No. _____

In The
Supreme Court of the United States

CRAIG MICHAEL HASKELL,

Petitioner,

v.

PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

ERWIN CHEMERINSKY
Counsel of Record
UNIVERSITY OF CALIFORNIA, IRVINE
SCHOOL OF LAW
401 E. Peltason
Irvine, California 92697-8000
(949) 824-7722
echemerinsky@law.uci.edu

Attorney for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. Whether due process is denied when a criminal defendant is prevented from raising a defense which negates essential elements of the crime.

2. Whether it is ineffective assistance of counsel when a defense lawyer fails to raise a defense which would negate essential elements of the crime and whether ineffective assistance of counsel should be decided based on the cumulative errors of trial counsel.

3. Whether the Constitution is violated when a defendant is convicted of four counts of criminal sexual conduct for conduct that occurs within a few minutes and then receives a sentencing enhancement for a continuing pattern of criminal activity based solely on these events.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATUTES

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Craig Haskell respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The decision of the United States District Court for the Eastern District of Michigan is found at Appendix (App.) p. 35.

The Sixth Circuit's decision affirming the District Court is at App. 1. The Sixth Circuit's denial of rehearing and rehearing *en banc* is found at App. 93.

JURISDICTION

The unpublished decision of the Court of Appeals was issued on January 16, 2013. (App. at 1.) The court denied a timely petition for rehearing and suggestion for re-hearing *en banc* on March 19, 2013. (App. at 93.)

Pursuant to 28 U.S.C. § 1254(1), this Court has jurisdiction to review the decision of the United States Court of Appeals for the Sixth Circuit.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury. . . ."

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

Craig Michael Haskell was convicted on August 15, 2003, by a jury in Livingston County, Michigan, with a verdict of "guilty but mentally ill" for four counts of first degree criminal sexual conduct (Mich. Comp. Laws § 750.520b(1)(f)), one count of criminal second degree sexual conduct (Mich. Comp. Laws § 750.520c(1)(f)), and aggravated domestic violence (Mich. Comp. Laws § 750.81a(2)), for beating and assaulting his former girlfriend. Haskell was sentenced to concurrent terms of 12 to 30 years for each count of first-degree criminal sexual conduct, 10 to 15 years for the second degree criminal sexual conduct offense, and one year in Livingston County Jail for the aggravated domestic violence conviction. Haskell is currently incarcerated.

The Michigan Court of Appeals denied Haskell's appeal in an unpublished opinion. (No. 251929, June 23, 2005). The Michigan Supreme Court denied

review. 474 Mich. 1118, 712 N.W.2d 448 (2006). A petition for a writ of certiorari was denied by the United States Supreme Court. 549 U.S. 993 (2006).

Haskell filed a timely habeas corpus petition in the United States District Court for the Eastern District of Michigan. On February 26, 2010, the District Court denied the habeas corpus petition, but granted a certificate of appealability on three issues: "(1) Petitioner was not deprived due process of law under the Fourteenth Amendment on being denied a right to present an automatism defense; (2) Petitioner was not denied effective assistance of counsel with respect to Mr. Plunkett; and (3) Petitioner was not denied effective assistance of counsel with respect to Mr. Resnick." Opinion and Order Denying Petition for Writ of Habeas Corpus and Granting in Part a Certificate of Appealability, at 36-37, *Haskell v. Berghuis*, 695 F. Supp. 2d 574, 600 (E.D. Mich. 2010).

On January 16, 2013, the United States Court of Appeals for the Sixth Circuit affirmed in a 2-1 decision. On March 19, 2013, the Sixth Circuit denied *en banc* review.

STATEMENT OF FACTS

This case arose from the events of May 17, 2002, when Craig Haskell, then 21 years old, visited his former girlfriend Rae Russell. Russell, then age 19, was a college student who lived in her parents' home. Haskell and Russell had dated for two and a half

years, had broken up, and at the time of the incident had just begun to see each other again. Russell testified that four days earlier, she and Haskell had oral sex in her bedroom. (Tr. I, 219).[1]

On the evening of the incident, the two watched a movie together in the basement of the home while Russell's parents watched television upstairs. Afterward, as was their custom when they were dating, Russell changed into her pajamas so that, as she put it in her testimony, Haskell could "tuck [her] in." (Tr. I, 194).

Haskell suddenly began crying and Russell said that his behavior changed dramatically and he acted in a way that she had not seen before. (Tr., I, 225-26, 239-40, 242; Tr. II, 49). At this point, Russell claims that Haskell physically and sexually assaulted her, including holding scissors to her throat. (Tr. I, 196-202). Haskell has consistently and vehemently denied that a sexual assault or any sexual activity occurred or that there were scissors even present. Russell testified that then Haskell suddenly stopped punching her and snapped out of it. (Tr. I, 245; II, 51). He repeatedly said, "What have I done?" (Tr. I, 245; II, 51). He was shaking and apologized. (Tr. I, 247). Russell told him to go home and get help from his parents. (Tr. I, 203-04, 239, 246). Russell acknowledged at trial that over their two and a half year

[1] Citations (Tr.) are to the trial transcript, volume and page number.

relationship, Haskell had never threatened her, assaulted her, hit her, or threatened her family. (Tr. I, 224).

Haskell returned home on the night of May 18, 2002, shortly after midnight, and burst into his parents' room. (Tr. II, 209). He was frantic and crying uncontrollably. (Tr. II, 210). Haskell's mother took him to the psychiatric emergency room at the University of Michigan Hospital. He was admitted to the psychiatric unit for ten days. (Tr. II, 211-12). When he was discharged, the tentative diagnosis was psychosis NOS (not otherwise specified). (Tr. III, 90).

The expert witnesses at trial confirmed that Haskell suffered from an illness. The defense witness, Dr. Kenneth Pitts, the psychiatrist who treated Haskell, testified that testing revealed that Haskell had a brain disturbance consistent with mental illness as well as with Complex Partial Seizure (CPS).[2]

---

[2] Complex Partial Seizure involves just the temporal lobe of the brain and differs from ordinary epilepsy because ordinary epilepsy involves the motor part of the brain and results in grand mal seizures. (Tr. III, 45). Complex partial seizure is often confused with schizophrenia because the left temporal lobe plays a major role in both diseases. (Tr. III, 46, 106). Complex partial seizure produces neuropsychiatric symptoms, including rapid heartbeat, feeling unreal, hallucinations (visual, auditory, and olfactory), and psychotic phenomena both during and after the seizures. (Tr. III, 47). While having a seizure, a person can engage in a wide range of behaviors in a state of being unaware – absence of clear consciousness. (Tr. III, 106-07). Aggressive acting out is common with complex partial seizure and often the person has no memory and no awareness of what they did during the episode. (Tr. III, 106-07). The person has no appreciation

(Continued on following page)

Haskell earlier had been diagnosed via an MRI with a brain cyst in the part of the brain, the left temporal lobe, where a CTS seizure would begin. He said that he believed that Haskell did not appreciate the wrongfulness of his conduct and could not conform his conduct to the requirements of the law when he was having the complex partial seizure. (Tr. III, 209).

The prosecutor called Dr. Lisa Marquis as an expert witness. She agreed with Dr. Pitts that Haskell was suffering from a mental illness. (Tr. III, 172). She said that she could not rule out that Haskell suffered from Partial Complex Seizure. (Tr. III, 201). But she disagreed with Dr. Pitts on the issue of whether Haskell appreciated the wrongfulness of his conduct and whether he was able to conform his behavior to the requirements of the law. (Tr. III, 176-77). Dr. Marquis admitted that her only knowledge of Complex Partial Seizure came from two lectures totaling approximately an hour, which she attended during her internship. (Tr. III, 166-67).

There is no dispute that Haskell hit Russell that night. As explained below, Haskell's defense to that charge was his illness. Both the prosecutor's and the defense's experts at trial agreed that Haskell suffers from an uncommon form of petit mal epilepsy called Partial Complex Seizure (CPS), also known as temporal lobe epilepsy. Haskell contends that he was

---

of reality during the seizure and no appreciation of his behavior and surroundings. (Tr. III, 107).

suffering such a seizure when he struck Russell in the face.

There is, however, great dispute over whether Haskell raped Russell. Haskell has maintained from the outset that no sexual assault, or sexual contact of any kind, occurred that night. There was no physical evidence of rape or sexual activity, such as the presence of semen. On the night of the assault, Ms. Russell spoke to the police and she did not indicate that she had been sexually assaulted or threatened with scissors. (Tr. II, 20-21). At the emergency room that night, Ms. Russell denied being sexually assaulted, denied having had sexual relations that evening, and no sperm or seminal fluid was found on any of Ms. Russell's clothing or any swabbed area. (Tr. II, 47, 126-27, 144). There was no evidence of tenderness around her neck, nor any evidence of fingerprints around her neck.

The claim of rape began on the following day when Ms. Russell's mother, Diane Russell, confronted her about blood in her underwear. Ms. Russell told her mother that she had been sexually assaulted. (Tr. I, 206; II, 36, 67, 82). The police were called again and Ms. Russell went back to the hospital, submitting to a rape examination. (Tr. I, 206; Tr. II 36, 67, 62). In Ms. Russell's second statement to the police, she indicated that Haskell had threatened her with scissors by holding them to her throat and that he put his hands down her throat. (Tr. I, 233, 236). Dr. Ramstack, the emergency room doctor who examined Ms. Russell during her second hospital visit, testified that there were no signs of sexual trauma to the vaginal or anus

areas nor evidence of forceful sexual contact. (Tr. II, 119, 130-31).

There was dispute over whether Haskell used the scissors against Russell. The jury acquitted Haskell of this, finding him not guilty of the charge of Felonious Assault, which would have required the finding of use of a dangerous weapon. No scissors were ever found and neither the victim's mother nor the officer who photographed the room ever saw any scissors. (Tr. II, 73-74, 83, 164-65, 170).

The jury found the defendant "guilty but mentally ill" and convicted Haskell of four counts of Criminal Sexual Conduct in the First Degree, one count Criminal Sexual Conduct in the Second Degree, and one count of Domestic Violence. The four counts were because Russell testified that Haskell put his fingers in her vagina twice before intercourse and once after afterwards. (Tr. I, 201; App. at 40). In other words, Haskell was convicted for four counts of sexual assault for what occurred within minutes.

At sentencing, the judge pointed to several factors as warranting an increase in the sentence above the statutory minimum prescribed by Michigan law for the offenses.

At the sentencing hearing, Haskell expressed his innocence to the rape charge. The judge repeatedly said that this showed a lack of remorse and imposed a greater sentence as a result.

The trial judge also found three enhancements under the Michigan sentencing guideline system. First, the judge increased the sentence by finding

that the defendant used a potentially lethal weapon, the scissors, even though the jury had found that the defendant did not do so in acquitting him for Felonious Assault. The judge dismissively stated that the jury's verdict was just "an opinion."

Second, the judge substantially increased the defendant's sentence by finding that there was a continuing pattern of criminal activity, even though *all* of the criminal events occurred in this one incident on this single evening. Haskell never before had been accused or convicted of any crime. The continuing pattern of criminal activity was based on the four counts of criminal sexual conduct that occurred during these few minutes.

Finally, the judge found exploitation of a vulnerable victim and enhanced the sentence. This was based on the defendant gaining access to and sexually assaulting the victim as a consequence of their former romantic relationship.

The Michigan Court of Appeals rejected all of Haskell's objections to his conviction and sentence. The Michigan Supreme Court denied review. The United States Supreme Court denied certiorari. 549 U.S. 993 (2006). Haskell filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan, which was denied on February 26, 2010.

The United States Court of Appeals for the Sixth Circuit affirmed in a 2-1 decision, with Judge Merritt dissenting and concluding that there was ineffective

assistance of counsel. The Sixth Circuit then denied *en banc* review.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A SPLIT AMONG THE CIRCUITS AND AN UNRESOLVED ISSUE OF NATIONAL IMPORTANCE AS TO WHETHER IT VIOLATES DUE PROCESS TO DENY THE DEFENDANT THE ABILITY TO RAISE A DEFENSE THAT NEGATES CRUCIAL ELEMENTS OF THE CRIME.

A. This Court Should Grant Review To Resolve A Split Among The Circuits And Decide An Issue Of National Importance As To Whether A State May Require A Defendant To Prove Automatism By A Preponderance of the Evidence.

It is a foundation of American criminal law and due process that the state must prove all the elements of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). As a result of the prosecution's burden, many federal courts, in addition to this Court, have concluded that it violates due process to require a defendant to affirmatively prove a defense that negates an essential element of a crime that the state has the burden to prove. *See*

Takacs v. Engle, 768 F.2d 122, 125-26 (6th Cir. 1985) (such an argument presents a "colorable" or "plausible" claim) (citing *Engle v. Isaac*, 456 U.S. 107, 121-22 (1982)); *Patterson v. New York*, 432 U.S. 197 (1977) (providing the converse rule, that a defendant may be required to prove an affirmative defense which goes only to excuse or mitigation and does not negate an element of the offense); *Thomas v. Arn*, 728 F.2d 813 (1984) (if a defense "does not negate any element of the crime charged, the State may properly place the burden of proof as to the defense on the defendant"). *See also United States v. Leal-Cruz*, 431 F.3d 667, 671 (9th Cir. 2005) (holding that when a defense negates the element of a crime, it is unconstitutional to place the burden of proving the defense on the defendant).

The defense of automatism, sometimes referred to as the defense of unconsciousness or involuntariness, is recognized by a majority of states. *See* Eunice A. Eichelberger, *Automatism or Unconsciousness as Defense to Criminal Charged*, 27 American Law Reports 4th, 1067 (Originally published in 1984) (listing the 35 states that recognize the defense of automatism). Courts recognize that automatistic behavior "may be brought about by any one of a variety of circumstances including epilepsy, stroke, concussion, or involuntary intoxication." *City of Missoula v. Paffhausen*, 289 P.3d 141, 148 (Mont. 2012) (citing 2 Wayne R. LaFave, *Substantive Criminal Law* § 9.4(a)-(b) (2d ed. 2003)); *accord People v. Grant*, 71 Ill.2d 551, 558-59, 377 N.E.2d 4, 8 (1978) (holding

automatism "may include those [acts] committed during convulsions, sleep, unconsciousness, hypnosis or seizures."). The defense of automatism uniquely negates either or both the action and the intent elements of a crime, often referred to as the actus reus and mens rea. *See Fulcher v. State*, 633 P.2d 142, 145 (Wyo. 1981); *State v. Jerrett*, 307 S.E.2d 339, 353 (N.C. 1983) ("Unconsciousness, sometimes referred to as automatism, is a complete defense to criminal charge because absence of consciousness not only precludes existence of any specific mental state, but also excludes possibility of a voluntary act without which there can be no criminal liability."); *Mendenhall v. State*, 77 S.W.3d 815, 818 (Tex. Crim. App. 2002) (holding that persons who were unconscious or semi-conscious at the time of the alleged offense may invoke "the no-mental-state defense and the no-voluntary-act defense . . . [and] may argue either that they lacked the *mens rea* necessary for criminal liability or that they did not engage in a voluntary act").

In spite of the well-established principle that a state violates due process by requiring a defendant to affirmatively prove a defense that negates an essential element of a crime, the Sixth Circuit, in this case reached the opposite conclusion. The Sixth Circuit held that Michigan may require a defendant to prove that he or she was in an automatistic state during the crime by establishing the defense of insanity. But this requires that the defendant prove a defense that negates the essential elements of intent and voluntary action; due process requires that the *prosecution*

prove the elements of the offense beyond a reasonable doubt. In reaching this conclusion, the Sixth Circuit reasoned that Michigan's requirement comported with due process because two other states, North Carolina and Wyoming, recognize automatism as an affirmative defense that, like the defense of insanity, the defendant must prove by a preponderance of the evidence. The Sixth Circuit expressly stated that "it was not unreasonable for Michigan courts to conclude that an automatism defense (sometimes called an unconsciousness defense) is not constitutionally required, or that its presentation outside the context of an insanity defense is not necessary as a matter of due process." *Id.* The court next explained that "it was not an unreasonable application of clearly established federal law for Michigan to require that [the defendant] present his automatism defense within the framework of an insanity defense" because "[t]wo [ ] states require a defendant to prove automatism by a preponderance of the evidence, as though it were any other affirmative defense." *Id.*

The Sixth Circuit relied exclusively on two state court cases, *Fulcher v. State*, 633 P.2d 142 (Wyo. 1981) and *State v. Caddell*, 287 N.C. 266 (1975), to reach the conclusion that Michigan may shift the burden to the defendant to prove automatism. In *Fulcher v. State*, the Supreme Court of Wyoming reasoned that a state may require the defendant to prove automatism by a preponderance of the evidence simply because "the defendant is the only person who knows his

actual state of consciousness." 633 P.2d at 147. In *State v. Caddell*, the Supreme Court of North Carolina reasoned that automatism was sufficiently similar to the defense of insanity that a state could presume consciousness just as it presumed sanity and place the burden on the defendant to disprove the presumption.

In sharp contrast, the Third Circuit expressed the view that the defense is not required to prove automatism by a preponderance of the evidence, but only to produce sufficient evidence to raise a reasonable doubt as to the defendant's consciousness at the time of the crime. In *Government of Virgin Islands v. Smith*, 278 F.2d 169 (3d Cir. 1960), the Third Circuit reversed the appellant's involuntary manslaughter convictions on the ground that the judge incorrectly assigned the burden of proof to the defense on the issue of epilepsy. *Id.* at 175. In recognizing that unconsciousness resulting from an epileptic seizure may negate mens rea, the Third Circuit deduced that the defense has only the burden of producing evidence that would raise a doubt as to the defendant's consciousness at the time of the crime given the government's burden on proving mens rea beyond a reasonable doubt. *Id.* at 173. The Third Circuit clearly explained that "the defendant did not have the burden of convincing the court he had an epileptic seizure. On the contrary, his burden was merely to go forward with the evidence to the extent necessary to raise a doubt." *Id.* The court noted that even where the evidence shows that a defendant acted as if

conscious and the law presumes that he was then conscious, this presumption should not require a defendant to prove unconsciousness by a preponderance of the evidence. *Id.* at 174. The Third Circuit emphasized that the presumption of consciousness "is merely another way of saying that defendant has the duty of going forward with the evidence, and it is entirely consistent with the rule that defendant has only the burden of producing evidence which would raise a reasonable doubt in the minds of the jury." *Id.* (internal quotation marks omitted).

Like the Third Circuit, many other courts have held that a defendant is not required to prove unconsciousness by a preponderance of the evidence but only need to offer enough evidence of automatism to cast reasonable doubt on the elements of a crime. *See*, *e.g.*, *People v. Kitt*, 83 Cal. App. 3d 834, 842 (1978) (holding that a defendant may rebut the presumed fact of consciousness by raising a reasonable doubt as to its existence); *City of Missoula v. Paffhausen*, 289 P.3d 141, 148 (Mont. 2012) (explaining that if a defendant raises the affirmative defense of automatism, he or she need only provide sufficient evidence to raise a reasonable doubt of his or her guilt given the state's burden of proving beyond a reasonable doubt every element of the offense charged); *State v. Welsh*, 508 P.2d 1041, 1044 (Wash. App. 1973) (stating that the defendant need only present enough evidence that he was suffering from psychomotor seizure at the time of the alleged assault to raise a reasonable doubt in the mind of the jury that he had the

consciousness to form specific intent); *State v. Hinkle*, 489 S.E.2d 257, 262-64 (W. Va. 1996) ("[O]nce the issue of unconsciousness or automatism is raised by the defense, the State must disprove it beyond a reasonable doubt in order to meet its burden of proof with respect to the elements of the crime." (citing *Patterson v. New York*, 432 U.S. 197, 215 (1977); *Mullaney v. Wilbur*, 421 U.S. 684, 701-04 (1975); *In re Winship*, 397 U.S. 358, 361-63 (1970))).

