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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LOREN T. ROBINSON,
Petitioner-Appellant,
v.

JEFFREY WOODS, Warden,
Respondent-Appellee.

No. 16-2067

Appeal from the United States District Court
for the Western District of Michigan at Marquette.
No. 2:14-cv-00050—R. Allan Edgar, District Judge.

Argued: June 7, 2018

Decided and Filed: August 24, 2018

Before: BOGGS and GRIFFIN, Circuit Judges;
HOOD, District Judge.*

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* The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

COUNSEL

ARGUED: Kristin Cope, BAKER BOTTS, L.L.P., Dallas, Texas, for Appellant. Linus Banghart-Linn, OFFICE OF THE ATTORNEY GENERAL OF MICHIGAN, Lansing, Michigan, for Appellee. **ON BRIEF:** Kristin Cope, BAKER BOTTS, L.L.P., Dallas, Texas, for Appellant. Linus Banghart-Linn, OFFICE OF THE ATTORNEY GENERAL OF MICHIGAN, Lansing, Michigan, for Appellee.

OPINION

GRIFFIN, Circuit Judge.

The Supreme Court has interpreted the Sixth Amendment's jury guarantee to mean that "[a]ny fact that, by law, increases the penalty for a crime . . . must be submitted to the jury and found beyond a reasonable doubt." *Alleyne v. United States*, 570 U.S. 99, 103 (2013). In this appeal, petitioner Loren Robinson seeks a writ of habeas corpus under 28 U.S.C. § 2254, arguing that the Michigan trial court violated his Sixth Amendment right to a jury trial by using judge-found facts to score sentencing variables that increased his mandatory minimum sentence. Because *Alleyne* clearly established that mandatory minimum sentences may only be increased on the basis of facts found by a jury or admitted by a criminal defendant, *Alleyne*, 570 U.S. at 108, the Michigan Court of Appeals' disposition of Robinson's case "was

contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1). Accordingly, we reverse the judgment of the district court, conditionally grant Robinson's petition limited to his sentence, and remand to the district court with instructions to remand to the state sentencing court for further proceedings consistent with this opinion and the United States Constitution.

I.

Petitioner and two of his cohorts sold the victim a large amount of crack cocaine on credit, beat the victim when he was unable to repay petitioner, and, eventually, extorted from the victim's parents the roughly $1,000 petitioner felt he was owed for the drugs. As a result, a Michigan jury convicted petitioner of extortion, M.C.L. § 750.213, delivery of a controlled substance, § 333.7413(2), unlawful imprisonment, § 750.349b, and aggravated assault, § 750.81a(1). *People v. Robinson*, No. 303236, 2013 WL 3942387, at *1 (Mich. Ct. App. July 30, 2013) (per curiam).

As is standard in Michigan criminal practice, the Michigan Department of Corrections prepared, and the trial court considered, a "Presentence Investigation Report" (PSIR) in conjunction with petitioner's sentencing. *See, e.g.*, *People v. Harper*, 739 N.W.2d 523, 548 n.72 (Mich. 2007) ("Michigan courts have long held that a sentencing court may presume that unchallenged facts contained in a PSIR are

accurate.").[1] In general, the Department sets guidelines ranges by scoring offense and offender variables, M.C.L. §§ 777.22, 777.50–.57, many of which do not reflect the mere elements of the offenses for which a defendant was convicted, *see, e.g.*, M.C.L. § 777.44 (directing the sentencing court to score 10 points if "[t]he offender was a leader in a multiple offender situation"). The parties agree, and the PSIR reflects, that the sentencing court scored multiple variables that went beyond the mere elements of the offenses for which Robinson was convicted, *see, e.g.*, M.C.L. § 777.39 (number of victims); § 777.40 (exploitation of a vulnerable victim), which resulted in higher minimum-sentence ranges than would have been warranted without the judge-found facts.

The PSIR provided the following sentencing guidelines ranges for the minimum sentence of each conviction: between 84 and 175 months for the extortion conviction (with a 30-year-maximum sentence), between 19 and 38 months for the delivery-of-a-controlled-substance conviction (with a 40-year-maximum sentence), between 50 and 125 months for

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[1] Petitioner's unopposed motion for this court to take judicial notice of his PSIR, which was not included in the lower court record, is granted. This court has the power to "judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned," and may do so on appeal. Fed. R. Evid. 201(b), (d). We have previously noted that we can "take judicial notice of facts contained in state court documents pertaining to [a petitioner]'s prior conviction so long as those facts can be accurately and readily determined." *United States v. Davy*, 713 F. App'x 439, 444 (6th Cir. 2017) (citing *United States v. Ferguson*, 681 F.3d 826, 834–35 (6th Cir. 2012)). And we find no reason not to do so in this case.

the unlawful-imprisonment conviction (with a 22-years-and-6-months-maximum sentence), and no recommended range for the aggravated-assault conviction (which comes with a one-year-maximum sentence). The Department recommended that the court give petitioner a minimum sentence near the bottom of each range. At the time of petitioner's sentencing, the ranges were mandatory, allowing a trial judge to "depart" from them only with a showing of "substantial and compelling" reasons. M.C.L. § 769.34(3).

The sentencing judge reviewed and accepted the recommended scores for the guidelines variables but disagreed with the Department's "low end" recommendation. Instead, he sentenced petitioner to a minimum of 150 months to a maximum of 30 years for the extortion conviction, 38 months to 40 years for the delivery-of-a-controlled-substance conviction, 10 years to 22 years and 6 months for the unlawful-imprisonment conviction, and one year for the aggravated-assault conviction, all to be served concurrently.

The Michigan Court of Appeals affirmed his convictions and sentences. *Robinson*, 2013 WL 3942387, at *1. Petitioner argued, in relevant part, that the sentence violated his Sixth Amendment rights because it was based on judge-found facts. *Id.* at *5. On that issue, the court held:

> Defendant claims that the trial court improperly scored the offense variables because the facts used to support the scoring of them were not found beyond a reasonable doubt by the jury, contrary to the holding of

> *Blakely v. Washington*, [542 U.S. 296] (2004). However, our Supreme Court has definitively held that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v. Drohan*, [715 N.W.2d 778, 791–92] ([Mich.] 2006). We are required to follow the decisions of the Supreme Court. *People v. Strickland*, [810 N.W.2d 660, 665] ([Mich. Ct. App.] 2011). Accordingly, defendant's argument is without merit.

Id. This brief discussion failed to address whether the United States Supreme Court's then-recent opinion in *Alleyne*, 570 U.S. 99 (issued roughly a month and a half prior), affected the court's analysis. Petitioner then filed an application for leave to appeal to the Michigan Supreme Court, which denied leave in a boilerplate order. *People v. Robinson*, 840 N.W.2d 352 (Mich. 2013) (order).

Robinson filed a timely habeas petition under 28 U.S.C. § 2254, asserting eleven separate grounds for relief. Our concern is his contention relating to "improper scoring of the legislatively imposed sentencing guidelines." After ordering a response to the petition, the district court denied Robinson's petition outright and declined to issue a certificate of appealability (COA). *Robinson v. Woods*, No. 2:14-cv-50, 2016 WL 3256837, at *18 (W.D. Mich, June 14, 2016). This court granted petitioner's motion for a COA, limited to his Sixth Amendment sentencing issue.

II.

"In an appeal from the denial of habeas relief, we review the district court's legal conclusions de novo and its factual findings for clear error." *Scott v. Houk*, 760 F.3d 497, 503 (6th Cir. 2014) (citation omitted). Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a state conviction may be overturned for an issue adjudicated on the merits in state court if the decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). To prevail under the "contrary to" clause of § 2254(d)(1), a petitioner must show that the state court "arrive[d] at a conclusion opposite to that reached by [the Supreme] Court on a question of law" or that it "confront[ed] facts that are materially indistinguishable from a relevant Supreme Court precedent and arrive[d] at a result opposite" to that reached by the Supreme Court. *Williams v. Taylor*, 529 U.S. 362, 405 (2000). "[B]ecause the purpose of AEDPA is to ensure that federal habeas relief functions as a guard against extreme malfunctions in the state criminal justice systems, and not as a means of error correction," *Greene v. Fisher*, 565 U.S. 34, 38 (2011) (internal quotation marks omitted), "[t]his is a difficult to meet, and highly deferential standard for evaluating state-court rulings," *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (internal quotation marks and citations omitted).

III.

Petitioner challenges his sentence as violative of the Sixth Amendment. Because we hold that *Alleyne*

clearly established the unconstitutionality of Michigan's mandatory sentencing regime, we reverse the district court and conditionally grant petitioner habeas relief, limited to his sentence.

A.

As an initial matter, the district court erred in its analysis of petitioner's Sixth Amendment claim. The court held that the claim was meritless because, under *Harris v. United States*, 536 U.S. 545, 566 (2002), the Sixth Amendment prohibited only sentences beyond the statutory maximum that were based on judge-found facts. *Robinson*, 2016 WL 3256837, at *11. Though the court acknowledged that *Alleyne* overruled *Harris*, it reasoned that *Harris* still controlled because *Alleyne* did not apply retroactively on collateral review. *Id*. at *11 n.1.

But the district court failed to appreciate that the Supreme Court issued *Alleyne* while petitioner's direct appeal was pending—*Alleyne* was decided a little more than a month before the Michigan Court of Appeals issued its opinion in this case.[2] And Supreme

[2] We must "look through" the Michigan Supreme Court's standard denial order to the Michigan Court of Appeals' opinion because the Court of Appeals opinion is the last reasoned state-court judgment. *Ylst v. Nunnemaker*, 501 U.S. 797, 803–05 (1991). The Supreme Court recently clarified that this look-through "rule" is a rebuttable presumption. *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018) ("[T]he State may rebut the presumption by showing that the unexplained affirmance relied or most likely did rely on different grounds than the lower state court's decision, such as alternative grounds for affirmance that were briefed or argued to the state supreme court or obvious in the record it reviewed."). However, neither party argues that the

Court opinions apply to all criminal cases pending on direct review, no matter how much of a departure the decision represents from prior caselaw. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) ("[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past."); *see also United States v. Booker*, 543 U.S. 220, 268 (2005) (Opinion of BREYER, J.) (applying the Court's Sixth Amendment holding to all cases pending on direct review). Therefore, the district court erred in holding that *Harris* controlled. We thus must now examine whether Michigan's scheme, as applied to Robinson, was contrary to clearly established federal law as embodied in *Alleyne*.

B.

The Sixth Amendment of the United States Constitution provides, in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. CONST. amend. VI. By operation of the Sixth Amendment, "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *see also Jones v. United States*, 526 U.S. 227, 253 (1999) (SCALIA, J., concurring). This rule applies equally to the states

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Michigan Supreme Court's boilerplate denial order relied on reasons different from the Court of Appeals opinion.

through the Due Process Clause of the Fourteenth Amendment. *Apprendi*, 530 U.S. at 476.

Over the course of the last 30 years, the Supreme Court has grappled with various components of modern sentencing schemes, to determine whether they complied with the original understanding of the Sixth Amendment. *See, e.g.*, *Alleyne*, 570 U.S. at 103; *Apprendi*, 530 U.S. at 490; *Jones*, 526 U.S. at 248–49; *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). In *Alleyne*, the Court applied, for the first time, its previous conclusions regarding the imposition of penalties beyond the statutory maximum to determinations of mandatory minimum sentences, holding that "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." 570 U.S. at 103. *Alleyne* was a watershed opinion, overruling two prior precedents—*Harris*, 536 U.S. at 566, and *McMillan*, 477 U.S. at 93—which had held that the Sixth Amendment allowed increases in mandatory *minimum* sentences on the basis of judge-found facts.

The question before us is whether *Alleyne*'s holding rendered Michigan's then-mandatory sentencing regime unconstitutional, such that the Michigan Court of Appeals decision in Robinson's case was contrary to clearly established federal law. *See Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). "A federal habeas court may issue the writ under the 'contrary to' clause if the state court applies a rule different from the governing law set forth in our cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts." *Bell v. Cone*, 535 U.S. 685, 694 (2002).

In *Alleyne*, the Supreme Court addressed the constitutionality of 18 U.S.C. § 924(c)(1)(A), which provided a five-year sentence for any person who "uses or carries a firearm" in relation to a "crime of violence," and increased the minimum sentence to seven years if the judge found that the firearm was brandished and to ten years if it was discharged. 570 U.S. at 103–04 (quoting 18 U.S.C. § 924(c)(1)(A)(i)–(iii)). While the defendant was indicted and jury-convicted under the five-year "use[] or carr[y] provision," the judge sentenced him to seven years for brandishing, as was authorized by the statute. *Id*. at 104. However, the Supreme Court held that the increased minimum sentence based on judge-found facts violated the defendant's Sixth Amendment jury guarantee, applying its *Apprendi* line of cases to mandatory minimums. *Id*. at 111–12. In doing so, the Court reasoned that, because *Apprendi* held "that any 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime," "the principle applied in *Apprendi* applies with equal force to facts increasing the mandatory minimum." *Id*. (quoting *Apprendi*, 530 U.S. at 490).

