] This testing established that the diluted bloodstain found on the bar sink was of the same blood type and PGM subtype as defendant's blood. The prosecution's expert clarified, however, that a comparison of the two blood profiles did not confirm that the blood was defendant's. Rather, the evidence established that defendant and about four percent of the African-American population have the same blood profile. The prosecution's serology expert testified that African-Americans constituted twenty-six percent of the United States population of 280 million people, and

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[2] DNA analysis of the blood on the knife and the napkin established a match with the victim's DNA profile; none of this blood matched defendant's DNA profile. Testing of the bloodstains on the victim's shirt revealed that the blood did not match the DNA profile of either the victim or defendant. These bloodstains, which originated from only one person, were attributable to an unknown female.

[3] There are four blood types, A, B, AB, and O, and there are ten PGM subtypes.

that "[p]ossibly millions" would have the same blood type and PGM subtype as defendant.[4]

B. Circuit Court Proceedings

Defendant filed a pretrial motion under MCL 775.15 for expert assistance in DNA and blood typing. This statute authorizes payment for an expert witness, provided that an indigent defendant is able to show "that there is a material witness in his favor within the jurisdiction of the court, without whose testimony he cannot safely proceed to a trial . . . ." *Id.* If the defendant makes this showing, the judge "in his discretion" may grant funds for the retention of an expert witness. *Id.*

At the hearing, defense counsel informed the trial court that he did not want to retain an expert to reanalyze the blood samples or repeat the testing conducted by the prosecution's experts. He stated that he wanted an expert to help him better understand the DNA evidence and possibly to testify at trial. After the prosecution pointed out that the DNA evidence was exculpatory, defense counsel asked for money to "consult the DNA expert, and then based on that consultation if I can persuade you that some money should be kicked in for him to testify then we can revisit that area . . . ." The trial court denied the request.

The case proceeded to trial. The jury found defendant guilty of second-degree murder, felony mur-

[4] A calculation using these numbers indicates that slightly more than 2.9 million African-Americans share defendant's type and PGM subtype.

der, and armed robbery. The trial court sentenced defendant to life imprisonment for felony murder and vacated the other two convictions.

C. The Court of Appeals Decision

Defendant appealed to the Court of Appeals, which vacated her conviction and remanded the case for retrial. The Court concluded that the "trial court erred in depriving defendant of expert assistance in the areas of DNA and serology because she could not otherwise proceed safely to trial without such assistance." 255 Mich App 404. It characterized the role of DNA and serology evidence in the case as "critical." *Id*. at 405. A DNA expert was needed so that defendant could "develop and argue the point that the DNA evidence exculpated her." *Id*. at 405-406. A serology expert was needed so that defendant could "defend herself against the effect" of the serology evidence, or "diminish its force by explaining that it constituted an anomalous test result." *Id*. at 406.

Further, the Court held that, without this expert assistance, defendant received a fundamentally unfair trial. Because it could not say that the error was harmless beyond a reasonable doubt, it reversed defendant's conviction and remanded for a new trial. The dissent stated that defendant had not shown that "the absence of an expert jeopardized her ability to prepare a defense," *id*. at 425, and that, therefore, the trial court's denial of defendant's motion did not result in a fundamentally unfair trial.

The prosecutor sought leave to appeal to this Court.

II. Standard of Review

This Court reviews a trial court's decision whether to grant an indigent defendant's motion for the appointment of an expert for an abuse of discretion. MCL 775.15. "A mere difference in judicial opinion does not establish an abuse of discretion." *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

III. Discussion

As MCL 775.15 makes clear, a trial court is not compelled to provide funds for the appointment of an expert on demand. In *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995), this Court held that, to obtain appointment of an expert, an indigent defendant must demonstrate a "'nexus between the facts of the case and the need for an expert.'" (Citation omitted.) It is not enough for the defendant to show a mere possibility of assistance from the requested expert. "Without an indication that expert testimony would likely benefit the defense," a trial court does not abuse its discretion in denying a defendant's motion for appointment of an expert witness. *Id*.

Because defendant failed to show a nexus between the facts of this case and the need for an expert, we hold that the trial court did not abuse its discretion in denying the motion. As the trial court recognized, the prosecutor's DNA experts testified that the blood in the bar and on the victim's shirt was not defendant's. The DNA evidence was entirely exculpatory. In fact, DNA analysis not only eliminated the possibility that the blood on the victim's shirt belonged to either defendant or the victim, it established that the blood be-

longed to an unidentified female. This favored defendant's assertion that she was not Watson's killer. Under these circumstances, defendant cannot show that she could not safely proceed to trial without a DNA expert.

Nor did defendant establish the need for appointment of an expert serologist. The serology evidence did link defendant to the crime scene in a general sense, by establishing that the diluted bloodstain by the sink was left by one of possibly millions of persons who shared defendant's blood type and PGM subtype. But we agree with the Court of Appeals dissent that defendant did not establish that an expert serologist would offer testimony that would "likely benefit the defense," as is required by the statute. *Jacobsen, supra* at 641.

As the dissent stated, defendant did not seek to have the serology testing repeated. Nor did defendant argue that a serology expert might refute the conclusion that the blood found by the sink had the same blood profile as defendant's blood. At best, defendant has raised only the mere possibility that the appointment of a DNA and serology expert might have provided some unidentified assistance to the defense. This falls short of satisfying defendant's burden of showing that she could not safely proceed to trial without such expert assistance. We hold that the trial court did not abuse its discretion in denying defendant's motion.[5]

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[5] For the same reason, the trial court did not abuse its discretion in denying appellate counsel's subsequent motion for the appointment of a serology expert.

IV. Conclusion

Because defendant failed to establish a nexus between the facts of the case and the need for a DNA and serology expert, the Court of Appeals erred when it held that defendant could not proceed safely to trial without one. The trial court did not abuse its discretion in ruling that defendant was not entitled to such assistance under MCL 775.15. Accordingly, we reverse the decision of the Court of Appeals and remand to the trial court for reinstatement of defendant's felony-murder conviction and sentence.[6] MCR 7.302(G)(1).

Maura D. Corrigan
Michael F. Cavanagh
Elizabeth A. Weaver
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman

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[6] Our holding renders moot the Court of Appeals directive that, on retrial, the prosecution may not charge defendant with felony murder under an aiding and abetting theory. Our review of the record confirms that, when the evidence is viewed in a light most favorable to the prosecution, the case was properly submitted to the jury on both theories of felony murder because a reasonable juror could find the essential elements of the crime proved beyond a reasonable doubt. *People v Riley*, 468 Mich 135,139; 659 NW2d 611 (2003). We note that circumstantial evidence and reasonable inferences may be sufficient to prove the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

S T A T E O F M I C H I G A N
SUPREME COURT

PEOPLE OF STATE OF MICHIGAN,
Plaintiff-Appellant,

No. 123414

MATTIE MAE TANNER,
Defendant-Appellee.

KELLY, J. (*dissenting*).

I would deny leave to appeal in this case, leaving intact the Court of Appeals decision remanding for a new trial. The trial court abused its discretion in denying funds to the public defender for consultation with an expert in blood tests[7] to enable counsel to understand and meet the prosecution's evidence. Moreover, the error was not harmless. The evidence supporting the conviction was not as strong as the majority characterizes it. Because blood test data testimony was central to the case, the trial court's decision denied defendant a fundamentally fair trial. She is entitled to a new trial after appointment of an expert in blood tests.

The record shows that the public defender who tried the case had a limited understanding of the prosecution's scientific evidence. He requested funds from the trial court to retain an expert witness to examine the data. The court denied the motion because the DNA part of the data exculpated, rather than inculpated, defendant. Because counsel had limited

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[7] The blood tests in question include both DNA and serological tests.

knowledge of the science of DNA analysis, he failed to argue specifically for an expert to analyze the serological data. Also, he was unable to articulate why the defense needed an expert to examine the data.

The majority finds that the trial court decision was proper. It sets an impossible goal for defense counsel. If counsel fully understands the prosecution's scientific evidence, there would be no need for an expert to explain it. If, as here, counsel is not expert in certain scientific matters, the majority seems to require counsel to petition for funds for an expert using an expert's grasp of the subject matter.

Furthermore, the per curiam opinion characterizes the evidence of defendant's guilt as being stronger than it was. All defendant's statements to the police were not incriminating. Moreover, they were internally inconsistent. Defendant admitted having been in the bar several years before the slaying, but denied being there on the night in question. At trial, she admitted driving past the bar that night, but denied going in.

The prosecution's assertion that a knife found at the scene belonged to her was controverted and denied by defendant. She admitted that the picture of the knife she was shown had an altered tip similar to an alteration she had made to one of her knives. But she denied the knife was hers because it could not fold up.

There were substantial problems with the recording equipment that the police used to take defendant's statements. There were a large number of inaudible responses. This raises the question of what exactly defendant admitted. Her statements, questionable in

the accuracy of their transcription, could not have supported a conviction beyond a reasonable doubt.

The per curiam opinion adopts the prosecutor's statement that serological evidence narrowed the universe of suspects to more than two million people, hence hardly incriminating defendant. However, that evidence did not go to the jury in that form. Rather, the jurors were told that only four percent of black women, women like defendant, match the blood sample found at the scene.

This blood was the only physical evidence placing defendant at the scene of the crime. Therefore, the denial of funds to retain an expert to advise the defense, given the closely drawn evidence of guilt, was not harmless beyond a reasonable doubt. It was an abuse of discretion. For those reasons, I would remand for a new trial.

Marilyn Kelly

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellee,

FOR PUBLICATION
February 18, 2003
9:05 a.m.

v

No. 231966
Calhoun Circuit Court
LC No. 00-003176-FC

Updated Copy
April 25, 2003

HATTIE MAE TANNER,

Defendant-Appellant.

Before: Cooper, P.J., and Jansen and R.J. Danhof*, JJ.

JANSEN, J.

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Defendant was convicted by a jury of first-degree felony murder, MCL 750.316(1)(b); second-degree murder, MCL 750.317; and armed robbery, MCL 750.529. She was originally sentenced to concurrent sentences of life imprisonment without parole for the felony-murder conviction, forty to sixty years' imprisonment for the second-degree murder conviction, and twenty-five to fifty years' imprisonment for the armed robbery conviction. Thereafter, the trial court entered sua sponte an amended judgment of sentence, vacating defendant's sentences for the second-degree murder and the armed robbery convictions. She now appeals as of right. We reverse defendant's convictions and her sentence for the felony-murder conviction and remand to the trial court for a new trial.