This Court has never addressed whether a state may, consistent with due process, require that the defense prove automatism by a preponderance of the evidence. Simply put, if Mr. Haskell's case had arisen in the Third Circuit, that court would have found that due process was violated when the burden was shifted to Mr. Haskell to prove his defense of epileptic unconsciousness by a preponderance of the evidence. But the Sixth Circuit held that a state may require the defendant to prove epileptic unconsciousness by a preponderance of the evidence within the framework of the insanity defense thereby shifting the burden to the defendant to disprove the essential elements of intent and voluntary action.

This is an issue of national importance because it implicates the fundamental right of the accused to have the prosecution prove beyond a reasonable doubt every fact necessary to constitute the crime charged. The direct conflict between the Sixth Circuit and the Third Circuit, and the split among the state courts, requires resolution by this Court.

B. This Court Should Grant Review To Address An Issue Left Unresolved by *Clark v. Arizona* As To Whether It Violates Due Process To Prohibit A Defendant From Using Exculpatory Evidence Of Unconsciousness To Cast Reasonable Doubt On The Element Of Mens Rea.

In addition to concluding that a state may, consistent with due process, require a defendant to prove automatism through the affirmative defense of insanity, the Sixth Circuit held that Michigan law, which precludes a defendant from using evidence of a mental disease to cast reasonable doubt on the element of mens rea, extends to also limit evidence of automatism for the same purpose. The Sixth Circuit repeatedly stressed that it is constitutionally permissible for a state to require a defendant to present a defense of automatism "within the framework of an insanity defense." App. at 15 (holding that "it was not unreasonable for Michigan courts to conclude that an automatism defense (sometimes called an unconsciousness defense) is not constitutionally required, or that its presentation outside the context of an insanity defense is not necessary as a matter of due process"). The Sixth Circuit then concluded that once a defendant had presented evidence of automatism "within the framework of an insanity defense," the defendant was statutorily precluded from using that evidence to rebut specific intent:

> Michigan does not recognize an independent automatism defense. Michigan has adopted a

> "comprehensive statutory framework" outlining when and under what conditions an insanity defense may be argued. *People v. Carpenter*, 464 Mich. 223, 627 N.W.2d 276, 277 (2001) (discussing Mich. Comp. Laws § 768.21a). In doing so, "the Legislature has demonstrated its policy choice that evidence of mental incapacity short of insanity cannot be used to avoid or reduce criminal responsibility by negating specific intent." App. at 13.

This Sixth Circuit's holding raises an issue of profound importance: Does it violate due process to prohibit a defendant from using exculpatory evidence of unconsciousness to cast reasonable doubt on the element of mens rea?

The due process clause requires that "criminal prosecutions must comport with prevailing notions of fundamental fairness," which this Court has long interpreted "to require that criminal defendants be afforded a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984); *accord Washington v. Texas*, 338 U.S. 14, 19 (1967). "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). This Court has ruled that the "wholesale" exclusion of certain categories of defense evidence without justification is unconstitutional. *See*, *e.g.*, *Crane v. Kentucky*, 476 U.S. 683, 691 (1986). In light of the well-established principles that a defendant has a right to present a complete defense and the

prosecution has the burden of proving a case beyond a reasonable doubt, this Court recently reaffirmed the right of the accused to present evidence to rebut essential elements of a crime. *Clark v. Arizona*, 548 U.S. 735, 739 (2006) ("A defendant has a due process right to present evidence favorable to himself on an element that must be proven to convict him.").

Michigan's "comprehensive statutory framework," barring the use of evidence of a mental disorder short of insanity to rebut specific intent, is essentially a version of Arizona's so-called *Mott* rule. This Court upheld Arizona's *Mott* rule in *Clark v. Arizona.* In *Clark*, the majority opinion expressly acknowledged that the right to raise reasonable doubt is part of the due process guarantee of fundamental fairness: "[I]t violates due process when the State impedes [a defendant] from using mental-disease and capacity evidence directly to rebut the prosecution's evidence that he did form *mens rea*." *Id.* at 773-74. But the majority also held that "the right to introduce relevant evidence can be curtailed if there is a good reason for doing that." *Id.* at 770. This Court found good reasons to justify Arizona's decision to prohibit a criminal defendant from presenting mental disorder evidence for the purpose of rebutting *mens rea*: (1) some mental disorder diagnoses are not generally accepted; (2) expert testimony about mental disorder can potentially mislead jurors; and (3) there are "particular risks inherent in the opinions of the experts who supplement the mental-disease classifications with opinions on incapacity: on whether the

mental disease rendered a particular defendant incapable of the cognition necessary for moral judgment or *mens rea* or otherwise incapable of understanding the wrongfulness of the conduct charged." *Id.* at 774-76.

Extending Michigan's rule limiting evidence of mental incapacity to evidence of automatism or unconsciousness is in conflict with these reasons. Automatism is a temporary state of unconsciousness and is neither a mental disease nor a matter of capacity. As a matter of consciousness, testimony regarding automatism does not require experts to opine whether a defendant had the ability to make moral assessments or understand wrongfulness. *See Mendenhall v. State*, 77 S.W.3d 815, 818 (Tex. Crim. App. 2002) (explaining that automatism should not be conflated with insanity because there is no question as to whether a defendant, who was unconscious or semi-conscious at the time of the alleged offense, had knowledge of the wrongfulness of his or her conduct, rather the inquiry is limited to whether a defendant consciously knew of his or her conduct at all). Instead, the cognitive issues associated with automatism are limited to whether a person was experiencing a seizure, blackout, or asleep. *See*, *e.g.*, *Sellers v. State*, 809 P.2d 676, 687 (Okla. Cr. 1991) ("Examples of automatic conduct are blackouts and epileptic seizures."). These are generally accepted and uncontroversial diagnoses within the medical community that are not likely to mislead jurors. In fact, Florida, which prohibits evidence of mental illness not constituting legal

insanity to rebut mens rea, makes an exception for epileptic automatism which, unlike conditions "only experts would be expected to understand," is a condition that "lay persons commonly understood." *Caren v. Crist*, No. 4:07cv320-RH/AK, 2008 WL 2397592 (N.D. Fla. June 10, 2008); *see also Evans v. State*, 946 So.2d 1, 11 (Fla. 2006); *Bunney v. State*, 603 So.2d 1270 (Fla. 1992).

The Sixth Circuit's application of Michigan's evidentiary limitation to automatism testimony is an issue of national importance. About a dozen states have rules like Arizona's and Michigan's which prohibit criminal defendants from offering mental disorder evidence to raise reasonable doubt about mens rea. Stretching these laws to apply to evidence of automatism threatens constitutional maxims basic to our system of jurisprudence: the right to present a meaningful defense, the requirement that the state prove beyond a reasonable doubt each and every element of a charged offense, and the presumption of innocence.

The Court has not yet directly addressed this issue of national importance. In *Clark v. Arizona*, this Court did not resolve whether there are good enough reasons for limiting evidence of automatism that satisfy the standard of fundamental fairness that due process requires. The majority opinion makes no mention of automatism or unconsciousness and does not address a defendant's burden of proof where the defendant has evidence that casts reasonable doubt not merely on the degree of requisite mens rea, but on

the very existence of mens rea and actus reus. *See Polston v. State*, 685 P.2d 1, 5 (Wyo. 1984) ("The effect of proof of the defense of 'unconsciousness' causing an automatistic state is that the action resulting in the crime charged is not voluntary; that therefore the actor cannot entertain either a specific or general intent necessary to guilt of a crime."). In his dissenting opinion in *Clark*, Justice Breyer, expressly identified this issue left unresolved by the majority opinion:

> I would also reserve the question (as I believe the Court has done) as to the burden of persuasion in a case where the defendant produces sufficient evidence . . . as to raise a reasonable doubt that he suffered from a mental illness so severe as to prevent him from forming any relevant intent at all. *Clark v. Arizona*, 548 U.S. at 780 (Breyer, J., dissenting).

It is important that this Court clarify whether a state's rule limiting evidence of mental illness to rebut specific intent may be applied to limit evidence of automatism that casts reasonable doubt on the existence of both intent and voluntary action.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE WHETHER THERE IS INEFFECTIVE ASSISTANCE OF COUNSEL WHEN THE DEFENSE COUNSEL FAILS TO RAISE AN OBVIOUS DEFENSE WHICH WOULD NEGATE ELEMENTS OF THE OFFENSE AND WHETHER COURTS MAY LOOK AT ERRORS CUMULATIVELY IN DECIDING WHETHER THERE IS INEFFECTIVE ASSISTANCE OF COUNSEL.

A. The Deficient Performance Of Counsel.

Haskell was represented by two different lawyers, in succession, at the trial court level. Ronald J. Plunkett represented Haskell from June 2002 until May 2003 during the arraignment, preliminary examination and through the pre-trial process. *Haskell*, 695 F. Supp. 2d at 593 n.5. Plunkett withdrew from Haskell's case the day before the trial was scheduled. *Id.* at 596. Barry Resnick represented Haskell during the trial and sentencing phase of his case. *Haskell*, 695 F. Supp. 2d at 593 n.5.

In each instance there was ineffective assistance of counsel in that counsel's performance was seriously deficient and Haskell suffered prejudice as a result. *Strickland v. Washington*, 466 U.S. 668 (1984).

1. Ineffective Assistance Of Counsel Of Ronald Plunkett

Plunkett's conduct was thoroughly unprofessional. Mr. Plunkett had multiple personal problems. His

divorce was finalized four days prior to being retained by Mr. Haskell. *Haskell*, 695 F. Supp. 2d at 596. He later admitted to having a cocaine addiction and was arrested for drug possession. *Id.* He was investigated for the apparent death by overdose of a woman found in his apartment. *Id.* He ultimately agreed to surrender his license to practice law. *Id.*

There was very significant evidence of ineffective assistance of counsel by Plunkett. Haskell was represented by Plunkett from June 2002 until May 19, 2003. When Haskell met with Plunkett on the evening before the trial, it was apparent that Plunkett had not prepared for the trial and had not prepared the insanity defense. As explained above, Haskell's primary defense was that he suffered from Complex Partial Seizure disorder and because of that he was legally insane at the time of the events that formed the charges. Despite the fact that Plunkett had Haskell's medical records and knew about Haskell's treating physician, Dr. Pitts, since June 2002, Plunkett had not talked to Pitts until the eve of the trial. If Plunkett had prepared for trial, he would have known that further testing of Haskell was required to establish the CPS disorder and provide valuable evidence to the jury.

Plunkett's misconduct went even further. After Haskell discharged Plunkett as his lawyer, Plunkett went to the judge and accused Haskell of making a threat. Unfortunately, the contents of the in-chambers discussion were not placed on the record. There is evidence to suggest that Plunkett lied to the

judge about threats from Haskell.[3] These statements from Plunkett to the court caused the trial court to revoke bail, send Haskell to the county jail, and refuse all attempts to get Haskell released so that he could be tested.

Dr. Pitts believed that it was essential to have a PET scan performed to confirm the diagnosis of Complex Partial Seizure. The test, however, could not be performed because Haskell was confined to the county jail. Also, Dr. Pitts wanted to have Haskell examined by an independent forensic psychiatrist. This, too, was frustrated by Haskell's confinement. The jail refused to allow Haskell to be released to have the test performed.

The ineffective assistance of counsel meant that the jury was never instructed on Haskell's actual defense, Complex Partial Seizure disorder. Instead, the instruction was only about the insanity defense, where, as explained above, Haskell had the burden of proof.

Plunkett's ineffective assistance of counsel also precluded Haskell from raising key impeachment

[3] In the petition for review to the Michigan Supreme Court, Haskell pointed to comments by the prosecutor, Plunkett's comments to Haskell's subsequent attorney, an affidavit by Plunkett, and Plunkett's response to a state bar grievance to indicate that Plunkett had lied to the court. Appendix L to Application for Leave to Appeal. Haskell requested that the Michigan Court of Appeals remand the case for a factual hearing on the issue of ineffective assistance of counsel. The Court of Appeals, without opinion, denied that request.

evidence at trial. Under Michigan law, a defendant who wishes to raise prior sexual acts of the victim must file a timely notice under MCL 750.520j(2). No such notice was ever was filed by Plunkett, even though he knew that Russell and Haskell had been in a romantic relationship and the topic came up at the preliminary examination. (Tr. I, 12). This meant that Russell could not be questioned about her prior romantic and sexual relationship with Haskell at trial. Nor, as the Court of Appeals noted, could Russell be questioned about her desire to keep her parents from knowing about her sexual activity. This was crucial to Haskell's explanation for why Russell falsely accused him of sexual assault.

Haskell asked the Michigan Court of Appeals to order a hearing on ineffective assistance of counsel. But it denied this request without opinion. The Michigan Court of Appeals then proceeded to reject the claim of ineffective assistance of counsel by adopting a set of facts totally at odds with what Haskell says occurred.

The District Court stated that: "Mr. Plunkett's controversial and negative personal issues do not equate with ineffective assistance of counsel. Petitioner has failed to demonstrate how Mr. Plunkett's personal and legal problems adversely impacted his right to a fair trial." 695 F. Supp. 2d at 596. The District Court pointed to the continuance given after Resnick took over the representation as ameliorating the adverse effects of Plunkett's negligence. But the continuance did not – and could not – cure the waivers

caused by Plunkett's incompetence. For example, Haskell was precluded from impeaching the testimony of his accuser because Plunkett did not file the necessary notice. This was a case of alleged sexual assault where there was *no* physical evidence of any kind, just the victim's testimony. Not being able to impeach her was crucial. Yet, the new lawyer, Resnick, was precluded from raising their prior sexual history or anything about how the sexual assault charges arose because of Plunkett's failure. Plunkett's failure to file notice as required under Michigan law was just incompetence – there was no strategic reason for this – and it was highly prejudicial.

2. Ineffective Assistance Of Counsel Of Barry Resnick

Resnick took over from Plunkett and was able to gain only a two month continuance before the trial began. Resnick did not know about or understand CPS disorders. This caused him to make crucial errors that were highly prejudicial to Haskell. The District Court summarized these: Resnick failed to "(1) object to Dr. Marquis as an expert witness and the admission of her testimony; (2) object to the insanity defense jury instruction; (3) raise the automatism defense; and (4) explain to the jury that the totality of Petitioner's actions consisted only of hitting Ms. Russell in the face and stomach during a 15-30 second time period, and did not include a sexual assault." *Haskell*, 695 F. Supp. 2d at 596-97.

B. This Court Should Grant Review To Decide Whether The Defense Counsel's Failure To Present A Defense Which Negates Elements Of The Crime Constitutes Ineffective Assistance Of Counsel.

Resnick's failure, perhaps due to lack of preparation time, to fully understanding the CPS disorder was likely fatal to Haskell's case. Much deference is given to possible discretionary decisions rooted in trial strategy. "The petitioner bears the burden of overcoming the presumption that the challenged action is sound trial strategy." *Miller v. Francis*, 269 F.3d 609, 615 (6th Cir. 2001). These decisions by Resnick do not appear to be strategic choice but a fundamental misunderstanding of CPS and automatism. As a result, Haskell was unable to establish a defense that shifted the burden of proof from himself to the prosecution. Had Resnick used CPS as evidence of failure to possess the requisite mens rea or actus reus rather than as an affirmative defense of insanity, the prosecutor would have been required to prove beyond a reasonable doubt that Haskell did in fact intend his action and voluntarily performed his action. Improperly framing this defense allowed the burden of proof to be placed on the wrong side in the trial and to have allowed the jury to find that he was "mentally ill" but not "insane."

There thus is a reasonable probability that the result would have been different had trial counsel performed competently. *Strickland*, 466 U.S. at 693.

The shifting of the burden of proof – from the prosecution (as it would have been had CPS and automatism been properly raised) to the defense (as it was by it being treated as an insanity defense) – certainly affected, if not determined, the outcome. Ineffective assistance of counsel, of course, is a basis for relief under 28 U.S.C. § 2254(d). *See*, *e.g.*, *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010); *Porter v. McCullum*, 130 S.Ct. 447 (2009).

This was exactly the ground upon which Judge Merritt dissented. Judge Merritt wrote:

> The jury returned an unusual verdict saying that Haskell was 'mentally ill' but did not meet the quite different standards for the insanity defense, a defense at odds with automatism. I believe that if Haskell's counsel had presented his automatism defense (a form of unconsciousness) as negating the mens rea or intent element of the case, the jury may well have returned a verdict of not guilty because of the absence of intent. By virtue of the failure of both Pluckett [sic] and Resnick, as counsel, to raise the automatism defense to the element of intent, the jury required Haskell to meet the different theory of insanity charged by the court as an affirmative defense.
>
> This occurred because neither lawyer in the case had any conception of how the particular mental illness should affect the elements of the crime and did not understand the *mens rea* requirement. . . .

Usually the most important work of a criminal defense lawyer is to develop a plausible defense theory. Here, there was an obvious theory that would have negated intent as a result of "mental illness," a fact that the jury found, but could not apply to insanity. The defense lawyers were so ineffective that they never gave the jury an opportunity to consider it as undermining intent. I would put that kind of lawyer malpractice on an equal plane with the lawyer who sleeps through the trial in the sense that the lawyer was unfocused on the case and therefore unable to make a rather obvious decision to use the type of "mental illness" the jury found to negate intent.

For purposes of *Strickland v. Washington*, 466 U.S. 668 (1984), the failure to assert an obvious defense to an element of the crime – intent – constitutes deficient performance. Competence requires a basic conception of the elements of the crime and how lawyers must go about casting doubt on *mens rea* which the state has the burden of establishing. Instead counsel chose to carry the heavy burden of proving the affirmative defense of insanity which includes proof of the defendant's lack of capacity to understand the difference between right and wrong. Where the jury finds the facts in favor of the automatism defense ("mental illness") but is unable to apply it because defense counsel did not correctly point out the element of the crime that it would undermine, prejudice is clear. Lawyers can be incompetent because they do

> not understand the law as well as incompetent because they do not develop the facts.

Haskell v. Berghuis, App. at 34 (Merritt, J., dissenting).

C. This Court Should Grant Review To Resolve A Conflict Among The Circuits As To Whether Ineffective Assistance of Counsel Is To Be Determined Based On The Cumulative Errors Of Defense Counsel.

In this case, as explained above, there were numerous errors by defense counsel. Are these errors to be assessed cumulatively in determining whether there was ineffective assistance of counsel? There is a split among the Circuits on this issue which requires resolution by this Court.

The Sixth Circuit in this case and in others has rejected looking at cumulative errors in deciding whether there is ineffective assistance of counsel. *See*, *e.g.*, *Moore v. Parker*, 425 F.3d 250, 256 (6th Cir. 2005); *Lorraine v. Coyle*, 291 F.3d 416, 447 (6th Cir. 2001); *see* Ruth A. Moyer, *To Err Is Human; to Cumulate, Judicious: The Need for U.S. Supreme Court Guidance on Whether Federal Habeas Courts Reviewing State Convictions May Cumulatively Assess* Strickland *Errors*, 61 Drake L. Rev. 447, 473-74 (2013). The Eighth Circuit also has rejected the assertion that cumulative errors can establish *Strickland* prejudice. *Kennedy v. Kemma*, 666 F.3d 472, 485 (8th Cir. 2012).