This rationale applies equally to Michigan's mandatory minimum sentences. At all relevant times, Michigan's sentencing regime operated through the use of offense categories, M.C.L. § 777.5, dual axis scoring grids, *e.g.*, M.C.L. § 777.61, minimum ranges, *id*., and a holistic focus on offender and offense characteristics. Generally speaking, the guidelines operate by "scoring" offense-related variables (OVs)

and offender-related, prior-record variables (PRVs).[3] These OV and PRV point totals are then inputted into the applicable sentencing grid to yield the guidelines range, within which judges choose a minimum sentence. *See* Sentencing Manual, p. 10. And at the time of Robinson's sentencing, Michigan's sentencing guidelines were mandatory—arguably more so than the previously mandatory federal sentencing guidelines. *Compare* M.C.L. § 769.34(2)–(3) ("[T]he minimum sentence imposed by a court of this state for a felony . . . shall be within the appropriate sentence range[.] . . . A court may depart from the appropriate sentence range . . . if the court has a substantial and compelling reason for that departure[.]"), *and People v. Babcock*, 666 N.W.2d 231, 237 (Mich. 2003) (defining "substantial and compelling" as "an objective and verifiable reason that keenly or irresistibly grabs [a court's] attention" (citation omitted)), *with* 18 U.S.C. § 3553(b) ("[T]he court shall impose a sentence of the kind, and within the range, referred to in [the sentencing guidelines] unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."), *and Koon v. United States*, 518 U.S. 81,

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[3] Each of the seven PRVs is scored in every case. M.C.L. § 777.21(1)(b); *see also* Michigan Sentencing Guidelines Manual, pp. 4–5, available at https://mjieducation.mi.gov/documents/sgm-files/94-sgm/file (hereinafter "Sentencing Manual"). Not every OV is scored in every case. Instead, only certain OVs are scored depending on the "crime group" (person, property, etc.) the conviction offense falls under. M.C.L. § 777.22; *see also* Sentencing Manual, pp. 6–7.

95 (1996) (allowing departures without reference to "objective and verifiable" requirements).

At bottom, Michigan's sentencing regime violated *Alleyne*'s prohibition on the use of judge-found facts to increase mandatory minimum sentences. 570 U.S. at 111–12. And, although we are not bound by its decision, we note that the Michigan Supreme Court recently so held in *People v. Lockridge*, 870 N.W.2d 502, 513–14 (Mich. 2015) ("[A] straightforward application of the language and holding in *Alleyne* leads to the conclusion that Michigan's sentencing guidelines scheme violates the Sixth Amendment."). While Michigan's regime uses a number of OVs and PRVs to come to a guidelines range, rather than the slightly more straightforward three-tier scheme addressed in *Alleyne*, 570 U.S. at 103–04, this distinction does not except the Michigan regime from *Alleyne*'s fundamental principles. In sum, *Alleyne* proscribed exactly that which occurred at petitioner's sentencing hearing—the use of "[f]acts that increase the mandatory minimum sentence" that were never submitted to the jury and found beyond a reasonable doubt. 570 U.S. at 108. The Michigan Court of Appeals' conclusion that Michigan's sentencing scheme did not violate the Sixth Amendment was, therefore, "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

Respondent argues, in part, that the scheme is constitutional because sentences in Michigan are "indeterminate," in that the sentencing judge sets the minimum sentence using judge-found facts to score a number of OVs and PRVs, while the criminal statute

for the particular offense sets the maximum sentence. *See* M.C.L. § 769.8(1) ("[T]he court imposing sentence shall not fix a definite term of imprisonment, but shall fix a minimum term, except as otherwise provided in this chapter. The maximum penalty provided by law shall be the maximum sentence[.]"). This argument of "indeterminacy" is based upon the fact that criminal defendants in Michigan do not know how long they will serve in prison, because, between the minimum sentence and statutory maximum sentence, prisoners are subject to the jurisdiction of the parole board and have no right to parole. M.C.L. § 791.234(1), (11); *Morales v. Mich. Parole Bd.*, 676 N.W.2d 221, 236 (Mich. Ct. App. 2003). Given that the Supreme Court has never retreated from its position that indeterminate sentencing poses no constitutional issue, *Blakely*, 542 U.S. at 308–09; *see also Lockridge*, 870 N.W.2d at 514 ("It is certainly correct that the United States Supreme Court has repeatedly distinguished between 'determinate' and 'indeterminate' sentencing systems and referred to the latter as not implicating Sixth Amendment concerns and that *Alleyne* did nothing to alter or undermine that distinction."), it may initially appear that Michigan's scheme is constitutional.

But, as acknowledged by the Michigan Supreme Court, the United States Supreme Court has never used the phrase "indeterminate sentencing" in the same manner as the Michigan courts. *See Lockridge*, 870 N.W.2d at 515–16. Instead, the Supreme Court uses the term "indeterminate" to refer to regimes that "involve judicial factfinding . . . [b]ut [where] the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence." *Blakely*, 542 U.S. at 309;

id. at 332 (O'Connor, J., dissenting) ("Under indeterminate systems, the length of the sentence is entirely or almost entirely within the discretion of the judge or of the parole board, which typically has broad power to decide when to release a prisoner."). Thus, though before *Lockridge* the Michigan courts considered their sentencing regime to be "indeterminate" because it produces a sentence with a minimum and a maximum with parole-board discretion in between, it is clear this is not how the Supreme Court uses that term in the Sixth Amendment context.[4] Moreover, regardless of how the Michigan Supreme Court previously characterized its system, it is clear that Michigan did not have indeterminate sentencing under the prevailing Supreme Court caselaw.

Respondent also argues that *Alleyne* does not implicate Michigan's sentencing regime because the minimum sentence in Michigan criminal practice is nothing more than a parole-eligibility date, and the Supreme Court has maintained that there is no constitutional right to parole. *See Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979) ("There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence."). But this

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[4] In other contexts, this court has explicitly referred to Michigan's sentencing regime as an indeterminate one. *See, e.g.*, *Shaya v. Holder*, 586 F.3d 401, 403 (6th Cir. 2009) (describing, in dicta, an immigration petitioner as having received "an indeterminate sentence of nine months to ten years" "under Michigan law"). But *Shaya* was not a Sixth Amendment sentencing case, and it certainly was not a determination "by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

argument misses the mark. While an increase in a Michigan minimum sentence may delay only the date on which a defendant becomes eligible for parole, the lack of a constitutional right to parole is wholly unrelated to the right to have a jury find the facts that "alter the prescribed range of sentences to which a defendant is exposed." *Alleyne*, 570 U.S. at 108. This right arises at sentencing, well before parole (or the denial thereof) comes into play. And that is the right addressed in the *Apprendi* and *Alleyne* line of cases. *See, e.g.*, *id*. Accordingly, *Alleyne* requires us to hold that the Michigan trial court's use of judge-found facts to score mandatory sentencing guidelines that resulted in an increase of petitioner's minimum sentence violated petitioner's Sixth Amendment rights. *Id*.

IV.

For these reasons, we reverse the judgment of the district court and conditionally grant Robinson's petition for a writ of habeas corpus, as it pertains to his Sixth Amendment sentencing claim. We remand this case to the district court with instructions to remand to the state sentencing court for sentencing proceedings consistent with this opinion and the Constitution. The district court shall grant a writ of habeas corpus unless the state initiates, within 180 days, such sentencing proceedings.

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

LOREN ROBINSON,

Petitioner, Case No. 2:14-cv-50

v. HON. R. ALLAN EDGAR

JEFFREY WOODS,

Respondent.
_____/

MEMORANDUM AND ORDER

Petitioner Loren Troueze Robinson filed this petition for writ of habeas corpus challenging his convictions for extortion, delivery of a controlled substance of less than 50 grams, second offense (crack cocaine), unlawful imprisonment, and aggravated assault. Petitioner was sentenced to concurrent prison terms of 150 to 360 for the extortion conviction, 38 to 480 months for the delivery of a controlled substance conviction, 120 to 270 months for the false imprisonment conviction, and 365 days for the aggravated assault conviction.

Petitioner alleges that:

I. Petitioner's convictions should be overturned because there was insufficient credible evidence at trial to prove Petitioner guilty of the crime.

II. The trial court denied Petitioner a fair trial and his due process rights by denying the motion to file a late notice of alibi and his motion for a new trial.

III. Petitioner's sentences were invalid because they were based on inaccurate information, i.e., improper scoring of the legislatively imposed sentencing guidelines, use of an incorrect burden of proof, and insufficient facts, thereby violating his due process rights.

IV. Correctly scoring the guidelines would require resentencing.

V. Petitioner was denied his right to due process of law under the federal and state constitutions where he was never arraigned on the charges in the felony information brought against him and he did not waive his right to an arraignment.

VI. The trial court violated Petitioner's due process rights by refusing to appoint substitute counsel where a conflict developed over fundamental trial tactics and defense trial counsel failed to subpoena exculpatory witnesses despite repeated demand.

VII. Petitioner was denied his state and federal constitutional rights to due process and a fair trial where he was shackled.

VIII. Petitioner was denied a fair trial through the prosecution's withholding of crucial evidence with respect to the full extent of the plea deal offered to Petitioner's co-defendant in exchange for testimony against Petitioner at trial.

IX. Due process requires vacating the trial court's assessment for court costs, fees, and restitution where the trial court failed to consider Petitioner's indigency and ability to pay during his incarceration.

X. The trial court's order to remit prisoner funds for fines, costs, and assessments is in clear error and must be corrected where it inaccurately indicates that Petitioner owes a balance greater than what was actually ordered by the court.

XI. Petitioner was denied his state and federal constitutional rights to effective assistance of trial counsel where counsel failed to (1) insure that Petitioner was informed of the nature of the charges brought against him in the information; (2) move for a mistrial after it came to his attention that jurors might be aware that Petitioner was shackled; (3) investigate the specifics of the plea deal the prosecutor offered to Petitioner's co-defendant in exchange for his testimony; and (4) object to Petitioner's ability to pay restitution and

court costs during the period of Petitioner's incarceration due to his indigency.

In April of 1996, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) became effective. Because this petition was filed after the effective date of the AEDPA, this Court must follow the standard of review established in that statute. Under the AEDPA, an application for writ of habeas corpus on behalf of a person who is incarcerated pursuant to a state conviction cannot be granted with respect to any claim that was adjudicated on the merits in state court unless the adjudication: "(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 upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d).

The AEDPA limits the source of law to cases decided by the United States Supreme Court. 28 U.S.C. § 2254(d). This provision marks a "significant change" and prevents the district court from looking to lower federal court decisions in determining whether the state decision is contrary to, or an unreasonable application of, clearly established federal law. *Herbert v. Billy*, 160 F.3d 1131, 1134 (6th Cir. 1998). To justify a grant of habeas corpus relief under this provision of the AEDPA, a federal court must find a violation of law "clearly established" by holdings of the Supreme Court, as opposed to its dicta, as of the time of the relevant state court decision. *Williams v. Taylor*, 529 U.S. 362, 412 (2000). Recently,

the Supreme Court held that a decision of the state court is "contrary to" such clearly established federal law "if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." *Id.* A state court decision will be deemed an "unreasonable application" of clearly established federal law "if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* A federal habeas court may not find a state adjudication to be "unreasonable" "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 412. Rather, the application must also be "unreasonable." *Id.* Further, the habeas court should not transform the inquiry into a subjective one by inquiring whether all reasonable jurists would agree that the application by the state court was unreasonable. *Id.* at 410 (disavowing *Drinkard v. Johnson*, 97 F.3d 751, 769 (5th Cir. 1996)). Rather, the issue is whether the state court's application of clearly established federal law is "objectively unreasonable." *Williams*, 529 U.S. at 409.

The AEDPA requires heightened respect for state factual findings. *Herbert v. Billy,* 160 F.3d 1131, 1134 (6th Cir. 1998). The habeas corpus statute has long provided that the factual findings of the state courts, made after a hearing, are entitled to a presumption of correctness. This presumption has always been accorded to findings of state appellate courts, as well as the trial court. *See Sumner v. Mata*, 449 U.S. 539,

546 (1981); *Smith v. Jago*, 888 F.2d 399, 407 n.4 (6th Cir. 1989), *cert. denied*, 495 U.S. 961 (1990). Under the AEDPA, a determination of a factual issue made by a state court is presumed to be correct. The petitioner has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *see also Warren v. Smith*, 161 F.3d 358, 360-61 (6th Cir. 1998), *cert. denied*, 527 U.S. 1040 (1999).

Petitioner claims that his convictions should be overturned because there was insufficient credible evidence at trial to prove Petitioner's guilt. On appeal, the Michigan Court of Appeals rejected Petitioner's claim stating:

> Defendant argues that his convictions were not supported by sufficient evidence. We review de novo challenges to the sufficiency of the evidence. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). We view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the prosecution proved the elements of the crime beyond a reasonable doubt. *Id.*
>
> Most of the defendant's argument is an attempt to reargue the credibility of the witnesses. Defendant claims that the victim, Joshua Karamalegos, was not a credible witness for numerous reasons, including that he lied to the police. Defendant also claims that Victor Sawyer, a codefendant, was not credible because Sawyer received a plea agreement and that his own testimony,

because it was supported by the testimony of two witnesses, was credible. The credibility of the witnesses was a question for the jury, *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009), and we will not interfere with the jury's role in determining the credibility of the witnesses, *People v. Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). Accordingly, we reject defendant's attempts to reargue witness credibility.

Defendant claims that his convictions for extortion and unlawful imprisonment were not supported by sufficient evidence because there was no threat of harm against Joshua if he did not pay the $1,000, his drug debt, to defendant. The crime of extortion requires the malicious communication of a threat, made with the intent to extort money or to obtain a pecuniary advantage, to injure a person or a person's property. MCL 750.213; *People v Fobb*, 145 Mich App 786, 790; 378 NW2d 600 (1985). The elements of unlawful imprisonment, as relevant to the present case, include the restraint of a person to facilitate the commission of another offense. *People v Railer*, 288 Mich App 213, 217; 792 NW2d 776 (2010). Joshua testified that, after he became persistent that he could not get the money unless he went back to Niles, Vincent Wiggins, codefendant, hit Joshua in the head and that, at some time, defendant told Joshua that he was not leaving until he paid the money. Then, as instructed, during one of the telephone calls with his father, Themelis

(Tim) Karamalegos, Joshua told Tim that Tim would not see him again if he did not get the money. Defendant did not release Joshua until Tim exchanged the money. Viewing this evidence in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that a malicious threat was made to injure Joshua if $1,000 was not paid to defendant. *Cline*, 276 Mich App at 642.