Defendant's convictions arise from the stabbing death of Sharon Watson, a bartender at Barney's Bar and Grill (Barney's) located in Calhoun County, during the course of a robbery that occurred at the bar after 1:00 a.m. on March 22, 1995. Initially, the Battle Creek Police Department requested warrants for defendant, Dion Paav, and Robert Cady in July 1995 for their alleged involvement in the victim's robbery and murder, but the prosecutor declined to issue the warrants in the fall of 1995 on the ground that there was insufficient evidence to charge these individuals. However, when a new prosecutor took office in 1997, an arrest warrant was eventually issued on May 23, 2000, for defendant only, charging her with open murder, MCL 750.316; felony murder, MCL 750.316; and armed robbery, MCL 750.529.

The case proceeded to trial in November 2000. It was the prosecutor's theory that Cady, a close friend

of defendant, used his status as a trusted regular customer of Barney's to gain entrance to the bar while the victim was in the process of closing the bar. The prosecutor further theorized that defendant committed the murder with her own knife, leaving it at the bar next to a drop of her own blood. Alternatively, the prosecutor argued that defendant aided and abetted Cady in the felony murder by providing the murder weapon.

At trial, Cady was the prosecution's first witness. Cady testified that after getting out of work at 10:55 p.m. on March 21, 1995, he had planned to meet Paav at Nottke's Bowling Alley, Paav's place of work.[1] When Paav did not appear, Cady went to a bar, where he claimed that he attempted to call Paav at home. Cady testified that he then called defendant to arrange for the purchase of crack cocaine. Shortly after midnight on March 22, Cady drove to defendant's house and went with her to purchase crack cocaine. After returning to defendant's house, Cady and defendant smoked crack cocaine together. Cady testified that about one-half hour later, he left to cash a check and eventually went to Barney's at about 1:00 a.m. Cady further testified that although the bar appeared to be closed when he arrived because the sign was off,

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[1] There is no indication in the trial transcript that Cady, a suspect and res gestae witness in this case, was ever advised of his Fifth Amendment rights. As the Court noted in *People v Dyer*, 425 Mich 572, 578 n 5; 390 NW2d 645 (1986), "[t]he proper procedure is for the prosecutor to inform the court, out of the presence of the witness, of the possible need for the witness to be informed of Fifth Amendment rights. If the trial judge finds such a warning necessary, the court should inform the witness of his right not to incriminate himself. This should be done out of the presence of the jury."

he entered through an open side door and saw Watson, a friend whom Cady had known for about two years, and an unidentified white male customer in the bar. Cady testified that because Watson had already closed out her cash register, she could not cash his check. Cady then left Barney's and went to another bar, the Green Tavern, where he cashed the check and drank a beer. Cady testified that he called defendant at about 1:30 a.m. to say that he was returning to her house. However, Cady first went to buy some more crack cocaine before stopping at defendant's house at approximately 2:30 a.m. Shortly thereafter, Cady drove home, passing by Barney's at about 2:45 a.m. According to Cady, while he found it unusual to see the bar's lights on at that hour, he nonetheless continued driving home without stopping.

Cady testified that at about 1:30 p.m. on March 22, 1995, Paav called and informed him that Watson had been found murdered in the basement of Barney's. Although Cady was concerned about talking with the police because of his use of crack cocaine, he and Paav went to talk with the police later that afternoon. According to Cady, defendant had been to Barney's only once during the last five years. Cady further testified that he knew that Barney's would close before the usual 2:00 a.m. closing time if it were a slow night. Cady admitted that he knew that after cashing out, the victim would take the money toward the back of the bar, where there was a storage area next to the bathrooms and basement stairs. Cady acknowledged that the victim also trusted Cady to watch the bar area while she cashed out. Cady also knew from talking to the victim and other bar employees that there was a safe in the basement.

On cross-examination, Cady testified that he was a friend of the victim and was trying to help the police find her killer when he became a suspect in the case. Cady also testified that he helped the police prepare two composite sketches of the man whom he claimed to have seen in the bar on the night of the homicide and robbery. Cady denied that defendant accompanied him to Barney's when he attempted to cash a check on the night in question. Cady also stated that, with the exception of being shown a picture of it, he had never seen the knife that the police recovered at Barney's.

On redirect examination, Cady testified that the victim had already cashed out by the time of his arrival at about 1:00 a.m. on March 22, 1995. Cady also admitted that, when interviewed by Officer Brad Wise of the Bedford Township Police Department on March 27, 1995, he stated that the victim would cash out early only if there were trusted regular customers in the bar. Cady further testified that during a conversation with the victim after his arrival at Barney's at about 1:00 a.m., he learned that the "stranger" who was sitting at the bar had been there since 12:15 a.m. Cady also admitted that he used a knife to cut up or chip rocks of crack cocaine on the night in question after previously denying it. Cady further admitted that if he ordered beer to go, it would have been a six-pack of "Bud light."

Watson's boyfriend, Jerry Dockum, testified that he received a call from the victim on the night in question and was told that she was closing early at about 1:30 a.m. At about 2:00 a.m., Dockum became concerned about her whereabouts and called the bar.

When no one answered the phone, Dockum called his sister, Gloria Loring. According to Dockum, Watson never removed the cash drawer from the cash register in the presence of people whom she did not know. Dockum further testified that he had been present on one previous occasion when Watson, in Cady's presence, removed the cash drawer in the bar and took it downstairs. Dockum also testified that he had never seen defendant at the bar.

According to Maria Coller, a former employee of Barney's, she received a call from Loring after Dockum had called his sister. Maria Coller, who had keys to the bar, and her husband, Ron Coller, then picked up Loring, and they went to Barney's, finding it unusual that the lights were on. In addition, Watson's car was in the parking lot behind the bar, although the outside doors were locked. According to Mr. Coller, they arrived at the bar at approximately 5:30 a.m. on March 22. Upon entering through the side door of the bar, Mr. Coller almost tripped on a six-pack of Budweiser beer in a Michelob pack left on the floor with a napkin on top of it. The television was blaring, and Watson's purse was on the back of the bar. After calling the bar owners and 911, the Collers noticed a knife behind the bar where the glasses were washed. On the back of a chair was the victim's coat. The Collers also found a note for a takeout order of beer on the cash register behind the bar. After Mr. Coller opened the door to the basement and observed loose cash at the bottom of the basement stairs, his wife called 911 a second time. Going downstairs, the Collers walked all over the basement, looking for the victim. When they discovered that the door to the

basement office was closed, Mrs. Coller called 911 a third time at about 6:00 a.m.

Shortly thereafter, Tom Bliler, one of the bar's owners, arrived at the bar and helped Mr. Coller open the door to the office, where they found the victim's body. According to Bliler, $1,009 had been stolen from the safe. Bliler also testified that he had never seen the knife that was found behind the bar and that the knife did not belong to the bar.

Officer John Hancotte, who, at the time of the offenses, was employed by the Bedford Township Police Department, was the first police officer to arrive on the scene at 6:25 a.m. on March 22, 1995. Upon finding that the victim had been dead for some time, Officer Hancotte called for additional help from the Battle Creek Police Department and the Michigan State Police. Reporting to the crime scene were Detective Michael VanStratton, the crime lab supervisor of the Battle Creek Police Department at the time of the murder, who was employed by the Kansas Bureau of Investigations at the time of trial, and State Trooper Harry O. Zimmerman, a crime-scene technician with the Michigan State Police, who was retired at the time of trial.

Detective VanStratton, who was qualified as an expert witness in the areas of bloodstain pattern analysis, latent-fingerprint analysis, and crime-scene reconstruction, arrived at Barney's at approximately 7:00 a.m. on March 22, 1995, and determined that his personnel did not have the necessary equipment to process the crime scene. After going back to the Battle Creek Police Department to retrieve additional equipment, Detective VanStratton returned to Barney's but

found that "some of the areas which we thought might be critical for investigation had already been occupied by people that came in that morning," including bar employees, and that "[c]offee was being made behind the bar." Detective VanStratton testified that because "there was some important evidence behind the bar," it was the first area that was isolated.

According to Detective VanStratton, the crime-scene technicians began collecting evidence upstairs in the bar, finding a bloodstained napkin stuck inside a six-pack of beer, a knife and diluted bloodstains on the stainless steel sink area directly behind the bar, the victim's purse, two drinking glasses, a cash register receipt, and "a small piece of paper that had to go with five dollars beer to go, a price of $5.10," which "were in the immediate area behind the bar." Detective VanStratton testified that the crime-scene technicians proceeded downstairs to the basement office where the victim's body was found. Scattered on the floor in front of the basement office door were seven $5 bills, which were collected as evidence. The crime technicians also collected a bloodstain that was found on the plasterboard wall at the bottom of the stairs, along with a piece of the wall containing what appeared to be knife punctures.

Detective VanStratton testified that when he entered the basement office, the victim was found on her back, with bloodstains smeared across her abdomen and "some stab wounds to the chest area." In Detective VanStratton's opinion, it was apparent that a struggle had taken place given the disarray in the office and the scrapes that were found on the victim's arms. Detective VanStratton further testified that

there was an excessive amount of blood on the victim's body, "particularly her neck area and chest area." In Detective VanStratton's opinion, the victim's assailant would also have had blood on his or her hands and possibly on his or her clothing because the victim's bloodstains were transferred to the assailant. According to Detective VanStratton, "we did find some blood transfer on the napkin that was found upstairs." Detective VanStratton also testified that three identifiable prints were found on the cash box, one belonging to the victim and the other two to the bar's owner, but that the police were not able to develop fingerprints from the other crime-scene evidence.

On cross-examination, Detective VanStratton testified that he first arrived at the bar shortly after 7:00 a.m. on March 22, 1995, and returned to it after 8:00 a.m. When he returned to the bar, there were a number of people inside, including the victim's friends and bar employees. In his testimony, Detective VanStratton agreed with Officer Hancotte's estimate that there were about seven people in the bar at that time who were not law-enforcement people. According to Detective VanStratton, people were mingling in the area where the knife, the bloodstains on the sink, and the bloodstained napkin on the six-pack of beer were found. Although people were drinking coffee in this area of the bar, Detective VanStratton did not see anybody eating. Detective VanStratton also testified that because the bloodstains on the sink were diluted, "[t]here's no way to tell if it was fresh or not fresh," in determining how long the bloodstains had been present. Detective VanStratton further testified that blood had been transferred from the victim to the assailant during the physical struggle in the basement

office, but he refused to speculate whether there was more than one assailant.