By contrast, several other Circuits have expressly held that cumulative errors can be used to determine whether there has been ineffective assistance of counsel. *See*, *e.g.*, *Dugas v. Copland*, 428 F.3d 317 (1st Cir. 2005) (recognizing cumulative error as a basis for finding ineffective assistance of counsel); *Lindstadt v. Keane*, 239 F.3d 191, 194 (2d Cir. 2001) (allowing cumulative error to demonstrate ineffective assistance of counsel); *Breakiron v. Horn*, 642 F.3d 126 n.5 (3d Cir. 2011); *Albrecht v. Horn*, 485 F.3d 103, 138-39 (3d Cir. 2007) (recognizing that a court should consider counsel's cumulative errors in its ineffective assistance of counsel analysis); *Richard v. Quarterman*, 566 F.3d 553, 571-72 (5th Cir. 2009) (applying cumulative error analysis); *Sanders v. Ryder*, 342 F.3d 991, 1000-01 (9th Cir. 2003) ("Separate errors by counsel at trial and at sentencing should be analyzed together to see whether their cumulative effect deprived the defendant of his right to effective assistance.")

Had this case been decided by the First, Second, Third, Fifth, or Ninth Circuits, the cumulative error analysis likely would have meant that Mr. Haskell's conviction would have been overturned. This Court should grant review to resolve this important split among the Circuits.

III. CERTIORARI SHOULD BE GRANTED TO RESOLVE AN ISSUE OF NATIONAL IMPORTANCE AND A SPLIT AMONG THE LOWER COURTS AS TO WHETHER DUE PROCESS OR THE SIXTH AMENDMENT RIGHT TO TRIAL BY JURY IS VIOLATED IF A "CONTINUING PATTERN OF CRIMINAL ACTIVITY" IS FOUND BASED ON ONE INCIDENT.

Sentencing systems across the country understandably provide for harsher punishments for those who are engaged in repeated criminal activity. *See*, *e.g.*, *Ewing v. California*, 538 U.S. 11, 15 (2003) (describing "three strikes laws" that provide for incarceration of repeat felons). One form such laws take is for sentencing statutes to provide, as does Michigan law, for significant sentencing enhancements for those involved in a continuing pattern of criminal behavior. MCL 777.43. The issues thus often arise, but have never been examined by this Court, as to what is sufficient to constitute a "continuing pattern of criminal activity" under the due process clause and what role the jury must play in making this determination under the requirements of the Sixth Amendment.

The trial judge here found that the events towards the victim in this case on a single night, over the period of a few minutes, constituted a "continuing pattern of criminal behavior." Based on this, the judge imposed a very significant increase in the sentence, 25 points under the Michigan sentencing

law. Haskell never before had been accused of any crime and the victim testified at trial that he had never before assaulted or threatened her. (Tr. I, 224).

The continuing pattern of criminal activity was that during the alleged rape he inserted his finger into her vagina several times and had intercourse with her, each penetration being deemed a separate crime. The Michigan Court of Appeals said that this was sufficient to constitute a continuing pattern of criminal activity, even though the acts occurred during the commission of a single rape. The Michigan Court of Appeals stated: "Each forcible penetration of the victim resulted in a separate conviction pursuant to the plain language of the statute and case law. Therefore, the trial court did not abuse its discretion in counting each offense as part of the defendant's pattern of criminal behavior."

Under this theory, almost any crime could, by itself, be deemed a continuing pattern of criminal activity. A person in a fight who landed four punches could be charged with four counts of battery and then that would be the basis for finding a continuing pattern of criminal activity and thus grounds for a tremendous increase in the sentence. A person who fired a gun multiple times would be engaged in a pattern of criminal activity.

This, however, is so arbitrary and unfair as to raise significant questions under the due process clause and to warrant review by this Court. *See*, *e.g.*,

Brecht v. Abrahamson, 507 U.S. 619, 639 (1993) (Stevens, J., concurring) ("[t]he Fourteenth Amendment prohibits the deprivation of liberty 'without due process of law'; that guarantee is the source of the federal right to challenge state criminal convictions that result from fundamentally unfair trial proceedings."); *Doggett v. United States*, 505 U.S. 647, 666 (1992) (Thomas, J., dissenting) ("the Due Process Clause always protects defendants against fundamentally unfair treatment by the government in criminal proceedings"); *Darden v. Wainwright*, 477 U.S. 168 (1986) (fundamentally unfair procedures violate due process); *Bearden v. Georgia*, 461 U.S. 660, 666 (1983) (due process is violated by procedures that are "fundamentally unfair or arbitrary.") Indeed, if "continuing pattern of criminal activity" is so broad as to include, as here, events that occurred in minutes, then it offends due process as being so vague as to not provide defendants adequate notice of what might be punished. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (vague laws that fail to provide adequate notice are unfair and "authorize and even encourage arbitrary and discriminatory enforcement.")

Not surprisingly, courts are divided as to what can constitute a "continuing pattern of criminal activity." Here, the Michigan courts found a continuing pattern from several acts that occurred to one victim in a few minutes. In sharp contrast, a federal district court recently found that events that occurred three days apart could not be a "pattern of criminal

behavior." *United States v. Grande*, 353 F. Supp. 2d 623, 633 (E.D. Va. 2005); *see also Wilson v. Florida*, 776 So.2d 347 (Fla. 2001) (a rapid succession of hits from a baseball bat was one assault and could not be charged as multiple assaults). *But see Sun Savings & Loan Association v. Dierdorff*, 825 F.2d 187, 193 (9th Cir. 1987) (in order to establish required "pattern" it is not necessary to show more than one fraudulent scheme or criminal episode). This Court should grant review to determine whether allowing a pattern of criminal behavior to be based on one incident violates due process.[4]

Independently of the due process issue, there is a crucial question of whether the Sixth Amendment rights to trial by jury and proof beyond a reasonable doubt are violated when the judge, rather than the jury, determines that there is a pattern of criminal activity. In this case, there was no instruction to the jury asking them to find a pattern of criminal activity. Rather, the judge, on his own, found this and tremendously increased the sentence as a result. As a factor which increased the sentence beyond what could

[4] This also can be phrased as a matter of double jeopardy. The Double Jeopardy Clause prohibits multiple punishments for the same offense. By calling one assault a "pattern of criminal activity," the court was essentially dividing one crime into multiple offenses and imposing multiple punishments for the same offense. *See*, *e.g.*, *State v. Sauceda*, 163 Wis.2d 553 (1991) (defendant's conviction for both first-degree and second-degree sexual assault was a multiple punishment for a single act in violation of constitutional prohibitions against double jeopardy).

based on the jury's verdict, this raises an important issue under *Blakely v. Washington*, 542 U.S. 961 (2004).

In fact, there is a conflict among the lower courts on this issue. For example, in *Isaac v. State*, 911 So.2d 813, 814 (Fla. 2005), the appellate court accepted the defendant's argument that "an escalating pattern of criminal activity, is a factual determination that must be found beyond a reasonable doubt by a jury, and that the trial court violated his sixth amendment right to a trial by jury as explained in *Apprendi v. New Jersey*, and clarified by *Blakely v. Washington*." *See also State v. Perez*, 102 P.3d 705 (Ore. App. 2004), *rev'd on other grounds*, 340 Ore. 310, 131 P.3d 168 (Ore. 2006) (a finding of "persistent involvement" in criminal activity is for the jury).

But other courts have come to the opposite conclusion and have held that the jury does not need to make the fact finding necessary to increase the sentence for a pattern of criminal activity. *See*, *e.g.*, *State v. Rivers*, 128 P.3d 608 (Wash. App. 2005) (jury need not make findings for application of Persistent Offender Accountability Act); *People v. Felder*, 129 P.3d 1072 (Colo. App. 2005) (defendant was not entitled to a jury trial on the issue of whether defendant was a habitual criminal pursuant to the habitual criminal statute.)

This issue is distinct from that decided in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which held that prior convictions do not need

to be proven to a jury. This case involves no prior convictions. Rather, the issue is whether a judge can impose a significant increase in a sentence by finding a "continuing pattern of criminal activity" or whether under *Blakely* this must be found by the jury since it significantly increases the sentence beyond what could be based on the jury's verdict. This is an issue of great national importance which will continue to confound the lower courts until there is guidance and clarification from this Court.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ERWIN CHEMERINSKY
Counsel of Record
UNIVERSITY OF CALIFORNIA, IRVINE
SCHOOL OF LAW
401 E. Peltason
Irvine, California 92697-8000
(949) 824-7722
echemerinsky@law.uci.edu

Attorney for Petitioner

2013 WL 163965

United States Court of Appeals for the Sixth Circuit
January 16, 2013, Filed
No. 10-1432

CRAIG HASKELL, Plaintiff-Appellant, v.
MARY BERGHUIS, Warden, Defendant-Appellee.

Counsel: For CRAIG HASKELL, Petitioner-Appellant: Erwin Chemerinsky, UCI School of Law, Irvine, CA.

For MARY BERGHUIS, Warden, Respondent-Appellee: Linus Richard Banghart-Linn, Assistant Attorney General, Office of the Michigan Attorney General, Lansing, MI.

Judges: BEFORE: MERRITT and MOORE, Circuit Judges; and MAYS, District Judge.* MERRITT, Circuit Judge, dissenting.

Opinion

MAYS, District Judge. Petitioner Craig Haskell ("Haskell") seeks review of the denial of his Petition for Writ of Habeas Corpus. Haskell was convicted on August 15, 2003, by a jury in Livingston County, Michigan, which returned a verdict of "guilty but mentally ill" on four counts of first-degree criminal sexual conduct ("CSC"), one count of second-degree CSC, and aggravated domestic violence against Rae

* The Honorable Samuel H. Mays, Jr., United States District Judge for the Western District of Tennessee, sitting by designation.

Russell ("Russell"), Haskell's ex-girlfriend. The state trial court sentenced Haskell to concurrent prison terms of 12-30 years for first-degree CSC, 10-15 years for second-degree CSC, and one year in Livingston County jail for aggravated domestic violence. Haskell has exhausted his state habeas procedures. In *Haskell v. Berghuis,* 695 F. Supp. 2d 574, 600 (E.D. Mich. 2010), the district court denied Haskell's federal habeas petition, but granted a certificate of appealability ("COA") on: (1) whether Haskell had a Due Process right to present an automatism defense; and (2) whether his attorneys' representation was ineffective in violation of the Sixth Amendment. In addition to the issues certified, Haskell seeks review of the state trial judge's finding that four separate digital and/or penile penetrations constituted continuing criminal behavior. We AFFIRM the district court's denial of Haskell's habeas corpus petition.

I. BACKGROUND

A. The Night of May 17, 2002

Haskell and Russell dated for more than two years in high school, but separated during Russell's first semester at Grand Valley State University. On May 13, 2002, Haskell, then 21 years old, visited Russell for the first time since their relationship had ended. Each had recently returned home for summer vacation, and they had agreed to spend time together as friends. Russell, then 19, testified that Haskell was sullen and depressed because of problems at

college and that he was suicidal. During this visit, Haskell sought reconciliation, despite Russell's understanding that their relationship was platonic. When Haskell refused to leave after several hours together, Russell succumbed to the pressure of the situation and engaged in oral sex with him.

Despite the awkwardness of the May 13 encounter, Haskell and Russell agreed to watch a movie at Russell's house on Thursday, May 17. Haskell behaved normally when he arrived, but after they went downstairs to watch a movie, Haskell became upset when Russell sat on a different couch. Haskell's seemingly innocent questions about why Russell refused to sit next to him became more serious, and he began making threats and demanding to know why they could not get back together. Russell believed that his behavior was an attempt to bring her closer to him.

Russell asked Haskell to leave, but he refused. Eventually, he agreed to leave if Russell changed into her pajamas, which included a t-shirt, athletic shorts, panties, and bra. Russell understood his request as a desire to tuck her into bed before leaving. After Russell had finished changing, Haskell sat next to her on the bed. He began speaking about his unhappiness, eventually concluding that he had made a final decision. When Russell asked about that decision, Haskell punched her in the left eye with enough force to propel her into a nearby nightstand. Russell testified that Haskell continued to strike her.

While pinning Russell to the ground, Haskell said that he had asked her to change into her pajamas to make it easier for him to rape her before he committed suicide. Haskell removed Russell's clothing and molested her vagina and breasts, digitally penetrating her vagina on at least two separate occasions. He vaginally raped her. After intercourse, Haskell instructed Russell to lie on the bed. He grabbed a pair of scissors from Russell's nightstand, and Russell thought he intended to kill her.

Haskell's demeanor changed abruptly. He lowered the scissors, covered Russell with a blanket, and repeatedly apologized for his actions. His apologies appeared to indicate confusion about what he had done. Relieved, Russell told him to leave her house and seek help. Before leaving, Haskell requested time before Russell told her parents.

Russell's initial police report included only Haskell's physical assault.[1] When asked by attending physicians at the local hospital where she was treated, she denied having experienced any sexual assault or advances. After the family had returned from the

[1] Russell's original statement to the police reads: "Craig and I went out for two years and eight months. We broke up in October, 2001. I didn't see him until May of 2002. At this time we were arguing 'cause he wanted to date again and I did not. He had been having some school and family problems and needed to talk them out with me. . . . [W]hen I couldn't help him and didn't want him back he hit me four or five times in the head. Then he muffled my screams then he felt bad and I told him to leave and he left out the front door."

hospital, Russell's mother discovered blood in Russell's underwear and confronted her about a possible sexual encounter. Russell admitted that Haskell had raped her, and her parents took her back to the hospital, where doctors conducted a "rape kit" and a physical exam. The examinations showed no signs of sexual trauma to the vagina or anus, and there was no evidence of forceful sexual contact. Russell filled out a new police report at the hospital that detailed the sexual assault.

While Russell was being treated for her injuries, Haskell returned to his parent's house. He appeared frantic, confused, and allegedly heard voices in his head. He did not remember the identity of the person he had just assaulted but eventually identified Russell as the victim. Haskell's parents had him admitted to a psychiatric hospital at the University of Michigan, where he stayed for approximately ten days. Haskell was under the care of Dr. Kenneth Pitts, whose tentative diagnosis of Haskell was NOS, or "not otherwise specified."

B. Ronald Plunkett and Barry Resnick

After Haskell was arrested, he retained Ronald Plunkett ("Plunkett") as his attorney. On the day before his trial, Haskell sought to have Plunkett removed as his counsel. Among other things, Haskell said that Plunkett had failed to communicate the terms of a pending plea bargain until immediately before trial. The trial court granted Haskell's request

for new counsel, revoked his bond, and held him in custody until trial. Haskell then hired Barry Resnick ("Resnick"), and the court granted a two-month continuance so Resnick could prepare for trial.

Before being replaced, Plunkett had filed a Notice of Intent to Assert the Insanity Defense as required by Michigan law. Resnick also pursued the insanity defense. Resnick offered the testimony of Dr. Pitts, Haskell's attending physician at the University of Michigan, who testified (1) that Haskell's assault on Russell was brought on by a complex partial seizure ("CPS")[2] that left Haskell incapable of appreciating the wrongfulness of his conduct and (2) that Haskell could not conform his conduct to the requirements of the law. The State's expert witness, Dr. Lisa Marquis, evaluated Haskell and agreed that he suffered from a CPS disorder, but disagreed that his disorder prevented him from conforming his behavior to the requirements of the law.

Before trial, Plunkett failed to file a motion under Michigan law that he intended to offer evidence of Russell's past sexual conduct. Resnick also failed to file the motion, although he had been on the case for more than sixty days before trial. Resnick believed

---

[2] CPS involves the temporal lobe of the brain and produces: (1) neuropsychiatric symptoms, (2) visual and olfactory hallucinations, (3) psychotic phenomena after the seizure, (4) rapid heart rate, (5) aggressive acting out, (6) no memory or awareness during the episode or seizure, and (7) no appreciation of any behavior or surroundings during the episode or seizure.

that Michigan law required the motion to be filed within 10 days of arraignment, and he came into the case well after that deadline had passed. The trial court originally prohibited Resnick from asking about Russell's sexual history, but reconsidered its ruling after the State's opening argument placed the former couple's sexual history at issue. Resnick requested, and the trial court granted, permission to ask about Russell's sexual relations with Haskell the Sunday before the events in question. Resnick did not request the opportunity to explore Russell's complete sexual history.

C. Procedural History

Haskell was convicted on August 15, 2003, by a jury in Livingston County, Michigan, which returned a verdict of "guilty but mentally ill." The state trial court sentenced Haskell, and the Michigan Court of Appeals affirmed his conviction and sentence. *See People v. Haskell,* No. 251929, 2005 Mich. App. LEXIS 1531, at *25 (Mich. Ct. App. June 23, 2005). The Michigan Supreme Court denied leave to appeal the judgment of the Michigan Court of Appeals. *See People v. Haskell,* 474 Mich. 1118, 712 N.W.2d 448 (Mich. 2006). Haskell timely filed a habeas corpus petition. On February 26, 2010, the district court denied Haskell's petition, but granted a COA on Haskell's Fourteenth and Sixth Amendment claims. *Haskell,* 695 F. Supp. 2d at 600. Haskell timely appealed.

II. JURISDICTION

We have jurisdiction under 28 U.S.C. § 2253 because the district court issued a COA based on Haskell's "substantial showing of the denial of a constitutional right," and that certificate stated which "specific issues or issues" could be appealed. 28 U.S.C. § 2253(c)(2)-(3). Although the district court did not issue a COA on Haskell's Due Process claim, we may treat Haskell's notice of appeal as a request for a COA. *See Johnson v. Hudson,* 421 F. App'x 568, 570 n.1 (6th Cir. 2011).

III. STANDARD OF REVIEW

We review "de novo a district court's denial of a writ of habeas corpus." *Ramonez v. Berghuis,* 490 F.3d 482, 486 (6th Cir. 2007) (citing *Dando v. Yukins,* 461 F.3d 791, 795-96 (6th Cir. 2006)); *see also Nichols v. United States,* 563 F.3d 240, 248 (6th 2009); *Ivory v. Jackson,* 509 F.3d 284, 291 (6th Cir. 2007). "And where as here the district court has reviewed only trial transcripts and other court records, any factual determinations by the district court are also reviewed de novo." *Ramonez,* 490 F.3d at 486.

Haskell is entitled to relief if the state court 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 on an unreasonable determination of the facts in light of the evidence

presented in the State court proceeding." Anti-Terrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254(d)(1)-(2).

Legal principles are "clearly established" if they are "embodied" in a holding of the Supreme Court. *Thayler v. Haynes,* 130 S. Ct. 1171, 1173, 175 L. Ed. 2d 1003 (2010) (citing *Carey v. Musladin,* 549 U.S. 70, 74, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006)). Decisions are contrary to clearly established Federal law if they are based on legal conclusions "opposite to [those] reached in Supreme Court precedent." *Ramonez,* 490 F.3d at 486 (citing *Dando,* 461 F.3d at 796). A decision is also contrary to clearly established Federal law "if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor,* 529 U.S. 362, 412-13, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).

"Unreasonable applications" of clearly established law are distinguishable from incorrect applications. *Woodford v. Visciotti,* 537 U.S. 19, 24-25, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002). Federal courts "must find the state court's application of Supreme Court precedent 'objectively unreasonable,' not merely 'incorrect or erroneous.'" *Ramonez,* 490 F.3d at 486 (quoting *Wiggins v. Smith,* 539 U.S. 510, 520-21, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter,* 131 S. Ct. 770, 786

178 L. Ed. 2d 624 (2011) (quoting *Yarborough v. Alvarado,* 541 U.S. 652, 664, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004)). A defendant must demonstrate that a state court's ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." *Id.* at 786-87. This Court takes the position that, "while the principles of 'clearly established law' are to be determined solely by resort to Supreme Court rulings, the decisions of lower federal courts may be instructive in assessing the reasonableness of a state court's resolution of an issue." *Stewart v. Erwin,* 503 F.3d 488, 493 (6th Cir. 2007) (citation omitted).