Defendant also claims that his conviction for aggravated assault was not supported by sufficient evidence because there was no proof of a serious injury. The elements of aggravated assault include the infliction of serious or aggravated injury. MCL 759.81a(1). "A serious or aggravated injury is a physical injury that requires immediate medical treatment or that causes disfigurement, impairment of health, or impairment of a part of the body." CJI2d 17.6(4). Joshua testified that he blacked out each time Wiggins hit him. Joshua also testified that, when he learned he was being arrested after cocaine was found in his pants pocket, he refused a ride in an ambulance to the hospital and asked to be taken to jail. The jail nurse stated that Joshua had to go to the emergency room. The emergency room doctor testified that Joshua suffered a mild concussion and sustained multiple abrasions and contusions on his face. Viewing this evidence in the light most favorable to the prosecution, a rational trier of fact could have found beyond a

> reasonable doubt that Joshua suffered a serious or aggravated injury. *Cline*, Mich App at 642.

Michigan Court of Appeals Opinion, PageID.23-24, ECF No. 1.

A federal court sitting in habeas corpus review of a state criminal trial is to determine whether there was sufficient evidence of the essential elements of the crime to justify *any* rational trier of fact to find guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The evidence is to be considered in the light most favorable to the prosecution. *Id.* Petitioner's arguments presented to the Michigan Court of Appeals show that he is chiefly challenging the credibility of those witnesses who testified against him. PageID.1019-1024, ECF No. 14-9. However, federal habeas courts have "no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them." *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983). *See also McPherson v. Woods*, 506 F. App'x 379, 388-89 (6th Cir. 2012).

Petitioner claims that, regarding his conviction for extortion and unlawful imprisonment, "[t]here was no testimony that anyone told him that he would be hurt, etc., if he didn't pay [the $1,000]." PageID.1024, ECF No. 14-9. However, the victim testified that Petitioner told the victim that "you will not be leaving this house until I have my money." PageID.423, ECF No. 14- 4. Accordingly, the victim told his father over the phone: "I will not - - you won't see me anymore if I don't get the money." *Id.* The victim also testified that his three captors, including Petitioner, "told me to tell

[my father] about the $1000, otherwise, he wouldn't see me again." PageID.425, ECF No. 14-4. The victim's father testified that, when his son was calling, he heard voices in the background, "people instructing him to say things." PageID.491, ECF No.14-4. He also testified that he decided to "do something" and give the $1,000 to him when the victim told him "that I would never see him again, from the position that he was in, that I would never see him again." PageID.492, ECF No. 14-4. Viewing this evidence in the light most favorable to the prosecution, it is clear that the evidence was sufficient for a rational trier of fact to establish that Petitioner committed the crimes of extortion and unlawful imprisonment under Michigan law.

Petitioner claims that there was insufficient evidence for the aggravated assault charge "because there is no proof of serious injury." PageID.1024, ECF No. 14-9. The victim testified that, after he had been taken to jail because police found cocaine on him, a nurse at the jail stated that "[h]e's got to go to the emergency room . . . he's pretty banged up." PageID.437, ECF No. 14-4. The victim's emergency room physician testified at trial that the victim had suffered "a mild concussion, because of the mental status changes that were associated with his injuries. And that he had multiple abrasions and contusions on the face." PageID.480, ECF No. 14-4. Viewing this evidence most favorable to the prosecution, it is clear that the evidence was sufficient to establish for a rational trier of fact that the victim suffered serious or aggravated injury. The Michigan Court of Appeals decision, therefore, was not contrary to, or involved an unreasonable application of, clearly established

federal law as determined by the Supreme Court of the United States; or did not result in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

Petitioner claims that the trial court denied him a fair trial and violated his due process rights by denying the motions to file a late notice of alibi and his motion for a new trial based on ineffective counsel. On appeal, the Michigan Court of Appeals rejected Petitioner's claim regarding the late filing of an alibi notice, stating:

> Defendant argues that the trial court erred when it denied his request to file a notice of alibi on the second day of trial. We review the trial court's decision whether to permit a defendant to introduce alibi evidence when the defendant failed to comply with the notice-of-alibi statute, MCL 768.20(1), for an abuse of discretion. *People v Travis*, 443 Mich 668, 679-680; 505 NW2d 563 (1993). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).
>
> A defendant, if he wants to present an alibi defense, is required to file notice of the alibi at least ten days before trial. MCL 768.20(1). Defendant did not request to file a notice of alibi until the second day of trial. We conclude that the trial court did not abuse its discretion in denying defendant's request to file a late notice of alibi. *Travis*, 443 Mich at 679-680.

The late notice resulted in prejudice to the prosecutor. The prosecutor did not have time to have the alibi witness interviewed or investigated or to find rebuttal alibi witnesses. The trial court accepted defense counsel's assertion that he did not learn of a potential alibi defense until January 20, 2011, when he reviewed defendant's January 13, 2011, letter. Defense counsel had represented defendant since the preliminary examination in September 2010, and no reason was provided for defendant's late disclosure of alibi witnesses. Further, defense counsel deemed it unwise to present an alibi defense. Not only was he concerned about the subornation of perjury, but he also did not believe that an alibi defense was a good strategic approach. Under these circumstances, the trial court's decision to deny defendant's request to file a late notice of alibi fell within the range of reasonable and principled outcomes. *Unger*, 278 Mich App at 217.

Defendant focuses his argument on defense counsel's statement to the trial court that presenting the alibi witnesses raised an ethical dilemma regarding the subornation of perjury. According to the defendant, defense counsel's statement was improper because counsel essentially told the trial court that he did not believe defendant. However, because defendant presents no legal authority in support of the claim that defense counsel made an improper statement, the argument is

> abandoned. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Regardless, the argument does not address whether the trial court, after hearing from defense counsel, defendant, and the prosecutor, abused its discretion in denying defendant's request to file a late notice of alibi.

Michigan Court of Appeals Opinion, PageID.24-25, ECF No. 1 (footnote omitted).

The Supreme Court affirmed that a defendant's "right to present his own witnesses to establish a defense . . . is a fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 19 (1967). However, the Court has also outlined the proper limitations of this right:

> A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions. . . . A defendant's interest in presenting such evidence may thus bow to accommodate other legitimate interests in the criminal trial process. . . . As a result, state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not arbitrary or disproportionate to the purposes they are designed to serve.

United States v. Scheffer, 523 U.S. 303, 308 (1998) (citations, quotation marks, and footnote omitted). *See also Taylor v. Illinois*, 484 U.S. 400, 411 (1988) ("The State's interest in the orderly conduct of a criminal

trial is sufficient to justify the imposition and enforcement of firm, though not always inflexible, rules relating to the identification and presentation of evidence.").

In particular, the Supreme Court upheld a state's notice-of-alibi rule as constitutional where that rule was found to be "carefully hedged with reciprocal duties requiring state disclosure to the defendant. Given the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh-hour defense is both obvious and legitimate." *Williams v. Florida*, 399 U.S. 78, 81 (1970). *See also Wardius v. Oregon*, 412 U.S. 470, 472 (1973) (holding enforcement of alibi rules unconstitutional "unless reciprocal discovery rights are given to criminal defendants"). Judges applying these rules are given "wide latitude to exclude evidence that is repetitive . . ., only marginally relevant or poses an undue risk of harassment, prejudice, [or] confusion of the issues." *Crane v. Kentucky*, 476 U.S. 683, 689-90 (1986) (quotations omitted).

The applicable Michigan statute, Mich. Comp. Laws § 768.20, provides not only discovery rights to a defendant; it also requires that a defendant "file and serve upon the prosecuting attorney a notice in writing of his intention to claim that defense" "no less than 10 days before the trial of the case." Mich Comp. Laws § 768.20(1). An exception to this rule is the "showing by the moving party that the name of an additional witness was not available when the notice required by subsection (1) . . . was filed and could not have been available by the exercise of due diligence, the additional witness may be called." *Id.* 768.20(3).

Petitioner did not comply with this rule or the exception when he requested to file a notice on the second day of trial for three alibi witnesses. That included Petitioner's parents and girlfriend. PageID.519-520, ECF 14-4. The Petitioner's motion, accepting counsel's assertion that he only learned of these alibi witnesses less than a week before trial and taking into account counsel's reluctance to use these witnesses out of concerns about perjury and trial tactics. PageID.533-534, ECF 14-4.

Defense counsel's concerns about perjury and trial tactics were validated at Petitioner's *Ginther* hearing in May 2012. At that hearing, Petitioner's alibi witnesses, his mother, father, and girlfriend, contradicted Petitioner's own testimony about his whereabouts during the time of the crimes. Petitioner's parents and girlfriend claimed under oath that Petitioner was locked up at their house after his 9 PM curfew on the night of the crime. PageID.838, 853, 855, 859, 866. ECF No. 14-8. However, Petitioner claimed in his trial testimony that after spending some time with his uncle at the place of the crime, at the time of the crime, he first got home "[p]robably around like 11, 12, something like that." PageID.696-698, ECF No. 14-5. His uncle's trial testimony also placed him there past his alleged curfew. PageID.665-666, ECF No. 14-5. At his *Ginther* hearing, Petitioner admitted that his parents' sworn testimony was false. PageID.901-902, ECF No. 14-8.

Petitioner argues that alibi witnesses would have provided his defense. PageID.1028, ECF No. 14-9. However, given the contradictory evidence presented at the *Ginther* hearing validating trial counsel's

concerns, Petitioner failed to produce any credible evidence demonstrating that the three alibi witness he intended to call at trial would have provided exculpatory testimony. The Michigan Court of Appeals decision, therefore, was not contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States; or did not result in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

The Michigan Court of Appeals also rejected Petitioner's claim regarding his motion for a new trial based on ineffective counsel stating:

> Defendant argues that the trial court erred in denying his motion for a new trial based on ineffective assistance of counsel. We review the trial court's decision on a motion for a new trial for an abuse of discretion. *People v Kevorkian*, 248 Mich App 373, 410; 639 NW2d 291 (2001). However, the determination whether a defendant was denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). A trial court must first find the facts and then decide whether those facts constitute a violation of the defendant's right to effective assistance. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court's findings of fact for clear error, but review de novo questions of constitutional law. *Id.*

"Effective assistance of counsel is presumed, and the defendant bears the heavy burden of proving otherwise." *People v Noble*, 238 Mich App 647, 661-662; 608 NW2d 123 (1999). To establish a claim for ineffective assistance of counsel, a defendant must show that counsel's performance fell below objective standards of reasonableness and that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceedings would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008).

First, the defendant claims that defense counsel was ineffective for not investigating his alibi defense, filing a notice of alibi, and calling the alibi witness at trial. Defendant relies on his and his mother's testimony at the *Ginther* hearing that counsel was told of the alibi witnesses before January 2011. However, the trial court did not believe defendant and his mother. Rather, it found defense counsel, and his version of defendant's assertion of this alibi defense, credible. It found that no alibi witness ever told defense counsel that defendant was with him or her on March 6 or 7, 2010, and that the alibi defense was not established until less than a week before trial. We must defer to the credibility determination of the trial court, which had a superior opportunity to judge the credibility of the witnesses. MCR 2.613(C); *Peope v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). Defendant makes no argument

that the trial court, after having found defense counsel credible, still erred in determining that counsel was not ineffective for failing to develop an alibi defense. Accordingly, defendant's claim that defense counsel was ineffective for failing to investigate and present an alibi defense is without merit. Defendant has not shown that his counsel's performance fell below an objective standard of reasonableness. *Uphaus (On Remand)*, 278 Mich App at 185.

Second, defendant claims that defense counsel was ineffective for failing to investigate the criminal backgrounds of Marcus Hughes and [Victor] Sawyer. According to defendant, Hughes and Sawyer could have been impeached with prior criminal convictions. However, not all convictions may be used to impeach a witness. Only convictions for crimes that contain an element of dishonesty or false statement or contain, in part, an element of theft may be used to impeach a witness. MRE 609(a). Defendant presented no evidence at the *Ginther* hearing that either Hughes or Sawyer had a conviction that could have been used to impeach him. Accordingly, defendant has not established the factual predicate of the claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Third, defendant claims that defense counsel was ineffective for failing to impeach Joshua with statements that he had made to the police. However, defendant has not identified

any statements in police reports that defense counsel failed to use to impeach Joshua. Accordingly, defendant has not shown that defense counsel's cross-examination of Joshua fell below objective standards of reasonableness. *Uphaus (On Remand)*, 278 Mich App at 185.

Fourth, defendant claims that defense counsel was ineffective for failing to alert the trial court to his learning disability and other problems at sentencing. However, through the presentencing and investigation report (PSIR) and from defense counsel's statements, the trial court learned that defendant has a learning disability and a very difficult time reading and writing and that, when he was in high school, defendant attended special education classes. Defendant does not identify any additional statements defense counsel should have made. Accordingly, defendant has not shown that defense counsel's performance at sentencing fell below objective standards of reasonableness. *Id.*

Fifth, defendant argues that defense counsel was ineffective for failing to obtain telephone records for the telephone number that called Tim's telephone. At trial, Detective Wesley Smigielski testified that the telephone number belonged to a "Boost phone" and, because there was no contract for the telephone, there were no records for it. Because no records existed for the telephone number, defense counsel's performance in

> failing to obtain the records did not fall below objective standards of reasonableness. *Id.*
>
> Sixth, defendant argues that defense counsel was ineffective for failing to obtain surveillance video from Wal-Mart. However, defendant did not present any evidence at the *Ginther* hearing to suggest that surveillance video from March 7, 2010, was still in existence at the time he was arrested, which was five months after the criminal offenses occurred. Defendant, therefore, has not established the factual predicate of his claim. *Hoag*, 460 Mich at 6.
>
> The trial court did not abuse its discretion in denying defendant's motion for a new trial. *Kevorkian*, 248 Mich App at 410. The ineffective assistance of counsel claims that defendant raised in the motion are without merit.