According to Dr. Stephan Cohle, who was qualified as a forensic pathologist, the victim suffered both "blunt force injury" and "sharp force injury." The blunt-force injuries consisted of scrapes and bruises, while the sharp-force injuries were "primarily stab wounds." Dr. Cohle testified that the victim suffered "a total of six stab wounds, four in the chest, two in the back." Dr. Cohle opined that "[t]he cause of death was [a] stab wound in the chest," which extended into the heart, causing massive bleeding.

George Bliler, the son of one of Barney's owners, also testified for the prosecution. According to George Bliler, Cady arrived at the bar between 8:00 and 9:30 a.m. on March 22, 1995, curious about why all the police were present, but departed after only a few minutes.

Officer Brad Wise, who was employed by the Bedford Township Police Department at the time of the offenses, testified that Cady approached him in the afternoon of March 22 and gave him a description of the white male customer in his thirties whom Cady claimed to have seen the night before when he entered the bar. Officer Wise subsequently interviewed defendant twice about the case, the first time by telephone and the second in person. During the second interview on May 3, 1995, defendant told Officer Wise that Cady came to her house at 11:00 p.m. on March 21, 1995, to drink alcohol and smoke crack cocaine. According to Officer Wise, defendant told him that Cady then left to cash a check and returned with $50,

which they used to purchase more crack cocaine. According to Officer Wise, defendant told him that she and Cady left her mother's home at about 3:00 a.m. after her mother complained that they were making too much noise. Defendant also told Officer Wise that she had not been to Barney's for five or six years.

On cross-examination, Officer Wise acknowledged that Cady assisted the police in preparing a composite sketch of the man whom he claimed was in the bar on the night in question. Officer Wise also acknowledged that after the homicide and robbery, he talked with Dennis Fodor, who originally corroborated Cady's description of the other man in the bar. Officer Wise admitted that after talking to Fodor, he reported that Fodor gave a description of the other man in the bar as looking like Cady. However, Officer Wise disputed whether Fodor's statement corroborated Cady's description of the other man. Officer Wise testified that although Fodor originally stated that he was in the bar until closing time, "the second time I talked to Mr. Fodor he indicated that he was there 'till last call, which was eleven o'clock." Officer Wise, however, explained that "[Fodor] said that it was his last call" because he had had too much to drink by that point, and "the bartender cut him off."

Thereafter, in the middle of May 1995, Detective David Walters of the Battle Creek Police Department was assigned to the case and, after reviewing the case file and talking with Officer Wise, decided to focus his investigation on Robert Cady, his wife Jennifer Cady, Dion Paav, and defendant. On May 24, 1995, Detective Walters interrogated defendant at the Battle

Creek Police Department and showed her a photograph of the knife that was recovered at crime scene. According to Detective Walters, defendant recognized that it was her knife because she had altered "the blade end of the knife" to make it easier "to clean up her crack pipes." However, during the interview, defendant gave no indication that she had been at Barney's during the early morning hours of March 22, 1995.[2]

Detective Walters then interviewed Paav and Jennifer Cady on May 25, 1995, but neither one provided much direction to his investigation. However, after interviewing Robert Cady on May 26, 1995, Detective Walters began to concentrate his attention on Cady as the principal suspect in this case, meeting him in the parking lot of Barney's for a second interview on June 2, 1995. According to Detective Walters, when they approached one another in the parking lot, Cady was wearing sunglasses, even though it was "a dark, dreary day," and "he was visibly shaking, like his body was shaking, his hands were shaking." While inside the bar, Cady acknowledged in response to Detective Walters' questioning that he knew that the safe was kept in the basement of the bar, although he did not know where the entrance to the basement was in the bar.

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[2] There is no indication in the trial transcript whether defendant was ever advised of her rights under *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), before she was questioned by Detective Walters in this case. We also note that defense counsel never raised the *Miranda* issue in the lower court, nor questioned Detective Walters whether defendant was advised of her *Miranda* rights.

Subsequently, on June 7, 1995, Detective Walters, accompanied by Detective David Adams of the Battle Creek Police Department, questioned defendant once again about the homicide that occurred at Barney's on March 22, 1995. During the interview, which took place in a police car, Detective Walters showed defendant a photograph of the knife that was found in the bar. According to Detective Walters, defendant acknowledged that it was her knife, indicating that she had used it at her mother's residence where she lived. Detective Walters further testified that defendant indicated that her fingerprints or those of Paav, who lived at the same residence, would be on the knife because "they had both handled the knife" about "three to four weeks prior to the homicide."

Detective Walters also testified that, during the June 7, 1995, interview, defendant admitted that she accompanied Cady to Barney's after 1:00 a.m. on March 22, 1995. According to Detective Walters, defendant stated that she stayed in the vehicle, while Cady went inside the bar to cash a check, and that there were a couple of cars in the parking lot at the time. Detective Walters testified that defendant stated that after leaving Barney's at approximately 1:30 a.m., she and Cady then went to various other establishments that night to cash a check and buy beer before stopping to purchase some crack cocaine. When Detective Walters questioned defendant about whether she might have been responsible for killing the victim, she shook her head in denial. When questioned about the circumstances under which she might commit such a homicide, Detective Walters reported that defendant said that "if that bitch had treated her bad she would do something to that effect."

Detective Walters further testified that "Defendant said that the person that would have been responsible for this would have been [sic] blood on them and that Rob—meaning Rob Cady—didn't have any blood on him. And she said what would she have done with the bloody clothes. I think she also said to the effect the person would have had—the victim was moved to the basement so the person would have had to have blood on them that did that."

On cross-examination, Detective Walters, who, at the time of trial, was retired from the Battle Creek Police Department after twenty years of service, acknowledged that, at some point during his two-month investigation into the homicide and robbery, the police conducted a search of defendant's residence with her consent and seized her clothes, including her purple jogging suit and nightgown, for any "trace evidence," such as blood and hair fibers, to determine whether they matched the blood and hair fibers that had been found at the crime scene. Detective Walters indicated that the hair and fiber comparison did not reveal any match. The police also searched Cady's residence with his consent, seizing some articles of his clothing. Cady's car was also searched on May 26, 1995, but the police found no blood or hair evidence linking him to the crime. Although Paav's residence was not searched, the police searched his vehicle, but again found nothing linking Paav to the crime.

In response to defense counsel's questioning about the interrogation conducted on May 24, 1995, at the Battle Creek Police Department, Detective Walters admitted that he experienced "some problems with the audio-visual equipment" that was used to record

the interview. Specifically, during the interview, Detective Walters discovered that "[t]he equipment was not working properly," and that at some point the audio started to work properly again, but not the video, which apparently never worked throughout the interrogation. As a result, only about one half of the lengthy interrogation was audiotaped. A thirty-two-page transcript of the audiotaped portion of the interrogation was thereafter prepared. However, Detective Walters admitted that he had never listened to the audiotape in order to compare it with the transcript that was prepared of the May 24, 1995, interrogation. Detective Walters further admitted that defendant's articulation was "rough at times" and that she was difficult to understand. As a result, there were 261 "inaudibles" in the thirty-two-page transcript, which Detective Walters admitted was a surprisingly high number for a transcript of this length.

Although Detective Walters testified on direct examination that defendant stated in the interrogation at the police station on May 24, 1995, "[t]hat the knife was hers" and that "she recognized the knife by the point on it," he conceded on cross-examination that while she stated that "it looks like one of my knives," her answer to the question whether it was "one of your knives" was transcribed as her "saying no." In addition, defendant's other answers to his questions about the knife were inaudible. Notwithstanding, Detective Walters stood by his testimony given in direct examination that defendant admitted that the knife was hers. Detective Walters acknowledged that despite the high number of inaudibles in the transcript of the May 24, 1995, interrogation, he did not send the tape

to the Michigan State Police Crime Laboratory to enhance the sound quality.

Detective Walters also acknowledged that at 1:10 a.m. on March 22, 1995, "officially, there was a report of a pickup truck style vehicle being seen leaving the area." According to Detective Walters, the pickup truck was "possibly a light colored pickup" with "[a] homemade box with a box or wooden frame in the back." Detective Walters testified that the police investigated this information, but did not find a pickup truck that matched the description of the vehicle.

On cross-examination, Detective Walters conceded that the police had no direct evidence that defendant was in the basement of Barney's at the time of the murder. Detective Walters also acknowledged that while Cady and Paav were suspects, they were not charged in this case. Further, while Detective Walters admitted that defendant never told him that the knife found in the bar belonged to Paav, he conceded that he told Paav during an interview on June 7, 1995, that defendant said that the knife was his. Detective Walters admitted that he lied to Paav because he wanted "to see if [he] was telling [] the truth." Detective Walters also admitted that he lied to defendant when he told her during an interview that her fingerprints were on the knife. Detective Walters further admitted that defendant denied going with Cady to cash a check at Barney's on the night in question and also denied being in the bar that night.

Dion Paav testified that he knew the victim as a bartender at Barney's and found out about her death on the morning of March 22, 1995, when a cook at Barney's called to tell him that she had been murdered.

Paav, then forty-five years old, testified that he had been friends with Cady since he was ten years old. Paav testified that he planned on meeting Cady at Barney's on the evening of March 21, 1995, because both of them lived near Barney's, where they were regular customers. However, after getting off work at 4:00 p.m., Paav went straight home and did not go to Barney's. Paav testified that he did not receive a call from Cady or anyone else that night. Paav also testified that he could not recall telling Detective Walters about a telephone conversation that he had with defendant while house-sitting for Cady after the murder. However, when presented with a previous statement he made to the police, Paav admitted that he did have a conversation with defendant at some point, although he claimed that he could barely understand her and that she said something about fingerprints and the knife.

On the final day of the trial, Detective Walters was recalled by the prosecution and testified that Paav told him that when he was house-sitting for Cady over the Memorial Day weekend in 1995, he received a telephone call from defendant. According to Walters, "[Paav] said that she thought the police had found her fingerprints on the knife at Barney's and also that the police had gotten her—taken her tennis shoes."

The prosecution also called Megan Clement, an employee of Laboratory Corporation of American (LabCorp), a DNA-testing company based in North Carolina, who was qualified as an expert witness in DNA and serological analyses. Clement testified that she was unable to obtain DNA results from the blood

found on the sink behind the bar because there was an insufficient amount of DNA from which to develop a profile for the purpose of comparing it with defendant's blood sample. According to Clement, she tested six bloodstains from the victim's shirt and that "the profile on all six strains were consistent with one other, and all six stains were consistent with originating from the same individual; however, it could not have been Ms. Tanner. Her profile was different than the profile on these six stains." However, Clement did not identify whose profile was contained on the six bloodstains.