IV. CERTIFIED ISSUES

A. Haskell's Automatism Defense

Haskell argues that his Due Process rights were violated because Michigan required the presentation of an automatism defense through the framework of its insanity statute. He contends that automatism is fundamentally distinguishable from insanity because it negates key elements of the criminal charge by "plac[ing] the individual in a state of unconsciousness or semiconsciousness." (Appellant Br. 12-13.) Because Haskell was allegedly unconscious – and therefore unable to control or direct his actions – he argues that he was incapable of forming the actus reus and mens rea of the crimes for which he was charged. (*Id.* at 13.) Haskell argues that placing the burden of

proving his defense on him was contrary to and an unreasonable application of clearly established constitutional principles.

It is not obvious that Haskell may bring this Due Process claim. At oral argument the parties were asked to demonstrate that Haskell attempted to raise his automatism defense as anything other than an insanity defense, but was barred by the state trial court from doing so. Haskell directs us to a single passage in the pretrial transcript discussing how the jury will be instructed about shifting burdens of persuasion of Haskell's insanity defense. *See* R. 9-9 (Trial Tr. at 9-10) (Page ID #1788-89). This passage provides, at best, weak support for the claim that the trial court prevented Haskell from raising his defense in the manner preferred-viz., as a challenge to mens rea and actus reus, rather than as an affirmative defense.

Nevertheless, assuming that Haskell was actually prevented at trial from raising automatism as a defense independent from an insanity defense, he has since properly exhausted his claim. *See Haskell,* 695 F. Supp. 2d at 590 ("Petitioner raised the issue in his supplemental brief on direct appeal as issue 'X', and raised it in his application for leave to appeal to the Michigan Supreme Court as issue 'VI'. . . . The Court will review the issue *de novo.*"). In Haskell's supplemental brief to the Michigan Court of Appeals, he "challenge[d] outright [ ] as violative of the Fourteenth Amendment's due process clause the actual or apparent requirement of Michigan law that *any*

mental-incapacity defense must be presented as an 'insanity' defense." (*See* Def.'s Supp. Br. 49, ECF No. 9-35) (emphasis in original). He relied on "federal cases employing constitutional analysis" and phrased his claim "in terms of constitutional law or in terms sufficiently particular to allege a denial of a specific constitutional right." *Whiting v. Burt,* 395 F.3d 602, 613 (6th Cir. 2005) (citation omitted). He supported his brief by "facts well within the mainstream of constitutional law" and attached exhibits and articles from medical journals on CPS. *Id.* "This is not an instance where the habeas petitioner failed to 'apprise the state court of his claim.'" *Dye v. Hofbauer,* 546 U.S. 1, 3-4, 126 S. Ct. 5, 163 L. Ed. 2d 1 (2005) (quoting *Duncan v. Henry,* 513 U.S. 364, 366, 115 S. Ct. 887, 130 L. Ed. 2d 865 (1995) (per curiam)). The exhaustion requirement "cannot turn upon whether a state appellate court chooses to [address] in its opinion" a constitutional claim; it must turn on what the party actually argued. *Id.* at 3 (citing *Smith v. Digmon,* 434 U.S. 332, 333, 98 S. Ct. 597, 54 L. Ed. 2d 582 (1978) (per curiam)).

On the merits, the parties dispute the scope of Haskell's Due Process claim. Haskell frames the issue broadly, arguing that his conviction was unconstitutional because "automatism should be recognized as an independent defense apart from the insanity defense." (Appellant Br. 19.) The State narrows the issue, contending that automatism is not a defense clearly established under federal law. (Appellee Br. 15.) According to the State, Due Process does not

require that a defendant be permitted to raise whatever defense he chooses, particularly if that defense does not exist as a matter of law. (*Id.*) (citing *Clark v. Arizona,* 548 U.S. 735, 126 S. Ct. 2709, 165 L. Ed. 2d 842 (2006)).

Michigan does not recognize an independent automatism defense. Michigan has adopted a "comprehensive statutory framework" outlining when and under what conditions an insanity defense may be argued. *People v. Carpenter,* 464 Mich. 223, 627 N.W.2d 276, 277 (Mich. 2001) (discussing Mich. Comp. Laws § 768.21a). In doing so, "the Legislature has demonstrated its policy choice that evidence of mental incapacity short of insanity cannot be used to avoid or reduce criminal responsibility by negating specific intent." *Id.* at 283. Automatism, insofar as it concerns a neurological condition precluding Haskell from forming the requisite intent, is a defense reliant on mental capacity-indeed, Haskell labeled his CPS disorder as a mental-incapacity defense before the state appellate court. Thus, Michigan law requires an automatism defense be raised within the statutory framework of the state's insanity defense; this means, *inter alia,* that Haskell had the burden of proving his defense by a preponderance of the evidence. Mich. Comp. Laws § 768.21a(3).

Supreme Court precedent does not clearly establish an automatism defense, nor does it establish that defendants may raise whatever defenses they choose. *See Clark,* 548 U.S. at 753 (recognizing that defining state crimes is open to state choice); *see also United*

States v. Sheffer, 523 U.S. 303, 308, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998) (stating that lawmakers have "broad latitude" to establish rules for a defendant's presentation of evidence). It is "'within the power of the State to regulate procedures . . . including the burden of producing evidence and the burden of persuasion,' and [the State's] decision in this regard is not subject to proscription . . . unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Medina v. California,* 505 U.S. 437, 445, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992) (quoting *Speiser v. Randall,* 357 U.S. 513, 523, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958)); *see also Patterson v. New York,* 432 U.S. 197, 201-202, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977). Here, Michigan's statute does not shift the burden of proving automatism. Automatism is simply not recognized in Michigan as distinct from an insanity defense. The Supreme Court makes clear that a state's conceptualization of the insanity defense will be accorded broad deference. *See Clark,* 548 U.S. at 752-53. In habeas proceedings, we should be reluctant to "second guess a state court's decision concerning matters of state law." *Greer v. Mitchell,* 264 F.3d 663, 675 (6th Cir. 2001). Given that principle, it would be overreaching to conclude that Haskell's conviction was contrary to clearly established federal law. When "cases give no clear answer to the questions presented," there is no clearly established law. *Wright v. Van Patten,* 552 U.S. 120, 126, 128 S. Ct. 743, 169 L. Ed. 2d 583 (2008) (per curiam).

In the absence of a specific legal rule, it was not unreasonable for Michigan courts to conclude that an automatism defense (sometimes called an unconsciousness defense) is not constitutionally required, or that its presentation outside the context of an insanity defense is not necessary as a matter of due process. To date, few state courts have embraced Haskell's constitutional theory. Haskell states that twelve states recognize a defense of automatism; only five of those states place the burden of proof on the prosecution. Letter Br. at 3 (identifying California, Indiana, South Dakota, Washington, and West Virginia). We have identified only five states that explicitly separate automatism and insanity defenses. *People v. Martin,* 87 Cal. App. 2d 581, 197 P.2d 379, 383 (Cal. 1948); *State v. Caddell,* 287 N.C. 266, 215 S.E.2d 348, 363 (N.C. 1975); *Jones v. State,* 1982 OK CR 112, 648 P.2d 1251, 1258 (Okla. Crim. Ct. App. 1982); *State v. Jenner,* 451 N.W.2d 710, 721 (S.D. 1990); *Fulcher v. State,* 633 P.2d 142, 145-47 (Wyo. 1981). Two of these states require a defendant to prove automatism by a preponderance of the evidence, as though it were any other affirmative defense. *Caddell,* 215 S.E.2d at 363; *Fulcher,* 633 P.2d at 147. In light of the small minority of states that share Haskell's theory about constitutionally required criminal defenses, it was not an unreasonable application of clearly established federal law for Michigan to require that he present his automatism defense within the framework of an insanity defense.

B. Ineffective Assistance of Counsel

Haskell claims that he was ineffectively assisted by Plunkett, who represented him from June 2002 to May 2003, and Resnick, who represented him from May 2003 until after his conviction. Haskell identifies several areas of Plunkett's ineffective assistance, but the weight of Haskell's argument is that Plunkett was unprepared. Haskell argues that Resnick was ineffective because he was not knowledgeable about CPS disorder, which was the basis for Haskell's defense.

The law of ineffective assistance is stated in *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *See also Padilla v. Kentucky,* 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010) (ineffective assistance of counsel is a basis for relief under 28 U.S.C. § 2254(d)); *Porter v. McCullum,* 558 U.S. 30, 130 S. Ct. 447, 175 L. Ed. 2d 398 (2009). Under *Strickland,* 466 U.S. at 687, Haskell must establish that his counsels' performances were deficient, which requires showing that counsels' errors were so serious they were not functioning as counsel. Haskell must then establish that at least one of the deficient performances prejudiced his defense, meaning that his counsel's errors were so serious that they deprived him of a fair trial or appeal. *Id.* Unless Haskell demonstrates both deficient performance and prejudice, "it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* at 687. "Surmounting *Strickland*'s high bar is never an easy

task." *Padilla,* 130 S. Ct. at 1485. We must evaluate Haskell's case with "scrupulous care, lest 'intrusive post-trial inquiry threaten the integrity of the very adversary process the right to counsel is meant to serve.'" *Richter,* 131 S. Ct. at 788 (quoting *Strickland,* 466 U.S. at 689-90).

"The first prong – constitutional deficiency – is necessarily linked to the practice and expectations of the legal community: 'The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Padilla,* 130 S. Ct. at 1482 (quoting *Strickland,* 466 U.S. at 688)). The Supreme Court has long "recognized that prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable. . . ." *Id.* (citations and internal quotation marks omitted). Although "only guides" and not "inexorable commands," prevailing norms of practice may be "valuable measures . . . of effective representation." *Id.* Claims under this prong carry the strong presumption that "counsel . . . rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Johnson v. Bell,* 525 F.3d 466, 487 (6th Cir. 2008); *see also Strickland,* 466 U.S. at 689.

To establish prejudice, Haskell must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 689. "It is not enough

to show that the errors had some conceivable effect on the outcome of the proceeding." *Richter,* 131 S. Ct. 770, 788, 178 L. Ed. 2d 624 (2011) (internal quotation marks omitted). Courts consider "'the totality of the available [] evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding'" – and gauge it in relation to evidence against the defense. *Id.* at 454 (quoting *Williams,* 529 U.S. at 397-98).

Richter states the inquiry:

> Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.

131 S. Ct. at 788 (internal citations omitted). This inquiry has a "'substantially higher threshold.'" *Knowles v. Mirzayance,* 556 U.S. 111, 123, 129 S. Ct. 1411, 173 L. Ed. 2d 251 (2009) (internal quotation marks omitted). "And, because the *Strickland* standard is a

general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Id.* (citing *Yarborough,* 541 U.S. at 664 ("[E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.")).

1. Plunkett

The district court succinctly summarized Haskell's allegations:

> (1) Mr. Plunkett and his wife's divorce became final four days after Mr. Plunkett was retained; (2) Mr. Plunkett has admitted to a crack cocaine addiction; (3) Mr. Plunkett was arrested for possession of 25 grams of crack cocaine and is facing incarceration; (4) the Michigan Attorney Grievance Commission was appointed receiver of Mr. Plunkett's files after the Commission received notice that Mr. Plunkett abandoned his law practice; (5) Mr. Plunkett was under investigation for the death of a 22-year-old woman who was found dead in his apartment from an apparent drug overdose; (6) Mr. Plunkett withdrew as Petitioner's attorney the day before trial was scheduled; (7) Mr. Plunkett requested so many trial date continuances in the past that the trial judge was initially going to allow Petitioner's new attorney Mr. Resnick only three weeks to prepare for trial; (8) Mr.

> Plunkett told the trial judge that Petitioner threatened him with physical violence, which led to the revocation of Petitioner's bond; (9) Dr. Pitts attested at trial and in an affidavit that Petitioner's incarceration while awaiting trial made it difficult and/or impossible to conduct proper testing in preparation for Petitioner's defense; and (10) Mr. Plunkett's story about being threatened by Petitioner was inconsistent. As to the latter incident, Petitioner argues Mr. Plunkett first told the trial judge that Petitioner threatened him, but at a July 9, 2003 bond hearing, Mr. Plunkett stated that he may have "misinterpreted" what Petitioner had said to him. Petitioner asserts that Mr. Plunkett responded to an attorney grievance by saying that it was Petitioner's father, William Haskell, who had threatened him.[3]

Haskell, 695 F. Supp. 2d at 595-96. In his brief, Haskell also identifies Plunkett's failure to address Russell's prior sexual history, which he argues was key impeachment evidence. According to Haskell, Plunkett failed to file a timely notice under Mich. Comp. Laws § 750.520j(2), "even though he knew that [ ] Russell and Haskell had been in a romantic relationship and the topic came up at the preliminary examination." (Appellant Br. 25.) After reviewing those contentions, the Michigan Court of Appeals

[3] As the district court noted, most of these issues were revealed after Plunkett no longer represented Haskell. *Haskell,* 695 F. Supp. 2d at 596 n.6.

concluded that Haskell had failed to show deficient performance, and – even if he had – that the deficient performance had not prejudiced his case. *See Haskell,* 2005 Mich. App. LEXIS, 1531, at *14-18.

Haskell's ineffective assistance claim does not satisfy the "doubly deferential" habeas standard. *See Knowles,* 556 U.S. at 123. He cites no authority that an attorney's drug or legal problems rise to a level of constitutional concern. Plunkett's personal problems are not relevant to this case absent a showing that they affected his performance. Because Haskell has not made that showing, his argument that Plunkett's personal problems rose to the level of ineffectiveness fails.

The inquiry is whether "there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Richter,* 131 S. Ct. at 788. Plunkett failed to file notice under Michigan law to cross-examine Russell about her sexual history, but that failure was inconsequential. Haskell's trial counsel sought and received permission to question Russell's sexual history to the limited extent he requested. Even if material, Plunkett's failure to file notice with the court can be seen as a "strategic choice[ ]." *Strickland,* 466 U.S. at 691. Russell was prepared to testify that she had a prior sexual relationship with Haskell. The inferences from that testimony are obvious. An attorney could reasonably conclude that the benefits of pressing Russell about her prior sexual relationship were outweighed by the danger of alienating the jury, given the physical and emotional

injuries Russell had sustained. A "heavy measure of deference to counsel's judgments" is demanded in ineffective-assistance cases. *Id.*

2. Resnick

The district court succinctly summarized Resnick's alleged ineffectiveness:

> Petitioner argues that Mr. Resnick's ineffectiveness as trial counsel resulted from his lack of knowledge about CPS disorders. Petitioner asserts that Mr. Resnick failed to: (1) object to Dr. Marquis as an expert witness and the admission of her testimony; (2) object to the insanity defense jury instruction; (3) raise the automatism defense; and (4) explain to the jury that the totality of Petitioner's actions consisted only of hitting Ms. Russell in the face and stomach during a 15-30 second time period, and did not include a sexual assault.

Haskell, 695 F. Supp. 2d at 596-97. Haskell argues that Resnick failed, "perhaps due to lack of preparation time, to fully understand [ ] CPS disorder," which was likely fatal to Haskell's case. (Appellant Br. 27.) Haskell contends that Resnick's choices were not strategic, but demonstrated a "fundamental misunderstanding of CPS and automatism . . . [and thus] Haskell was unable to establish a defense that shifted the burden of proof from himself to the prosecution." (*Id.*) "Improperly framing this defense" allowed the jury to find that Haskell was "mentally ill" but not

"insane." (*Id.*) The Michigan Court of Appeals rejected Haskell's argument in a single paragraph:

> Defendant's claim that he was deprived of effective assistance of counsel because his trial counsel failed to object to the assertions of error addressed on appeal lacks merit because counsel is not required to advocate a meritless position. As noted above, defendant has failed to show any prosecutorial misconduct, instructional error, or improper admission of evidence. Therefore, his trial counsel was not ineffective for failing to object to these assertions of law.

Haskell, 2005 Mich. App. LEXIS 1531, at *8.

Haskell was competently represented. He has not identified, and we have not located, a constitutional requirement that Resnick assert a defense not recognized under state law. Resnick's failure to challenge Michigan's insanity defense does not make his representation unsound. It does not demonstrate that he lacked a fundamental understanding of automatism. His line of questioning at trial supports the opposite conclusion. During cross-examination, Resnick asked Russell to describe the rapidity of Haskell's behavior change. He asked, "[D]id [Haskell's behavior] seem like a sudden change or d[id] you notice a gradual change in Craig at, at this time that we're talking about?" (Trial Tr. (Vol. I) 226: 3-6.) When questioning Russell about when Haskell stopped assaulting her, he asked, "Do you recall testifying . . . that: 'Shortly after that, he must have realized what he was doing

because he stopped and he covered me with a blanket." (*Id.* 232: 18-23.) He also questioned Russell about what she perceived to be Haskell's "normal" behavior during their previous relationship. (*Id.* 240: 1-16.) Again, Resnick pursued whether Haskell's behavioral change was "drastic" or "gradual." (*Id.* 240: 13-18.) Resnick's questions are consistent with a theory of automatism.

V. HASKELL'S THIRD ISSUE

Haskell argues that the district court erred in denying a COA on the issue of whether his actions constituted a "continuing pattern of criminal behavior" that supported a 25-point increase under Michigan sentencing law (Appellant Br. 28.) The alleged "continuing pattern of criminal behavior" was the repeated penetration of Russell's vagina by Haskell's fingers and/or penis. The Michigan Court of Appeals rejected this argument, and the district court agreed. See *Haskell,* 2005 Mich. App. LEXIS 1531, at *8; *Haskell,* 695 F. Supp. 2d at 598-99.

Haskell attacks the logic of the state-court decision that "[e]ach forcible penetration of the victim resulted in a separate conviction pursuant to the plain language of the statute and case law." *Haskell,* 2005 Mich. App. LEXIS 1531, at *8. According to Haskell, "[u]nder this theory, almost any crime could, by itself, be deemed a continuing pattern of criminal activity. A person in a fight who landed four punches could be charged with four counts of battery and then

that would be the basis for finding a continuing pattern of criminal activity and thus grounds for a tremendous increase in the sentence." (Appellant Br. 29.) Haskell argues that the state court's decision is "so arbitrary and unfair as to raise significant questions under the due process clause." *See, e.g., Brecht v. Abrahamson,* 507 U.S. 619, 639, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993). Haskell also argues that the state court's decision is "so broad" that it "offends due process as being so vague as not to provide defendants adequate notice of what might be punished." *See, e.g., City of Chicago v. Morales,* 527 U.S. 41, 56, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999). Haskell contends that the state-court decision violates his Sixth Amendment right to trial by jury because the judge, not the jury, decided there was a pattern of criminal activity, which increased his sentence, although not beyond the statutory maximum. *See Blakely v. Washington,* 542 U.S. 961,125 S. Ct. 21, 159 L. Ed. 2d 851 (2004).

The district court did not grant a COA on this issue. "Rule 22(b)(2) provides that when an appellant fails to file an express request for a COA, the notice of appeal constitutes such a request to the judges of the court of appeals." *United States v. Cruz,* 108 F. App'x. 346, 348 (6th Cir. 2004). Haskell concedes that he has failed to certify this issue for appeal. (Appellant Rep. Br. 10-12.) His sole argument is that the Court should treat his notice of appeal as a request for a COA. (Appellant Rep. Br. 12.)

Generally, "a court of appeals will address only the issues which are specified in the [COA]" on habeas review. *See Searcy v. Carter,* 246 F.3d 515, 518 (6th Cir. 2001); *Johnson v. Bradshaw,* 205 F. App'x 426, 430 (6th Cir. 2007) ("We . . . limit our review to those issues identified in the [COA]."); *Hunt v. Mitchell,* 261 F.3d 575, 579-80 (6th Cir. 2001) (reviewing the "sole question[s]" presented to the Court on appeal). However, we have recognized our ability to grant a COA in the first instance at our own discretion. *See Hudson,* 421 F. App'x at 570 n.1.