Michigan Court of Appeals Opinion, PageID.25-27, ECF No. 1 (footnote omitted)

In *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984), the Supreme Court established a two-prong test by which to evaluate claims of ineffective assistance of counsel. To establish a claim of ineffective assistance of counsel, the petitioner must prove: (1) that counsel's performance fell below an objective standard of reasonableness; and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome. A court considering a claim of ineffective assistance must "indulge a strong

presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. The defendant bears the burden of overcoming the presumption that the challenged action might be considered sound trial strategy. *Id.* (citing *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)); *see also Nagi v. United States*, 90 F.3d 130, 135 (6th Cir. 1996) (holding that counsel's strategic decisions were hard to attack). The court must determine whether, in light of the circumstances as they existed at the time of counsel's actions, "the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. Even if a court determines that counsel's performance was outside that range, the defendant is not entitled to relief if counsel's error had no effect on the judgment. *Id.* at 691.

Moreover, as the Supreme Court recently has observed, while "'[s]urmounting *Strickland*'s high bar is never an easy task,' . . . [e]stablishing that a state court's application was unreasonable under § 2254(d) is all the more difficult." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quoting *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010)). Because the standards under both *Strickland* and § 2254(d) are highly deferential, "when the two apply in tandem, review is 'doubly' so." *Harrington*, 562 U.S. at 105 (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)). In those circumstances, "[t]he question before the habeas court is "whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.*

Petitioner raises again his alibi defense under his ineffective defense claim: During his *Ginther* hearing, Petitioner claimed that he "told his attorney about alibi witnesses in sufficient time so there could and should have been an alibi defense." PageID.1032, ECF No. 14-9. *See* PageID.881-882, 890-891, ECF No. 14-8. However, the judge presiding at that hearing did not find this claim credible, holding instead that Petitioner's credibility "is clearly compromised and suspect" and that, before or during trial, Petitioner's alibi witnesses "NEVER told [counsel] that the Defendant was with them at the time of the offense." PageID.988, ECF No. 14-9. Additionally, the judge held that "the result would have been disastrous," if trial counsel had raised the alibi defense demanded by Petitioner at trial. *Id.* Accordingly, the judge did not find counsel's assistance deficient under *Strickland*. Moreover, given that "[t]he evidence against Defendant was overwhelming" at trial, the judge also did not find counsel's performance prejudicial. PageID.989, ECF No. 14-9.

Petitioner also raises counsel's alleged failure to investigate the criminal background of two of the witnesses that testified against Petitioner and use that background to impeach them at trial. PageID.1033, ECF No. 14-9. However, Petitioner failed to show that these two witnesses had committed any impeacheable offenses under MRE 609. Petitioner also raises counsel's alleged failure to impeach the victim by using statements allegedly made by the victim "in different police reports." PageID.1033, ECF 14-9. However, Petitioner provides no evidence concerning the contents of these statements; he also fails to demonstrate that the victim ever actually

made those impeaching statements to the police. Petitioner also claims that counsel was ineffective for not raising Petitioner's "learning disability and . . . other problems" at sentencing. *Id.* However, the record of the sentencing hearing shows that counsel raised as an attenuating circumstance that Petitioner "has a learning disability and has difficulty reading and writing." PageID.794, ECF No. 14-6. Petitioner has not demonstrated what else counsel could have done to raise this issue more effectively.

Petitioner also claims that counsel was ineffective for not obtaining the phone records of the phone used to make the critical phone calls to the victim's father. PageID.1033, ECF No. 14-9. However, the investigating detective testified at trial that, while the voice mail on that phone identified Petitioner as its owner, the detective was not able to obtain any phone records because it was a "Boost phone" without a contract. PageID.598-599, ECF No. 14-4. Petitioner has not shown that there was a record for the phone in question and that this record would have been exculpatory. Petitioner finally claims that counsel was ineffective for not obtaining a certain piece of surveillance footage deemed critical by Petitioner. At the *Ginther* hearing, trial counsel not only addressed his tactical decision not to use the footage; he also testified that, based on a police report, he was led to believe that the footage "did not exist by the time it became a subject." PageID.926-927, ECF No. 14-8. Petitioner has not provided any evidence demonstrating that this tape existed and that it would have been exculpatory. The Michigan Court of Appeals decision, therefore, was not contrary to, or involved an unreasonable application of, clearly

established federal law as determined by the Supreme Court of the United States; or did not result in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

Petitioner claims that his sentences were invalid because they were based on improper scoring of the legislatively imposed sentencing guidelines, use of an incorrect burden of proof, and insufficient facts. He furthermore claims that scoring the guidelines correctly would require resentencing. Afer reviewing Petitioner's sentencing claims in great detail, the Michigan Court of Appeals rejected Petitioner's claims, concluding:

> Because the trial court did not abuse its discretion in scoring any of the offense variables for defendant's conviction for extortion, we affirm defendant's sentences for extortion and unlawful imprisonment. We also affirm defendant's sentence for delivery of a controlled substance less than 50 grams without even determining whether the trial court erred in scoring the relevant offense variables . . . for this specific conviction. See *Eller v Metro Indus Contracting, Inc*, 261 Mich App 569, 571; 683 NW2d 242 (2004) (stating that an issue is moot and should not be reached if a court cannot fashion a remedy). Defendant's minimum sentence for delivery of a controlled substance is 38 months, which is far shorter than defendant's minimum sentence of 150 months for extortion. Even if we were to vacate defendant's sentence for

> delivery of a controlled substance and remand for resentencing, defendant would not be granted any practical relief. Regardless whether defendant's sentence is 38 months or any shorter length, defendant is required, based on his sentence for extortion, to serve a minimum of 150 months' imprisonment.

Michigan Court of Appeals Opinion, PageID.31, ECF No. 1.

Claims concerning the improper scoring of sentencing guidelines are state-law claims and typically are not cognizable in habeas corpus proceedings. *See Hutto v. Davis*, 454 U.S. 370, 373- 74 (1982) (federal courts normally do not review a sentence for a term of years that falls within the limits prescribed by the state legislature); *Austin v. Jackson*, 213 F.3d 298, 301-02 (6th Cir. 2000) (alleged violation of state law with respect to sentencing is not subject to federal habeas relief); *Cheatham v. Hosey*, No. 93-1319, 1993 WL 478854, at *2 (6th Cir. Nov. 19, 1993) (departure from sentencing guidelines is an issue of state law, and, thus, not cognizable in federal habeas review); *Cook v. Stegall*, 56 F. Supp. 2d 788, 797 (E.D. Mich. 1999) (the sentencing guidelines establish only rules of state law). Moreover, a criminal defendant has "no federal constitutional right to be sentenced within Michigan's guideline minimum sentence recommendations." *Doyle v. Scutt*, 347 F. Supp. 2d 474, 485 (E.D. Mich. 2004); *accord Lovely v. Jackson*, 337 F. Supp. 2d 969, 977 (E.D. Mich. 2004); *Thomas v. Foltz*, 654 F. Supp. 105, 106-07 (E.D. Mich. 1987).

Although state law errors generally are not reviewable in a federal habeas proceeding, an alleged

violation of state law "could, potentially, 'be sufficiently egregious to amount to a denial of equal protection or of due process of law guaranteed by the Fourteenth Amendment.'" *Koras v. Robinson,* 123 F. App'x 207, 213 (6th Cir. Feb. 15, 2005) (citing *Bowling v. Parker*, 344 F.3d 487, 521 (6th Cir. 2003)). *See also Doyle*, 347 F. Supp. 2d at 485 (a habeas court "will not set aside, on allegations of unfairness or an abuse of discretion, terms of a sentence that is within state statutory limits unless the sentence is so disproportionate to the crime as to be completely arbitrary and shocking.") (citation omitted).

The Supreme Court has also held that, to meet constitutional standards of due process, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (1999). In *Blakely v. Washington*, 542 U.S. 296, 303 (2004), the Supreme Court explained that " that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." While the Court is, thus, concerned about exceeding the statutory maximum by facts not proven to a jury beyond a reasonable doubt, it does not recognize a constitutional right requiring the same burden of proof for a sentence that does not exceed this limit. *Harris v. United States*, 536 U.S. 545, 566 (2002).[1]

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[1] The Court is aware that *Harris* has been overruled by the Supreme Court in *Alleyne v. United States*, 133 S. Ct. 2151, 2155

Petitioner's sentence clearly is not so disproportionate to the crime as to be arbitrary or shocking. *Doyle*, 347 F. Supp. 2d at 485. Furthermore, Petitioner's sentences do not exceed the statutory maximum. Instead, Petitioner argues only that the court's sentencing was not sufficiently supported by facts proved to a jury beyond a reasonable doubt but was based, instead, on "judicial fact-finding." PageID.1038, ECF 14-9. Such claims clearly fall far short of the sort of egregious circumstances implicating due process. The state-court's rejection of Petitioner's claim was not based on an unreasonable determination of the facts and was neither contrary to nor an unreasonable application of established Supreme Court precedent.

Petitioner claims that he was denied his federal and state due process rights because he was not arraigned on the charges in the felony information brought against him and did not waive his right to an arraignment. The Michigan Court of Appeals reviewed and rejected Petitioner's claim stating:

> In his pro per brief, defendant argues that he was denied due process of law because he was not arraigned on the charges in the information and he did not waive arraignment. Because this claim of error was not raised before the trial court, it is unpreserved for appellate review. *People v*

(2013). However, since Petitioner was sentenced in 2011, *Harris* still controls this sentence. *See In re Mazzio*, 756 F.3d 487, 491 (6th Cir.2014) (holding that "*Alleyne* does not apply retroactively to cases on collateral review") and *Floyd v. Palmer*, No. 13-10050, 2015 WL 4877423, at *8-9 (E.D. Mich. Aug. 14, 2015).

Matamora Water Serv, Inc, 276 Mich App 376, 382; 741 NW2d 61 (2007). We review unpreserved claims of error for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The purpose of an arraignment is to provide the defendant with formal notice of the charges against him. *People v Waclawski*, 286 Mich App 634, 706; 780 NW2d 321 (2009). At arraignment on the information, the "court must either state to the defendant the substance of the charge contained in the information or require the information to be read to the defendant." MCR 6.113(B). However, a defendant may not be entitled to be arraigned on the information. MCR 6.113(E) provides that "[a] circuit court may submit to the State Court Administrator pursuant to MCR 8.112(B) a local administrative order that eliminates arraignment for a defendant represented by an attorney, provided other arrangements are made to give the defendant a copy of the information." In December 2007, the Berrien Circuit Court issued Administrative Order 2007-05, which states that "[i]n all cases where the defendant is represented by an attorney, the Court need not conduct an arraignment on the information." Accordingly, because defendant was represented by an attorney, his right to be arraigned on the information was eliminated.

> This was no plain error. *Carines*, 460 Mich at 763.
>
> In addition, defendant's claim that he never received notice of the charges against him before trial commenced is contradicted by the lower court record. Defendant was arraigned on the complaint and warrant and had a preliminary examination. At the conclusion of the preliminary examination, after it bound defendant over for trial, the court stated, "I have a not guilty plea entered without formal arraignment; that is entered at this time, along with a jury demand." Defendant, on the day of the preliminary examination, signed a document captioned "Defendant's entry of plea of not guilty without arraignment (M.C.R. 6.113)." By signing the document, defendant agreed, in part, that he had received and read a copy of the complaint, warrant, or information; understood the substance of the charges against him; waived arraignment in open court; pleaded not guilty; and demanded a jury trial. Defendant knew of the charges against him before trial commenced.

Michigan Court of Appeals Opinion, PageID.31-32, ECF No. 1.

The Constitution requires that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation." U.S. Const. amend. VI; *see Lucas v. O'Dea*, 179 F.3d 412, 417 (6th Cir. 1999). However, it does not require the specific procedure of arraignment

as long as a defendant's right to notice is satisfied by other means. *Redwine v. Renico*, No. Civ. 01–CV–74802–DT, 2002 WL 31245256, at *3 (E.D. Mich. Sept. 30, 2002).

Petitioner claims that the trial court record does not show that he "had notice of the charges in this matter prior to the commencement of his jury trial," although he admits that "the record indicates that Defendant was arraigned on a 'complaint and warrant' in the district court." PageID.1080-1081, ECF No. 14-9. *See* PageID.179, ECF 14-1 (Petitioner's Berrien County Docket Sheet recording "DEFENDANT IN COURT . . . DEFNDT ADV OF CONTENT OF C&W"). Petitioner, furthermore, admits in ¶ 5 of his Affidavit that "[a]t the conclusion of the preliminary examination I was told by the Court and my attorney that I was being bound over for trial on the charges in the complaint and warrant." PageID.1162, ECF No. 14-9. *See* PageID.180, ECF No. 14-1 (recording "PRELIMINARY EXAM HELD AS TO COUT 1, 2, 3, 4 . . . DEFN W/ATTY IN COURT").