Clement also testified about the process of serological testing, explaining that there are four common blood types—A, B, AB, and O—and that there were ten different types of the enzyme phosphoglucomutase (PGM) found in human blood, thus permitting subtyping with regard to blood type and PGM. According to Clement, "if you type for ABO and PGM, you look at the frequency of ABO times the frequency [of] the PGM to come up with what percentage of the population would have both of the characteristics in the sample detected." Clement then explained:

> In the Caucasian population a type B blood is approximately ten percent and a PGM two plus one plus is approximately 20 percent, actually 21 percent. If you multiply the two for a person to have type B blood and be a two plus one plus it would be approximately two percent of the population of the Caucasian population.

Clement added:

> In the African-American population a type B is much higher. It's approximately 20 percent. And the PGM two plus one plus is about 19.8 percent, so approximately 20 percent as well. So a person who have [sic] blood type B and PGM two plus one plus in the African-American population would be approximately four percent so it would be twice as common in the African-American population as the Caucasian.

On cross-examination, Clement acknowledged that there was insufficient blood to obtain DNA results from the bloodstain that was found near the sink in the bar. In addition, Clement testified that the DNA analysis of the six bloodstains exculpated defendant. During cross-examination, defense counsel also questioned Clement about how many people in the United States have type B and PGM two plus one plus. In response, Clement stated that considering that African-Americans constituted twenty-six percent of the United States population of 280 million people, "26% of 280 million people times four percent of that" resulted in "[p]ossibly millions" matching this serological profile. Defendant is African-American.

Nibedita Mahanti, who was employed by the Michigan State Police, also testified as an expert witness in DNA analysis for the prosecution. Mahanti testified that she performed DNA analysis on blood samples from the victim, defendant, Cady, and Paav and from the evidence items that were submitted to her. In Mahanti's opinion, the DNA profile of the blood samples from the knife, the napkin, and a stained

cloth matched the DNA profile of the victim. The DNA profile of the victim was also found on one napkin from the bar, a blood sample that was taken from next to the knife, and a section of cardboard from a box. The blood sample from the bar sink, however, had insufficient DNA to produce a reliable result. In addition, blood found on the section of the victim's shirt contained the DNA profile of an unknown donor, because it was not contributed by the victim, defendant, Cady, or Paav. Defense counsel stipulated the admission of Mahanti's DNA report and moved, without objection, that Mahanti be recognized as an expert in DNA analysis.

The prosecution also called Marie Bard-Curtis to testify as an expert in the area of serology. Bard-Curtis, who was employed by the Michigan Department of State Police Forensic Science Division Microchem Subunit, testified that she performed serological testing on the following evidence items received from the Battle Creek Police Department: "a white folded paper packet identified as containing a sample from the bar sink"; "a control sample from that area"; "a sample from the bar top near the beer taps; a "[s]ample from a napkin in a beer six pack"; "[a] sample from the bar and the sink next to the knife"; "[a] sample portion of wallboard with a blood stain"; "a portion of a box lid"; and blood samples of the victim whose first name was incorrectly recorded as Susan. Bard-Curtis also obtained ABO blood typing for the victim, defendant, Cady, and Paav, as well as PGM typing of the blood of the victim and defendant.

Bard-Curtis testified that the victim had blood type B and PGM subtype of 2+, 1-, while defendant

had the blood type B and PGM subtype of 2+, 1+. Cady and Paav both had blood type A. The samples from the bar top, the bar and sink next to the knife, the wallboard and cardboard box were tested and showed the presence of human blood, but insufficient protein was available to perform PGM subtyping. Testing performed on the articles of clothing seized from defendant's residence did not disclose the presence of human blood. However, with regard to the sample of blood taken from the bar sink that was found next to the knife, Bard-Curtis testified: "The ABO type determined on the blood on the bar sink was type B. Hattie Mae Tanner was blood type B. The PGM subtyping detected on the sample from the bar sink was two plus one plus and Hattie Mae Tanner was also two plus one plus."

On cross-examination, Bard-Curtis testified that no results were obtained from the control sample, indicating that contamination had not affected the results. However, Bard-Curtis admitted that she did not know if "whole blood samples" were submitted to her for analysis, and that it was possible that the bloodstains could have been the mixture of more than one person's blood. On redirect examination, Bard-Curtis clarified her testimony. Assuming that two individuals contributed to a blood sample, Bard-Curtis testified that both individuals would have to have type B blood if the result were a type B sample and both would also have the same PGM enzyme subtyping.

After the prosecution rested, defendant's first witness was Catherine Huskins, who testified that she knew the victim and that she and her husband informed the police that before the murder the victim

had found a nonfolding knife and that the victim had told her husband that she was going to keep it in her purse. However, on cross-examination, Huskins, after being shown the knife, admitted that she had never seen the knife before.

Defendant next called Dale Crum, who worked at Barney's in 1995 and at the time of the trial. According to Crum, the door to the basement at Barney's was kept shut but unlocked during business hours so that employees could access the basement for food and supplies.

Defendant also called her mother, Hattie Mae Tanner, to testify in her behalf. Mrs. Tanner testified that on the evening of March 21, 1995, defendant was home and that Cady, who was a frequent visitor to her house, was also present. According to Mrs. Tanner, Cady was sitting at her dining-room table drinking beer when she woke up in the morning. Mrs. Tanner did not see any blood on defendant's clothing.

Todd Green, whose family owns Green's Tavern, testified as a defense witness that Cady was at the bar for about fifteen minutes after midnight on March 22, 1995. Green testified that Cady, after cashing a check at the bar, drank a beer and made a telephone call before leaving.

Defendant testified in her own behalf that Cady was at her mother's house on March 22, 1995, and that they smoked crack cocaine together before Cady left to cash a check. According to defendant, Cady returned to her mother's house after cashing a check, but left again around 2:30 a.m. or 3:00 a.m. Defendant denied that she went anywhere with Cady that night

except to purchase crack cocaine with him shortly after midnight. Specifically, defendant denied that she went with Cady to Barney's on the night in question, that she killed the victim, that the knife in question was hers, and that she told Detective Walters that the knife was hers. Defendant testified that she could not remember having ever gone to Barney's, although she acknowledged that Cady told her that she had been there once about ten years previously. According to defendant, any indication in the tape recording that she told Detective Walters that she had been to Barney's a couple of times was incorrect. As for the knife, defendant testified that when she was questioned by Detective Walters at the police station, "I told him yes, [it] looked like a knife I used to have. I asked him did it bend or fold. He said no. I said it couldn't have been my knife because it's not allowed on the job, straight bladed knife." Defendant also denied giving any statement to Detective Walters in his police car on June 7, 1995.

Defendant also called Kevin Sage, who testified that while passing by Barney's between 1:15 and 1:25 a.m. on March 22, 1995, he saw "a light colored truck with a pickup—or a wooden cap on it" that "looked like . . . a house." According to Sage, he saw "a driver that looked white, Caucasian with a beard and there was a passenger."

Defendant's final witness was Nancy Chantrene, who testified that at 2:47 a.m. on March 22, 1995, she passed Barney's en route to work at the post office when she noticed that the outside sign was on, which was unusual. According to Chantrene, a light colored

truck "that had a cap on it" was parked along the west end of the bar.

I

On appeal, defendant first argues that the trial court erred in not conducting a pretrial hearing to determine if PGM blood typing complies with the *Davis-Frye* standard, adopted from *People v Davis*, 343 Mich 348; 72 NW2d 269 (1955), and *Frye v United States*, 54 US App DC 46; 293 F 1013 (1923), which requires that novel scientific methods must be shown to have gained general acceptance in the scientific community to which they belong before being admitted as evidence at trial.[3] *People v Young*, 418 Mich 1, 17-19; 340 NW2d 805 (1983) (*Young I*) (*After Remand*), 425 Mich 470; 391 NW2d 270 (1986) (*Young II*); *People v Adams*, 195 Mich App 267, 269; 489 NW2d 192 (1992), mod on other grounds 441 Mich 916 (1993). Although defendant questioned whether the prosecution's expert witnesses possessed expertise in population genetics to

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[3] In *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579, 587, 593-594; 113 S Ct 2786; 125 L Ed 2d 469 (1993), the United States Supreme Court, rejecting the more stringent *Frye* test of "general acceptance within the scientific community," held that the admissibility of scientific evidence is primarily controlled by Rule 702 of the Federal Rules of Evidence. In determining whether the proposed scientific opinion is sufficiently reliable for jury consideration under *Daubert*, a trial court must determine whether "the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Daubert, supra* at 592. Under *Daubert*, the evidentiary reliability of the proposed expert testimony is based upon scientific validity. *Id.* at 590, 592-595. However, we are bound to follow the *Davis-Frye* standard until such time as the standard is modified by our Supreme Court. *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993).

opine on the statistical probability of blood-type results, she did not specifically challenge the scientific acceptance of electrophoresis to identify blood types or PGM markers. Therefore, defendant failed to preserve her claim that a *Davis-Frye* hearing was necessary. MRE 103(a)(1); *People v Kilbourn*, 454 Mich 677, 684-685; 563 NW2d 669 (1997). Unpreserved evidentiary error is reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Herndon*, 246 Mich App 371, 404; 633 NW2d 376 (2001).

In this case, defendant relies on *Young I*, which held that the trial court erred in not holding a *Davis-Frye* hearing to determine the admissibility of the then-novel technique of serological electrophoresis. In *Young I*, the Court remanded for an evidentiary hearing in the trial court "to determine whether the results of serological electrophoresis have achieved general scientific acceptance for reliability among impartial and disinterested experts." *Young I, supra*, 418 Mich 25. Defendant also relies on *Young II*, which held that the prosecution had not established by disinterested experts that thin-gel electrophoresis of dried bloodstains was generally accepted in the relevant field. *Young II, supra*, 425 Mich 475, 481-485, 495.

Defendant's reliance on *Young I* and *Young II* to establish plain error in the present case is misplaced. First, our Supreme Court recognized the general acceptance in the scientific community of serological electrophoresis and the acceptance in the scientific community of the general validity of genetic-typing tests. *Young II, supra*, 425 Mich 486, 499.

Defendant's argument also fails because the proponent of scientific evidence that has already been judicially recognized as generally accepted in the relevant scientific community is not required to meet the *Davis-Frye* standard. *People v Haywood*, 209 Mich App 217, 221-224; 530 NW2d 497 (1995); *United States v Downing*, 753 F2d 1224, 1234 (CA 3, 1985). After *Young II*, this Court twice held that singe-test serological electrophoresis to identify PGM markers is generally accepted as reliable in the relevant scientific community. See *People v Gistover*, 189 Mich App 44, 48, 53-54; 472 NW2d 27 (1991) (recognizing the general acceptance of electrophoresis); *People v Stoughton*, 185 Mich App 219, 229; 460 NW2d 591 (1990) (noting that "the single system method of electrophoresis has been accepted by the relevant scientific community and is not subject to the independent validation requirement of *Young II*").