Haskell concedes that he failed to ask this Court to review the district court's decision and that his counsel provides no reason for failing to comply with Rule 22's express language. These shortcomings are not fatal. His notice of appeal constitutes a request for a COA. *Castro v. United States,* 310 F.3d 900, 903 (6th Cir. 2002). Although we encourage "petitioners as a matter of prudence to move for a COA at their earliest opportunity so that they can exercise their right to explain their argument," we grant a COA on Haskell's third issue. *Id.*

Haskell argues that: (1) the state trial court's finding that four separate digital penetrations constituted continuing criminal activity was so arbitrary and fundamentally unfair that it deprived him of due process, and (2) the state trial court's determination that the continuing criminal behavior warranted a higher prison sentence violated his Sixth Amendment rights under *Blakely.*

A. Due Process

Sentences violate due process if they are based on "misinformation of constitutional magnitude[,]" *Roberts v. United States,* 445 U.S. 552, 556, 100 S. Ct. 1358, 63 L. Ed. 2d 622 (1980), or "extensively and materially false" evidence that the defendant had no opportunity to cure. *Townsend v. Burke,* 334 U.S. 736, 741, 68 S. Ct. 1252, 92 L. Ed. 1690 (1948). "A state court's alleged misinterpretation of state sentencing guidelines and crediting statutes is a matter of state concern only." *Howard v. White,* 76 F. App'x 52, 53 (6th Cir. 2003). "In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire,* 502 U.S. 62, 68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991); *see also Greer,* 264 F.3d at 675.

The Michigan Court of Appeals rejected Haskell's due process challenge as follows:

> "And, regarding OV 13, continuing pattern of criminal behavior, the evidence clearly indicated that defendant committed three or more crimes against the victim within a five year period, i.e., the sentencing offenses. . . . Each forcible sexual penetration of the victim resulted in a separate conviction pursuant to the plain language of the statute and relevant case law. Therefore, the trial court did not abuse its discretion in counting each offense as part of defendant's pattern of criminal behavior and scoring OV 13 at twenty-five points. In sum, OV 2, 10, and 13 were

> scored correctly; thus, defendant's sentence is within the appropriate guidelines range and this issue is without merit."

Haskell, 2005 Mich. App. LEXIS 1531, at *23-24 (internal citations omitted).

The Michigan Court of Appeals' decision is not unreasonable. The jury found that Haskell sexually assaulted Russell on at least four occasions with either his fingers or his penis. That information is neither misleading nor materially false. The jury convicted Haskell on the basis of that evidence. The district court concluded that multiple penetrations constituted a pattern of behavior that warranted increasing Haskell's sentence within the Michigan guidelines. *See Haskell,* 695 F. Supp. 2d at 598. The "actual computation of [a prisoner's] term involves a matter of state law that is not cognizable under 28 U.S.C. § 2254." *Kipen v. Renico,* 65 F. App'x 958, 959 (6th Cir. 2003) (citing *McGuire,* 502 U.S. at 68).

Haskell cites a number of Supreme Court decisions to argue that the state trial court's sentence was fundamentally unfair. (*See* Appellant Br. 29) (collecting cases.) None of Haskell's cases addresses unfairness in the sentencing process, or supports his assertion that the trial court's finding of a "continuing pattern of criminal activity" violates due process. *See Abrahamson,* 507 U.S. at 639 ("[W]e conclude that the *Doyle* error that occurred at petitioner's trial did not 'substantially . . . influence' the jury's verdict."); *Doggett v. United States,* 505 U.S. 647, 657-58, 112

S. Ct. 2686, 120 L. Ed. 2d 520 (1992) (overturning a defendant's conviction because an approximately nine-year delay violated his Speedy Trial rights); *Darden v. Wainright,* 477 U.S. 168, 186, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986) (affirming a defendant's conviction and death sentence); *Beardan v. Georgia,* 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221, (1983) (states may not use the poverty of a probationer as the sole justification for imprisonment). These decisions have no concrete application to this case. They do not address sentencing adjustments. They do not address what is required to establish a continuing pattern of criminal behavior. At best, they establish general rules. State courts have "even more latitude to reasonably determine that a defendant has not satisfied [general standards]." *Knowles,* 556 U.S. at 111.

Haskell contends that, if "continuing pattern of criminal behavior" is so broad as to include, as here, events that occurred within minutes, the concept offends due process because its vagueness denies defendants "adequate notice of what might be punished." (Appellant Br. 29-30.) Haskell also mentions in a footnote, without development, that this argument "can also be phrased as a matter of double jeopardy." *Id.* at 30 n.3. Haskell did not exhaust either his vagueness or double-jeopardy claims in state court; for example, neither argument is mentioned in any of his briefs to the Michigan Court of Appeals or the Michigan Supreme Court. Thus, we will not consider these arguments unless Haskell can show cause and actual

prejudice. He offers no reason to believe that procedural default can be overcome in this instance.

B. *Blakely v. Washington*

Haskell contends that the state trial court's finding of a pattern of criminal behavior increased his sentence beyond the statutory maximum permitted by the jury's verdict and violated his Sixth Amendment rights. In *Blakely,* the Supreme Court invalidated a Washington sentencing scheme that permitted judges to impose sentences above standard guideline ranges if they found "substantial and compelling reasons justifying an exceptional sentence." *Id.* at 299. The defendant in *Blakely* was sentenced to more than three years above the 53-month statutory maximum of the standard range because he had acted with "deliberate cruelty." *Id.* at 303. The Supreme Court held that this increase violated the principle that, "'[o]ther than 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.'" *Id.* (quoting *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)); *see also id.* ("When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority.") (internal citations omitted). In *Cunningham v. California,* 549 U.S. 270, 274, 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007), the Supreme Court invalidated

a California sentencing scheme that placed sentence-elevating fact-finding within the province of individual judges. *Id.* at 274.[4] The Court affirmed that it had "repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." *Id.*

In contrast to the sentencing laws at issue in *Blakely* and *Cunningham,* Michigan has an indeterminate sentencing scheme. The maximum sentence in Michigan is determined by law, not the trial judge. *See, e.g., Chontos v. Berghuis,* 585 F.3d 1000, 1001 (6th Cir. 2009) ("Under the Michigan sentencing scheme, a particular criminal offense carries with it a statutory maximum penalty set by the legislature."); *see also People v. Drohan,* 475 Mich. 140, 160-61, 715 N.W.2d 778 (2006). "[M]ichigan's sentencing guidelines, unlike the Washington guidelines at issue in *Blakely,* create a range within which the trial court must set the minimum sentence." *Drohan,* 475 Mich. at 161. Under Michigan law, only the minimum sentence must presumptively be set within the appropriate sentencing guidelines range. *See Deatrick v. Sherry,* 451 F. App'x 562, 564 (6th Cir. 2011) ("[T]he *Apprendi/Blakely* line of cases is not implicated by Michigan's statutory scheme because judicial fact-finding increases the minimum sentence, rather than

[4] California had a determinate sentencing scheme. 549 U.S. at 274.

the maximum sentence."); *see also People v. Babcock,* 469 Mich. 247, 255 n.7, 666 N.W.2d 231 (2003). The trial judge can never exceed the maximum sentence. *Id.*

Blakely does not apply to indeterminate sentencing schemes. 542 U.S. at 304-05 (concluding that *Blakely* does not apply to sentencing schemes that do "not authorize a sentence in excess of that otherwise allowed for [the underlying] offense."). Cases addressing indeterminate sentencing regimes do not "involve[ ] a sentence greater than what state law authorized on the basis of the verdict alone," and thus are not limited by *Blakely. Id.* "Indeterminate sentencing . . . increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty." *Id.* at 309-10. The record demonstrates that Haskell's sentences are well within the statutory maximum for each offense of conviction. Haskell has failed to show a *Blakely* violation.

VI. CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

Dissent

MERRITT, Circuit Judge, dissenting. The jury returned an unusual verdict saying that Haskell was "mentally ill" but did not meet the quite different

standards for the insanity defense, a defense at odds with automatism. I believe that if Haskell's counsel had presented his automatism defense (a form of unconsciousness) as negating the mens rea or intent element of the case, the jury may well have returned a verdict of not guilty because of the absence of intent. By virtue of the failure of both Pluckett [sic] and Resnick, as counsel, to raise the automatism defense to the element of intent, the jury required Haskell to meet the different theory of insanity charged by the court as an affirmative defense.

This occurred because neither lawyer in the case had any conception of how the particular mental illness should affect the elements of the crime and did not understand the *mens rea* requirement. The first lawyer, Pluckett [sic], was a drug addict with a record of legal malpractice and completely ineffective as a lawyer in the case. He was confused beyond repair. He left the case immediately before the trial. The substitute lawyer was in a difficult situation in having but little time to prepare for the trial. Nevertheless, Resnick should obviously have understood that the automatism defense went to intent or *mens rea* and did not support a standard for insanity under the Michigan law. It certainly did, however, negate the element of intent under Michigan law. The fact that the jury returned the "mentally ill" defense strongly indicates that it accepted the automatism defense – the only "mental illness" raised in the case.

Usually the most important work of a criminal defense lawyer is to develop a plausible defense

theory. Here, there was an obvious theory that would have negated intent as a result of "mental illness," a fact that the jury found, but could not apply to insanity. The defense lawyers were so ineffective that they never gave the jury an opportunity to consider it as undermining intent. I would put that kind of lawyer malpractice on an equal plane with the lawyer who sleeps through the trial in the sense that the lawyer was unfocused on the case and therefore unable to make a rather obvious decision to use the type of "mental illness" the jury found to negate intent.

For purposes of *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the failure to assert an obvious defense to an element of the crime – intent – constitutes deficient performance. Competence requires a basic conception of the elements of the crime and how lawyers must go about casting doubt on *mens rea* which the state has the burden of establishing. Instead counsel chose to carry the heavy burden of proving the affirmative defense of insanity which includes proof of the defendant's lack of capacity to understand the difference between right and wrong. Where the jury finds the facts in favor of the automatism defense ("mental illness") but is unable to apply it because defense counsel did not correctly point out the element of the crime that it would undermine, prejudice is clear. Lawyers can be incompetent because they do not understand the law as well as incompetent because they do not develop the facts.

695 F. Supp. 2d 574

United States District Court for the
Eastern District of Michigan, Southern Division
February 26, 2010, Decided; February 26, 2010, Filed
Case No. 2:07-CV-11679

CRAIG MICHAEL HASKELL, # 468699, Petitioner, v. MARY BERGHUIS, Respondent.

Counsel: For Craig Haskell, Petitioner: Erwin S. Chemerinsky, LEAD ATTORNEY, Duke University Law School, Durham, NC.

For Mary Berghuis, Respondent: Andrew L. Shirvell, MI Dept of Atty Gen, Lansing, MI.

Judges: Honorable George Caram Steeh, UNITED STATES DISTRICT JUDGE.

Opinion by: George Caram Steeh

Opinion

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS AND GRANTING IN PART A CERTIFICATE OF APPEALABILITY

Petitioner, Craig Michael Haskell, is a state inmate currently incarcerated at Richard A. Handlon Correctional Facility in Ionia, Michigan. On August 15, 2003, a jury in Livingston County, Michigan,

found Petitioner guilty[1] of four counts of first-degree criminal sexual conduct ("CSC"), Mich. Comp. Laws § 750.520b(1)(f), one count of second-degree CSC, Mich. Comp. Laws § 750.520c(1)(f), and aggravated domestic violence, Mich. Comp. Laws § 750.81a(2), for beating and sexually assaulting his former girlfriend. Petitioner was sentenced to concurrent terms of twelve to thirty years for each count of the first-degree CSC convictions, ten to fifteen years for the second-degree CSC offense, and one year in Livingston County Jail for the aggravated domestic violence conviction. He filed a petition, through counsel, for a writ of habeas corpus under 28 U.S.C. § 2254. For the reasons stated below, the Court will deny habeas relief and grant, in part, a certificate of appealability.

I. BACKGROUND

The convictions arose from Rae Russell's allegations that Petitioner sexually assaulted her on the evening of May 17, 2002. Ms. Russell was a former girlfriend of Petitioner, and was nineteen years of age at the time. It is undisputed that Petitioner visited Ms. Russell on that evening and that she was physically assaulted by Petitioner. However, Petitioner asserts that he struck Ms. Russell in the face while he was experiencing a seizure. (Pet. at 6). He denies

[1] The jury found that Petitioner was "guilty but mentally ill." (Sent. Tr., 10/2/03 at 32). Thus, the jury did not find Petitioner satisfied the conditions necessary to establish the legal defense of insanity.

that he sexually assaulted Ms. Russell or that he threatened her with a pair of scissors. *Id.*

Ms. Russell testified that she and Petitioner dated in high school over a two year period. (Trial Tr., Vol. I at 186). While they were both attending different colleges, their relationship ended in the fall of 2001. *Id.* at 187. Petitioner was facing some family, school, and job related challenges and reached out to Ms. Russell in an effort to reconcile. *Id.* at 188-90. Petitioner expressed his suicidal thoughts to Ms. Russell. *Id.* at 117, 220-21, 227, 231. A few days later on May 17, 2002, Petitioner went to Ms. Russell's home, where she lived with her parents, at about 7:30 p.m. *Id.* at 191.

Ms. Russell further testified that the two rented a movie and were watching a television sitcom before the movie when Petitioner became angry that Ms. Russell would not sit with him. *Id.* at 191-92, 222, 228. Petitioner began to cry, started talking about killing himself, said "mean things" to her, and threatened to send derogatory notes to her father. *Id.* at 192-93. Ms. Russell tried to console him when his demeanor completely changed. *Id.* at 225-26, 242. Ms. Russell stated that Petitioner was not his normal self and at that point he: (1) punched her in the left eye; (2) hit her in the head and slammed her head against a dresser; (3) put his hands around her throat and then one hand down her throat to keep her quiet; (4) threatened to kill her family if she made any noise; (5) continued to hit her; (6) disrobed her; (7) called her a whore; (8) digitally penetrated her; (9) had sexual

intercourse with her; and (10) threatened her with a pair of scissors. *Id.* at 196-202.

Ms. Russell also testified that she begged Petitioner to stop, but he did not seem to hear her. *Id.* at 202. Suddenly, however, Petitioner appeared to "snap out of it" and he stopped. *Id.* at 245; Vol. II at 51. Again, Petitioner's temperament changed; he was shaking, apologetic, and repeatedly said "what have I done?" (Trial Tr., Vol. I at 245, 247; Vol. II at 51). Ms. Russell told Petitioner to go home and to get help from his parents. (Trial Tr., Vol. I at 103-04, 239, 246). Ms. Russell testified that, before this incident, Petitioner had never forced himself upon her, threatened her or her family, or assaulted her during their relationship. *Id.* at 224.

Janice Haskell, Petitioner's mother, testified that when he came home from college for Easter break, he "seemed different," (i.e., tired, not sleeping well, weight loss, etc.) (Trial Tr., Vol. II at 186). Also according to Ms. Haskell's testimony, Petitioner came directly home after he left Ms. Russell's home and told her that he hit Ms. Russell and was very distraught (i.e., pacing, holding his head, acting frantic and confused, crying, asking for help, etc.). *Id.* at 209-10. Ms. Haskell took Petitioner to the Psychiatric Emergency Room at the University of Michigan Hospital, where he stayed for ten days in the psychiatric unit under the treatment of Dr. Kenneth Pitts. When Petitioner was discharged, his tentative diagnosis was psychosis NOS, or "not otherwise specified." (Trial Tr., Vol. III at 90).

In Ms. Russell's initial statement to the police, she stated in part as follows:

> He had been having some school and family problems and needed to talk them out with me. When I couldn't help him he didn't want him back . . . when I couldn't help him and didn't want him back he hit me four or five times in the head. Then he muffled my screams then he felt bad and I told him to leave and he left out the front door.

(Trial Tr., Vol. II at 20). Ms. Russell did not indicate to the police that she was sexually assaulted, threatened with scissors, or that Petitioner put his hand/fist down her throat while she was being violently raped. (*Id.* at 20-21). While at the Emergency Room on the evening of the assault: (1) Ms. Russell denied being sexually assaulted; (2) she denied that she had sexual relations that evening; (3) there was no evidence of tenderness around her neck area; (4) there were no fingerprint marks around her neck; and (5) no sperm or seminal fluid was found on any of Ms. Russell's clothing or on any swabbed areas. (Trial Tr., Vol. II at 47, 126-27, 144).

However, the following day, after Ms. Russell's mother, Diane Russell, confronted her about blood in her underwear, Ms. Russell told her mother that she had been sexually assaulted. (Trial Tr., Vol. I, at 206 & Vol. II at 36, 67 & 82). Subsequently, the police were called back, another statement was made to the police, and Ms. Russell went back to the hospital, submitting to a rape examination. (Trial Tr., Vol. I at

207 & Vol. II at 67-68). In Ms. Russell's second statement to the police, she indicated that Petitioner threatened her with scissors by holding them to her throat, and that he put his hands down her throat. (Trial Tr., Vol. I at 233, 236). Dr. Ramstack, the emergency room doctor who examined Ms. Russell during her second hospital visit, testified that there were no signs of sexual trauma to the vaginal or anus areas nor evidence of forceful sexual contact. (Trial Tr., Vol. II at 119, 130-31).

Dr. Kenneth Pitts, Petitioner's treating psychiatrist, testified at trial that the assault upon Ms. Russell was brought on by a complex partial seizure ("CPS")[2], which left Petitioner incapable of appreciating the wrongfulness of his conduct, and that Petitioner could not conform his conduct to the requirements of the law. *Id.* at 107-09. Dr. Lisa Marquis, the prosecution's expert witness, is a Ph.D. psychologist from the Center of Forensic Psychiatry, who evaluated Petitioner. She agreed that Petitioner suffered from a mental illness, and did not rule out that he suffered from a CPS disorder. (Trial Tr., Vol. III at 176-77, 201, 206-07). However, she disagreed that he did not appreciate the wrongfulness of his conduct and that

[2] Dr. Pitts testified that CPS involves the temporal lobe of the brain and produces: (1) neuropsychiatric symptoms, (2) visual and olfactory hallucinations, (3) psychotic phenomenon after the seizure, (4) rapid heart rate, (5) aggressive acting out, (6) no memory or awareness during the episode or seizure, and (7) no appreciation of any behavior or surroundings during the episode or seizure. (Trial Tr., Vol. III at 47-48, 106-07).

he was not able to conform his behavior to the requirements of the law. *Id.* The prominent issues at trial were whether Petitioner was sane at the time he committed the assault, and whether Ms. Russell's version of events was a fabrication.

II. PROCEDURAL HISTORY

After Petitioner's state court conviction, he filed an appeal of right and raised the following claims:

> I. Craig Haskell maintained his innocence at sentencing in the statements he made to the court. In passing sentence the court repeatedly referred to Haskell's statements and tried to get him to admit guilt. The court violated Haskell's Fifth and Sixth Amendment rights by considering his refusal to admit guilt in its sentence. Further the trial court incorrectly scored the sentencing guidelines. For all of these reasons Haskell is entitled to a resentencing.
>
> II. Prior trial counsel destroyed Haskell's ability to effectively defend himself at trial. Counsel lied to the police about Haskell's clothes, failed to prepare for trial, and failed to develop the insanity defense. But worst of all, counsel lied to the trial court about nonexistent threats, which caused Haskell to be locked up, turned the court against Haskell, and created a situation where trial counsel could not effectively present the insanity defense. Therefore, he is entitled to a new trial.