Moreover, as the Michigan Court of Appeals noted, Petitioner, on the day of his preliminary examination, signed a document captioned "Defendant's entry of plea of not guilty without arraignment (M.C.R. 6.113)." *See* Page.ID.180, ECF No. 14-1 (recording "DEFN ENTRY PLEA N/GUILTY"). The trial judge referred to the contents of this document at the end of Petitioner's preliminary examination. PageID.222, ECF No. 14-2. Therefore, Petitioner was aware of the charges against him well before his trial. The the state appellate court's rejection of Petitioner's claim was not based on an

unreasonable determination of the facts and was neither contrary to nor an unreasonable application of established Supreme Court precedent.

Petitioner claims that the trial court violated his due process rights by refusing to appoint substitute counsel where a conflict developed over fundamental trial tactics and defense trial counsel failed to subpoena exculpatory witnesses despite repeated demand. The Michigan Court of Appeals reviewed and rejected Petitioner's claims stating:

> Next, defendant argues that the trial court erred in denying his request for substitute counsel. "The decision regarding substitution of counsel is within the sound discretion of the trial court and will not be upset on appeal absent a showing of an abuse of that discretion." *People v Jesse Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991).
>
> Defendant claims that he requested substitute counsel after he and defense counsel disagreed about trial strategy. He wanted to pursue an alibi defense, but defense counsel refused to investigate and pursue the defense. However, in his November 2010 letter to the trial court, defendant did not indicate that he wanted a new attorney because he and defense counsel disagreed about an alibi defense. Rather, defendant told the trial court that he did not feel comfortable with defense counsel as his attorney because he smelled alcohol on defense counsel's breath and because he had not heard from defense counsel after he had told defense counsel that

he had new evidence and new witnesses, whom he had not previously been able to contact because they had been out of town, and had requested that counsel file a "motion to discover."

Based on the record, especially the testimony at the *Ginther* hearing, it would be unreasonable for us to conclude that the new witnesses referenced in defendant's letter were the alibi witnesses. At the *Ginther* hearing, defendant testified that he told defense counsel about his alibi witnesses every time that counsel came to see him. There is no indication that the alibi witnesses were ever out of town or that defendant had not been able to contact them. Defendant's mother and his girlfriend had been in contact with defendant while he was at jail. In addition, a conclusion that the "new witnesses" referenced in defendant's letter were not the alibi witnesses is consistent with the trial court's factual findings at the conclusion of the *Ginther* hearing. The trial court found that defendant had not informed defense counsel of an alibi defense until shortly before trial.

Accordingly, defendant has failed to establish that the trial court abused its discretion in denying his request for substitute counsel. *Mack*, 190 Mich App at 14. The trial court's decision not to appoint substitute counsel based on a disagreement of which it was never apprised did not fall outside the range of

> reasonable and principled outcomes. *Unger*, 278 Mich App at 217.

Michigan Court of Appeals Opinion, PageID.32-33, ECF No. 1.

The Sixth Amendment guarantees the right to assistance of counsel in criminal proceedings to ensure that the criminal defendant receives a fair trial. *Wheat v. United States*, 486 U.S. 153, 158-159 (1988). The inquiry focuses on the adversarial relationship and whether the defendant is represented by an effective advocate, as opposed to the defendant's personal relationship with his lawyer. *Id.*, *Morris v. Slappy*, 461 U.S. 1 (1983). Moreover, an indigent defendant must show "good cause" to warrant substitution of his appointed counsel. *United States v. Mooneyham*, 473 F.3d 280, 291 (6th Cir. 2007).

Petitioner has failed to show that he was represented by an ineffective advocate. Petitioner asserts that counsel was ineffective for failing to present the alibi defense and that Petitioner had requested substitute counsel in a November 2010 letter to the court. PageID.1086, ECF No. 14-9. However, as the Michigan Court of Appeals noted: Petitioner's letter to the court requesting substitute counsel was not about irreconcilable conflicts regarding trial strategy, but was mainly based on Petitioner's not feeling comfortable with defense counsel. Thus, Petitioner has failed to show good cause warranting substitution of his appointed counsel. He also failed to establish that the trial court was aware of any substantive conflicts between him and trial counsel. The Michigan Court of Appeals'

decision rejecting Petitioner's claim is supported by clearly established federal law and based on a reasonable application of the facts.

Petitioner claims that he was denied state and federal constitutional due-process and fair-trial rights when he was shackled during trial. The Michigan Court of Appeals considered and rejected Petitioner's claims stating:

> Defendant also argues that the trial court erred when it ordered that he be shackled during trial. We review a trial court's decision to restrain a defendant for an abuse of discretion. *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996).
>
> The right to a trial includes, absent extraordinary circumstances, the right to be free from shackles in the courtroom. *People v Payne*, 285 Mich App 181, 186; 774 NW2d 714 (2009). A defendant may only be shackled on a finding, supported by record evidence, that shackling is necessary to prevent escape or injury to persons in the courtroom or to maintain order. *People v Dunn*, 446 Mich 409, 425; 521 NW2d 255 (1994). Even if a trial court abuses its discretion when it orders that a defendant be shackled, the defendant, to be entitled to relief, must show that he suffered prejudice. *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008). "[A] defendant is not prejudiced if the jury was unable to see the shackles on the defendant." *Id.*

> We conclude that the trial court did not abuse its discretion in ordering that defendant be shackled during trial. *Dixon*, 217 Mich App at 404- 405. The trial court ordered that defendant be shackled only after it found that defendant was a flight risk after conducting an evidentiary hearing. As shown by defendant's jail records, defendant had attempted to place himself in situations where an escape could be possible, such as a hospital or a jail cell with exterior windows. Defendant's manipulation attempts, along with defendant's history of not appearing for court, his anger when learning that no one would help him post bond, and his uncooperative behavior toward officers in jail, support the trial court's finding that defendant was a flight risk. The trial court's order that defendant be shackled was not based merely on the preference of a law enforcement officer. See *People v Banks*, 249 Mich App 247, 257-258; 642 NW2d 351 (2002). Accordingly, the trial court's decision that defendant be shackled during trial did not fall outside the range of reasonable and principled outcomes. *Unger*, 278 Mich App at 217.

Michigan Court of Appeals Opinion, PageID.33, ECF No. 1.

The Supreme Court has rejected the routine use of shackles because "the Fifth and Fourteenth Amendments prohibit the use of physical restraints *visible to the jury* absent a trial court determination, in the exercise of its discretion, that they are justified

by a state interest *specific to a particular trial*. Such a determination may of course take into account the factors that courts have traditionally relied on in gauging potential security problems and the risk of escape at trial." *Deck v. Missouri*, 544 U.S. 622, 629 (2005) (emphasis added); *See Lakin v. Stine*, 431 F.3d 959, 963 (6th Cir. 2005).

To determine the appropriateness of shackling decisions, the Sixth Circuit considers the following four factors: "(1) the defendant's record, his temperament, and the desperateness of his situation; (2) the state of both the courtroom and the courthouse; (3) the defendant's physical condition; and (4) whether there is a less prejudicial but adequate means of providing security." *Larkin*, 431 F.3d at 964. The nature of the charges against a defendant cannot, by itself, justify shackling. *Id.* at 964-65.

Petitioner failed to demonstrate that the jurors actually saw the shackles he was wearing during trial. The court expressly addressed this issue following the evidentiary hearing to determine the need for shackles and asked Petitioner to be "cooperative in that you not be jangling any chains or shackles around to upset what we're trying to prevent [the jury becoming aware that Petitioner was shackled.]" PageID.254, ECF No. 14-3. Furthermore, this evidentiary hearing was held in the absence of potential jurors. PageID.226, ECF No. 14-3.

During the hearing, the trial court heard testimony concerning Petitioner's apprehension and uncooperative, manipulative conduct in prison. It also considered Petitioner's prior uncooperative conduct in failing to show up in court while released on bond as

well as the lower security available in the courthouse, concluding that "[u]nder the totality of circumstances, the court is satisfied that the defendant is an escape risk." It therefore granted the prosecution's motion to keep Petitioner shackled during trial. PageID.252-254, ECF No. 14-3. Petitioner's contention that the court's findings were not "reasonable" is not supported by the record before this Court. The record shows that the trial court evaluated the need for shackles based on considerations consistent with the above-mentioned factors used by the Sixth Circuit. Therefore, the appellate court's rejection of Petitioner's claim was not based on an unreasonable determination of the facts and was neither contrary to nor an unreasonable application of established Supreme Court precedent.

Petitioner claims that he was denied a fair trial through the prosecution's withholding of crucial evidence with respect to the full extent of the plea deal offered to Petitioner's codefendant in exchange for testimony against Petitioner at trial. The Michigan Court of Appeals considered and rejected Petitioner's claim stating:

> Defendant argues that the prosecutor violated *Maryland v Brady*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), when she failed to disclose that Sawyer's plea agreement included the dismissal of drug charges in an unrelated case. This claim of prosecutorial misconduct is unpreserved because it was not raised before the trial court. See *Metamora Water Serv, Inc*, 276 Mich App at 382. We review unpreserved claims of prosecutorial

misconduct for plain error affecting the defendant's substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

Pursuant to Brady, a defendant has a due process right to obtain evidence that is in the possession of the prosecution if the evidence is favorable to the accused and material to guilt or punishment. *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994). In claiming that Sawyer's plea agreement included the dismissal of drug charges in an unrelated case, defendant relies on defense counsel's testimony from the *Ginther* hearing. However, defense counsel's testimony was ambiguous whether Sawyer's plea agreement included the dismissal of an unrelated drug charge. Although counsel seemed to believe that a drug charge against Sawyer in an unrelated case was dismissed, he could not recall whether the dismissal was related to Sawyer's plea agreement. Accordingly, defense counsel's testimony does not establish that Sawyer's plea agreement included the dismissal of a drug in an unrelated case.[7] Accordingly, there was no prosecutorial misconduct constituting plain error. *Ackerman*, 257 Mich App at 448.

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[7] In addition, even if the dismissal of a drug charge was part of Sawyer's plea agreement, because defense counsel's testimony indicates that counsel knew of the dismissal, the

> testimony does not establish that the prosecutor suppressed evidence of the dismissal. See *People v Lester*, 232 Mich App 262, 282; 591 NW2d 267 (1998).

Michigan Court of Appeals Opinion, PageID.33-34, ECF No. 1.

It is a violation of due process of law when the prosecution suppresses "evidence favorable to an accused upon request . . . where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Favorable evidence includes evidence impeaching a witness. *United States v. Bagley*, 473 U.S. 667, 676 (1985) (citing *Napue v. Illinois*, 360 U.S. 264, 269 (1959)). Favorable evidence "is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682.

In order for a petitioner to be entitled to habeas relief on the basis of prosecutorial misconduct, the petitioner must demonstrate that the prosecutor's improper conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). "[T]he touchstone of due process analysis . . . is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219 (1982)). In evaluating the impact of the prosecutor's misconduct,

a court must consider the extent to which the claimed misconduct tended to mislead the jury or prejudice the petitioner, whether it was isolated or extensive, and whether the claimed misconduct was deliberate or accidental. *See United States v. Young*, 470 U.S. 1, 11-12 (1985). The court also must consider the strength of the overall proof establishing guilt, whether the conduct was objected to by counsel and whether a curative instruction was given by the court. *See id.* at 12-13; *Darden*, 477 U.S. at 181-82; *Donnelly*, 416 U.S. at 646-47; *Berger v. United States*, 295 U.S. 78, 84-85 (1935).

Petitioner, claims that the Prosecution failed to disclose "the full scope of its deal with Mr. Sawyer to the defense" because there is "nothing in the record indicating that the prosecution disclosed" this deal fully. PageID.1101, ECF No. 14-9. Petitioner claims that Mr. Sawyer, the witness in question, was not only given a plea deal regarding his involvement in the events leading to Petitioner's conviction – the witness testified about this deal during Petitioner's trial, PageID.578- 579, ECF No. 14-4 – but that he also made another deal with the government to get "drug charges in an unrelated case dismissed in exchange for his testimony against [Petitioner] at trial." PageID.1100, ECF No. 14-9.

Petitioner bases this claim on (a) what Petitioner allegedly learned "shortly after arriving in prison" and (b) trial counsel's testimony during Petitioner's *Ginther* hearing. PageID.1100-1101, ECF No. 14-9. However, the record of Petitioner's *Ginther* hearing shows that, at best, trial counsel's statements do not corroborate Petitioner's claim that there was "another

deal" with Sawyer. When Petitioner's appellate counsel erroneously asked Petitioner's trial counsel about whether "Mr. Hughes" was "involved in getting a plea bargain in another case," trial counsel stated: "That part, I don't recall. I know he did not get charged in this case." Petitioner's appellate counsel then corrected himself, "Victor Sawyer's plea bargain's what I'm talking about," and asked trial counsel: "Do you remember what the plea bargain was?" Trial counsel answered: "Not without looking at the transcripts, no." After looking at the trial transcript, trial counsel admitted to the prosecutor that "the jury was able to hear" that there "was a plea agreement, in fact, with Victor Sawyer." PageID.934-936, ECF No. 14-8. The issue of "another deal" for Sawyer did not come up again at that hearing.

Therefore, Petitioner fails to show that there was impeaching evidence that the prosecution should have disclosed to the defense. Further, Petitioner fails to show that this evidence was favorable or material to his case. Therefore, the appellate court's rejection of Petitioner's claim was not based on an unreasonable determination of the facts and was neither contrary to nor an unreasonable application of established Supreme Court precedent.