Finally, we note that in *People v Carines*, unpublished opinion per curiam of the Court of Appeals, issued April 25, 1997 (Docket No. 182792), which was affirmed by our Supreme Court in *Carines, supra* at 753, this Court followed *Gistover* and *Stoughton*, holding that the admission of evidence of single-system electrophoresis of dried bloodstains for two genetic markers, PGM and EAP, was not plain error. In affirming this Court's decision in *Carines*, the Supreme Court indirectly approved *Gistover* and *Stoughton* when it held that the prosecution had presented sufficient evidence of the defendant's guilt, including key inculpatory bloodstain evidence derived from electrophoresis. *Carines, supra* at 758, 761, 772.

II

Next, defendant argues that the trial court denied her due process by not appointing a DNA expert or a serology expert to assist her defense. Specifically, defendant argues that, as an indigent, she was entitled to such expert assistance in order to respond to the trial testimony of the prosecution's expert witnesses who were qualified in the areas of DNA analysis and serology.[4] We review for an abuse of discretion a trial court's decision denying a motion to appoint an expert witness for an indigent defendant at public expense. *Herndon, supra* at 398.

A

The issue concerning the appointment of an expert witness for an indigent defendant was addressed by this Court in *People v Leonard*, 224 Mich App 569, 580; 569 NW2d 663 (1997). In that case, the prosecution argued that the trial court abused its discretion in granting a new trial to the defendant on the basis that the defendant did not have a DNA expert at trial. In *Leonard*, this Court, referencing the principles articulated in *Ake v Oklahoma*, 470 US 68; 105 S Ct 1087; 84 L Ed 2d 53 (1985), noted that "[u]nder the Due Process Clause, states may not condition the exercise of basic trial and appeal rights on a defendant's ability to pay for such rights." *Leonard, supra* at 580.

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[4] Defendant also claims on appeal that the trial court erred in denying her motion for funds to retain a serological expert to assist appellate counsel, which was raised in her motion for a new trial. Because we hold that the trial court erred in denying defendant's motion for expert assistance at trial, we need not address this issue.

This Court in *Leonard* added that while indigent defendants are not entitled to "all the assistance that wealthier defendants might buy, [] fundamental fairness requires that the state not deny them "'an adequate opportunity to present their claims fairly within the adversary system."'" *Id.*, quoting *Moore v Kemp*, 809 F2d 702, 709 (CA 11, 1987), quoting *Ross v Moffitt*, 417 US 600, 612; 94 S Ct 2437; 41 L Ed 2d 341 (1974). However, the *Leonard* Court, after reviewing the case law from other jurisdictions, pointed out:

> "[A] defendant must demonstrate something more than a mere possibility of assistance from a requested expert; due process does not require the government automatically to provide indigent defendants with expert assistance upon demand. Rather, a fair reading of these precedents is that a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial." [*Leonard*, *supra* at 582, quoting *Moore*, *supra* at 712.]

Thus, this Court in *Leonard, supra* at 582, held:

> [C]onsistent with the majority of courts, other than psychiatric experts, a defendant is entitled to the appointment of an expert at public expense only if he cannot otherwise proceed safely to trial without the expert. MCL 775.15; MSA 28.1252. In other words, a defendant must show a nexus between the facts of the case and the need for an expert.

People v Jacobsen, 448 Mich 639, 641; 532 NW2d 838 (1995).

Applying these principles, the *Leonard* Court found that the trial court erred in granting the defendant a new trial on the basis that the defendant was entitled to a DNA expert. Specifically, *Leonard* held that the trial court erred in finding that the defendant was entitled to a DNA expert simply because DNA evidence was being offered against him. However, even assuming that the defendant was erroneously deprived of a DNA expert, *Leonard* stated that any error by defense counsel or the trial court in depriving an indigent defendant of the appointment of an expert is grounds for reversal only "if [the] defendant was prejudiced and received a fundamentally unfair trial as the result of not having expert assistance." *Leonard*, *supra* at 583, citing *People v Mateo*, 453 Mich 203, 214-215; 551 NW2d 891 (1996), *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994), and *People v Young* (*After Remand*), 425 Mich 470, 501; 391 NW2d 270 (1986). Because the *Leonard* Court concluded that the defendant was not denied due process by the lack of a DNA expert, it did not address whether the defendant was prejudiced.

In this case, defendant contends that she was denied her federal right to due process when her pretrial motion for the appointment of expert witnesses in the areas of DNA and serology was denied. Specifically, defendant sought the procurement and testimony of expert witnesses in order to respond to the prosecution's contention that the bloodstain that was found on the sink behind the bar implicated her in the felony murder. While the procedural posture of this case,

which involves a pretrial motion for appointment of expert witnesses at public expense, is different than *Leonard*, which involved the grant of a new trial on the basis that the defendant was entitled to a DNA expert at trial, we nonetheless apply the principles set forth in *Leonard* in analyzing whether defendant was erroneously deprived of the appointment of expert witnesses in DNA and serology at trial. To determine whether defendant is entitled to such expert assistance we first consider whether she could otherwise proceed safely to trial without these experts. If defendant could not do so, we then consider whether she was prejudiced and received a fundamentally unfair trial as the result of not having expert assistance. If defendant was so prejudiced, then reversal of her convictions and the sentence for the felony-murder conviction is required.

In determining whether reversal is required, we note that the *Leonard* Court erred in referencing the harmless-error standard for nonconstitutional error as set forth in *Mateo*, *supra* at 203.[5] Because the claimed error concerns an alleged violation of the federal constitution, we must apply the federal harmless-error standard. *People v Anderson* (*After Remand*), 446 Mich 392, 404; 521 NW2d 538 (1994), citing *Chapman v California*, 386 US 18, 24; 87 S Ct 824; 17 L Ed 2d 705 (1967), and *Arizona v Fulminante*, 499 US 279;

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[5] As for the harmless-error standard, *Leonard* is not binding under MCR 7.215(I)(1) because it did not establish a rule of law on this point since its discussion of the harmless-error standard was mere obiter dictum. See *Sumner v Gen Motors Corp (On Remand),* 245 Mich App 653, 661;633 NW2d 1 (2001); *People v Petros*, 198 Mich App 401, 406 n 3; 499 NW2d 784 (1993).

111 S Ct 1246; 113 L Ed 2d 302 (1991).[6] Under the federal harmless-error standard, the question is whether the claimed federal constitutional error constitutes a structural defect in the trial that defies harmless-error analysis so as to require automatic reversal or whether it amounts to a trial error occurring in the presentation of the case "'and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.'" *Anderson*, *supra* at 405-406, quoting *Fulminante*, *supra* at 307-308; see also *People v Solomon (Amended Opinion)*, 220 Mich App 527, 535; 560 NW2d 651 (1996). Under the standard stated in *Chapman*, the prosecutor must prove beyond a reasonable doubt that the constitutional error did not contribute to the guilty verdict.

In this case, the alleged constitutional error is not a structural error that infects the entire trial mechanism; rather, it should be classified as a trial error occurring in the presentation of the case. In support, we rely upon *State v Scott*, 33 SW3d 746, 755 n 6 (Tenn, 2000), where the Supreme Court of Tennessee, in reversing an indigent defendant's convictions of rape and aggravated assault, held that the failure to provide the defendant with state-funded expert assistance in the area of DNA analysis was "a trial error and properly subject to constitutional harmless error analysis." *Id*. In *Scott*, the Supreme Court of Tennes-

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[6] The dissent, citing MCR 2.613(A), MCL 769.26, and *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999), mistakenly references the harmless-error standard for preserved, *nonconstitutional* error.

see found that the indigent defendant had demonstrated a "particularized need" for expert assistance, finding that "[b]ecause the identity of the offender was the only real issue at trial and because the jury's conclusion as to the weight of the DNA evidence may have been conclusive as to its determination of the appellant's guilt, expert assistance in DNA analysis may have been crucial to a successful defense." *Id.*, at 754. However, because the denial of needed expert assistance did not affect the "'entire conduct of the trial from beginning to end,'" the *Scott* court concluded that it was a trial error. *Id.* at 755 n 6. We likewise apply the harmless-error standard under the federal constitution for trial error in determining whether the alleged constitutional error in this case was harmless beyond a reasonable doubt. But see *Rey v State*, 897 SW2d 333, 345-346 (Tex Crim App, 1995) (ruling on the basis of the reasoning expressed in *Ake* that depriving an indigent defendant of the necessary expert assistance amounted to a structural defect in the trial that defied harmless-error analysis).

B

On October 9, 2000, the trial court held a hearing on defendant's motion for expert assistance. Defense counsel did not call any witnesses at the hearing and requested expert assistance because "[o]ne of the important prongs of [the prosecution's] theory against the defendant relates to this blood evidence," arguing that "due process really requires that I be able to explore this to a minimal degree." When questioned by the trial court, defense counsel indicated that expert assistance was necessary to assist him in understanding the nature of the DNA and blood evidence being

presented by the prosecution so as to defend his client against the charges. The following colloquy ensued.

> *The Court*: Can't you do that through your cross-examination of the DNA person that the People bring?
>
> *Mr. Sullivan [defense counsel]*: Imagine if the government had to—the only way they could prepare their case and be informed and develop their defense or their government's strategy is to wait for the defense witness to take the stand and cross them to learn. I'm not asking for a lot of money, Judge. I would think most of the DNA experts wouldn't charge very much for an indigent defendant.
>
> *The Court*: Well, I beg to differ with you, Mr. Sullivan. That's a fairly sophisticated area of expertise.
>
> *Mr. Sullivan*: I'm not asking that there be reanalysis, Judge. I'm just asking for consultation with them about what these results would mean to them. I'm not asking for them to analyze blood, any of that. I'm not—I'm not asking for money for lab work or anything like that.
>
> *The Court*: You only want to consult with someone and have them review what the People have?
>
> *Mr. Sullivan*: Yes.

The Court: And be able to talk with them, is that it?

Mr. Sullivan: Then—Right, and then based upon the conversation that I would have, maybe call them as a witness for the defense.

The Court: That opens a door to a lot more money, Mr. Sullivan. Mr. Kabot, what's your position as it relates to this request?

Mr. Kabot [assistant prosecutor]: My position is this, Judge—and Mr. Sullivan knows this full well—the blood stain that was on the sink upstairs in the bar, that was tested for serology. There is a breakdown of that—of that blood along with the blood samples that were submitted by a number of other people, because again they were tested serologically to see—they were tested for PGM enzymes and there is a breakdown. And as Mr. Sullivan knows[,] the report came back indicated that Ms. Hattie—Ms. Tanner's blood was included within the specified group that could have been a donor of that blood. DNA-wise there really isn't anything that links this defendant to anything that was found in that bar through DNA.

The Court: Even in the basement?

Mr. Kabot: Even in the basement and I think Mr. Sullivan understands that also. That what we're talking about in the base-

ment and the blood in the basement every report that we received back where DNA was performed excluded Hattie Tanner.

The Court: So the point—I took it from Mr. Sullivan's argument we were going in a different direction—at this point in time the only thing you have apparently that by inference would link Ms. Tanner to the crime scene is she has the same blood type as was found on the stain in the kitchen and there is nothing in the basement in terms of the DNA analysis that at all links Hattie Tanner to that scene, is that it, Mr. Kabot?

Mr. Kabot: That's my understanding, Judge. Now understand I just got this case the other day and I had it at home over the weekend and I was reading it. But from each of the reports that we received back—forensic reports concerning DNA I saw on each of those that Ms. Tanner was excluded by way of DNA as being the donor for whatever blood sample they were testing.

The Court: Would you even call this person [sic] as a prosecution witness then?

Mr. Kabot: The only thing that I'm going to do, your Honor, as far as Megan Clements [sic] is concerned or anyone else as far as DNA is concerned is—there are some questions I have to ask them, but I mean as far as Mr. Sullivan's cross-examination of them I'm not sure how much there'll even be for the DNA people because again the bottom line is the results of

the testing says right there. You know, Hattie Tanner's excluded from being the donor of blood on the victim's clothing and the blood stains that they recovered in the immediate area of the victim's body which was in the basement. So how much cross-examination is there really going to be concerning that issue, only Mr. Sullivan knows.

The Court: Mr. Sullivan.

Mr. Sullivan: Can I offer a middle position here?

The Court: Sure.

Mr. Sullivan: How you [sic] about you approve enough money to me to consult the DNA expert, and then based on that consultation if I can persuade you that some money should be kicked in for him to testify then we can revisit that area, and that wouldn't put off the trial.

The Court: Well, Mr. Sullivan, the thing that occurs to me is that—and I'm not saying this would happen—but potentially you would confer with this expert and that expert would say I think the prosecution's expert is all wrong, it really doesn't link the defendant with the blood in the basement. Why do you need someone when you already have the prosecution witnesses saying it excludes your client?

Because the trial court concluded that "the prosecution's expert would exonerate and exculpate the defendant from the evidence found at the scene," it denied defendant's request for funds to hire an expert witnesses in the areas of DNA and serology.

C

We believe that the trial court erred in depriving defendant of expert assistance in the areas of DNA and serology because she could not otherwise proceed safely to trial without such assistance.

Here, defendant was facing various charges, including felony murder, an offense punishable by life imprisonment without parole, the maximum penalty under law in the state of Michigan. Notwithstanding the severity of the charges, the prosecution's case against defendant was quite tenuous. As the parties recognized at the motion hearing, the DNA evidence excluded defendant as a contributor to the DNA found on the evidence samples. Moreover, there was expert testimony at trial that the blood found on the victim's shirt contained the DNA profile of an unknown female. Even though the DNA evidence exculpated defendant, the prosecution's experts determined that the serological evidence linked her to the crime scene because her blood type and PGM subtype were the same as those on the diluted bloodstain found on the sink behind the bar. In fact, this bloodstain, as interpreted by the prosecution's expert witnesses, was the only physical evidence that linked defendant to the crime scene. Thus, the prosecution's case against defendant rested very heavily upon the serological analysis and testimony of the prosecution's expert witnesses.

Given the critical role of the DNA and blood evidence in this case, it was absolutely essential for defendant to have been provided with expert assistance in the areas of both DNA analysis and serology in order to have a meaningful opportunity in which to prepare her defense against the charges and to respond to the prosecution's three expert witnesses at trial. While the trial court suggested that defendant did not need a DNA expert because the DNA evidence was exculpatory to defendant, defense counsel rightly pointed out at the motion hearing that defendant nonetheless had the constitutional right to put on her own defense and not simply rely upon what the prosecution had developed in seeking to prove the charges against her. By having her own DNA expert, defendant would have been able to develop and argue the point that the DNA evidence exculpated her. Moreover, given the complex nature of DNA evidence, expert assistance was necessary to ensure that defendant was properly represented, especially since defense counsel acknowledged that the subject matter was beyond his understanding. Specifically, it was evident that expert assistance in DNA analysis was needed to enable defense counsel to cross-examine the prosecution's expert witnesses in an effective fashion. See *Scott*, *supra* at 754 (finding that expert assistance in the field of DNA evidence "was absolutely crucial to competent representation given that the subject matter was inordinately complex and beyond the common understanding of most attorneys" in a prosecution where there were "inconsistent results regarding the donor of the hair samples"). For these reasons, we do not believe that defendant could have safely proceeded to trial without the assistance of a DNA expert.

In addition, the trial court, in denying defendant's motion for funds to hire expert witnesses, ignored the fact that defendant also needed to have an expert witness in the area of serology. After all, it was the evidence presented by the prosecution's experts in serology, Megan Clement and Marie Bard-Curtis, that linked defendant to the crime scene on the basis of the fact that she could have been a donor of the blood that was found on the sink next to the bar. Without her own expert witness in serology, however, defendant had no means to defend herself against the effect of such inculpatory evidence or to diminish its force by explaining that it constituted an anomalous test result. *Id.* at 754 (finding that "expert assistance was especially needed to help determine whether the samples were contaminated and why the appellant was apparently excluded as a donor in one test involving PCR analysis"). Considering the damaging nature of the prosecution's serological evidence, it was thus imperative in the context of this case that defendant be provided with an expert witness in serology as well as a DNA expert.

Under the factual circumstances of this case, defendant was prejudiced and received a fundamentally unfair trial as the result of not having expert assistance provided by the court *Leonard*, *supra* at 583-584. Applying the appropriate harmless-error standard, we cannot say that the error was harmless beyond a reasonable doubt. Thus, we are compelled to reverse defendant's convictions and her sentence for the felony-murder conviction.

As already indicated, the key physical evidence presented by the prosecution was the drop of diluted

blood that was found next to the sink, near the alleged murder weapon. Bard-Curtis, the prosecution's principal expert witness in serology, testified that the blood was consistent with defendant's blood type B and PGM type 2+, 1+. While this same drop of blood matched the victim's blood type, it was inconsistent with the victim's PGM type. The bloodstain was also inconsistent with the blood type of the two other suspects, Cady and Paav. Further, according to Clement, the prosecution's expert witness in the statistical application of serology, blood type B and PGM 2+, 1+ is found in about four percent of the African-American population. Thus, according to the prosecution, there was an apparently high likelihood that the diluted bloodstain that was found on the sink behind the bar came from defendant, an African-American.

The only other significant evidence adduced by the prosecution in support of defendant's conviction of felony murder was based upon Detective Walters' testimony regarding defendant's statements to him under questioning. First, Detective Walters testified that defendant, in two different statements, identified the knife found behind the bar as belonging to her on the basis of the chipped tip of the blade. Second, Detective Walters testified that defendant stated in the interview conducted in a police car on June 7, 1995, that she went with Cady to Barney's on the night in question but stayed in the parked car. Detective Walters also testified that defendant told him that her fingerprints might be on the knife. In addition, Detective Walters testified that defendant, in an answer to a hypothetical question whether there might be circumstances in which she would have committed the crime,

stated that, "If that bitch had treated her bad she would do something to that effect."

However, at trial, defense counsel sought to undermine the credibility of Detective Walters. Specifically, Detective Walters acknowledged that when he interrogated defendant at the Battle Creek Police Department on May 24, 1995, the audiovisual equipment malfunctioned and that only about one-half of the extensive interrogation was audiotaped. Moreover, there were 261 "inaudibles" in the thirty-two-page transcript that was prepared about the recorded portion of the interrogation. Despite the admittedly high number of inaudibles, Detective Walters never listened to the tape in an attempt to increase the accuracy of the transcript, nor did he dispatch the tape to the Michigan State Police to improve the sound quality. Significantly, although Detective Walters claimed in his direct testimony that defendant stated "[t]hat the knife was hers," he admitted during cross-examination that defendant's answer to the question whether it was "one of her knives" was transcribed as her "saying no." Moreover, we also note that defendant's alleged statements to Detective Walters on June 7, 1995, took place in a police car, apparently in the presence of another officer, Detective Adams, and were not recorded. We further note that Detective Adams did not testify at trial.

Thus, with the exception of the prosecution witnesses' expert testimony regarding the diluted bloodstain that was found near the sink next to the knife, there was no physical evidence that placed defendant at the crime scene. In this regard, we note that Cady,

testifying as a prosecution witness, did not place defendant at Barney's on the night in question. Further, defendant denied that she went with Cady to Barney's on the night in question, that it was her knife that was used to kill the victim, and that she told Detective Walters that the knife was hers.

Considering the crucial importance of the blood-evidence testimony provided by the prosecution's expert witnesses at trial, it was thus fundamentally unfair for the trial court to have deprived defendant of expert assistance at trial because it was not beyond a reasonable doubt that a rational jury would have found her guilty if she had been provided with experts in the areas of DNA and serology. First, the DNA evidence exculpated defendant. Furthermore, of the blood samples tested, there was only one sample—the diluted bloodstain that was found near the sink next to the knife—that possibly linked defendant to the crimes in question on the basis of the fact that she had the same blood type and PGM subtype as was found on this bloodstain. See *Scott*, *supra* at 755 (noting that "because the DNA evidence appears to have been the keystone of the State's case, an expert's assistance on the issues concerning the anomalous results of the various DNA tests could very well have made a difference in the preparation and presentation of the appellant's case or otherwise given rise to reasonable doubt in the minds of the jurors"). Further, when questioned, Clement, the prosecution's other serological expert, testified that about four percent of the African-American population had blood type B and PGM 2+,

1+.[7] However, this evidence only made it likely that the bloodstain came from defendant; it did not positively identify her as the donor. Thus, we cannot conclude that the prosecutor proved beyond a reasonable doubt that the constitutional error in question did not contribute to defendant's guilty verdict. *Chapman*, *supra*.

Moreover, it cannot be ruled out that someone other than defendant contributed the blood that was found near the sink. As Detective VanStratton indicated at trial, the diluted bloodstain came from an area of the bar that was occupied by people, including bar employees and the victim's friends, where coffee was being prepared, until the area was isolated by the crime-scene technicians. Given that various people were mingling in an area considered "critical" to the police investigation before the evidence was collected, it cannot be excluded as beyond a reasonable doubt

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[7] Clement also testified during cross-examination that because African-Americans constituted twenty-six percent of the population of the United States, there were "[p]ossibly millions" of people matching this serological profile. However, according to the United States Census Bureau, African-Americans constituted only 12.3 percent of the estimated United States population of 281 million people in 2000. See http://quickfacts.census.gov/qfd/states/00000.html. While Clement's error in doubling the percentage of African-Americans in the United States population benefited defendant in this instance by increasing the number of individuals possessing this blood profile, it goes to show that defendant could not simply rely upon the accuracy of the prosecution's expert witnesses in presenting her defense to these charges. We also note that the blood samples of the victim that were submitted to the Michigan State Police for serological testing erroneously listed her first name as Susan.

that the bloodstain came from someone other than defendant.

There was also evidence presented at trial raising a reasonable doubt whether the bloodstain in question was contributed by another individual who committed the homicide and robbery at Barney's. According to Cady's testimony, there was a white male customer in the bar when he entered Barney's at about 1:00 a.m. on March 22, 1995. Even discounting Cady's testimony as unreliable, defendant introduced the testimony of two other witnesses who claimed to have seen a pickup truck with a "wooden cap" parked at Barney's during the early morning hours of March 22. In addition, one witness, Kevin Sage, testified that he saw "a driver that looked white, Caucasian with a beard" together with a passenger in this vehicle. In this regard, defendant introduced a reasonable doubt whether someone else robbed and murdered the victim. In light of the evidence presented in this case, we therefore conclude that the trial court's error in depriving defendant of expert assistance in the areas of DNA and serology was not harmless beyond a reasonable doubt. Accordingly, we reverse defendant's convictions and her sentence for the felony-murder conviction and remand for a new trial.[8]

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[8] In addition, we note that while the trial court vacated defendant's sentences for her second degree murder and armed robbery convictions, it apparently did not vacate these convictions as required under the doctrine of double jeopardy. US Const, Am V; Const 1963, art 1, § 15. However, the second-degree murder conviction must be vacated because the principles of double jeopardy prohibit multiple murder convictions for the death of a single victim. *People v Clark*, 243 Mich App 424, 429-430; 622 NW2d 344 (2000). Defendant's conviction of armed robbery must be vacated

III

Defendant also argues that the trial court erred in denying her motions to dismiss, claiming that the five-year delay between an initial police request for an arrest warrant and initiation of criminal charges by the prosecutor denied her due process. We disagree.

The trial court's decision whether to dismiss charges because of prearrest delay is reviewed for an abuse of discretion. *Herndon*, *supra* at 389. To the extent that the parties argue this issue as a matter of prosecutorial misconduct, the test is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Because the claim implicates constitutional due process, our review is de novo, *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999), while the factual findings of the trial court are reviewed for clear error, MCR 2.613(C); *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001); *People v Adams*, 232 Mich App 128, 140; 591 NW2d 44 (1998).

Defendant first moved to dismiss the charges before trial, alleging that the prearrest delay had prejudiced her because she lost the ability to gather evidence from the scene of the crime and locate potential witnesses, and that the delay had caused the memory of witnesses to fade. Following a pretrial hearing, the trial court denied the motion, ruling that the delay

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as well because convicting a defendant of both felony murder and the underlying felony violates the constitutional protections against double jeopardy. *People v Gimotty*, 216 Mich App 254, 259-260; 549 NW2d 39 (1996).

was occasioned by the prosecutor's need to conduct further investigation.

In addition, after the presentation of evidence at trial, defendant renewed her motion to dismiss, claiming that no additional investigation had been undertaken in the three to four years before the charges were brought against her. Defendant's due-process argument was based on the trial testimony of Detective Walters, whose requests for the issuance of arrest warrants for defendant, Dion Paav, and Robert Cady in July 1995 were denied by the prosecutor in the fall of that year. Detective Walters also testified that when a new prosecutor took office in 1997, he was promised a "fresh look," but a warrant for defendant was not authorized until the spring of 2000. According to the prosecution, however, laboratory work was still being performed on evidence in 1998 "with the hopes of getting additional evidence."

In denying the motion, the trial court ruled that defendant was not prejudiced by the delay because she had presented several witnesses whose memories were intact. The trial court also noted that the failure of the police officers to uncover additional inculpatory evidence during the delay did not negate the fact that they were performing their duties to investigate the case thoroughly. In the trial court's view, different prosecutors might have simply viewed the sufficiency of the evidence differently.

The right to a speedy trial guaranteed by the Sixth Amendment does not apply to delay occurring before an arrest or initiation of a formal criminal charge, *United States v Marion*, 404 US 307, 320; 92 S Ct 455; 30 L Ed 2d 468 (1971), and the primary restraint on

such delay is found in applicable limitation periods adopted by the Legislature, *id.* at 322. However, due process provides limited protection against oppressive prearrest delay. *United States v Lovasco*, 431 US 783, 789; 97 S Ct 2044; 52 L Ed 2d 752 (1977); *People v Bisard*, 114 Mich App 784, 788; 319 NW2d 670 (1982). To determine if due process is implicated, the court must balance the actual prejudice to the defendant against the state's reasons for the delay. *Lovasco*, *supra* at 790; *Cain*, *supra* at 108. Under this test, the defendant bears the initial burden to demonstrate prejudice and the burden then shifts to the prosecutor to explain the delay. *Id.* at 109; *Bisard*, *supra* at 790-791.

To establish a due-process violation meriting dismissal of the charges, a defendant must demonstrate both actual and substantial prejudice that impairs the defendant's right to a fair trial. *Adams*, *supra* at 134-135. Substantial prejudice is prejudice of a kind or sort that the defendant's ability to defend against the charges was so impaired that it likely affected the outcome of the trial. *Id.* at 135. Actual prejudice is not established by general allegations or speculative claims of faded memories, missing witnesses, or other lost evidence. *Cain*, *supra* at 109-110. Furthermore, a defendant must show that the prosecution intended to gain a tactical advantage by delaying formal charges. *Marion*, *supra* at 324; *People v White*, 208 Mich App 126, 134; 527 NW2d 34 (1994).

In the present case, defendant has alleged only vague claims of faded memories and lost witnesses without specifically showing how these alleged defi-

ciencies actually and substantially impaired her defense. Thus, the trial court properly ruled that defendant's allegations concerning lost physical evidence were too speculative to establish actual and substantial prejudice. See *Adams*, *supra* at 137 (noting that the defendant failed to demonstrate actual and substantial impairment by showing how the missing evidence would have benefited the defense).

Moreover, the trial court did not clearly err in finding that the delay in this case resulted from the police conducting further investigation and because the prosecutors were simply not satisfied that the evidence was sufficient to proceed. Either reason was a proper basis to delay prosecution. As this Court noted in *Adams*:

> "In our view, investigative delay is fundamentally unlike delay undertaken by the Government solely to gain tactical advantage over the accused precisely because investigative delay is not so one-sided. Rather than deviating from elementary standards of fair play and decency, a prosecutor abides by them if he refuses to seek indictments until he is completely satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt. Penalizing prosecutors who defer action for these reasons would subordinate the goal of orderly expedition to that of mere speed. This the Due Process Clause does not require. We therefore hold that to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat

> prejudiced by the lapse of time." [*Id.* at 140-141, quoting *Lovasco*, *supra* at 795-796 (citations and internal punctuation omitted).]

In summary, defendant failed to establish actual and substantial prejudice from prearrest delay or that the delay was intended to gain a tactical advantage. Thus, the trial court did not abuse its discretion in denying her motions to dismiss.

IV

Finally, defendant argues that the trial court erred in denying her motion for a directed verdict with regard to the charges of open murder, felony murder, and armed robbery. Defense counsel moved for a directed verdict after the close of the proofs, claiming that "[t]he Prosecutor hasn't introduced any circumstantial or direct evidence that would place my client at the site of this murder." In response, the prosecutor contended that the elements of first-degree premeditated murder and felony murder were established because "there certainly is enough both direct and circumstantial evidence for a jury to be able to find beyond a reasonable doubt that not only was Rob Cady at Barney's that night[,] he was accompanied by Hattie Tanner, that she was the one with the knife, and that in the process of this robbery that a murder occurred." In denying the motion for a directed verdict, the trial court ruled:

> Well, looking at the evidence in the light most favorable to the nonmoving party; to wit, the Prosecutor, there is no question but what [sic] a murder occurred. There is no question but what [sic] an armed robbery occurred. And

> the only issue is whether or not there is sufficient proof to establish that it was Hattie Tanner that is guilty of the crime.
>
> Now, if the jury believes Mr. Walters the jury could find and when I say jury—a rational trier of fact could find that based on her statement as read by Mr. Walters; to wit, she was there, that it was her knife, and you couple that with the fact that her blood type was found in a stain at the bar that would form the basis where a rational trier of fact could conclude that it was, in fact, Hattie Tanner who committed the crime. The number of cuts and stab wounds, the positioning of the body, and the fact that it was a stab wound to the chest that penetrated the heart could be used by a rational trier of fact to conclude that it was first-degree premeditated murder.

When ruling on a motion for a directed verdict, the court must consider the evidence presented by the prosecutor up to the time the motion was made in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the charged crime were proved beyond a reasonable doubt. *Jackson v Virginia*, 443 US 307, 319; 99 S Ct 2781; 61 L Ed 2d 560 (1979); *People v Jolly*, 442 Mich 458, 465; 502 NW2d 177 (1993); *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime. *Jolly*, *supra* at 466. This Court applies the same standard during review of the trial

court's ruling on such a motion. *People v Daniels*, 192 Mich App 658; 482 NW2d 176 (1992).

To convict a defendant of first-degree murder, the prosecutor must prove that the killing was intentional and that the act of killing was accompanied by premeditation and deliberation on the part of the defendant. MCL 750.316(1)(a); *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Premeditation and deliberation can be inferred from the surrounding circumstances, but the inferences cannot be merely speculative and must have support in the record. *People v Plummer*, 229 Mich App 293, 301; 581 NW2d 753 (1998); *Anderson*, *supra* at 537. Premeditation may be established through evidence of such factors as the prior relationship of the parties, the defendant's actions before the killing, the circumstances of the killing, and the defendant's conduct after the victim's death. *Id.*

With respect to the felony-murder charge, the prosecution's theory was that defendant murdered the victim during the course of a robbery and, alternatively, that she aided and abetted Cady in committing the felony murder. To convict defendant of felony murder as the principal, the prosecution had to prove: (1) the killing of a human being, (2) that the defendant had the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) that the killing occurred while the defendant was committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316(1)(b), which

includes the underlying charged offense of armed robbery. *Carines, supra* at 768; *People v Turner*, 213 Mich App 558, 565-566; 540 NW2d 728 (1995).

To support a finding that defendant aided and abetted Cady in committing felony murder, the prosecution must show that (1) the crime charged was committed by defendant or some other person, (2) defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that he gave aid and encouragement. *Id.* An aider and abettor must have the same requisite intent as that required of a principal. *People v Barrera*, 451 Mich 261, 294; 547 NW2d 280 (1996). Thus, "'the prosecutor must show that the aider and abettor had the intent to commit not only the underlying felony, but also to kill or to cause great bodily harm, or had wantonly and wilfully disregarded the likelihood of the natural tendency of this behavior to cause death or great bodily harm.'" *Turner*, *supra* at 567, quoting *People v Flowers*, 191 Mich App 169, 178; 477 NW2d 473 (1991). To sustain an aiding and abetting charge, the guilt of the principal must be shown beyond a reasonable doubt, but the principal need not be convicted. *Barrera*, *supra* at 294-295; *Turner*, *supra*, 569. "Rather, the prosecutor need only introduce sufficient evidence that the crime was committed and that the defendant committed it or aided and abetted it." *Id.*

To establish the elements of armed robbery, the prosecution must show (1) an assault; (2) a felonious taking of property from the victim's presence or person; (3) that the taking occurred while the defendant

is armed with a dangerous weapon. MCL 750.529; *Turner*, *supra* at 569.

As for the charge of first-degree premeditated murder, the trial court properly denied defendant's motion for a directed verdict. Given Detective Walters' testimony and the fact that the diluted bloodstain on the bar sink next to the knife implicated defendant, a rational jury could conclude that defendant was present at Barney's on the night in question. Further, on the basis of Detective Walters' testimony, a rational jury could also find that the knife used in committing the murder belonged to defendant. Considering the wounds inflicted upon the victim, and reasonable inferences drawn from the evidence gathered at the crime scene, a rational jury could thus conclude defendant committed first-degree premeditated murder during the course of a robbery.

On the basis of the foregoing evidence, the trial court also did not err in denying defendant's motion for a directed verdict with regard to the charge of felony murder on the theory that defendant was the principal in committing the crime.

However, the trial court erred in denying defendant's motion for a directed verdict with regard to the prosecution's theory that defendant aided and abetted in the felony murder because the prosecution failed to introduce sufficient evidence establishing Cady's guilt beyond a reasonable doubt. Viewed in the light most favorable to the prosecution, there was insufficient evidence to show that Cady, as a principal, committed felony murder.

In reaching this conclusion, it is useful to consider the prosecutor's closing argument. In his closing argument, the prosecutor contended that the evidence showed that Cady was at Barney's earlier than he claimed to have been that night. Although Cady testified at trial that he went to Barney's at about 1:00 a.m. and left when the victim could not cash his check, the prosecution pointed out that Officer Wise testified that Dennis Fodor had seen a person who looked very much like Cady at Barney's at 11:30 p.m. on March 21, 1995. The prosecutor also argued that because the victim trusted Cady, she would have told him that she was going to close early that night. According to the prosecutor, because Cady knew that the victim was closing the bar early that night, he returned to defendant's house, and Cady and defendant eventually went to Barney's when the victim was closing the bar. The prosecutor further argued that Cady made their visit appear legitimate by purchasing a six-pack of Budweiser, which was the brand of beer that he drank, for $5.10. The prosecutor finally argued that either Cady or defendant stabbed the victim to death during the course of the robbery.

The principal flaw in the prosecutor's theory is that there is insufficient evidence to support it. See *People v Petrella*, 424 Mich 221, 275; 380 NW2d 11 (1985) ("While the trier of fact may draw reasonable inferences from facts of record, it may not indulge in inferences wholly unsupported by any evidence, based only upon assumption."). Specifically, there was no evidence introduced by the prosecutor showing that Cady committed felony murder as the principal. In this respect, we note that, apart from unsupported in-

ferences and speculation, there was no evidence establishing beyond a reasonable doubt that Cady was present at Barney's at the time of the felony murder or that he participated in the crime. Because the prosecutor failed to establish Cady's guilt beyond a reasonable doubt, a rational jury thus could not convict defendant of felony murder under an aiding and abetting theory. *Barrera*, *supra* at 294-295; *Turner*, *supra* at 569. Thus, the trial court erred in not directing a verdict of acquittal on the charge of felony murder under an aiding and abetting theory.[9]

Accordingly, on retrial, the prosecution may not charge defendant with felony murder under an aiding and abetting theory. In addition, because the jury acquitted defendant of first-degree premeditated murder, the doctrine of double jeopardy bars her retrial on that charge.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Jessica R. Cooper

Cooper, P.J., concurred.

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[9] We note that although the members of the jury were polled after delivering their verdict, they were not asked whether they found defendant guilty of felony murder as a principal or as an aider and abettor.

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellee,

FOR PUBLICATION
February 18, 2003
9:05 a.m.

v

No. 31966
Calhoun Circuit Court
LC No. 00-003176-FC

Updated Copy
April 25, 2003

HATTIE MAE TANNER,

Defendant-Appellant.

Before: Cooper, P.J., and Jansen and R.J. Danhof*, JJ.

R.J. DANHOF, J. (*concurring in part and dissenting in part*).

I respectfully disagree with part II of the majority's opinion. The trial court's denial of defendant's request to pay for an expert in either DNA or serology did not result in a fundamentally unfair trial.

This Court reviews the decision whether to appoint an expert for an abuse of discretion. *People v Lueth*, 253 Mich App 670; ___ NW2d ___ (2002). An

abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it shows a perversity of will or the exercise of passion or bias rather than the exercise of discretion. *Solution Source, Inc v LPR Assoc Ltd Partnership*, 252 Mich App 368, 381; 652 NW2d 474 (2002). In general, either permitting or excluding expert testimony is not grounds for reversal unless the party claiming error establishes prejudice by showing it was "more probable than not that a different outcome would have resulted without the error." *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999); MCR 2.613(A); MCL 769.26. Denying an indigent defendant a court-appointed expert does not warrant reversal unless it results in a fundamentally unfair trial. *People v Leonard*, 224 Mich App 569, 582-583; 569 NW2d 663 (1997). We must remember that the standard outlined in *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995), requires a defendant to demonstrate a nexus between the facts of the case and the *need* for an expert. In all cases, the defendant must show a need for an expert: that the defendant cannot proceed safely to trial without expert assistance. MCL 775.15; *Leonard*, *supra* at 582.

In this case, there were two types of scientific evidence presented by the prosecution, DNA analysis and blood serology, as well as statistical population data. The DNA evidence was clearly exculpatory. As the majority notes, Clement testified that, on the basis of the DNA profile obtained from the blood on the victim's shirt, "it could not have been Ms. Tanner." The prosecution's DNA experts not only excluded defendant and her associates as contributors to the DNA

found on the evidence but also established a DNA profile of an unknown female from the blood found on the victim's shirt. In fact, it was defense counsel that moved for the admission of the prosecution's expert's report. Defendant does not explain how she was unable to proceed safely to trial as a result of the prosecution's witnesses' stating unequivocally that the blood was not hers. In fact, defendant's appellate brief does not discuss the DNA evidence at all, only the serological evidence. On the facts of this case, the absence of a defense expert was not outcome-determinative, nor did it deny defendant a fundamentally fair trial. *Lukity*, *supra* at 495-496; *Leonard*, *supra* at 583-584.

The majority relies on *State v Scott*, 33 SW3d 746 (Tenn, 2000), where the court found that expert assistance in the field of DNA evidence "was absolutely crucial to competent representation given that the subject matter was inordinately complex and beyond the common understanding of most attorneys" in a prosecution where there were "inconsistent results regarding the donor of the hair samples." *Id*. at 754. However, an important difference in this case is that, unlike *Scott*, the DNA evidence did not contribute to defendant's conviction; in fact, it exculpated her. It is not enough for defendant to argue simply that the subject is complex or highly technical, she must show that the presence of an expert would have changed the outcome of the trial. *Leonard, supra* at 584-585 & n 5; *Lukity, supra* at 495-496.

Likewise, defendant has not established an actual need for a serologist. The blood evidence was the only physical evidence linking defendant to the scene. However, there was no dispute over the results of the

tests and no allegations that the procedures were faulty. See *In re Klevorn*, 185 Mich App 672, 679; 463 NW2d 175 (1990). The majority, citing *Scott, supra* at 754, proposes that defendant needed an expert to "explain[ ] that it constituted an anomalous test result." *Ante* at ___. But the testing anomalies and contamination present in *Scott* do not exist in this case.

Defendant does not explain how an expert would help, other than arguing that, without a defense expert, the prosecutor's serologist "was free to present what might have been grossly-exaggerated findings." This presents only a mere possibility of assistance from an expert, and fails to meet the burden on defendant of showing that she could not "proceed safely to trial." *Leonard, supra* at 582; MCL 775.15; *Lueth, supra* at 688. Defendant does not argue that an expert would have refuted the conclusion that the blood found and defendant's blood were of the same type, and that none of the other suspects had that type blood. Defendant's theory, that someone else with the same type blood was the perpetrator, was fully explored on cross-examination and in closing argument. Defendant fails to explain how the absence of an expert jeopardized her ability to prepare a defense; I therefore find no error in the trial court's denial.

Finally, although I would find no error in this matter, I include a brief response to the majority's conclusion that the prosecutor failed to prove "beyond a reasonable doubt that the constitutional error in question did not contribute to defendant's guilty verdict." *Ante* at ___. I would beg to differ. While the *evidence* may have contributed to the verdict, I do not find that the alleged *error*, i.e., the trial court's denial

of a defense expert, contributed to the verdict. The blood evidence likely played a role in convincing the jury of defendant's guilt, but nothing defendant argued in this Court demonstrates that the evidence would have been any different with court-provided, expert assistance.

Similarly, appellate counsel's argument that the trial court erred in denying the motion for funds to retain a serology expert must be rejected because he has alleged no specific need for an expert. *Jacobsen*, *supra* at 641; *Leonard*, *supra* at 581-584. There are a vast number of scientific articles, treatises, and published appellate decisions available to a lawyer who lacks knowledge of the "arcane" world of criminal forensics and population genetics. General allegations that the field is technical or that expert assistance is required are insufficient to establish a need to appoint an expert. *Id.* at 584-585 & n 5.

I would affirm defendant's conviction of felony murder and the sentence for that conviction.

/s/ Robert J. Danhof