III. The defense sought to introduce the statements Haskell made about the voices in his head when he burst into this parents bedroom after this incident. The statements about the voices fell within MRE 803(2) because they were excited utterances. When he "woke up" from his complex partial seizure, Haskell obviously observed a startling event – the injuries to Russell. When he arrived home shortly afterwards, he was obviously still under the stress of the event. Therefore, the court erred in excluding these statements.

IV. The jury instruction on Mental Anguish (CJI 2d 20.9) as given was unfairly prejudicial to Haskell. The instruction lists nine things for the jury to weigh when deciding whether the complainant suffered mental anguish. Seven of those factors were not supported by the evidence resulting in an instruction that was unfairly argumentative. Haskell was denied a fair trial by this instruction because it was not tailored to the facts of the case.

V. The trial court allowed the prosecutor's psychologist, Dr. Marquis, to sit in the courtroom and listen to Haskell's psychiatrist, Dr. Pitts, about Haskell's insanity. Dr. Marquis had all of the information, including Dr. Pitts' notes from which she drew her own opinion about Haskell's mental state. Letting her listen to Dr. Pitts' testimony allowed her to shade her testimony, deprived Haskell of meaningful cross-examination, and violated

Haskell's Sixth and Fourteenth Amendment rights.

Petitioner filed a supplemental brief on appeal raising the following ten additional claims:

I. The only evidence that rebutted the testimony of Haskell's psychiatrist regarding the nature, effects and symptoms of a complex partial epileptic seizure ("CPS seizure") was a non-physician who has no expertise in CPS and whose medical-fact testimony is unsupported by any medical literature and was patently false. The presentation of that testimony violated Haskell's Fourteenth and Sixth Amendment rights. It resulted in a verdict that contravenes *Morissette v. U.S.,* 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952), and that could not have been obtained otherwise, or at least could not have been sustained, under the Fourteenth Amendment's sufficiency-of-evidence due process standard.

II. The prosecutor told the jury repeatedly at various stages of the trial, including during closing argument, that the pertinent area of expertise regarding the nature, effects and symptoms of a CPS seizure was not medicine but instead "forensics" and that Haskell's psychiatrist was an inappropriate expert because he was not an expert in forensics, and that the State's forensic psychologist rather than the jury itself was charged by law with determining the ultimate issue regarding the "insanity" defense. She also said Haskell's

psychiatrist, by testifying as an expert, was acting in violation of the "Code of Ethics" of the American Academy of Psychiatry and the Law, and therefore was violating medical ethics. Those fundamental misstatements of law and of medical ethics violated Haskell's Fourteenth Amendment right to due process and his Sixth Amendment right to have the jury apply the law to the facts and draw the ultimate conclusion of guilt or innocence. (*See U.S. v. Gaudin,* 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995)).

III. During closing argument, the prosecutor told the jury that there really *is* no legal defense of insanity because a defense of insanity depends upon medical – expert opinion testimony, which, she said, can *never* be sufficient to establish legal insanity. "But," she said, proving a "mental defense" is nonetheless "what they have to do." The prosecutor's instruction of law to the jury regarding Haskell's burden of proof of legal insanity constituted structural error regarding burden of proof and also constituted prosecutorial misconduct, in violation of the Fourteenth and Sixth Amendments.

IV. Compounding the prosecutor's misstatement regarding burden of proof of insanity, the jury was never told, either in the "insanity defense" jury instruction or elsewhere, that once Haskell proved his insanity defense by a preponderance of the evidence, the burden of proof shifted back to the prosecution to prove mental cognizance and

control beyond a reasonable doubt. That incomplete instruction to the jury thus misstated Haskell's and the State's respective burdens of proof, violations of the Fourteenth and Sixth Amendments. Compounding this, in turn, in response to the jury's request for a further definition of the word "substantial" in the "insanity" instruction, the judge, ignoring the objection of Haskell's counsel, read the jury an inappropriate and probably misleading definition of the word from a 1950's dictionary he had in his chambers that could have been interpreted as placing upon Haskell an improperly high burden of proof of lack of cognizance in order to prove legal "insanity."

V. The State's forensic psychologist stated her conclusory opinion on one of the two ultimate issues in this trial, testifying that in her opinion Haskell, at the time of the incident, possessed substantial awareness of control over his actions, and therefore the criminal element of "specific intent" – and thus invaded the province of the jury and violated Haskell's Sixth and Fourteenth Amendment rights, respectively, to jury determination of disputed facts and to due process of law.

VI. Marquis' hearsay account of Russell's written statements to the police about the events at issue – an iteration cleansed of inconsistencies and irrationalities, and presented to the jury after Russell had testified – violated Haskell's right under the Sixth

Amendment's Confrontation Clause. *See Crawford v. Washington,* 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

VII. The videotaped reply for the jury, during its deliberations, of Marquis' entire testimony, unaccompanied by a replay of Dr. Pitts' countervailing testimony or any other testimony, and unaccompanied by a precautionary instruction, violated Haskell's Fourteenth Amendment right to due process especially in light of the improprieties of Marquis' testimony itself.

VIII. The numerous constitutional errors discussed in this brief, individually and certainly taken together, constitute plain and harmful constitutional error that seriously affected the fairness, integrity or public reputation of trial.

IX. The Sixth Amendment guarantees the right to the effective assistance of counsel, and the reason for the ineffective assistance of counsel need not be that counsel's fault; it can be, as in this case, prior counsel's fault, e.g., a palpably insufficient length of time to prepare the case for trial, and the government's fault. Haskell's trial counsel's failure to preserve for appeal the constitutional errors delineated above, whatever the cause of that failure, denied Haskell his Sixth Amendment right to the effective assistance of counsel.

X. If, as Haskell's counsel believed and as appears accurate, Michigan law required

> Haskell to present his complex partial epileptic seizure defense as an "insanity" defense – an inappropriate medical defense for CPS seizure – this requirement of Michigan law itself violates the Fourteenth Amendment's due process clause.

The Michigan Court of Appeals affirmed Petitioner's conviction. *People v. Haskell,* No. 251929, 2005 WL 14899480 [sic], *1 (Mich. Ct. App. June 23, 2005) (unpublished).

Petitioner filed an application for leave to appeal with the Michigan Supreme Court raising the following issues:

> I. Craig Haskell maintained his innocence at sentencing in the statements he made to the court. In passing sentence the court repeatedly referred to Haskell's statements and tried to get him to admit guilt. The court violated Haskell's Fifth and Sixth Amendment rights by considering his refusal to admit guilt in its sentence. Further the trial court incorrectly scored the sentencing guidelines. For all of these reasons Haskell is entitled to a resentencing.
>
> II. Prior trial counsel destroyed Haskell's ability to effectively defend himself at trial. Counsel lied to the police about Haskell's clothes, failed to prepare for trial, and failed to develop the insanity defense. But worst of all, counsel lied to the trial court about nonexistent threats, which caused Haskell to be locked up, turned the court against Haskell,

and created a situation where trial counsel could not effectively present the insanity defense. Therefore, he is entitled to a new trial.

III. The defense sought to introduce the statements Haskell made about the voices in his head when he burst into his parent's bedroom after this incident. The statements about the voices fell within MRE 803(2) because they were excited utterances. When he "woke up" from his complex partial seizure, Haskell obviously observed a startling event – the injuries to Russell. When he arrived home shortly afterwards, he was obviously still under the stress of the event. Therefore, the court erred in excluding these statements.

IV. The jury instruction on Mental Anguish (CJI 2d 20.9) as given was unfairly prejudicial to Haskell. The instruction lists nine things for the jury to weigh when deciding whether the complainant suffered mental anguish. Seven of those factors were not supported by the evidence resulting in an instruction that was unfairly argumentative. Haskell was denied a fair trial by this instruction because it was not tailored to the facts of the case.

V. The trial court allowed the prosecutor's psychologist, Dr. Marquis, to sit in the courtroom and listen to Haskell's psychiatrist, Dr. Pitts, about Haskell's insanity. Dr. Marquis had all of the information, including Dr. Pitts' notes from which she drew her own

opinion about Haskell's mental state. Letting her listen to Dr. Pitts' testimony allowed her to shade her testimony, deprived Haskell of meaningful cross-examination, and violated Haskell's Sixth and Fourteenth Amendment rights.

VI. If, as Haskell's trial counsel believed and as appears accurate, Michigan law required Haskell to present his complex partial epileptic seizure defense as an "insanity" defense – an inappropriate medical defense for Complex Partial Epileptic Seizure – and thus artificially "prove" that Haskell was, at the relevant moments, insane as a medical fact, this requirement of Michigan law violates the Fourteenth Amendment's due process clause. Conversely, if trial counsel was incorrect, Haskell was denied his Sixth Amendment right to the effective assistance of counsel.

VII. The Court of Appeals appears to state that under Michigan law, expert witnesses' areas of expertise are fungible – that is, anyone qualified by the court as an expert in one area of expertise is permitted by law to testify as an expert in any other area of expertise irrespective of the witness's qualifications. If accurate as a statement of Michigan law, it violates the Fourteenth Amendment right to due process of law and the Sixth Amendment right to a jury determination of the acts as per, e.g., *Sullivan v. Louisiana.*

VIII. According to the Court of Appeals, Michigan law permits prosecutors to present experts in "forensics," i.e., experts in offering opinions in legal matters. Also according [to the] Court of Appeals, Michigan law permits prosecutors to tell the jury that experts in "forensics" are the appropriate type of expert to testify about a medical condition and that a medical expert is not an appropriate expert to testify about a medical condition if the physician isn't an expert in "forensics." If accurate, those rules of law violate the Fourteenth and Sixth Amendments.

IX. The jury was never told in the "insanity defense" jury instructions or elsewhere that once Haskell proved his insanity defense by a preponderance of the evidence, the burden of proof shifted back to the prosecution to prove mental cognizance and control beyond a reasonable doubt. The thus-incomplete instructions misstated Haskell's and the State's respective burdens of proof [and] violated the Fourteenth and Sixth Amendments.

X. Haskell was denied his Sixth Amendment right to the effective assistance of counsel, and there is a reasonable probability that, absent this, the outcome of his trial would have been different.

The Michigan Supreme Court denied Petitioner's application for leave to appeal stating that "it was not persuaded that the questions presented should be

reviewed by this Court." *People v. Haskell,* 474 Mich. 1118, 712 N.W.2d 448 (2006) (table).

Petitioner now seeks a writ of habeas corpus asserting the following claims:

> I. Due process was denied by Mr. Haskell's conviction on the basis of testimony that was not accurate concerning his complex partial epileptic seizure disorder.
>
> II. Due process was violated because automatism, and therefore CPS seizure, is not appropriately an insanity defense at all, but is a separate claim that may eliminate the voluntariness of a criminal act.
>
> III. Haskell's Sixth Amendment rights were violated because the instruction the jury was given regarding burden of proof in insanity – defense cases was incomplete in that it improperly failed to instruct the jury that once Haskell met his burden of proof by a preponderance of the evidence that his mental state met the statutory definition of "insanity," [and] the burden of proof shifted back to the State to prove *mens rea,* an element of the crimes charged beyond a reasonable doubt.
>
> IV. Ineffective assistance of counsel by Ronald J. Plunkett.
>
> V. Ineffective assistance of counsel of Haskell's trial counsel Barry Resnick.
>
> VI. Haskell's Fifth and Sixth Amendment rights were violated by using events in a single event to find him a[n] habitual offender

and to not have had the jury make the requisite fact finding to warrant this conclusion.

Respondent filed an answer to the petition, asserting that: Petitioner's evidentiary and instructional issues are not cognizable claims subject to habeas relief; the state court's decision regarding Petitioner's ineffective assistance claim was not contrary to *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); Petitioner's sentencing claim is without merit; and the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") does not violate the Suspension Clause of the United States Constitution. In response, Petitioner filed a reply brief addressing the issue of exhaustion and an analysis under 28 U.S.C. § 2254(d)(1) and (2).

Petitioner subsequently filed a motion for oral argument asserting that the habeas petition "raises several issues of unusual complexity that oral argument would aid the court in navigating." (Mot. at 2). The Court granted the motion finding that oral argument relative to the nature of a CPS disorder and Petitioner's ineffective assistance of counsel claims would assist in resolving these matters. (Dkt. # 15). A hearing was held and, following the proceeding, the Court asked the parties to submit supplemental briefs in further support of their respective arguments. Respondent filed a "Post-Hearing Summary" and Petitioner filed a responsive pleading.

III. STANDARD

The AEDPA governs this Court's habeas corpus review of state court decisions. Petitioner is entitled to the writ of habeas corpus if he can show that the state court's adjudication of his claim on the merits:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented at the State court proceedings.

28 U.S.C. § 2254(d).

A state court's decision is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor,* 529 U.S. 362, 412-413, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). A state court's decision is an "unreasonable application of" clearly established federal law "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413.

"[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law."

Id. at 410 (emphasis in original). "[A] federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law is objectively unreasonable." *Id.* at 409. "Furthermore, state findings of fact are presumed to be correct unless the defendant can rebut the presumption by clear and convincing evidence." *Baze v. Parker,* 371 F.3d 310, 318 (6th Cir. 2004) (citing 28 U.S.C. § 2254(e)(1)).

IV. DISCUSSION[3]

A. Due Process Violation – Inaccurate Testimony Concerning Complex Partial Epileptic Seizure Disorder

Petitioner contends that he was denied due process because his conviction was based upon inaccurate testimony as provided by the prosecution's expert witness, Dr. Lisa Marie Marquis, about his complex partial epileptic seizure disorder.

The Michigan Court of Appeals rejected Petitioner's claim as follows:

> We disagree that the testimony was false or that the trial court erred in admitting it.

---

[3] Because Respondent claims that Petitioner has either failed to exhaust certain claims or that some of his claims are procedurally defaulted, and because Petitioner has filed an extensive Reply brief addressing the issues, the Court will address the issues of exhaustion and procedural default relative to each claim.

Defendant essentially argues that the prosecutor's expert testimony concerning the effect of a complex partial seizure was incorrect as a matter of medical fact. However, defendant misconstrues the prosecutor's expert's testimony. The expert did not testify that someone experiencing a complex partial seizure would still be in control and cognizant. In fact, during cross-examination, she admitted that someone experiencing a seizure may not appreciate the wrongfulness of their behavior, may not be able to conform their actions to the law, and may not remember what happened during a seizure. Instead, the prosecutor's expert testified that, after reviewing the information concerning defendant's actions before, after and *during* the assault, she found nothing to suggest that defendant was not cognizant of what was happening or was unable to control his actions. This testimony supports a finding that even if defendant suffers from the disorder, she found nothing to suggest that defendant was suffering from an actual seizure at the time of the assault. The trial court did not err.

Defendant next asserts that the trial court plainly erred in admitting the prosecutor's expert's testimony stating her opinion concerning defendant's mental cognizance and capacity for control at the time of the assault. We disagree. MRE 704 provides, "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate

> issue to be decided by the trier of fact." Michigan case law specifically states that an expert testifying in a criminal case can give an opinion as to whether a defendant is able to conform his conduct to the requirements of the law and whether he is mentally ill or insane. Therefore, defendant has failed to show plain error through the admission of such opinion testimony

Haskell, 2005 Mich. App. LEXIS 1531, 2005 WL 14899480, *1, *2 (internal citations omitted).

1. Procedural Default

Petitioner does not dispute that this issue is procedurally defaulted as there were no challenges at trial to Dr. Marquis' qualifications as an expert, nor any objections or motions to strike her testimony. In this case, the last state court to issue a reasoned opinion addressing Petitioner's claim that Dr. Marquis provided inaccurate information about the CPS disorder held that the claim was not preserved for review because no such challenge was put before the trial court. 2005 Mich. App. LEXIS 1531, [WL] at *1. Where "a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice."

Coleman v. Thompson, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). Petitioner's claim regarding Dr. Marquis' expert testimony is procedurally defaulted.

While the procedural default doctrine precludes habeas relief on a defaulted claim, the procedural default doctrine is not jurisdictional. *Trest v. Cain,* 522 U.S. 87, 89, 118 S. Ct. 478, 139 L. Ed. 2d 444 (1997); *Howard v. Bouchard,* 405 F.3d 459, 476 (6th Cir. 2005). The Court proceeds to address the merits of Petitioner's claim.

2. Analysis

Alleged trial court errors in the application of state evidentiary law are generally not cognizable as grounds for federal habeas relief.

> [A] federal habeas court has nothing whatsoever to do with reviewing a state court ruling on the admissibility of evidence under state law. State evidentiary law simply has no affect on [a court's] review of the constitutionality of a trial, unless it is asserted that the state law itself violates the Constitution.

Pemberton v. Collins, 991 F.2d 1218, 1223 (5th Cir. 1993). "[E]rrors by a state court in the admission of evidence are not cognizable in habeas proceedings unless they so perniciously affect the prosecution of a criminal case as to deny the defendant the fundamental right to a fair trial." *Kelly v. Withrow,* 25 F.3d 363, 370 (6th Cir. 1994).

In short, "[o]nly when the evidentiary ruling impinges on a specific constitutional protection or is so prejudicial that it amounts to a denial of due process may a federal court grant a habeas corpus remedy." *Barrett,* 169 F.3d at 1163; *see also Coleman v. Mitchell,* 244 F.3d 533, 542 (6th Cir. 2001). Where a specific constitutional right is not implicated, federal habeas relief is available only if the alleged erroneously admitted evidence "is almost totally unreliable and . . . the factfinder and the adversary system will not be competent to uncover, recognize, and take due account of its shortcomings." *Barefoot v. Estelle,* 463 U.S. 880, 899, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983).

a. Backgrounds of Prosecution Expert Dr. Lisa Marie Marquis and Petitioner's Psychiatrist and Expert Dr. Kenneth Pitts

Petitioner contends that Dr. Marquis' testimony should not have been admitted into evidence because of her inexperience and lack of expertise in the area of CPS disorders, and because of several false assertions she made to the jury about a CPS disorder and its effect upon Petitioner. Based on these circumstances and the fact that the jury requested a complete transcript of only Dr. Marquis' trial testimony, and was instead shown an audio/video tape, Petitioner maintains that Dr. Marquis' erroneous testimony heavily influenced the jury's decision in finding him guilty but mentally ill, and resulted in an unfair trial.

Dr. Marquis, a certified consulting forensic psychologist, admittedly has no medical training, and has only been exposed to principles of psychiatry or other psychiatric matters through seminars and internships. (Trial Tr., Vol. III at 191). Dr. Marquis conducts forensic examinations and practices from the Center for Forensic Psychiatry. *Id.* 161. She is not a neuropsychologist or a neurologist. *Id.* at 210. Dr. Marquis' only training in the area of CPS disorders was in the form of a one-hour lecture/seminar. *Id.* at 166-67,197. She has conducted no studies regarding CPS disorders, nor has she performed any case histories of persons suffering from the disorder. *Id.* at 197-98. Dr. Marquis has looked at other CPS disorder case studies, but has spent less than 1% of her time reviewing such studies. *Id.* at 199. She did not evaluate Petitioner for a seizure disorder because she is a forensic psychologist. *Id.* at 188-89. Dr. Marquis based her opinions upon Petitioner's "behaviors" rather than a "diagnosis." *Id.* She also testified that Petitioner could have suffered from CPS when he assaulted Ms. Russell. *Id.* at 196, 201.