Petitioner claims that due process requires vacating the trial court's assessment for court costs, fees, and restitution where the trial court failed to consider Petitioner's indigency and ability to pay. The Michigan Court of Appeals has considered and rejected Petitioner's claims stating:

> Because defendant did not object when the trial court ordered him to pay the fees, costs,

> and restitution, the claim of error is unpreserved, see *People v Dunbar*, 264 Mich App 240, 251; 690 NW2d 476 (2004), overruled on other grounds *People v Jackson*, 483 Mich 271; 769 NW2d 630 (2009), and we review it for plain error affecting defendant's substantial rights, *Carines*, 460 Mich at 763.
>
> Defendant's reliance on *Dunbar*, 264 Mich App at 254-255, where this Court held that a trial court must consider a defendant's ability to pay before it orders the defendant to pay the costs of his court-appointed attorney, is misplaced. The Supreme Court overruled *Dunbar* in *Jackson*, 483 Mich 271. In *Jackson*, the Supreme Court held that a defendant does not have a constitutional right to an assessment of his ability to pay before a fee for his court-appointed attorney is imposed. *Id.* at 290. According to the Supreme Court, a defendant is entitled to an ability-to-pay assessment, but the trial court need not conduct an assessment of a defendant's ability to pay until the imposition of the fee is enforced and the defendant objects to the enforcement. *Id.* at 292-293. Because defendant relies on Dunbar, he has failed to establish plain error. *Carines*, 460 Mich at 763.

Michigan Court of Appeals Opinion, PageID.34, ECF No. 1.

The purpose of federal habeas corpus proceedings is to obtain release from confinement "in violation of the Constitution or laws or treaties of the United

States." 28 U.S.C. § 2254(a). Petitioner's claims regarding court costs, fees, and restitution do not challenge his confinement. Therefore, Petitioner is not entitled to habeas relief on the basis of this claim. *See Fisher v. Booker*, No. 03-10029-BC, 2006 WL 2420229, at *9 (E.D. Mich. Aug. 22, 2006); *See also United States v. Watroba*, 56 F.3d 28, 29 (6th Cir. 1995). Petitioner claims that the trial court's order to remit prisoner funds for fines, costs, and assessments is in clear error. The Michigan Court of Appeals agreed with Petitioner and remanded for correction. PageID.34, ECF No. 1. Like Petitioner's previous claim, this claim is non-cognizable in a habeas corpus proceeding.

Petitioner, finally, claims that he was denied state and federal constitutional rights to effective counsel where his trial counsel failed to (1) insure that Petitioner was informed of the nature of the charges brought against him in the information; (2) move for a mistrial after it came to his attention that jurors might be aware that Petitioner was shackled; (3) investigate the specifics of the plea deal the prosecutor offered to Petitioner's co-defendant in change for his testimony; and (4) object to Petitioner's ability to pay restitution and court costs during the period of Petitioner's incarceration due to his indigency.

The Michigan Court of Appeals has reviewed and rejected this claim stating:

> Because no *Ginther* hearing has been held on the four claims of ineffective counsel raised in defendant's pro per brief, our review of the

claims is limited to errors apparent on the record. *Horn*, 279 Mich App at 38.

Defendant asserts that defense counsel was ineffective for failing to ensure that he was informed of the nature of the charges brought against him in the information. The basis of the claim is that defendant was never arraigned on the information and did not waive arraignment. However, as previously established, defendant's right to an arraignment on the information was eliminated. Accordingly, defense counsel's failure to ensure that defendant was arraigned on the information did not fall below objective standards of reasonableness. *Uphaus (On Remand)*, 278 Mich App at 185.

Defendant asserts that defense counsel was ineffective for failing to move for a mistrial when defendant brought it to his attention that some jurors might be aware that he was in shackles. However, as previously explained, nothing in the record indicates that any juror was aware of defendant's shackles. Accordingly, defendant has failed to establish the factual predicate of the claim. *Hoag*, 460 Mich at 6.

Defendant also claims that defense counsel was ineffective because counsel never made a "formal objection or argument" to the prosecutor's request that he be shackled during trial. However, because the trial court was aware of the circumstances under which it could order defendant to be shackled and

found that one of those circumstances existed, and because defendant has not identified any objection or argument that defense counsel should have made, defendant has not shown that counsel's performance fell below objective standards of reasonableness. *Uphaus (On Remand)*, 278 Mich App at 185.

Defendant argues that defense counsel was ineffective for failing to investigate the specifics of Sawyer's plea agreement. According to defendant, had counsel investigated the plea agreement, he would have learned that the agreement included the dismissal of drug charges in an unrelated case. However, as previously explained, nothing in the record establishes that the dismissal of any drug charge was included in Sawyer's plea agreement. Accordingly, defendant has failed to establish the factual predicate of the claim. *Hoag*, 460 Mich at 6.

Defendant claims that defense counsel was ineffective for failing to object, based on his inability to pay, to the trial court's order requiring him to pay fees, costs, and restitution. However, as previously established, defendant, at sentencing, was not entitled to an assessment of his ability to pay. Accordingly, any objection by defense counsel would have been meritless. Counsel is not ineffective for failing to make a futile motion. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Michigan Court of Appeals Opinion, PageID.34-35, ECF No. 1.

The highly deferential standards for reviewing claims of ineffective counsel in a habeas proceeding have been set forth above. Each of the issues that Petitioner raises in his final ineffective assistance of counsel are either without merit or non-cognizable. Therefore, the rejection of Petitioner's claim by the Michigan Court of Appeals was not based on an unreasonable determination of the facts and was neither contrary to nor an unreasonable application of established Supreme Court precedent.

Accordingly, the Petition is Dismissed.

In addition, if Petitioner should choose to appeal this action, a certificate of appealability is denied as to each issue raised by the Petitioner in this application for habeas corpus relief. Under 28 U.S.C. § 2253(c)(2), the court must determine whether a certificate of appealability should be granted. A certificate should issue if Petitioner has demonstrated a "substantial showing of a denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

The Sixth Circuit Court of Appeals has disapproved issuance of blanket denials of a certificate of appealability. *Murphy v. Ohio*, 263 F.3d 466 (6th Cir. 2001). Rather, the district court must "engage in a reasoned assessment of each claim" to determine whether a certificate is warranted. *Id.* Each issue must be considered under the standards set forth by the Supreme Court in *Slack v. McDaniel*, 529 U.S. 473 (2000). *Murphy*, 263 F.3d at 467.

Under *Slack*, 529 U.S. at 484, to warrant a grant of the certificate, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." The undersigned concludes that reasonable jurists could not find that a dismissal of each of Petitioner's claims was debatable or wrong. Therefore, the court will deny Petitioner a certificate of appealability as to each claim raised.

A Judgment consistent with this Memorandum and Order will be entered.

SO ORDERED.

Dated: 6/14/2016

/s/ R. Allan Edgar
R. ALLAN EDGAR
UNITED STATES
DISTRICT JUDGE

Order

Michigan Supreme Court
Lansing, Michigan

December 23, 2013

Robert P. Young, Jr.,
Chief Justice

147721

PEOPLE OF THE
STATE OF MICHIGAN,
Plaintiff-Appellee,

v

Michael F. Cavanagh
Stephen J. Markman
Mary Beth Kelly
Brian K. Zahra,
Bridget M. McCormack,
David F. Viviano,

Justices

SC: 147721
COA: 303236
Berrien CC:
2010-001540-FH

LOREN TROUEZE ROBINSON,
Defendant-Appellant.
_____/

On order of the Court, the application for leave to appeal the July 30, 2013 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

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

December 23, 2013 — *Larry S. Royster*
Clerk

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
July 30, 2013

v

No. 303236 Berrien Circuit Court
LC No. 2010-001540-FH

LOREN TROUEZE ROBINSON,

Defendant-Appellant.

Before: SAWYER, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of extortion, MCL 750.213; delivery of a controlled substance less than 50 grams, second offense, MCL 333.7401(2)(a)(iv); MCL 333.7413(2); unlawful imprisonment, MCL 750.349b; and aggravated assault, MCL 750.81a(1). The trial court sentenced defendant as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of 150 to 360 months for the extortion conviction, 38 to 480 months for the delivery of a controlled substance conviction, 120 to 270 months for the false imprisonment conviction, and 365 days for the aggravated assault

conviction. Defendant appeals as of right. We affirm defendant's convictions and sentences, but remand for correction of the order to remit prisoner funds.

I. SUFFICIENCY OF THE EVIDENCE

Defendant argues that his convictions were not supported by sufficient evidence. We review de novo challenges to the sufficiency of the evidence. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). We view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the prosecution proved the elements of the crime beyond a reasonable doubt. *Id.*

Most of defendant's argument is an attempt to reargue the credibility of the witnesses. Defendant claims that the victim, Joshua Karamalegos, was not a credible witness for numerous reasons, including that he lied to the police. Defendant also claims that Victor Sawyer, a codefendant, was not credible because Sawyer received a plea agreement and that his own testimony, because it was supported by the testimony of two witnesses, was credible. The credibility of the witnesses was a question for the jury, *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009), and we will not interfere with the jury's role in determining the credibility of the witnesses, *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). Accordingly, we reject defendant's attempts to reargue witness credibility.

Defendant claims that his convictions for extortion and unlawful imprisonment were not supported by sufficient evidence because there was no threat of harm against Joshua if he did not pay the

$1,000, his drug debt, to defendant. The crime of extortion requires the malicious communication of a threat, made with the intent to extort money or to obtain a pecuniary advantage, to injure a person or a person's property. MCL 750.213; *People v Fobb*, 145 Mich App 786, 790; 378 NW2d 600 (1985). The elements of unlawful imprisonment, as relevant to the present case, include the restraint of a person to facilitate the commission of another offense. *People v Railer*, 288 Mich App 213, 217; 792 NW2d 776 (2010). Joshua testified that, after he became persistent that he could not get the money unless he went back to Niles, Vincent Wiggins, codefendant, hit Joshua in the head and that, at some time, defendant told Joshua that he was not leaving until he paid the money. Then, as instructed, during one of the telephone calls with his father, Themelis (Tim) Karamalegos, Joshua told Tim that Tim would not see him again if he did not get the money. Defendant did not release Joshua until Tim exchanged the money. Viewing this evidence in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that a malicious threat was made to injure Joshua if $1,000 was not paid to defendant. *Cline*, 276 Mich App at 642.

Defendant also claims that his conviction for aggravated assault was not supported by sufficient evidence because there was no proof of a serious injury. The elements of aggravated assault include the infliction of serious or aggravated injury. MCL 750.81a(1). "A serious or aggravated injury is a physical injury that requires immediate medical treatment or that causes disfigurement, impairment of health, or impairment of a part of the body." CJI2d

17.6(4). Joshua testified that he blacked out each time Wiggins hit him. Joshua also testified that, when he learned he was being arrested after cocaine was found in his pants pocket, he refused a ride in an ambulance to the hospital and asked to be taken to jail. The jail nurse stated that Joshua had to go to the emergency room. The emergency room doctor testified that Joshua suffered a mild concussion and sustained multiple abrasions and contusions to his face. Viewing this evidence in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that Joshua suffered a serious or aggravated injury. *Cline*, 276 Mich App at 642.

II. NOTICE OF ALIBI

Defendant argues that the trial court erred when it denied his request to file a notice of alibi on the second day of trial. We review a trial court's decision whether to permit a defendant to introduce alibi evidence when the defendant failed to comply with the notice-of-alibi statute, MCL 768.20(1), for an abuse of discretion. *People v Travis*, 443 Mich 668, 679-680; 505 NW2d 563 (1993). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

A defendant, if he wants to present an alibi defense, is required to file notice of the alibi at least ten days before trial. MCL 768.20(1). Defendant did not request to file a notice of alibi until the second day of trial. We conclude that the trial court did not abuse its discretion in denying defendant's request to file a late notice of alibi. *Travis*, 443 Mich at 679-680. The

late notice resulted in prejudice to the prosecutor. The prosecutor did not have time to have the alibi witnesses interviewed or investigated or to find rebuttal alibi witnesses. The trial court accepted defense counsel's assertion that he did not learn of a potential alibi defense until January 20, 2011, when he reviewed defendant's January 13, 2011, letter. Defense counsel had represented defendant since the preliminary examination in September 2010, and no reason was provided for defendant's late disclosure of the alibi witnesses. Further, defense counsel deemed it unwise to present an alibi defense. Not only was he concerned about the subornation of perjury, but he also did not believe that an alibi defense was a good strategic approach. Under these circumstances, the trial court's decision to deny defendant's request to file a late notice of alibi fell within the range of reasonable and principled outcomes. *Unger*, 278 Mich App at 217.[1]

Defendant focuses his argument on defense counsel's statement to the trial court that presenting the alibi witnesses raised an ethical dilemma

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[1] We agree with defendant that he has a constitutional right to present a defense. See *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984). However, "[t]he accused must still comply with 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *Id.*, quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). MCL 768.20, which is "not intended as a disparagement of the [alibi] defense" but "to erect safeguards against its wrongful use and give the prosecution time and information to investigate the merits of such defense" *People v Merritt*, 396 Mich 67, 77; 238 NW2d 31 (1976) (quotations omitted), is designed to assure fairness and reliability in the verdict.

regarding the subornation of perjury. According to defendant, defense counsel's statement was improper because counsel essentially told the trial court that he did not believe defendant. However, because defendant presents no legal authority in support of the claim that defense counsel made an improper statement, the argument is abandoned. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Regardless, the argument does not address whether the trial court, after hearing from defense counsel, defendant, and the prosecutor, abused its discretion in denying defendant's request to file a late notice of alibi.

III. NEW TRIAL/INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that the trial court erred in denying his motion for a new trial based on ineffective assistance of counsel. We review a trial court's decision on a motion for a new trial for an abuse of discretion. *People v Kevorkian*, 248 Mich App 373, 410; 639 NW2d 291 (2001). However, the determination whether a defendant was denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). A trial court must first find the facts and then decide whether those facts constitute a violation of the defendant's right to effective assistance. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court's findings of fact for clear error, but review de novo questions of constitutional law. *Id.*

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving

otherwise." *People v Noble*, 238 Mich App 647, 661-662; 608 NW2d 123 (1999). To establish a claim for ineffective assistance of counsel, a defendant must show that counsel's performance fell below objective standards of reasonableness and that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceedings would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008).

First, defendant claims that defense counsel was ineffective for not investigating his alibi defense, filing a notice of alibi, and calling the alibi witnesses at trial. Defendant relies on his and his mother's testimony at the *Ginther*[2] hearing that counsel was told of the alibi witnesses before January 2011. However, the trial court did not believe defendant and his mother. Rather, it found defense counsel, and his version of defendant's assertion of the alibi defense, credible. It found that no alibi witness ever told defense counsel that defendant was with him or her on March 6 or 7, 2010, and that the alibi defense was not established until less than a week before trial. We must defer to the credibility determinations of the trial court, which had a superior opportunity to judge the credibility of the witnesses. MCR 2.613(C); *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). Defendant makes no argument that the trial court, after having found defense counsel credible, still erred in determining that counsel was not ineffective for failing to develop an alibi defense. Accordingly, defendant's claim that defense counsel was ineffective for failing to investigate and present an alibi defense

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[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

is without merit. Defendant has not shown that his counsel's performance fell below an objective standard of reasonableness. *Uphaus (On Remand)*, 278 Mich App at 185.

Second, defendant claims that defense counsel was ineffective for failing to investigate the criminal backgrounds of Marcus Hughes and Sawyer. According to defendant, Hughes and Sawyer could have been impeached with prior criminal convictions. However, not all convictions may be used to impeach a witness. Only convictions for crimes that contain an element of dishonesty or false statement or contain, in part, an element of theft may be used to impeach a witness. MRE 609(a). Defendant presented no evidence at the *Ginther* hearing that either Hughes or Sawyer had a conviction that could have been used to impeach him. Accordingly, defendant has not established the factual predicate of the claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Third, defendant claims that defense counsel was ineffective for failing to impeach Joshua with statements that he made to the police. However, defendant has not identified any statements in police reports that defense counsel failed to use to impeach Joshua. Accordingly, defendant has not shown that defense counsel's cross-examination of Joshua fell below objective standards of reasonableness. *Uphaus (On Remand)*, 278 Mich App at 185.

Fourth, defendant claims that defense counsel was ineffective for failing to alert the trial court to his learning disability and other problems at sentencing. However, through the presentencing investigation report (PSIR) and from defense counsel's statements,

the trial court learned that defendant has a learning disability and a very difficult time reading and writing and that, when he was in high school, defendant attended special education classes. Defendant does not identify any additional statements defense counsel should have made. Accordingly, defendant has not shown that defense counsel's performance at sentencing fell below objective standards of reasonableness. *Id.*

Fifth, defendant argues that defense counsel was ineffective for failing to obtain telephone records for the telephone number that called Tim's telephone. At trial, Detective Wesley Smigielski testified that the telephone number belonged to a "Boost phone" and, because there was no contract for the telephone, there were no records for it. Because no records existed for the telephone number, defense counsel's performance in failing to obtain the records did not fall below objective standards of reasonableness. *Id.*

Sixth, defendant argues that defense counsel was ineffective for failing to obtain surveillance video from Wal-Mart. However, defendant did not present any evidence at the *Ginther* hearing to suggest that surveillance video from March 7, 2010, was still in existence at the time he was arrested, which was five months after the criminal offenses occurred. Defendant, therefore, has not established the factual predicate of his claim. *Hoag*, 460 Mich at 6.

The trial court did not abuse its discretion in denying defendant's motion for a new trial. *Kevorkian*, 248 Mich App at 410. The ineffective assistance of counsel claims that defendant raised in the motion are without merit.

IV. OFFENSE VARIABLES

Defendant argues that, in scoring the sentencing guidelines for his convictions for extortion, delivery of a controlled substance less than 50 grams, and unlawful imprisonment, the trial court erred in scoring offense variables (OVs) 3, 7, 8, 9, 10, 14, 15, and 16. The interpretation and application of the sentencing guidelines involve legal questions that we review do novo. *People v Huston*, 489 Mich 451, 457; 802 NW2d 261 (2011). However, a trial court has discretion to determine the number of points to be scored, *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), and we will uphold a scoring decision for which there is any evidence in support, *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). The evidence includes the trial testimony and the contents of the PSIR. *People v Althoff*, 280 Mich App 524, 541; 760 NW2d 764 (2008). We review de novo issues of constitutional law. *People v Billings*, 283 Mich App 538, 541; 770 NW2d 893 (2009).

Defendant claims that the trial court improperly scored the offense variables because the facts used to support the scoring of them were not found beyond a reasonable doubt by the jury, contrary to the holding of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, our Supreme Court has definitively held that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). We are required to follow the decisions of the Supreme Court. *People v Strickland*, 293 Mich App 393, 402; 810 NW2d 660 (2011). Accordingly, defendant's argument is without merit.

Defendant also argues that, even under a preponderance of the evidence standard, see *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008), the trial court erred in scoring the offense variables. Sentencing information reports (SIRs) were completed and used by the trial court for sentencing defendant on his convictions for extortion, delivery of a controlled substance less than 50 grams, and unlawful imprisonment. Defendant argues that the trial court erred in scoring the sentencing guidelines for each of the three offenses. However, the trial court was not required to score the guidelines for the unlawful imprisonment conviction. A consecutive sentence was not authorized for the conviction, see MCL 771.14(2)(e)(*i*) and unlawful imprisonment is of a lesser crime class than extortion, see MCL 771.14(2)(e)(*ii*); *People v Chris Mack*, 265 Mich App 122, 126-130; 695 NW2d 342 (2005).[3] We begin with analyzing whether the trial court erred in scoring any of the offense variables, OVs 3, 7, 8, 9, 10, and 14, for the extortion conviction.

"Offense variable 3 is physical injury to a victim." MCL 777.33(1). Ten points are to be scored if "[b]odily injury requiring medical treatment occurred to a victim." MCL 777.33(1)(d). Defendant does not dispute that Joshua suffered bodily injury requiring medical treatment. Rather, he claims that OV 3 was improperly scored because, as directed by the Supreme Court in *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009), each offense is to be scored separately and because the assault against Joshua

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[3] Extortion is a class B crime. MCL 777.16*l*. Unlawful imprisonment is a class C crime, MCL 777.16q.

was contained in the conviction for aggravated assault and "the extortion was complete after the statement and threat was issued to" Joshua.

In *McGraw*, 484 Mich at 129, 133, our Supreme Court held that the offense variables are to be scored by reference only to the sentencing offense. Conduct occurring outside the sentencing offense may only be considered in scoring an offense variable when the variable specifically so provides. *Id.* at 129. Nothing in *McGraw* stands for the proposition that, where a defendant is convicted of multiple offenses, an offense variable cannot be scored for one offense because the facts used to score the variable were the basis for one of the other convictions. Accordingly, we find no merit to defendant's argument that OV 3 cannot be scored because the actions that resulted in Joshua's bodily injury were the basis for defendant's aggravated assault conviction. The record does not support defendant's assertion that the assault occurred after all threats were made. Joshua testified that no telephone calls were made to Tim until after he was hit by Wiggins. Then, in a telephone call to Tim, Joshua relayed the threat that, unless Tim got the $1,000, Tim would not see him again.

We cannot conclude that the assault was not part and parcel of the extortion offense. At the Lavette Street house, defendant became persistent about getting his money for the cocaine, and Joshua was insistent that he be allowed to go to Niles to get the money. But, Joshua was not allowed to leave the back room of the house. His cellular telephone, wallet, and glasses were taken from him. When Joshua became too persistent on leaving, Wiggins beat him.

Thereafter, because defendant had told Joshua that he was not leaving until defendant was paid, Joshua called Tim for the money. He communicated the threat that Tim would not see him again if Tim did not get the money. Under these facts, the assault on Joshua, which caused him bodily injury requiring medical treatment, was part of defendant's attempt to extort the money owed him. We affirm the trial court's scoring of OV 3. *Elliott*, 215 Mich App at 260.[4]

"Offense variable 7 is aggravated physical abuse." MCL 777.37(1). Fifty points are to be scored if "[a] victim was treated with sadism, torture, or excessive brutality, or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). Conduct "designed to substantially increase the fear and anxiety a victim suffered during the offense" is conduct that is "designed to cause copious or plentiful amounts of additional fear." *People v Glenn*, 295 Mich App 529, 533-534; 814 NW2d 686 (2012). Such conduct must be "similarly egregious" as to acts of sadism, torture, and excessive brutality. *Id.* at 534. While in the back room of the Lavette Street house, when Joshua became insistent on leaving, he was hit in the head several times by Wiggins, who had put on gloves. Joshua

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[4] We reject defendant's argument that the "rule of lenity" requires a score of zero for OV 3 or any other offense variable. "The 'rule of lenity' provides that courts should mitigate punishment when the punishment in a criminal statute is unclear." *People v Denio*, 454 Mich 691, 699; 564 NW2d 13 (1997). It only applies when the statute's language is ambiguous or in the absence of any firm indication of legislative intent. *Id.* at 700 n 12. Defendant makes no argument that the language of OV 3 or any other offense variable is ambiguous.

blacked out each time he was hit and he suffered a concussion. After Joshua stated that, because of a previous head injury, a hard blow to the head could cause him to have a seizure and die, Wiggins showed complete indifference. He asked Joshua if it looked like he cared. Joshua, after Tim agreed to get the $1,000, was taken to an abandoned house, where no one, other than defendant, Wiggins, and Sawyer, knew of his location. At the abandoned house, according to the PSIR, defendant was forced to take off his pants and shoes. This evidence supports the trial court's finding that Joshua was treated with conduct designed to substantially increase his fear and anxiety. We affirm the trial court's score of 50 points for OV 7. *Elliott*, 215 Mich App at 260.[5]

"Offense variable 8 is victim asportation or captivity." MCL 777.38(1). Fifteen points are to be scored if "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." MCL 777.38(1)(a). Here, Joshua was taken from the Lavette Street house, where Hughes had last seen him and where Stevie Viel, a resident of the house, had told everyone to leave after he heard Joshua say that he could have a seizure, and brought to an abandoned house owned by defendant's father. No one other than defendant, Wiggins, and Sawyer knew that Joshua was there. Accordingly, as found by the trial court, Joshua was placed in a situation of

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[5] We find no merit to defendant's claim, based on *McGraw*, 484 Mich 120, that OV 7 should be scored at zero points because "the force was used at a different time than when the other crimes were committed." This conduct was part of defendant's attempt to extort the $1,000.

greater danger. We affirm the trial court's score of 15 points for OV 8. *Elliott*, 215 Mich App at 260.[6]

"Offense variable 9 is number of victims." MCL 777.39(1). Ten points are to be scored if "[t]here were 2 to 9 victims who were placed in danger of physical injury or death." MCL 777.39(1)(c). A victim is any person who was placed in danger of physical injury or loss of life. MCL 777.39(2)(b). A person, to be a victim, need not suffer actual harm; close proximity to a physically threatening situation may suffice. *People v Gratsch*, 299 Mich App 604, 624; ___ NW2d ___ (2013). Defendant does not dispute that Joshua was a victim, but claims that there was no other victim. However, the record evidence supports the trial court's finding that Tim was also a victim. Tim agreed to give $1,000 to the people who had threatened Joshua's life and who had actually beaten Joshua. Then, by following their instructions to come to and meet them in Benton Harbor to make the exchange, Tim was placed in danger of physical injury. We affirm the trial court's score of ten points for OV 9. *Elliott*, 215 Mich App at 260.

"Offense variable ten is exploitation of a vulnerable victim." MCL 777.40(1). Points may not be scored unless it was readily apparent that the victim was vulnerable and the victim's vulnerability was

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[6] We reject defendant's claim that OV 8 should be scored at zero points because "the crimes are to be scored separately." Defendant makes no argument why the movement of Joshua from the Lavette Street house to the abandoned house, which happened after Tim agreed to pay the $1,000 and defendant needed time to decide where to make the exchange, should not be considered part of the extortion offense.

exploited. *People v Cannon*, 481 Mich 152, 158-159; 749 NW2d 257 (2008). Five points are to be scored if "[t]he offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious." MCL 777.40(1)(c). The term "exploit" means "to manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b).

According to the PSIR, Joshua told Hughes, while the two men were in jail, that Tim owned several automobile shops and was rich. Hughes testified that he hooked Joshua up with defendant after Joshua said that he wanted some cocaine. Joshua smoked the cocaine he bought from defendant and got high. Hughes testified that he told Joshua to slow down the speed at which he was smoking cocaine. According to Hughes, Joshua was taking his abuse of the cocaine "to another level." After Joshua ran out of cocaine, defendant "fronted" him with more. Hughes thought it was odd that defendant kept giving Joshua, who was not from Benton Harbor, more cocaine without getting any money from him. These facts support the trial court's scoring of OV 10. Joshua's vulnerability, being under the influence of drugs, MCL 777.40(1)(c), would have been readily apparent to defendant. Defendant exploited this vulnerability for his own selfish purposes, MCL 777.40(3)(b), by continuing to give Joshua more cocaine, thereby increasing Joshua's debt to him, when Joshua was unable to recognize how much cocaine he was actually using and how deeply in debt he became. We affirm the trial court's score of five points for OV 10. *Elliott*, 215 Mich App at 260.