Petitioner's expert witness Dr. Pitts is a practicing psychiatrist who first met and evaluated Petitioner on June 15, 2002, approximately one month after Ms. Russell was assaulted by Petitioner. Petitioner had not been previously evaluated for a CPS disorder. Dr. Pitts is certified by the American Board of Neurology and Psychiatry. (Trial Tr., Vol. III at 8). Unlike Dr. Marquis, Dr. Pitts has no training in the area of forensic psychiatry, nor has he attended any

conferences, studied, or written about forensic psychiatry topics. *Id.* at 10-11.

b. Testimony of Dr. Marquis and Dr. Pitts

Petitioner cites the following as factual errors in Dr. Marquis' testimony: (1) a person experiencing CPS *might* still be in control and cognizant; (2) a CPS diagnosis is irrelevant to a "determination of the extent to which a person was mentally cognizant and in control during the seizure"; (3) "mental cognizance and control in the hours and minutes preceding and succeeding a seizure indicate mental cognizance and control *during* the seizure"; (4) "amnesia about what transpired during the seizure is *not* likely and [ ] the fact that Haskell had not experienced memory loss at 'at any other time' indicates that he did not experience memory loss about what transpired *during* the seizure – and [ ] therefore his claim of amnesia 'strains credulity' "; (5) "the *appearance* of purposefulness during the seizure indicates cognizance during the seizure;" (6) "Haskell's cognizance *several months later* when she, Dr. Marquis, interviewed him suggests that he was cognizant at the time of the incident at issue"; (7) "violence during a CPS seizure is extremely rare"; and (8) "emotional stress is not associated with the onset of a CPS seizure." (Pet'r. Mich. Sup. Ct. Brief, at 38-40); (Trial Tr. Vol. III, at 177, 180-81, 183-86, 188, 195-96, 200-01, 209).

It is Petitioner's position that this inaccurate testimony misled the jury into believing that Petitioner was aware of the fact that he was assaulting Ms. Russell, he had control of his actions, and that he was able to appreciate the wrongfulness of his conduct. Petitioner argues these opinions conveyed by Dr. Marquis precluded the jury from finding Petitioner not guilty of the assault, and deprived him of a fair trial.

Respondent argues that, although Petitioner's expert Dr. Pitts testified that Petitioner's EEG results indicated some abnormality and evidence of a brain lesion consistent with a CPS diagnosis, Dr. Pitts did not testify that his diagnosis of Petitioner was in fact a CPS disorder. Specifically, Respondent argues Dr. Pitts instead testified that his evaluation of Petitioner revealed Petitioner suffered from a "psychotic illness" which was receptive to treatment with antipsychotic medication. *Id.* at 91. Dr. Pitts did not testify that every individual with an abnormal EEG and a brain lesion is necessarily suffering from a CPS disorder.

Dr. Marquis' opinions regarding Petitioner's conduct conveyed to the jury that Petitioner was cognizant of his actions *during* the assault, undermining Petitioner's insanity defense. If the admitted evidence is unreliable and if it's unreliability cannot reasonably be uncovered or recognized as being evidence that can be depended upon, grounds are presented for habeas relief. *Barefoot,* 463 U.S. at 899. CPS disorder is certainly not a condition that is

generally known about and understood. It would be reasonable for the jury to rely heavily upon expert witness testimony regarding Petitioner's condition and CPS disorders.

The Court has reviewed the CPS disorder documentation and the testimony of Dr. Marquis and Dr. Pitts, and finds that Petitioner's conviction and the state appellate courts' affirmations of the conviction were based on a reasonable determination of the facts in light of the evidence presented at trial.

> During a complex partial seizure, consciousness is impaired. The person cannot interact normally with other people; is not in control of his or her movements, speech, or actions; doesn't know what he or she is doing; and cannot remember afterward what happened during the seizure.
>
> Although someone may appear to be conscious because he stays on his feet, his eyes are open and he can move about, it will be an altered consciousness-a *dreamlike,* almost *trancelike* state.

(App. Brief, App. A-1); (Trial Tr. Vol. III, at 209) (emphasis added). Dr. Marquis testified that, although a CPS diagnosis cannot be ruled out as the illness from which Petitioner suffered, "the very extreme aggressive behavior allegedly seen in this criminal activity would be very rare for someone with this kind of seizure disorder." *Id.* at 202, 209.

"[T]he hallmark of complex partial seizures is the fact that the patient initially has impaired consciousness with decreased awareness of self and the environment, *and also amnesia for the event afterwards.*" (App. Brief, App. F-4) (emphasis added). Dr. Marquis acknowledged that amnesia of an event after it occurs is an indication of a CPS disorder, clarifying that does not mean that Petitioner did not "realize" and/or "remember" what was transpiring *during* the assault. *Id.* at 196-97. According to Dr. Marquis, Petitioner's asserted failure to remember sexually assaulting Ms. Russell did not necessarily equate with a CPS diagnosis, a legitimate assessment.

Record evidence indicates that, during a seizure, a person suffering from complex partial seizure disorder can be "vicious," act out sexually, and become very emotional. (Dkt. # 16: Ex. G-2, H-2, H-4). Dr. Marquis testified that it would be "rare" for a person with CPS disorder to behave in the manner in which Petitioner has been accused, which included "crying," saying "mean things," and the assault. (Trial Tr. Vol. III, at 188, 209). Dr. Marquis' testimony is not inconsistent with the record evidence.

Supporting documentation regarding CPS disorders indicates: (1) a CPS episode lasts from 90 to 120 seconds; (2) an individual experiencing a CPS type seizure is unfocused, confused, disorganized, and unable to control his or her movements; (3) CPS episodes are debilitating; and (4) CPS type seizures result in reflex-like actions. (Dkt. # 16: Ex. A-1, F-7). Ms. Russell's sexual assault lasted approximately 20

minutes. According to Ms. Russell's account, Petitioner's behavior was purposeful, and entirely inconsistent with a CPS episode.

Although there were some test results indicating Petitioner suffered a CPS seizure, including Dr. Pitts' testimony, Trial Tr., Vol. III, 90-93, 141-146, there was other evidence contradicting a finding of a CPS episode: (1) Petitioner was responsive to Ms. Russell during the sexual assault, undermining any reasonable inference that he was in a trance-like state and did not know what was going on; (2) Petitioner disrobed Ms. Russell's clothing, issued threats against her and her family, and sought to quiet her screams by attempting to put his hand down her throat; and (3) Petitioner admitted planning a sexual assault. (Trial Tr., Vol. III, at 180, 185-86, 196, 198); (Dkt. # 16: Ex. A-1; B-6, 16-17; F-4; G-1).

The jury ultimately chose to conclude from the totality of the evidence that, although Petitioner was mentally ill, he was not insane and was guilty of sexually assaulting Ms. Russell. The fact that the jury chose to believe the facts as testified by Ms. Russell and as supported by Dr. Marquis' testimony, as well as other evidence presented by the prosecution, does not warrant habeas relief. *Kelly,* 25 F.3d at 370. Petitioner's argument that Dr. Pitt's testimony was the more credible testimony is without merit. Petitioner has not advanced persuasive evidence that the jury was unfairly swayed by watching an audio/video tape of Dr. Marquis' testimony.

B. Due Process Violation – Complex Partial Epileptic Seizure Disorder is not a Proper Basis for an Insanity Defense

Petitioner contends that criminal conduct caused by a CPS disorder cannot be categorized as "insane" behavior because the very nature of such a seizure places the individual in a state of unconsciousness or semi-consciousness. (Pet. Memo., at 18). Petitioner claims that the proper defense would have been automatism accompanied by the following argument:

> Section 44 of Wayne R. LaFave & Austin W. Scott, Jr. Criminal Law (1972 states: "A defense related to but different from the defense of insanity is that of unconsciousness, often referred to as automatism: one who engages in what would otherwise be criminal conduct is not guilty of a crime if he does so in a state of unconsciousness or semi-consciousness.") Automatism eliminates one of the basic elements of the crime – either mental state or the voluntary nature of the act. As such, once the issue of automatism is raised by the defense, the State must disprove it beyond a reasonable doubt in order to meet its burden of proof with respect to the elements of the crime. In other words, the burden of proof on this issue, once raised by the defense, remains on the State to prove that the act was voluntary beyond a reasonable doubt. An instruction on the defense of automatism is *required* when there is reasonable evidence that the defendant was unconscious at the time of the commission of

> the crime, and Haskell had a Fourteenth Amendment right to have the jury so instructed.
>
> * * *
>
> The insanity instruction and the insanity defense itself instructed the jury that a defense of CPS seizure is a psychiatric rather than a neurologic illness – a "diminished capacity" defense rather than an absolute defense – thus allowing the jury to do what it did in Haskell's case: find him "Guilty but mentally ill." But just as a woman cannot be a little bit pregnant, a person cannot be "Guilty but mentally ill" while experiencing a CPS seizure. That's because intent, and therefore cognizance – therefore *consciousness* – is an element of all felonies. *See Morissette v. U.S., supra*
>
> By contrast, the burden of proof in an automation-defense [sic] case would remain on the State to prove that the act was voluntary beyond a reasonable doubt.

Id. at 18-20 (emphasis in original). Petitioner argues that if Michigan law does not allow for an automatism defense, "i.e., a defense of complete absence of *mens rea* due to complete absence of consciousness and control," then Michigan law violates the Fourteenth Amendment. *Id.* at 21. Alternatively, Petitioner argues that if such a defense is available in Michigan, then his trial counsel Barry Resnick was ineffective in failing to advance the proper automatism argument. *Id.*

This issue has been exhausted. Petitioner raised the issue in his supplemental brief on direct appeal as issue "X", and raised it in his application for leave to appeal to the Michigan Supreme Court as issue "VI". The Michigan Court of Appeals did not address this issue. Consequently, the state appellate courts did not adjudicate this claim on its merits or otherwise. The Court will review the issue *de novo. Howard,* 405 F.3d at 467.

Automatism has not been shown to be a recognized defense in Michigan. *See People v. Griffin,* 108 Mich. App. 625, 641, 310 N.W.2d 829; 108 Mich. App. 625, 310 N.W.2d 829 (1981) (not reaching the issue of whether "the defense of automatism should be recognized in Michigan[.]"). This Court has not found Michigan precedent or statutory authority recognizing automatism as a criminal defense. Mr. Resnick cannot be found deficient in his representation of Petitioner for failing to raise a defense not recognized in Michigan.

There is a reasonable argument that Michigan should adopt the defense of automatism as part of its criminal law jurisprudence. Other states have adopted the defense.

> In Oklahoma, the defense of automatism or unconsciousness under Okla. Stat. Ann. Tit. 21 § 152(6) (1998), involves criminal conduct resulting from an involuntary act completely beyond the individual's knowledge and control, and cannot be used where the defendant's unconsciousness results from the

> voluntary consumption of alcohol or drugs. It is a defense distinct from that of insanity, and [e]xamples of automatic conduct are blackouts and epileptic seizures.

West v. Addison, 127 Fed. Appx. 419, 422, n.5 (10th Cir. 2005) (internal citations and quotations omitted). "Automatism has been recognized by courts as a valid defense bearing on the voluntariness of an otherwise criminal act." *Haynes v. United States,* 451 F.Supp.2d 713, 724 (D. Md. 2006), citing John Parry & Eric Y. Drogin, *Criminal Law Handbook on Psychiatric Psychological Evidence and Testimony,* 155-56, 174-75 (Am. Bar Ass'n, ed. 2000). "On the other hand, 'automatism' also has a meaning in common parlance where it refers to the 'performance of acts by an individual without his awareness or conscious volition.'" *Haynes,* 451 F.Supp.2d at 724, citing *Webster's Encyclopedic Unabridged Dictionary of the English Language* 101 (1994). "With or without expert testimony, arguing that condition is something that counsel . . . is frequently able to do." *Id.* "As a result, it can be argued that he has acted without the necessary criminal intent, even if not acting while insane or in a certifiable medical sense." *Id.*

Nevertheless, it is well established that the circumstances under which a criminal defense may be asserted is a question of state law. *United States v. Scheffer,* 523 U.S. 303, 308, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998); *see also, Lakin v. Stine,* 80 Fed Appx. 368, 373 (6th Cir. 2003). State courts are the "ultimate expositors of state law." *Mullaney v. Wilbur,*

421 U.S. 684, 691, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975). Petitioner argues that Michigan's refusal to adopt automatism as a criminal defense violates his right to due process under the Fourteenth Amendment.

The right of an accused to present a defense has long been recognized as "a fundamental element of due process." *Washington v. State,* 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). However, "due process does not require that a defendant be permitted to present any defense he chooses." *Lakin,* 80 Fed Appx. at 373. "Rather, states are allowed to define the elements of, and defenses to, state crimes." *Id.*

In this case, Petitioner was not denied due process by Michigan's failure to expressly recognize automatism as a defense in common law or by statute. Even absent formal recognition of the defense, Petitioner was afforded a meaningful opportunity at trial to present his CPS seizure defense through lay and expert witnesses. *See Crane v. Kentucky,* 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986). The trial court did not preclude Petitioner from presenting his defense that, as a result of his CPS disorder, he performed the alleged criminal acts, including sexual assault, "without his awareness or conscious volition.'" *Haynes,* 451 F.Supp.2d at 724. Although the jury was not given a formal automatism instruction, the trial court was under no constitutional mandate to do so and committed no error. *Mullaney,* 421 U.S. at 691. Habeas relief is not

warranted relative to Petitioner's claim that he was denied due process of law.

C. Improper Insanity Defense Jury Instruction

Petitioner argues that the trial court erred by failing to instruct the jury that, once Petitioner met his burden of proof by a preponderance of the evidence that his mental state met the statutory definition of "insanity," the burden shifted back to the state to prove the *mens rea* element of the charged crimes beyond a reasonable doubt. The Michigan Court of Appeals considered the issue.

> Defendant did not object to the insanity defense instruction challenged on appeal and, when given the opportunity to note any corrections needed to the instructions given, indicated his acceptance of the instructions; therefore, defendant has waived this issue on appeal. Because defendant waived this right there is no error to review. Regardless, pursuant to MCL 768.20a(3) [and MCL 768.36(1)], defendant has the burden of proving his defense of legal insanity by a preponderance of the evidence. Therefore, contrary to defendant's assertion on appeal, the instruction correctly advised the jury of the burdens of proof regarding defendant's legal insanity defense.

Haskell, 2005 Mich. App. LEXIS 1531, 2005 WL 1489480, *3 (internal citations omitted). Petitioner

concedes that his claim of an erroneous jury instruction on the insanity issue was not preserved for appellate review. Petitioner's jury instruction claim is thus procedurally defaulted. The Court nonetheless proceeds to address the merits of the claim.

In order for habeas relief to be warranted on the basis of incorrect jury instructions, a petitioner must show more than the instructions were undesirable, erroneous, or universally condemned; rather, the jury instructions viewed as a whole must be shown to be so infirm that they rendered the entire trial fundamentally unfair. *Estelle,* 502 U.S. at 72. "The only question for us is 'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.'" *Id.,* citing *Cupp v. Naughten,* 414 U.S. 141, 94 S. Ct. 396, 38 L. Ed. 2d 368 (1973). The issue is not whether the jury instruction could have been applied unconstitutionally, but whether there is a reasonable likelihood that the jury applied the instruction in an unconstitutional manner. *See Victor v. Nebraska,* 511 U.S. 1, 6, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994). Due process neither prohibits trial courts from defining reasonable doubt, nor does it require them to do so as a matter of course, so long as the trial court instructs the jury on the necessity that the defendant's guilt must be proven beyond a reasonable doubt. *Id.* at 5.

If an instruction is ambiguous and not necessarily erroneous, it violates the Constitution only if there is a reasonable likelihood that the jury has applied the instruction improperly. *Binder v. Stegall,* 198 F.3d

177, 179 (6th Cir. 1999). A jury instruction is not to be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial court record. *See Grant v. Rivers,* 920 F.Supp. 769, 784 (E.D. Mich. 1996). "An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." *Henderson v. Kibbe,* 431 U.S. 145, 155, 97 S. Ct. 1730, 52 L. Ed. 2d 203 (1977). State law instructional errors rarely form the basis for federal habeas corpus relief. *Estelle,* 502 U.S. at 71-72.

The state trial court accurately instructed the jury about the requisite burden of proof in an insanity defense under Michigan law.

> And as to insanity, you'll get that instruction in a little bit, and that is the Defendant must prove insanity by a preponderance of the evidence. If you find that the Prosecution has not proven every element beyond a reasonable doubt, then you must find the Defendant not guilty.
>
> * * *
>
> The defense of legal insanity has been raised in this case and that is an affirmative defense that the Defendant has the burden of proving by a preponderance of the evidence. This means that the Defendant must satisfy you by evidence that outweighs the evidence against it that he was legally insane when he committed the acts constituting the offense . . .

> Before you may consider the legal insanity defense, of course, you must be convinced beyond a reasonable doubt that the Defendant committed each of the alleged acts. If you are, you should consider the Defendant's claim that he was legally insane at the time.
>
> * * *
>
> There is another verdict that is completely different from the verdict of not guilty because of insanity and this is called guilty, but mentally ill. If you find the Defendant guilty but mentally ill, you must find each of the following. First, that the Prosecution has proven beyond a reasonable doubt that the Defendant is guilty of a crime. Second, that Defendant has proven by a preponderance of the evidence that he was mentally ill as I have defined that term for you at the time of the crime. And third, that the Defendant has not proven by a preponderance of the evidence that he lacks the substantial capacity either to appreciate the nature and quality of the wrongfulness of his conduct or to confirm, conform his conduct to the requirements of the law. Legal insanity [may] be permanent or temporary. You must decide whether the Defendant was legally insane at the time of the alleged crime.

(Trial Tr., Vol. III. at 262-63, 275-76, 278-79). The state trial court also gave Michigan's standard reasonable doubt instruction.

> A reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence.

> It's not merely an imaginary or possible doubt, but it's a doubt based on reason and common sense. A reasonable doubt is just that, a doubt that is reasonable after a careful and considered examination of the facts and circumstances of this case.

Id. at 263.

Considering the jury instructions as a whole, the trial court properly instructed the jury on the burden of proof and the concept of reasonable doubt. There is no reasonable likelihood that the jury applied those instructions in an unconstitutional manner. *Binder,* 198 F.3d at 179. The Michigan Court of Appeals' resolution of this issue was not "contrary to" clearly established federal law. *See* 28 U.S.C. § 2254(d). Habeas relief on Petitioner's jury instruction claim will be denied.

D. Ineffective Assistance of Counsel

Petitioner contends that he received ineffective assistance of counsel from Ronald J. Plunkett, who represented Petitioner from June 2002 until May 2003.[4] The crux of Petitioner's claim is that Mr. Plunkett was not prepared. Petitioner also claims that the attorney who represented his interests after Mr. Plunkett's withdrawal, Barry Resnick, was also

[4] Mr. Plunkett represented Petitioner at his arraignment, preliminary examination and through the pre-trial process.

unprepared because he was completely unknowledgeable about CPS disorders, the basis of Petitioner's defense.[5]

1. Attorney Ronald J. Plunkett

The Michigan Court of Appeals did not agree with Petitioner's ineffective assistance of counsel argument relative to Ronald J. Plunkett. The court held as follows:

> Defendant first argues that . . . Ronald Plunkett, either misrepresented or lied to the trial court in chambers about a perceived threat regarding defendant and/or his family and that these misrepresentations resulted in defendant's bond being cancelled, precluded the performance of a diagnostic test to confirm defendant's expert's diagnosis, and precluded interviews of defendant by independent orensic psychiatrists or psychologists. We disagree. The trial court heard testimony regarding these statements on July 9, 2003, and found Plunkett's testimony credible that certain statements were made the night before he withdrew as defendant's counsel on May 19, 2003, which at the time, led him to believe that there was a threat of violence. This court must give regard to the special opportunity of the trial court to judge the

[5] Mr. Resnick represented Petitioner's interests during trial and at sentencing.

credibility of the witnesses who appeared before it.

* * *

[D]efendant has failed to show that completion of the desired tests and examinations were impossible because defendant was remanded to jail.

* * *

[D]efendant has not demonstrated a reasonable probability that the result of the proceedings would have been different had defendant's bond not been revoked.