"Offense variable 14 is the offender's role." MCL 777.44(1). Ten points are to be scored if "[t]he offender was a leader in a multiple offender situation." MCL 777.44(1)(a). A leader is one who is a guiding or directing head of a group. *People v Jones*, 299 Mich App 284, 287; 829 NW2d 350 (2013) (quotation omitted). The record evidence supports the trial court's finding that defendant was a leader. Defendant gave cocaine to Joshua. When he wanted to be paid for the cocaine, defendant bought food items at a gas station to confirm that Joshua had money on his debit card, picked out a television at Wal-Mart for Joshua to buy for him, and called Joshua's bank. Although Wiggins was the person who hit Joshua, Joshua testified that defendant was in charge and he was just letting his friends do the "dirty work." Defendant told Joshua that he would not be leaving until defendant got his money, and defendant used his cellular telephone to call Tim. Joshua was taken to an abandoned house owned by defendant's father. There, defendant decided that the exchange would occur at the apartment complex. At the apartment complex, defendant instructed Wiggins to give Joshua some of the cocaine that he had previously given Wiggins. Accordingly, we affirm the trial court's scoring of ten points for OV 14. *Elliott*, 215 Mich App at 260.

Because the trial court did not abuse its discretion in scoring any of the offense variables for defendant's conviction for extortion, we affirm defendant's sentences for extortion and unlawful imprisonment. We also affirm defendant's sentence for delivery of a controlled substance less than 50 grams without even determining whether the trial court erred in scoring the relevant offense variables, OVs 3, 9, 14, 15, and

16, for this specific conviction. See *Eller v Metro Indus Contracting, Inc*, 261 Mich App 569, 571; 683 NW2d 242 (2004) (stating that an issue is moot and should not be reached if a court cannot fashion a remedy). Defendant's minimum sentence for delivery of a controlled substance is 38 months, which is far shorter than defendant's minimum sentence of 150 months for extortion. Even if we were to vacate defendant's sentence for delivery of a controlled substance and remand for resentencing, defendant would not be granted any practical relief. Regardless whether defendant's sentence is 38 months or any shorter length, defendant is required, based on his sentence for extortion, to serve a minimum of 150 months' imprisonment.

V. DEFENDANT'S STANDARD 4 BRIEF

Initially, we note that defendant, in his pro per brief, relies extensively on an affidavit that he filed with this Court when he moved for a remand. However, in analyzing defendant's claims, we will not consider the affidavit. Our review is limited to the lower court record. *People v Warren*, 228 Mich App 336, 356; 578 NW2d 692 (1998), rev'd in part on other grounds 462 Mich 415 (2000). The lower court record does not include the affidavit. See 7.210(A)(1).

In his pro per brief, defendant argues that he was denied due process of law because he was not arraigned on the charges in the information and he did not waive arraignment. Because this claim of error was not raised before the trial court, it is unpreserved for appellate review. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). We review unpreserved claims of error for plain error

affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The purpose of an arraignment is to provide the defendant with formal notice of the charges against him. *People v Waclawski*, 286 Mich App 634, 706; 780 NW2d 321 (2009). At arraignment on the information, the "court must either state to the defendant the substance of the charge contained in the information or require the information to be read to the defendant." MCR 6.113(B). However, a defendant may not be entitled to be arraigned on the information. MCR 6.113(E) provides that "[a] circuit court may submit to the State Court Administrator pursuant to MCR 8.112(B) a local administrative order that eliminates arraignment for a defendant represented by an attorney, provided other arrangements are made to give the defendant a copy of the information." In December 2007, the Berrien Circuit Court issued Administrative Order 2007-05, which states that "[i]n all cases where the defendant is represented by an attorney, the Court need not conduct an arraignment on the information." Accordingly, because defendant was represented by an attorney, his right to be arraigned on the information was eliminated. There was no plain error. *Carines*, 460 Mich at 763.

In addition, defendant's claim that he never received notice of the charges against him before trial commenced is contradicted by the lower court record. Defendant was arraigned on the complaint and warrant and had a preliminary examination. At the conclusion of the preliminary examination, after it bound defendant over for trial, the court stated, "I have a not guilty plea entered without formal

arraignment; that is entered at this time, along with a jury demand." Defendant, on the day of the preliminary examination, signed a document captioned "Defendant's entry of plea of not guilty without arraignment (M.C.R. 6.113)." By signing the document, defendant agreed, in part, that he received and read a copy of the complaint, warrant, or information; understood the substance of the charges against him; waived arraignment in open court; pleaded not guilty; and demanded a jury trial. Defendant knew of the charges against him before trial commenced.

Next, defendant argues that the trial court erred in denying his request for substitute counsel. "The decision regarding substitution of counsel is within the sound discretion of the trial court and will not be upset on appeal absent a showing of an abuse of that discretion." *People v Jesse Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991).

Defendant claims that he requested substitute counsel after he and defense counsel disagreed about trial strategy. He wanted to pursue an alibi defense, but defense counsel refused to investigate and pursue the defense. However, in his November 2010 letter to the trial court, defendant did not indicate that he wanted a new attorney because he and defense counsel disagreed about an alibi defense. Rather, defendant told the trial court that he did not feel comfortable with defense counsel as his attorney because he smelled alcohol on defense counsel's breath and because he had not heard from defense counsel after he told defense counsel that he had new evidence and new witnesses, whom he had not

previously been able to contact because they had been out of town, and had requested that counsel file a "motion to discover."

Based on the record, especially the testimony at the *Ginther* hearing, it would be unreasonable for us to conclude that the new witnesses referenced in defendant's letter were the alibi witnesses. At the *Ginther* hearing, defendant testified that he told defense counsel about his alibi witnesses every time that counsel came to see him. There is no indication that the alibi witnesses were ever out of town or that defendant had not been able to contact them. Defendant's mother and his girlfriend had been in contact with defendant while he was in jail. In addition, a conclusion that the "new witnesses" referenced in defendant's letter were not the alibi witnesses is consistent with the trial court's factual findings at the conclusion of the *Ginther* hearing. The trial court found that defendant had not informed defense counsel of an alibi defense until shortly before trial.

Accordingly, defendant has failed to establish that the trial court abused its discretion in denying his request for substitute counsel. *Mack*, 190 Mich App at 14. The trial court's decision not to appoint substitute counsel based on a disagreement of which it was never apprised did not fall outside the range of reasonable and principled outcomes. *Unger*, 278 Mich App at 217.

Defendant also argues that the trial court erred when it ordered that he be shackled during trial. We review a trial court's decision to restrain a defendant for an abuse of discretion. *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996).

The right to a fair trial includes, absent extraordinary circumstances, the right to be free from shackles in the courtroom. *People v Payne*, 285 Mich App 181, 186; 774 NW2d 714 (2009). A defendant may only be shackled on a finding, supported by record evidence, that shackling is necessary to prevent escape or injury to persons in the courtroom or to maintain order. *People v Dunn*, 446 Mich 409, 425; 521 NW2d 255 (1994). Even if a trial court abuses its discretion when it orders that a defendant be shackled, the defendant, to be entitled to relief, must show that he suffered prejudice. *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008). "[A] defendant is not prejudiced if the jury was unable to see the shackles on the defendant." *Id.*

We conclude that the trial court did not abuse its discretion in ordering that defendant be shackled during trial. *Dixon*, 217 Mich App at 404-405. The trial court ordered that defendant be shackled only after it found that defendant was a flight risk after conducting an evidentiary hearing. As shown by defendant's jail records, defendant had attempted to place himself in situations where an escape could be possible, such as a hospital or a jail cell with exterior windows. Defendant's manipulation attempts, along with defendant's history of not appearing for court, his anger when learning that no one would help him post bond, and his uncooperative behavior toward officers in jail, support the trial court's finding that defendant was a flight risk. The trial court's order that defendant be shackled was not based merely on the preference of a law enforcement officer. See *People v Banks*, 249 Mich App 247, 257-258; 642 NW2d 351 (2002). Accordingly, the trial court's decision that

defendant be shackled during trial did not fall outside the range of reasonable and principled outcomes. *Unger*, 278 Mich App at 217.

Regardless, defendant has not shown that he was prejudiced. There is nothing in the lower court record indicating that any juror saw or heard defendant's shackles. Because there is no evidence that any juror was aware of defendant's shackles, defendant was not prejudiced by having to wear shackles. Therefore, he would not be entitled to any relief. *Horn*, 279 Mich App at 36.

Defendant argues that the prosecutor violated *Maryland v Brady*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), when she failed to disclose that Sawyer's plea agreement included the dismissal of drug charges in an unrelated case. This claim of prosecutorial misconduct is unpreserved because it was not raised before the trial court. See *Metamora Water Serv, Inc*, 276 Mich App at 382. We review unpreserved claims of prosecutorial misconduct for plain error affecting the defendant's substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

Pursuant to *Brady*, a defendant has a due process right to obtain evidence that is in the possession of the prosecution if the evidence is favorable to the accused and material to guilt or punishment. *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994). In claiming that Sawyer's plea agreement included the dismissal of drug charges in an unrelated case, defendant relies on defense counsel's testimony from the *Ginther* hearing. However, defense counsel's testimony was ambiguous whether Sawyer's plea

agreement included the dismissal of an unrelated drug charge. Although counsel seemed to believe that a drug charge against Sawyer in an unrelated case was dismissed, he could not recall whether the dismissal was related to Sawyer's plea agreement. Accordingly, defense counsel's testimony does not establish that Sawyer's plea agreement included the dismissal of a drug charge in an unrelated case.[7] Accordingly, there was no prosecutorial misconduct constituting plain error. *Ackerman*, 257 Mich App at 448.

Defendant next argues that the trial court erred when it ordered him to pay fees, costs, and restitution without conducting an assessment of his ability to pay. Because defendant did not object when the trial court ordered him to pay the fees, costs, and restitution, the claim of error is unpreserved, see *People v Dunbar*, 264 Mich App 240, 251; 690 NW2d 476 (2004), overruled on other grounds *People v Jackson*, 483 Mich 271; 769 NW2d 630 (2009), and we review it for plain error affecting defendant's substantial rights, *Carines*, 460 Mich at 763.

Defendant's reliance on *Dunbar*, 264 Mich App at 254-255, where this Court held that a trial court must consider a defendant's ability to pay before it orders the defendant to pay the costs of his court-appointed attorney, is misplaced. The Supreme Court overruled

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[7] In addition, even if the dismissal of a drug charge was part of Sawyer's plea agreement, because defense counsel's testimony indicates that counsel knew of the dismissal, the testimony does not establish that the prosecutor suppressed evidence of the dismissal. See *People v Lester*, 232 Mich App 262, 282; 591 NW2d 267 (1998).

Dunbar in *Jackson*, 483 Mich 271. In *Jackson*, the Supreme Court held that a defendant does not have a constitutional right to an assessment of his ability to pay before a fee for his court-appointed attorney is imposed. *Id.* at 290. According to the Supreme Court, a defendant is entitled to an ability-to-pay assessment, but a trial court need not conduct an assessment of a defendant's ability to pay until the imposition of the fee is enforced and the defendant objects to the enforcement. *Id.* at 292-293. Because defendant relies solely on *Dunbar*, he has failed to establish plain error. *Carines*, 460 Mich at 763.

In addition, defendant requests that we remand for correction of the order to remit prisoner funds. The order to remit prisoner funds states that defendant owes a balance of $3,887, not including restitution. However, at sentencing, the trial court ordered defendant to pay a total of $3,487 in costs and fees and $1,000 in restitution. Because the order to remit prisoner funds states that defendant owes $400 more than what the trial court ordered him to pay, we remand for correction of the order to remit prisoner funds.

Finally, defendant argues that defense counsel was ineffective. Because no *Ginther* hearing has been held on the four claims of ineffective assistance of counsel raised in defendant's pro per brief, our review of the claims is limited to errors apparent on the record. *Horn*, 279 Mich App at 38.

Defendant asserts that defense counsel was ineffective for failing to ensure that he was informed of the nature of the charges brought against him in the information. The basis of the claim is that

defendant was never arraigned on the information and did not waive arraignment. However, as previously established, defendant's right to an arraignment on the information was eliminated. Accordingly, defense counsel's failure to ensure that defendant was arraigned on the information did not fall below objective standards of reasonableness. *Uphaus (On Remand)*, 278 Mich App at 185.

Defendant asserts that defense counsel was ineffective for failing to move for a mistrial when defendant brought it to his attention that some jurors might be aware that he was in shackles. However, as previously explained, nothing in the record indicates that any juror was aware of defendant's shackles. Accordingly, defendant has failed to establish the factual predicate of the claim. *Hoag*, 460 Mich at 6.

Defendant also claims that defense counsel was ineffective because counsel never made a "formal objection or argument" to the prosecutor's request that he be shackled during trial. However, because the trial court was aware of the circumstances under which it could order defendant to be shackled and found that one of those circumstances existed, and because defendant has not identified any objection or argument that defense counsel should have made, defendant has not shown that counsel's performance fell below objective standards of reasonableness. *Uphaus (On Remand)*, 278 Mich App at 185.

Defendant argues that defense counsel was ineffective for failing to investigate the specifics of Sawyer's plea agreement. According to defendant, had counsel investigated the plea agreement, he would have learned that the agreement included the

dismissal of drug charges in an unrelated case. However, as previously explained, nothing in the record establishes that the dismissal of any drug charge was included in Sawyer's plea agreement. Accordingly, defendant has failed to establish the factual predicate of the claim. *Hoag*, 460 Mich at 6.

Defendant claims that defense counsel was ineffective for failing to object, based on his inability to pay, to the trial court's order requiring him to pay fees, costs, and restitution. However, as previously established, defendant, at sentencing, was not entitled to an assessment of his ability to pay. Accordingly, any objection by defense counsel would have been meritless. Counsel is not ineffective for failing to make a futile motion. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Affirmed, but remanded for correction of the order to remit prisoner funds. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Patrick M. Meter
/s/ Pat M. Donofrio