Defendant also argues that he received ineffective assistance of counsel from Plunkett because it was clear that, on the eve of trial, Plunkett was not prepared to represent defendant at trial and had not prepared an insanity defense. . . . Defendant's argument lacks merit because Plunkett did not represent him at trial and defendant's trial attorney was allowed additional time in which to prepare after taking over the case. Defendant does not assert that his actual trial counsel was unprepared. Therefore, even assuming that Plunkett was unprepared, defendant has not shown that he was prejudiced where his actual counsel requested and received additional time in which to prepare for trial.

Defendant also asserts that he received ineffective assistance of counsel from Plunkett because Plunkett failed to file the required

notice, under MCL 750.520j(2), that defendant intended to question the victim about their prior sexual conduct and misinformed the police about defendant's clothes being washed so that testing was never completed on the clothes. We disagree.

* * *

In this case, the trial court granted the prosecutor's motion to exclude this evidence based on the lack of the proper notice; however, the trial court changed its decision after the prosecutor referred to defendant wanting to have sex with the victim "one more time" in her opening statement and allowed defendant to cross-examine her about this previous sexual conduct. Defense counsel was then able to question the victim as to why she continued to talk to defendant after these relations and, amidst her refusal to rekindle their relationship, she admitted that defendant had never forced her to do anything before. Furthermore, defendant's expert testified as to portions of the victim's preliminary examination testimony, that he used in his diagnosis of defendant, and read a portion, which included questions to the victim about whether defendant had ever scared or threatened her in the past before having sexual relations with her. Therefore, the jury knew from previous testimony that the victim and defendant had dated for over two years and, because of defendant's cross-examination, knew that the two had been sexually intimate. While defendant argues

> that he was not allowed to elicit testimony from the victim regarding her desire to keep her sexual activity from her parents, this ignores the trial court's specific direction to defendant's trial counsel to request a hearing if he wished to pursue testimony outside the scope of its limitation. No such request was made. Defendant has failed to show that he was prejudiced by Plunkett's failure to file the required notice.
>
> * * *
>
> Defendant finally argues that he received ineffective assistance of counsel from Plunkett because Plunkett misrepresented the time defendant might serve if he accepted the plea offer and communicated the offer to him only the night before trial. We disagree. Defendant argues that Plunkett told defendant that he would serve only two or three years in prison and that such advice is dangerously incompetent as defendant would realistically serve much longer if he pleaded guilty to two counts of third-degree CSC. However, defendant refused this offer and continued to trial under new representation, therefore, defendant has failed to show how this advice prejudiced him.

Haskell, 2005 Mich. App. LEXIS 1531, 2005 WL 14899480, *6, *7 (internal citations omitted). This issue has been exhausted as it was briefed on direct appeal in Petitioner's supplemental brief at issue "IX" (and at pages 18-20) and was raised in Petitioner's

application for leave to appeal to the Michigan Supreme Court at issue "X."

In *Strickland, supra,* the United States Supreme Court set forth the two-pronged test for determining whether a habeas petitioner has received ineffective assistance of counsel. First, a petitioner must prove that counsel's performance was deficient. This requires a showing that counsel made errors so serious that he or she was not functioning as counsel as guaranteed by the Sixth Amendment. *Strickland,* 466 U.S. at 687. Second, the petitioner must establish that the deficient performance prejudiced his defense. Counsel's errors must have been so serious that they deprived the petitioner of a fair trial or appeal. *Id.*

With respect to the performance prong, a petitioner must identify the acts which were "outside the wide range of professionally competent assistance[.]" *Id.* at 690. The reviewing court's scrutiny of counsel's performance is highly deferential. *Id.* at 689. The court must recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* at 690. To satisfy the prejudice prong, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is one that is sufficient to undermine confidence in the outcome. *Id.* "On balance, the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so

undermined the proper functioning of the adversarial process that the [proceeding] cannot be relied on as having produced a just result." *McQueen v. Scroggy,* 99 F.3d 1302, 1311-12 (6th Cir. 1996).

Consistent with the Michigan Court of Appeals' decision, this Court likewise finds that Mr. Plunkett's alleged lack of preparedness was generally inconsequential in that Mr. Resnick tried the case to the jury. Petitioner identifies various specific acts that contributed to Mr. Plunkett's alleged deficient representation: (1) Mr. Plunkett and his wife's divorce became final four days after Mr. Plunkett was retained; (2) Mr. Plunkett has admitted to a crack cocaine addiction; (3) Mr. Plunkett was arrested for possession of 25 grams of crack cocaine and is facing incarceration; (4) the Michigan Attorney Grievance Commission was appointed receiver of Mr. Plunkett's files after the Commission received notice that Mr. Plunkett abandoned his law practice; (5) Mr. Plunkett was under investigation for the death of a 22-year-old woman who was found dead in his apartment from an apparent drug overdose; (6) Mr. Plunkett withdrew as Petitioner's attorney the day before trial was scheduled; (7) Mr. Plunkett requested so many trial date continuances in the past that the trial judge was initially going to allow Petitioner's new attorney Mr. Resnick only three weeks to prepare for trial; (8) Mr. Plunkett told the trial judge that Petitioner threatened him with physical violence, which led to the revocation of Petitioner's bond; (9) Dr. Pitts attested at trial and in an affidavit that Petitioner's

incarceration while awaiting trial made it difficult and/or impossible to conduct proper testing in preparation for Petitioner's defense; and (10) Mr. Plunkett's story about being threatened by Petitioner was inconsistent. As to the latter incident, Petitioner argues Mr. Plunkett first told the trial judge that Petitioner threatened him, but at a July 9, 2003 bond hearing, Mr. Plunkett stated that he may have "misinterpreted" what Petitioner had said to him. Petitioner asserts that Mr. Plunkett responded to an attorney grievance by saying that it was Petitioner's father, William Haskell, who had threatened him.[6]

The Court finds it is speculative at best for Petitioner to argue that that the above stated series of events adversely affected the trial judge's view of Petitioner in a constitutional sense, the judge's patience with the parties and the attorneys, the latitude extended to Mr. Resnick to prepare for trial, or Mr. Resnick's ability to prepare Petitioner's insanity defense under an abbreviated time restriction. The Court notes there was a four year span of time between Mr. Plunkett's narcotics arrest and Petitioner's conviction. Mr. Plunkett's controversial and negative personal issues do not equate with ineffective assistance of counsel. Petitioner has failed to demonstrate how Mr. Plunkett's personal and legal problems adversely impacted or prejudiced his right to a fair trial. *Strickland,* 466 U.S. at 687. Mr. Plunkett did

[6] Most of these issues were revealed *after* Mr. Plunkett was no longer Petitioner's counsel.

not represent Petitioner at trial. The state trial court granted Petitioner's new attorney Mr. Resnick a two month extension to review the file and prepare for trial. Notwithstanding Mr. Plunkett's failure to give 10-day notice under M.C.L. § 750.520(j) that Petitioner intended to use evidence of Russell's prior sexual relations with him at trial, the state trial court ultimately permitted Russell to be cross-examined about their prior sexual conduct at trial. Petitioner has not met the *Strickland* standard for demonstrating ineffective assistance of counsel with respect to Mr. Plunkett. *Id.*

2. Attorney Barry Resnick

Petitioner argues that Mr. Resnick's ineffectiveness as trial counsel resulted from his lack of knowledge about CPS disorders. Petitioner asserts that Mr. Resnick failed to: (1) object to Dr. Marquis as an expert witness and the admission of her testimony; (2) object to the insanity defense jury instruction; (3) raise the automatism defense; and (4) explain to the jury that the totality of Petitioner's actions consisted only of hitting Ms. Russell in the face and stomach during a 15-30 second time period, and did not include a sexual assault. (Pet. at 13).

The Michigan Court of Appeals rejected Petitioner's ineffective assistance of counsel claim against Mr. Resnick.

> Defendant's claim that he was deprived of effective assistance of counsel because his trial

> counsel failed to object to the assertions of error addressed on appeal lacks merit because counsel is not required to advocate a meritless position. . . . [D]efendant has failed to show any prosecutorial misconduct, instructional error, or improper admission of evidence. Therefore, his trial counsel was not ineffective for failing to object to these assertions of error.

Haskell, 2005 Mich. App. LEXIS 1531, 2005 WL 14899480, *7 (internal citations omitted). Petitioner exhausted this issue by raising it in his supplemental appellate brief on direct appeal under issues "IX" and "X," and by raising the issue in his application for leave to appeal to the Michigan Supreme Court under issue "X."

The Court has concluded herein that Dr. Marquis' testimony was factually consistent with the nature of a CPS disorder. Mr. Resnick's failure to object to the admission of her testimony, and his failure to challenge Dr. Marquis' use as an expert, does not support a finding that Mr. Resnick's performance resulted in the denial of Petitioner's right to a fair trial. *Strickland,* 466 U.S. at 687.

Petitioner makes an unsupported statement in his petition that "Mr. Resnick had never heard of complex partial epileptic seizure before, and substituted in for Plunkett barely more than two months before the trial date." (Pet. Memo at 25). The Court has reviewed the affidavits of Mr. Resnick and Dr. Pitts, Petitioner's psychiatrist and expert witness,

and it is clear that Mr. Resnick contacted Dr. Pitts several times regarding Petitioner's condition and information about CPS disorders. Whether Mr. Resnick had not heard of a CPS seizure two months before trial is immaterial given the record demonstrates Mr. Resnick educated himself before trial about Petitioner's asserted CPS disorder. Mr. Resnick presented Petitioner's alleged CPS disorder as the cornerstone of Petitioner's defense. Consistent with the Court's rulings that there were no trial errors of constitutional magnitude with respect to the insanity defense, the automatism issue, or the burden of proof jury instruction, Mr. Resnick was not ineffective as Petitioner's trial counsel as a result of failing to advance objections on these issues. Mr. Resnick's representation of Petitioner at trial did not deny Petitioner a fair trial. *Strickland,* 466 U.S. at 687.

Mr. Plunkett's and Mr. Resnick's representation of Petitioner did not so undermine the state court proceedings and jury verdict as to have rendered an unreliable and unjust result. *McQueen,* 99 F.3d at 1311-12. Petitioner is not entitled to habeas relief on his claims of ineffective assistance of counsel.

E. Sentencing Claim

Petitioner argues that the trial court erred by imposing a significant increase in his sentence (i.e., 25 points under the Michigan Sentencing Guidelines) by finding a "continuing pattern of criminal behavior" in the multiple offenses perpetrated by Petitioner on

the evening of Ms. Russell's assault. Petitioner claims that the issue should have been decided by the jury and not unilaterally and arbitrarily by the trial court. Petitioner reasons that a judge's findings can significantly increase the sentence beyond what the sentence would have been based upon the jury's verdict. Petitioner contends that the state trial judge violated his constitutional right to a trial by jury by using factors to score the sentencing guidelines which were based on facts that were not submitted to the jury and proven beyond a reasonable doubt.

The Michigan Court of Appeals rejected this argument.

> And regarding OV 13, continuing pattern of criminal behavior, the evidence clearly indicated that defendant committed three or more crimes against the victim within a five year period, i.e., the sentencing offenses. *See* MCL 777.43. Each forcible sexual penetration of the victim resulted in a separate conviction pursuant to the plain language of the statute and relevant case law. MCL 750.520b; *People v. Dowdy,* 148 Mich. App. 517, 521, 384 N.W.2d 820; 148 Mich. App. 517, 384 N.W.2d 820 (1986) (legislature intended to punish each criminal sexual penetration separately). Therefore, the trial court did not abuse its discretion in counting each offense as part of defendant's pattern of criminal behavior and scoring OV 13 at twenty-five points . . . [D]efendant's sentence is within the guidelines range and this issue is without merit.

Haskell, 2005 Mich. App. LEXIS 1531, 2005 WL 14899480, *8. This issue has been exhausted within Petitioner's appeal brief to the Michigan Court of Appeals as Issue "I" and within his application for leave to appeal filed with the Michigan Supreme Court as Issue "I." The Court proceeds to address the merits of Petitioner's claim.

1. State Law Claim

Questions of state sentencing law, and the scoring of state sentencing guidelines in particular, are not cognizable on federal habeas corpus review. *Miller v. Vasquez,* 868 F.2d 1116, 1118-19 (9th Cir. 1989); *Long v. Stovall,* 450 F.Supp.2d 746, 754 (E.D. Mich. 2006). As succinctly explained by the Sixth Circuit, "[a] state court's alleged misinterpretation of state sentencing guidelines and crediting status is a matter . . . of state concern only." *Howard v. White,* 76 Fed. Appx. 52, 53 (6th Cir. 2003), citing *Travis v. Lockhart,* 925 F.2d 1095, 1097 (8th Cir. 1991); *Branan v. Booth,* 861 F.2d 1507, 1508 (11th Cir. 1988). "[F]ederal habeas corpus relief does not lie for errors of state law. . . ." *Lewis v. Jeffers,* 497 U.S. 764, 780, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990). "In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle,* 502 U.S. at 68. This claim does not merit habeas relief.

2. Due Process Claim

A sentence violates due process if it is based on "misinformation of constitutional magnitude[,]" *Roberts v. United States,* 445 U.S. 552, 556, 100 S. Ct. 1358, 63 L. Ed. 2d 622 (1980), or "extensively and materially false" information, which the defendant had no opportunity to correct. *Townsend v. Burke,* 334 U.S. 736, 741, 68 S. Ct. 1252, 92 L. Ed. 1690 (1948). Petitioner disputes Offense Variable 13, which requires an assessment of whether the defendant engaged in a continuing pattern of felonious criminal activity on three or more occasions. Petitioner was bound over to the circuit court on seven counts of criminal activity, six of which involved criminal sexual conduct. (PE Tr., at 55-56). The evidence supporting these charges was sufficient for the trial court to conclude that Petitioner engaged in a pattern of felonious criminal activity involving three or more crimes. This Court finds that Petitioner was not sentenced on the basis of "extensively and materially false" information, which he had no opportunity to correct. *Townsend,* 334 U.S. at 741. Petitioner's constitutional right to due process was not violated by the trial court's scoring of the state sentencing guidelines. *Id.*; *Roberts,* 445 U.S. at 556.

3. *Blakely v. Washington* Claim

The Supreme Court "has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be

found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." *Cunningham v. California,* 549 U.S. 270, 127 S.Ct. 856, 863-64, 166 L.Ed.2d 856 (2007). "[T]he Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant." *Id.* at 860.

Petitioner relies upon *Blakely v. Washington,* 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), which held that, other than the fact of a defendant's prior conviction, any fact that increases or enhances a penalty for a crime beyond the prescribed statutory maximum for the offense must be submitted to the jury and proven beyond a reasonable doubt. *Id.* at 301, citing *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

Blakely involved a trial court's departure from Washington's determinate sentencing scheme. Michigan, by contrast, has an indeterminate sentencing system in which the defendant is given a minimum and maximum sentence. The maximum sentence is not determined by the trial judge, but is instead set by law. *See People v. Drohan,* 475 Mich. 140, 160-61, 715 N.W.2d 778 (2006), *cert. den. sub nom, Drohan v. Michigan,* 549 U.S. 1037, 127 S.Ct. 592, 166 L. Ed. 2d 440 (2006); *People v. Claypool,* 470 Mich. 715, 730, n.14, 684 N.W.2d 278; 470 Mich. 715, 684 N.W.2d 278 (2004) (both citing, MCL Mich. Comp. Laws § 769.8).

"[M]ichigan's sentencing guidelines, unlike the Washington guidelines at issue in *Blakely,* create a range within which the trial court must set the minimum sentence." *Drohan,* 475 Mich. at 161. Under Michigan law, only the minimum sentence must presumptively be set within the appropriate sentencing guidelines range. *See People v. Babcock,* 469 Mich. 247, 255, n. 7, 666 N.W.2d 231; 469 Mich. 247, 666 N.W.2d 231 (2003), citing Mich. Comp. Laws § 769.34(2). Under Michigan law, the trial judge can never exceed the maximum sentence. *Claypool,* 470 Mich. at 730., n. 14.

The decision in *Blakely* has no application to Petitioner's sentence. Indeterminate sentencing schemes, unlike determinate sentencing schemes, do not infringe on the province of the jury. *See Blakely,* 542 U.S. at 304-05, 308-09. Because *Apprendi* and *Blakely* do not apply to indeterminate sentencing schemes like the one used in Michigan, the trial court's calculation of Petitioner's sentencing guidelines range did not violate his Sixth Amendment right to a jury trial.

The maximum penalty for first-degree criminal sexual conduct in Michigan is life imprisonment. Mich. Comp. Laws § 750.520b(2)(a). The maximum penalty for second-degree criminal sexual conduct is fifteen years. Mich. Comp. Laws § 750.520c(2)(a). The maximum penalty for aggravated domestic violence is one year. Mich. Comp. Laws § 750.81a(2). Because Petitioner's sentences are twelve to thirty years, ten to fifteen years, and one year, respectively, his

sentence is within the statutory maximum for each offense of which he was convicted. Petitioner's *Blakely* claim is without merit. *Stephenson v. Renico,* 280 F.Supp.2d 661, 669 (E.D. Mich. 2003).

F. Certificate of Appealability

A district court, in its discretion, may decide whether to issue a certificate of appealability ("COA") at the time the court rules on a petition for a writ of habeas corpus or may wait until a notice of appeal is filed to make such a determination. *Castro v. United States,* 310 F.3d 900, 903 (6th Cir. 2002). In deciding to deny the habeas petition, the court has, of course, studied the case record and the relevant law, and concludes that it is presently in the best position to decide whether to issue a COA. *See Id.* at 901 (*quoting, Lyons v. Ohio Adult Parole Auth.,* 105 F.3d 1063, 1072 (6th Cir. 1997)) ("[Because] 'a district judge who has just denied a habeas petition . . . will have an intimate knowledge of both the record and the relevant law,' the district judge is, at that point, often best able to determine whether to issue the COA.")

A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner must "show [] that reasonable jurists could debate whether" (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "adequate to deserve encouragement to proceed further." *Slack v.*

McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) (citation omitted).

The court finds that reasonable jurists could disagree with this Court's conclusions that: (1) Petitioner was not denied due process of law under the Fourteenth Amendment on being denied a right to present an automatism defense; (2) Petitioner was not denied effective assistance of counsel with respect to Mr. Plunkett; and (3) Petitioner was not denied effective assistance of counsel with respect to Mr. Resnick. The remainder of Petitioner's claims are beyond reasonable agreement.

Petitioner has failed to present any claims upon which habeas relief may be granted. The Court grants in part a certificate of appealability.

V. CONCLUSION

Petitioner has not established that he is in the custody of the State of Michigan in violation of the Constitution or laws of the United States. Accordingly,

IT IS ORDERED that the "Petition for Writ of Habeas Corpus" [Dkt. # 1] is hereby DENIED.

IT IS FURTHER ORDERED that a certificate of appealability is hereby GRANTED, IN PART, as to the issues of: (1) whether Petitioner was denied due process of law under the Fourteenth Amendment on being denied a right to present an automatism defense; (2) whether Petitioner was denied effective

assistance of counsel with respect to Mr. Plunkett; and (3) whether Petitioner was denied effective assistance of counsel with respect to Mr. Resnick.

SO ORDERED.

Dated: February 26, 2010

/s/ George Caram Steeh
GEORGE CARAM STEEH
UNITED STATES DISTRICT JUDGE

No. 10-1432

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CRAIG HASKELL, Petitioner-Appellant, v. MARY BERGHUIS, WARDEN, Respondent-Appellee.	)	ORDER (Filed Mar. 19, 2013)

BEFORE: MERRITT and MOORE, Circuit Judges; and MAYS,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the

* Hon. Samuel H. Mays, Jr., United States District Judge for the Western District of Tennessee, sitting by designation.

petition is denied. Judge Merritt would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk