

No. _____

In The
Supreme Court of the United States

—————◆—————
JEFFREY KITTKA,

Petitioner,

v.

JACKIE FRANKS,

Respondent.

—————◆—————
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

—————◆—————
PETITION FOR A WRIT OF CERTIORARI

—————◆—————
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QUESTIONS PRESENTED

1. Whether it was a violation of clearly established law to sentence petitioner to a term of imprisonment instead of an intermediate sanction when the increase was based on facts not found by the jury beyond a reasonable doubt.
2. Whether there was cause for petitioner's failure to argue on direct review that he received ineffective assistance of counsel at trial, during sentencing and on appeal.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jeffrey Kittka respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit in *Kittka v. Franks*, No. 12-1919.

**OPINIONS BELOW**

The opinion of the court of appeals (App. 1-14) is unpublished, but available at 2013 WL 5227043. The opinion of the district court (App. 15-39) is unpublished, but available at 2012 WL 2367162.

**JURISDICTION**

The judgment of the court of appeals was entered on September 18, 2013. This Court has jurisdiction under 28 U.S.C. §1254(1).

**RELEVANT CONSTITUTIONAL PROVISION**

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be

informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.



STATEMENT OF THE CASE

Petitioner Jeffrey Kittka seeks certiorari review of the denial of his petition for a writ of habeas corpus. He was convicted of one count of 2nd-degree criminal sexual conduct and acquitted of another in connection with allegations that he inappropriately touched his then seven-year-old niece, M.M. The trial court sentenced him to 18 months to 15 years of incarceration. Two claims are at issue: (1) whether petitioner's right to trial by a jury was violated when he was exposed to an increased sentence based on facts that were not found by the jury beyond a reasonable doubt; and (2) whether he received ineffective assistance of counsel at trial, during sentencing and on appeal.

The United States District Court for the Eastern District of Michigan rejected each claim and the United States Court of Appeals for the Sixth Circuit affirmed the district court's decision. Each court cited the following portions of the trial court's summary of the testimony of the state's witnesses:

At trial, [M.M.'s] testimony established that she is eight years old and attends the 3rd grade. Defendant is her uncle and he is married to

her aunt Debbie. They have a child, Jimmy, that is older than her. Sometimes she and her sister spend the night at Defendant's house. The last time she was at Defendant's house, she slept in the basement with Defendant and Jimmy. Jimmy slept on the couch, she slept on the floor and Defendant was behind her. When she woke up, Defendant had his hand under her pajamas. Defendant's fingers were touching her private parts where she goes pee. She pushed his hand away and he stopped. Defendant touched her private parts other times, but she could not remember how many times. When [she] got home, she told her mother that Defendant touched her private parts.

* * *

Detective Mark Boody's testimony established that he is a juvenile detective with the Novi Police Department. Boody was present when Amy Allen from Care House interviewed [M.M.] Boody also interviewed Defendant at the police station. During the interview, Defendant suggested that maybe he is used to sleeping next to his wife and maybe he touched [M.M.] in the way he touches his wife. However, at no point did Defendant say that [M.M.] was a liar or that she had lied in the past.

App. 1-2, 16-17.

Petitioner asserted a defense of mistake, suggesting that he was asleep at the time and may have unconsciously touched M.M. because he was used to

sleeping with his wife. Although he did not testify at trial, he called Debra Kittka, Theodore Tekesian and Donna Holtschneider as witnesses. Mrs. Kittka testified that her husband is an honest and loving person, and has an exceptionally high reputation for moral character. She explained that the morning after the alleged incident, M.M. came upstairs, acted normal and sat in petitioner's lap while they watched cartoons. She also testified that M.M.'s mother had told her that M.M. thought petitioner was asleep during the incident. Attorney Theodore Tekesian testified that his son is a friend of petitioner's son. He testified that petitioner has a very good reputation for truth and honesty, and good moral character. Holtschneider testified that petitioner has a reputation for being honest and true to his word, and is of exemplary moral character.

The jury found petitioner guilty of one count of 2nd-degree criminal sexual conduct, but acquitted him of a second count. Prior to sentencing, the prosecutor filed a memorandum requesting that petitioner's sentencing guidelines range be increased because he engaged in a pattern of felonious activity involving three or more crimes against a person. The increase for engaging in a pattern of felonious activity moved him from an intermediate sanction cell authorizing no more than a year in jail to a straddle cell authorizing a prison sentence. App. 7. The trial court adopted the guidelines range set forth in the prosecutor's memorandum, and sentenced him to a term of 18 months to 15 years imprisonment. *Id.* at 3, 19.

Petitioner appealed to the Michigan Court of Appeals. He asserted that he was entitled to re-sentencing because, under the correct scoring of his sentencing guidelines, he should have received no more than 12 months in jail. He also claimed that the trial court erred in not instructing the jury on the defense of accident. In an unpublished opinion, the court of appeals affirmed his conviction and sentence. *People v. Kittka*, No. 269425 (Mich. Ct. App. May 22, 2007). As to his argument that the trial court was not entitled to assess points on the basis of its own conclusion that he committed more acts than what the jury determined beyond a reasonable doubt, the court of appeals concluded that Michigan's sentencing system does not implicate the Sixth Amendment. The court also found that petitioner had failed to properly preserve the issue through either an objection at sentencing or a timely motion to remand. In addition, the court of appeals concluded that the instructions offered by the trial court adequately covered the theory of accidental touching. Petitioner sought leave to appeal his sentence in the Michigan Supreme Court, but leave was denied. *People v. Kittka*, 480 Mich. 893 (2007). He then filed a petition for a writ of certiorari in this Court. The petition was denied. *Kittka v. Michigan*, 552 U.S. 1310 (2008).

Following the conclusion of direct review, petitioner filed a motion for relief from judgment in the trial court. He contended that ineffective assistance of counsel at trial, during sentencing and on appeal denied him the right to assistance of counsel for his

defense. He argued that his trial attorney was constitutionally ineffective for failing to object to the trial court's admission of evidence of other acts, and for failing to challenge the allocation of additional points sentencing. He claimed that his appellate attorney was likewise ineffective for failing to properly raise these issues on direct appeal in the Michigan Court of Appeals. The trial court denied the evidentiary portion of the claim on the basis that it could have been raised on appeal and petitioner failed to demonstrate actual prejudice from the alleged irregularities. The court concluded that the sentencing component of the claim did not warrant relief because it had already been decided on direct review. Petitioner sought review of the trial court's denial in the Michigan Court of Appeals. The court of appeals issued a one-sentence order denying leave to appeal for failure to establish entitlement to relief from judgment. *People v. Kittka*, No. 290445 (Mich. Ct. App. Mar. 20, 2009). The Michigan Supreme Court denied leave to appeal for the same reason. *People v. Kittka*, 485 Mich. 974 (2009). He again sought, but was denied, certiorari review in this Court. *Kittka v. Michigan*, 131 S.Ct. 145 (2010).

Petitioner then filed a timely petition for a writ of habeas corpus in the district court. The district court had jurisdiction under 28 U.S.C. §2254(a). In the petition he claimed that: (1) his sentence was imposed in violation of the Sixth Amendment; and (2) he received ineffective assistance of counsel at trial, during sentencing and on direct appeal. App. 3, 15.

The district court denied the sentencing claim on the merits, but rejected the ineffective assistance of counsel claim based on his purported failure to establish cause for procedurally defaulting the claim. *Id.* at 28-29, 38. The court issued a certificate of appealability for each claim. *Id.* at 39. On September 18, 2013, the Sixth Circuit affirmed the decision of the district court. Like the district court, the court of appeals reached the sentencing claim on the merits. The court of appeals concluded that the question whether petitioner’s sentence violates the Sixth Amendment “is not a matter of clearly established Supreme Court precedent.” *Id.* at 9. The court of appeals noted that this Court “has not addressed any analogous provision[.]” *Id.* at 9-10. As to the ineffective assistance of counsel claim, the court of appeals determined that the district court was correct in finding that no showing of cause had been made. *Id.* at 13-14.



REASONS FOR GRANTING THE WRIT

I. IT WAS A VIOLATION OF CLEARLY ESTABLISHED LAW TO SENTENCE PETITIONER TO A TERM OF IMPRISONMENT INSTEAD OF AN INTERMEDIATE SANCTION WHEN THE INCREASE WAS BASED ON FACTS NOT FOUND BY THE JURY BEYOND A REASONABLE DOUBT

Under Michigan’s sentencing guidelines system, a maximum sentence is generally determined by

statute. MCL §769.8(1). The minimum sentence is selected from a range defined by a set of mandatory sentencing guidelines. App. 6. The range is determined by considering the offense variables (OV's), prior record variables (PRV's) and the offense class of the defendant. MCL §777.21(1). The minimum sentence range is found by totaling the OV's and PRV's, and locating the intersection of the appropriate numbers on the applicable grid-chart. App. 6. Grids contain several different types of cells: (1) prison cells; (2) straddle cells; and (3) intermediate sanction cells. In a prison cell, the lower and upper limits of the minimum range each exceed 12 months, and a prison sentence is required. *Ibid.* In a straddle cell, the upper limit exceeds 18 months and the lower limit is equal to or less than 12 months. MCL §769.34(4)(c). When the defendant's score places him or her in a straddle cell, the court may impose either a prison term or a lesser intermediate sanction. App. 6. Finally, if the upper limit of the guidelines range is equal to or less than 18 months, then the court must impose an intermediate sanction (which may include imprisonment in a county jail, but the term may not exceed 12 months). MCL §769.34(4).

In this case, petitioner was convicted of one count of 2nd-degree criminal sexual conduct, contrary to MCL §750.520c(1)(a). He was acquitted of a second count of the same offense. Ordinarily, the statutory maximum for 2nd-degree criminal sexual conduct would be 15 years. But, absent the trial court's finding that petitioner engaged in a pattern of felonious

criminal activity (and the 25-point OV assessment that accompanied the finding), the upper limit of petitioner's sentencing guidelines range was 17 months. Since his upper limit was equal to or less than 18 months, petitioner fell within an intermediate sanction cell and was entitled to be sentenced to no more than 12 months. MCL §769.34(4)(c). Once the trial court assessed 25 points under OV-13 based on the finding that he engaged in a pattern of felonious criminal activity, though, the upper limit of petitioner's guidelines range increased to 24 months. The increase moved him from an intermediate sanction cell into a straddle cell in which the 12-month ceiling no longer applied.

At the time petitioner was sentenced, it was clearly established that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The term "statutory maximum" refers to "the maximum sentence a judge may impose solely on the basis of facts reflected in the jury verdict or admitted by the defendant." *Blakely v. Washington*, 542 U.S. 296, 303 (2004) (citing *Ring v. Arizona*, 536 U.S. 584, 602 (2002) (emphasis omitted)). An offender's "statutory maximum" is not "the maximum sentence [the] judge may impose after finding additional facts," but rather "the maximum he may impose *without* any additional findings." *Id.* at 303-304 (emphasis in original). As set forth above, the maximum

sentence the trial court could have imposed without the additional finding that petitioner engaged in a pattern of felonious criminal activity was 12 months. And the additional finding which allowed for the increased sentence was not made by a jury utilizing the reasonable doubt standard.

The increase warrants habeas relief. The threshold inquiry in reaching this conclusion is whether the state court adjudication of the claim involved an unreasonable application of clearly established federal law as determined by this Court. 28 U.S.C. §2254(d)(1). The Court has explained that the range of reasonable judgment in the habeas corpus context can depend on the nature of the relevant rule:

If a legal rule is specific, the range may be narrow. Application of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over time. Applying a general standard to a specific case can demand a substantial element of judgment.

Yarborough v. Alvarado, 541 U.S. 652, 664 (2004). The rule at issue in this case falls decidedly in the former category. Application of the rule requires only one thing: that the Court determine whether the required finding (that petitioner engaged in a pattern of felonious criminal activity) exposed him to a greater punishment than that authorized by the jury's guilty verdict.

The district court concluded, and the Sixth Circuit agreed, that the trial court's sentence did not violate the Sixth Amendment because, pursuant to MCL §769.34, the trial court scored petitioner's sentencing guidelines in order to calculate the range for the minimum portion of the sentence, not to set the maximum sentence. App. 10, 28-29. Intermediate sanctions, the district court emphasized, "are a component of Michigan's statutory scheme for setting a defendant's minimum sentence . . . and merely give the defendant the opportunity to be incarcerated for less than the sentence authorized by the jury verdict or guilty plea." App. 28-29 (citing *People v. Harper*, 479 Mich. 599, 603-604, 624 (2007)). However, when a Michigan court computes a defendant's sentencing guidelines score and the total calls for an intermediate sanction, the guidelines have the clear and unambiguous effect of setting a ceiling, not a floor. If the court then employs judicial fact finding to score additional points in order to increase the defendant's score to one that allows for a prison sentence (by moving the defendant from an intermediate sanction cell to either a straddle cell or a prison cell), the court has raised the ceiling.

Labeling the increase in this case as one that was imposed as a function of the trial court's computation of petitioner's minimum sentence is not a principled basis for denying his claim. This Court squarely rejected such an approach when it emphasized in *Apprendi* that "the relevant inquiry is one not of form, but of effect – does the required finding expose

the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.*, 530 U.S. at 494; *see also*, *Ring*, 535 U.S. at 602. Here, the pivotal factor in the analysis – that, without the assessment of points under OV-13, the most time the trial court could have given petitioner was 12 months in jail – is not in dispute. The trial court's use of judge-found facts in support of its decision to score 25 points under OV-13 had the obvious effect of exposing petitioner to a greater punishment. Since those facts were not proved to a jury beyond a reasonable doubt, petitioner's sentence was imposed in clear violation of the Sixth Amendment. The lower courts' determination that the state courts did not unreasonably apply clearly established federal law is, therefore, subject to reversal.

There are no procedural impediments to review of this claim. First, although petitioner was on parole at the time he filed his habeas petition, he is now discharged. A defendant wishing to continue his appeals after the expiration of his sentence must suffer some continuing injury in order to proceed. *United States v. Juvenile Male*, 131 S.Ct. 2860, 2864 (2011). Both the district court and the court of appeals correctly determined that the inclusion of petitioner's picture in the Michigan Department of Corrections inmate tracking database constitutes a continuing injury because his image would no longer be included had he received the appropriate sentence. App. 4-5, 22. Second, when petitioner initially presented his sentencing claim to this Court on direct

review, review of the claim was arguably impeded by the Michigan Court of Appeals' determination that he had failed to preserve the claim by raising it in a timely motion to remand. Now, however, with the claim before the federal courts on habeas review, the state has decided against raising the defense of procedural default. App. 25.

II. THERE WAS CAUSE FOR PETITIONER'S FAILURE TO ARGUE ON DIRECT REVIEW THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL, DURING SENTENCING AND ON APPEAL

The standard governing an ineffective assistance of counsel claim is clearly established and regularly applied by the courts. The Sixth Amendment provides that in all criminal prosecutions the accused shall have the right to have the assistance of counsel for his defense. This right requires that counsel's assistance not be ineffective. An attorney's performance is deficient when his or her representation falls "below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Deficient performance is prejudicial when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

The ineffective assistance of counsel claim in this case involves three components: (1) trial counsel's failure to object to highly prejudicial other acts evidence;

(2) trial counsel's failure to object at sentencing to the trial court's 25-point assessment under OV-13; and (3) appellate counsel's failure to raise the evidentiary claim and properly preserve the sentencing claim. The other acts evidence consisted of an allegation by a second niece, K.M., that petitioner also touched her inappropriately. K.M.'s allegations were mentioned at trial during Detective Boody's testimony and when the prosecutor played Boody's videotaped interview with petitioner. App. 34-35. Trial counsel asked Detective Boody about one incident during which petitioner allegedly put his hand on K.M.'s thigh, and another incident when he supposedly touched K.M. inappropriately while they were wrestling. Detective Boody testified that K.M. said it always happened when they were wrestling. Trial counsel's questions and Detective Boody's testimony opened the door for the prosecutor to inquire on re-direct whether petitioner had touched K.M.'s breast and vagina. Detective Boody responded affirmatively. Petitioner additionally claimed that trial counsel erred by not challenging the trial court's use of judicial fact finding at sentencing to move him from an intermediate sanction cell to a straddle cell. He also asserted that his appellate attorney was ineffective for failing to challenge the statements about K.M.'s allegations of inappropriate touching and missing the deadline for timely preserving his sentencing claim through a motion to remand.

The district court found petitioner's ineffective assistance of counsel claim to be procedurally defaulted because, although it was raised on state

collateral review, it had not been raised in petitioner's direct appeal. App. 33. The court acknowledged, however, that federal habeas review was cognizable if petitioner could demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law. *Id.* (citing *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)). Since petitioner had asserted that his appellate attorney's deficient performance constituted cause for his failure to raise the ineffective assistance of trial counsel claim on direct review, the district court considered whether appellate counsel's conduct satisfied the *Strickland* standard. In order to make that determination, the court examined the underlying claim about trial counsel. App. 34.

As to the evidentiary component of the claim, the district court concluded that in questioning Detective Boody about K.M., trial counsel was attempting to establish that the touching was not done for a sexual purpose. App. 35. This had the potential to lead the jurors to infer that the touching of M.M. was also innocent and not sexual in nature. *Ibid.* The district court conceded that trial counsel could have attempted to exclude K.M.'s statements. App. 36. But the court found that the statements would likely have been admissible to show the absence of mistake or accident. *Id.* (citing MRE 404(b)(1)). The court of appeals agreed. App. 13.

Evidence of other acts is indeed admissible under MRE 404(b) to show absence of mistake or accident. And accidental touching was one of the defenses

raised at trial. But, as the Michigan Supreme Court pointed out in *People v. Crawford*, 458 Mich. 376 (1998), there is “a continuum upon which each proffered prior act must be placed; the more similar the prior act to the charged crime, the closer the evidence to the admissibility threshold.” *Id.* at 395 n.13. Petitioner was accused of reaching inside M.M.’s pajamas and underpants, and touching her privates. His attorney suggested that, while sleeping, he may have mistaken M.M. for his wife of 17 years. Evidence that petitioner had done the same thing to K.M. while sleeping next to her would have tended to show that petitioner did not mistake M.M. for his wife. However, the evidence that was introduced at trial with regard to petitioner touching K.M. was much different. First, the state offered testimony suggesting that *while awake* petitioner touched K.M. while wrestling with her and pushing her on roller skates. This evidence had little tendency to negate the assertion that petitioner mistakenly touched M.M. in his sleep. Second, Detective Boody testified that petitioner put his hand on K.M.’s thigh while they slept in a tent. That allegation, too, is dissimilar from the charged act because it did not involve petitioner putting his hand inside K.M.’s clothing and touching her in a sexual manner. Since the references to K.M.’s statements were likely inadmissible under Michigan law, the lower courts should have concluded that the deficiency prong of the *Strickland* inquiry has been satisfied. This Court should accordingly reverse and remand for a determination whether petitioner

suffered prejudice as a result of counsel's failure to object to the references.

With regard to petitioner's contention that his attorneys' failure to properly preserve his sentencing claim was objectively unreasonable, both the district court and the court of appeals determined that the underlying claim was itself lacking in merit. The courts concluded that, since the claim could not have succeeded on the merits, counsel did not perform deficiently in failing to preserve it. As set forth above, however, the trial court's use of facts not found by a jury beyond a reasonable doubt to deny him an intermediate sanction was a clear violation of the Sixth Amendment. Either trial counsel or appellate counsel could have properly preserved the issue, *see* MCL §769.34(10), but neither did. Appellate counsel's failure to preserve the issue was particularly egregious because he spotted it and included it as a basis for his motion to remand, but failed to file the motion in a timely manner. As a result, petitioner was imprisoned when he should have spent no more than 12 months in jail.



CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the petition for a writ of certiorari be granted.

Dated: December 17, 2013

Respectfully submitted,

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**NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION**

Case No. 12-1919

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

JEFFREY KITTKA,) **ON APPEAL FROM**
) **THE UNITED**
Petitioner-Appellant,) **STATES DISTRICT**
) **COURT FOR**
v.) **THE EASTERN**
JACKIE FRANKS,) **DISTRICT OF**
) **MICHIGAN**
Respondent-Appellee.)
) **(Filed Sep. 18, 2013)**

**BEFORE: BATCHELDER, Chief Judge; GUY
and BOGGS, Circuit Judges.**

I.

ALICE M. BATCHELDER, Chief Judge.

Kittka was charged in state court with two counts of second-degree criminal sexual conduct for touching his seven-year-old niece, M.M., in an inappropriate manner. The state court summarized the evidence against him:

At trial, [M.M.'s] testimony established that she is eight years old and attends the 3rd grade. Defendant is her uncle and he is married to her aunt Debbie. They have a [son, who] is older than her. Sometimes she and

her sister spend the night at Defendant's house. The last time she was [to] Defendant's house, she slept in the basement with Defendant and [his son]. [His son] slept on the couch, she slept on the floor and Defendant was behind her. When she woke up, Defendant had his hand under her pajamas. Defendant's fingers were touching her private parts where she goes pee. She pushed his hand away and he stopped. Defendant touched her private parts other times, but she could not remember how many times. When [she] got home, she told her mother that Defendant touched her private parts.

Detective Mark Boody's testimony established that he is a juvenile detective with the Novi Police Department. Boody was present when Amy Allen from Care House interviewed [M.M.] Boody also interviewed Defendant at the police station. During the interview Defendant suggested that maybe he is used to sleeping next to his wife and maybe he touched [M.M.] in the way he touches his wife. However, at no point did Defendant say that [M.M.] was a liar or that she had lied in the past.

Kittka acknowledged to the detective that what M.M. said was probably true because he could not imagine that M.M. would lie about it. At trial he argued a defense of mistake, suggesting that he was asleep at the time and may have unconsciously touched M.M. because he was used to sleeping with his wife. Another niece, K.M., told the detective that Kittka had also

touched her inappropriately, once touching her thigh while she was sleeping, and another time touching her inappropriately while they were wrestling. The detective testified at trial about what K.M. had told him.

Kittka was charged with two counts based on M.M.'s testimony that he had inappropriately touched her on prior occasions, but the jury only convicted Kittka of one count. The Michigan trial court sentenced Kittka under Michigan's indeterminate sentencing scheme to 18 months to 15 years of incarceration. Kittka appealed the decision to the Michigan Supreme Court, filed a motion for relief in the district court [sic], and then unsuccessfully appealed the dismissal of that motion through the Michigan courts.

Kittka then filed the present habeas petition in the district court. He makes two arguments. At sentencing, the trial court relied on M.M.'s testimony (summarized above) and the second charged (but dismissed) count in calculating the offense variable points used under Michigan's indeterminate sentencing scheme to set the minimum sentence. Kittka argues that this constituted judicial fact-finding in violation of the Sixth Amendment and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Second, Kittka argues that his trial counsel was ineffective for failing to object to the introduction of K.M.'s testimony and for failing to object to the sentencing scheme described in the first argument. We agree with the

district court that both claims should be dismissed, and we therefore AFFIRM.

II.

Kittka was a parolee when he filed his habeas petition and is now discharged. The case or controversy requirement of Article III requires that a defendant in a criminal case “wishing to continue his appeals after the expiration of his sentence must suffer some ‘continuing injury’ or ‘collateral consequence’ sufficient to satisfy Article III.” *United States v. Juvenile Male*, 131 S. Ct. 2860, 2864 (2011). That “collateral consequence” must be “traceable to the challenged portion of the sentence.” *Id.* (internal quotation marks omitted).

When a defendant challenges his *conviction*, the Supreme Court is willing to assume that collateral consequences exist. *See Juvenile Male*, 131 S. Ct. at 2864 (“When the defendant challenges his underlying *conviction*, this Court’s cases have long presumed the existence of collateral consequences.”). We will presume on this basis that collateral consequences exist and so conclude that Kittka’s ineffective-assistance claim, as a challenge to his conviction, is not moot.

We find as well that Kittka still suffers from the collateral consequences of his sentence. Kittka is classified as a sex offender because of his conviction, not because of his sentence. Kittka argues, though, that the inclusion of his picture in the State Department of Correction’s online database of sex offenders

constitutes a collateral consequence of his sentence because, had he received the appropriate sentence, he would no longer be listed in the database. The district court accepted this argument but noted that Kittka had failed to cite “any case law supporting the contention.” The “collateral consequences” category is quite broad and includes such things as sex-offender registration and notification requirements, and the right to vote, engage in business, hold office, and serve as a juror. *See Leslie v. Randle*, 296 F.3d 518, 522 (6th Cir. 2002). Given this, we agree with the district court that inclusion in the online database of sex offenders likely counts as a collateral consequence of Kittka’s sentence. Thus, we are able to consider Kittka’s claims.

III.

Kittka first argues that the trial court violated *Apprendi* at sentencing by using Kittka’s second charged count of sexual conduct and M.M.’s above-quoted testimony that Kittka had touched her “other times” to find that the offense of conviction was part of a “pattern” of criminal conduct. This finding, argues Kittka, constituted judicial fact-finding in violation of *Apprendi* and the Sixth Amendment right to trial by jury.

A.

Michigan has an indeterminate sentencing scheme. Under that scheme, a maximum sentence for

an offense is determined by statute. *People v. McCuller*, 739 N.W.2d 563, 570 (Mich. 2007) (citing Mich. Comp. Laws § 769.8(1)). The minimum sentence is defined by a range. *Id.* (citing Mich. Comp. Laws § 769.34(2)). That range is defined by a set of mandatory sentencing guidelines and is determined by considering the offense variables (OVs), prior record variables (PRVs), and the offense class of the defendant. *See id.* (citing Mich. Comp. Laws § 777.21(1)). The minimum sentence range is found by totaling the OV's and PRV's and locating the intersection of the appropriate numbers on a grid-chart.

There are three types of “cells” in the grid of OV's and PRV's. If the lower and upper limits of the minimum range are both more than 12 months, the judge must sentence the defendant to a state prison term, absent certain exceptions. This is called a “prison cell.” If the upper limit of the minimum sentence exceeds 18 months and the lower limit is under 12 months, the judge may either sentence the defendant to a state prison term or to a lesser “intermediate sanction.” This is called a “straddle cell.” Mich. Comp. Laws § 769.34(4)(c). Finally, if the upper limit of the minimum sentence is under 18 months, the judge must impose an “intermediate sanction” – a punishment that may include imprisonment in the county jail for up to a year. Mich. Comp. Laws § 769.34(4). If the judge offers a “substantial and compelling reason” in writing for doing so, he may impose a stricter sentence. *Id.* This third category is called an “intermediate sanction cell.”

Here, the jury convicted Kittka of one count of criminal sexual conduct in the second degree in violation of Mich. Comp. Laws § 750.520c(1)(a). Such a conviction is punishable “[b]y imprisonment for not more than 15 years.” *Id.* at (2)(a). This is the statutory maximum for his offense. The jury acquitted him of a charged second count of the same offense. The trial court, however, took the second charge into account at sentencing and assessed 25 offense variable (OV) points because “[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person.” *See* Mich. Comp. Laws § 777.43(1)(c). This OV score placed Kittka’s minimum sentence in a “straddle cell.” The judge chose *not* to give Kittka an intermediate sanction, choosing instead to give him a term of imprisonment from 18 months to 15 years. Had the judge not assessed the 25 offense variable points, Kittka’s minimum sentence would have fallen into an intermediate sanction cell, and the judge would have been required to sentence Kittka to a maximum of 12 months in county jail, absent a “substantial and compelling reason” to send Kittka to state prison.

Kittka’s argument is simple. He was entitled to an “intermediate sanction” and so to a maximum jail term of 12 months. The only reason he received a longer prison term was because the judge, without a jury’s finding beyond a reasonable doubt, concluded that Kittka had engaged in multiple counts of criminal sexual conduct. This increased his offense variable points and placed him in a straddle cell, thus

permitting his sentence of 18 months to 15 years. Thus, according to Kittka, because the judge's fact-finding resulted in a sentence of more than 12 months in county jail, the judge's fact-finding violated *Apprendi*.

We accord AEDPA deference in reviewing this issue. AEDPA deference applies "if the state court conducts any reasoned elaboration of an issue under federal law." *Fleming v. Metrish*, 556 F.3d 520, 531 (6th Cir. 2009). Indeed, AEDPA deference may apply even where there is not any such elaboration. *See Harrington v. Richter*, 131 S. Ct. 770, 784 (2011) ("[D]etermining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning. . . . Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief.") Here, the Michigan Court of Appeals found that this sentencing issue was not preserved at trial, but it also addressed the merits of the claim, conducting a "reasoned elaboration" on the merits and, quoting *People v. Drohan*, 715 N.W. 2d 778, 791 (Mich. 2006), concluded that "the Michigan system is unaffected by the holding in *Blakely*," and "[d]efendant's recourse to *Blakely* . . . is thus unavailing." *People v. Kittka*, 2007 WL 1490471 at *2 (Mich. App. 2007). Habeas relief may not be granted as to this claim, therefore, unless the state court's decision "was contrary to, or involved

an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court.” 28 U.S.C. § 2254(d)(1). After considering this claim on the merits, the district court agreed with the state court that the claim should be dismissed. *Kittka v. Franks*, 2012 WL 2367162 at *5-6. (E.D. Mich. 2012).

B.

The Supreme Court in *Alleyne v. United States* held that any fact that increases a mandatory minimum sentence “increases the penalty for a crime” and so “must be submitted to the jury.” 133 S. Ct. 2151, 2155 (2013). *Alleyne* expressly overruled *Harris v. United States*, 536 U.S. 545, 568 (2002) (holding that increases in a minimum sentence based on judicial fact-finding do not violate the Sixth Amendment because a minimum sentence does not alter the prescribed statutory maximum). *See Alleyne*, 133 S. Ct. at 2155. However, when the state court considered this case, *Alleyne* had not been decided and *Harris* was still good law. Our review therefore is premised entirely on the Supreme Court’s *pre-Alleyne* decisions and does not address the effect of *Alleyne* on either Michigan’s indeterminate sentencing scheme or mandatory minimum sentences imposed under that scheme. *See Greene v. Fisher*, 132 S. Ct. 38, 44 (2011).

Whether Michigan’s “intermediate sanction” sentencing violates the Sixth Amendment is not a matter of clearly established Supreme Court precedent. The Supreme Court has not addressed any

analogous provision, and the Sixth Circuit has expressly recognized that it is an unanswered question. *Montes v. Trombley*, 599 F.3d 490, 498 (6th Cir. 2010). On the other hand, Michigan’s Supreme Court has expressly found that “intermediate sanction” sentencing is constitutional. That court explained:

A sentencing court scores the OV’s only to calculate the recommended range for the *minimum* portion of the defendant’s sentence, not to arrive at the defendant’s maximum sentence, which is set by statute. The conditional limit on incarceration contained in MCL 769.34(4)(a) – an intermediate sanction – does not establish the defendant’s statutorily required maximum sentence authorized by the jury’s verdict or the guilty plea, but is instead a matter of legislative leniency, giving a defendant the opportunity to be incarcerated for a period that is *less* than that authorized by the jury’s verdict or the guilty plea.

People v. McCuller, 739 N.W.2d 563, 566 (Mich. 2007) (citing *People v. Harper*, 739 N.W.2d 523, 527 (Mich. 2007)).

Clearly established federal law, as announced by the Supreme Court, does not contradict this logic. Accordingly, we cannot grant Kittka’s habeas petition here.

IV.

Kittka also brings a claim of ineffective assistance of counsel, alleging that his trial counsel was ineffective for failing to object to hearsay testimony, and for failing to object to the 25-point offense variable increase at Kittka's sentencing (the claim underlying the *Apprendi* claim). Kittka also claims that his appellate counsel on direct appeal was ineffective for not bringing an ineffective-assistance-of-trial-counsel claim. The latter claim allegedly serves as "cause" for the procedural default of the former claim in state court.

Kittka brought these claims for the first time in a collateral action as part of his motion for relief from judgment. The trial court held that Kittka's ineffectiveness claims were procedurally defaulted under Mich. Ct. R. 6.508(D)(3), which states that a court may not grant collateral relief on grounds that "could have been raised on appeal from the conviction and sentence," unless the movant shows good cause for the failure and actual prejudice. The trial court reviewed the evidence against Kittka and concluded that the alleged errors in his trial representation did not actually prejudice Kittka. The state appellate court and supreme court affirmed in summary fashion the trial court's denial of defendant's motion, based on Mich. Ct. R. 6.508(D).

State court dismissal based on Mich. Ct. R. 6.508(D) constitutes an adequate and independent state ground for the dismissal of this claim. A habeas

claim must be dismissed if: “(1) the petitioner fails to comply with a state procedural rule; (2) the state courts enforce the rule; (3) the state procedural rule is an adequate and independent state ground for denying review of a federal constitutional claim; and (4) the petitioner cannot show cause and prejudice excusing the default.” *Guilmette v. Howes*, 624 F.3d 286, 290 (6th Cir. 2010) (en banc) (citing *Tolliver v. Sheets*, 594 F.3d 900, 928 n. 11 (6th Cir. 2010)). Kittka failed to comply with Mich. Ct. R. 6.508(D)(3), and Michigan courts enforced the rule and dismissed Kittka’s ineffectiveness claims. The Sixth Circuit has routinely found that procedural default under rule 6.508(D) constitutes an independent and adequate state ground for a conviction where that ground is explained by the state court. *See, e.g., id.*

Thus, Kittka’s ineffectiveness claims are procedurally defaulted unless he can show cause and prejudice excusing the default. The alleged cause for the procedural default of his ineffectiveness claim is the alleged ineffectiveness of appellate counsel, who did not bring the claim on direct appeal. Ineffective appellate counsel is sufficient to excuse procedural default if it can be shown that appellate counsel “unreasonably failed to discover” a “nonfrivolous issue” on appeal. *Smith v. Robbins*, 528 U.S. 259, 285 (2000).

The district court found that appellate counsel was not ineffective because trial counsel’s performance was not deficient. The alleged “hearsay” evidence to which trial counsel failed to object was

the testimony of the detective that a second niece had also reported that Kittka had touched her inappropriately.¹ According to Kittka, trial counsel compounded the error by asking questions about the incident on cross-examination. The federal district court correctly found that trial counsel was not deficient here. The strength of M.M.'s testimony left Kittka with only a defense of mistake. Evidence of prior bad acts is admissible to show an absence of mistake under Michigan Rule of Evidence 404(b)(1). The detective's testimony described conduct like that of the charged offense – inappropriate touching of a minor – and was directly relevant to Kittka's defense. Thus, the objection would reasonably have been denied, and counsel was not ineffective for failing to make a "futile objection." Kittka's argument to the contrary is unpersuasive. Appellate counsel was not ineffective for failing to bring this claim on appeal.

Likewise, appellate counsel was not ineffective for failing to raise trial counsel's failure to object to the sentencing calculations. The underlying claim

¹ The trial court [sic] labeled the potential objection "hearsay" but treated it as a character-evidence objection. [R. 10 at 11, Page ID 794.] The briefs are unclear; here it is treated as a potential character-evidence objection. Although presentation of this evidence second-hand through the detective may have constituted hearsay, there is no reason to think that the second niece was unavailable to testify. Given that fact, trial counsel had every reason not to object to the hearsay element. Defense counsel could reasonably have strategized that it would be better for the defense if the evidence came in through the detective.

here is the *Apprendi* issue discussed above. Although the state appellate court found that Kittka had defaulted the issue because of trial counsel's failure to object, that court also rejected the argument on the merits. Because the claim underlying the objection was decided on the merits and dismissed, Kittka was not prejudiced by trial counsel's failure to preserve it for appeal.

We agree with the district court that Kittka's ineffectiveness claims should be dismissed because they were procedurally defaulted in state court, and so **AFFIRM**.

V.

For the foregoing reasons, we **AFFIRM** the judgment of the district court on both claims and so dismiss the habeas petition.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JEFFREY KITTKA,	CASE NO. 10-11582
Petitioner,	HONORABLE
JACKIE FRANKS,	GERALD E. ROSEN
Respondent.	

**OPINION AND ORDER DENYING
THE PETITION FOR WRIT OF
HABEAS CORPUS BUT GRANTING
A CERTIFICATE OF APPEALABILITY**

Petitioner Jeffrey Kittka has filed a habeas corpus petition challenging his Oakland County conviction and sentence of eighteen months to fifteen years for criminal sexual conduct in the second degree. *See* Mich. Comp. Laws § 750.520c(1)(a) (sexual contact with a person under the age of thirteen). Petitioner alleges that his sentence violates the Sixth Amendment and that he was denied effective assistance of counsel at trial, at sentencing, and on appeal. The Court agrees with Respondent, who argues in an answer to the petition, that the state court's adjudication of Petitioner's sentencing claim was objectively reasonable and that Petitioner's ineffective-assistance-of-counsel claim is procedurally defaulted. Accordingly, the habeas petition will be denied.

I. Background

Petitioner was charged with two counts of second-degree criminal sexual conduct. The charges arose from allegations that Petitioner touched his niece, M.M., in an inappropriate manner when M.M. was seven years old.¹ Petitioner was tried before a jury in Oakland County Circuit Court. The state court summarized the testimony of the prosecution's witnesses as follows:

At trial, [M.M.'s] testimony established that she is eight years old and attends the 3rd grade. Defendant is her uncle and he is married to her aunt Debbie. They have a child, Jimmy, that is older than her. Sometimes she and her sister spend the night at Defendant's house. The last time she was at Defendant's house, she slept in the basement with Defendant and Jimmy. Jimmy slept on the couch, she slept on the floor and Defendant was behind her. When she woke up, Defendant had his hand under her pajamas. Defendant's fingers were touching her private parts where she goes pee. She pushed his hand away and he stopped. Defendant touched her private parts other times, but she could not remember how many times. When [she] got home, she told her mother that Defendant touched her private parts.

¹ The Court will refer to the complaining witness by her initials.

[M.M.'s mother's] testimony established that [M.M.] is her daughter and that Defendant is her brother-in-law. [M.M.] would visit about six times a year and would stay overnight at Defendant's house about four times a year. The last time [M.M.] slept over at Defendant's home was on January 14 and 15 of 2005. When Defendant and his wife picked up [M.M.] before the overnight stay, [M.M.'s mother] noticed that [M.M.] was apprehensive about going to Defendant's house. On January 31, 2005, [M.M.] told [her mother] that Defendant had touched her. [M.M.'s mother] took [M.M.] to Care House where she was interviewed. There was also a police detective and someone from the Prosecutor's Office there to observe. Since January of 2005, [M.M.'s mother] has notice[d] that [M.M.] has "gotten very down on herself, very low self-esteem . . . and she's fearful of a lot of things."

Detective Mark Boody's testimony established that he is a juvenile detective with the Novi Police Department. Boody was present when Amy Allen from Care House interviewed [M.M.] Boody also interviewed Defendant at the police station. During the interview, Defendant suggested that maybe he is used to sleeping next to his wife and maybe he touched [M.M.] in the way he touches his wife. However, at no point did Defendant say that [M.M.] was a liar or that she had lied in the past.

People v. Kittka, No. 05-201838-FH, at 3-4 (Oakland County Cir. Ct. Jan. 27, 2009).

Petitioner did not testify at trial, but he presented his wife, an attorney, and his wife's friend as witnesses. His wife, Debra Kittka, testified that Petitioner was an honest and loving person, who had a reputation in the community for truth and honesty and for having exceptionally high moral character. Mrs. Kittka also testified that, on the night in question, she observed both Petitioner and M.M. sleeping downstairs on the floor. After about an hour in the room, she went upstairs. She later heard Petitioner come upstairs. They both went to bed, and the next morning, M.M. came upstairs, acted normal, and sat in Petitioner's lap while they watched cartoons. Mrs. Kittka claimed that M.M. sometimes lied or created fantastic stories, and that Petitioner never admitted to intentionally touching M.M. Mrs. Kittka also testified that M.M.'s mother had told her that M.M. thought Petitioner was asleep during the incident in question.

Attorney Theodore Takesian testified that his son was a friend of Petitioner's son. Mr. Takesian testified that Petitioner had a very good reputation for truth, honesty, and good moral character. He claimed that his opinion of Petitioner would not change even if Petitioner had acknowledged that he touched M.M. inappropriately and even if another niece had accused Petitioner of touching her inappropriately.

Donna Holtschneider testified that she knew Petitioner through his wife, who was a friend of hers. Ms. Holtschneider stated that Petitioner had a reputation for being honest, true to his word, and of exemplary moral character. She claimed that her opinion of Petitioner would not change even if she were told about another niece who had accused Petitioner of touching her inappropriately, because Ms. Holtschneider had heard about that incident from Petitioner.

The prosecutor maintained during closing arguments that Petitioner took advantage of his then-seven-year-old niece on two occasions by putting his hand in her pants and rubbing her vaginal area for his own sexual gratification. Defense counsel argued to the jury that reasonable doubt existed and that the alleged touching was not intentional, nor done for a sexual purpose.

On February 1, 2006, the jury found Petitioner guilty of one count of criminal sexual conduct in the second degree. The jury acquitted Petitioner of the other count of criminal sexual conduct. The trial court subsequently sentenced Petitioner to imprisonment for one and a half to fifteen years.

On direct appeal, Petitioner argued that the trial court did not properly instruct the jury on the defense of accident and that he was entitled to re-sentencing because the state sentencing guidelines were incorrectly scored. The Michigan Court of Appeals affirmed Petitioner's conviction and sentence in an unpublished,

per curiam opinion. See *People v. Kittka*, No. 269425 (Mich. Ct. App. May 22, 2007). Petitioner presented his sentencing claim to the Michigan Supreme Court, which denied leave to appeal because it was not persuaded to review the issue. See *People v. Kittka*, 480 Mich. 893 (2007) (table). On April 14, 2008, the United States Supreme Court denied Petitioner's application for a writ of certiorari. See *Kittka v. Michigan*, 552 U. S. 1310 (2008).

On November 6, 2008, Petitioner filed a motion for relief from judgment in which he alleged that he was denied effective assistance of trial and appellate counsel. The trial court denied Petitioner's motion on the basis that he could have raised his claims on appeal and he failed to demonstrate actual prejudice from the alleged irregularities. The Michigan Court of Appeals denied leave to appeal due to Petitioner's failure to establish entitlement to relief under Michigan Court Rule 6.508(D). See *People v. Kittka*, No. 290445 (Mich. Ct. App. Mar. 20, 2009). On February 26, 2010, the Michigan Supreme Court denied leave to appeal for the same reason. See *People v. Kittka*, 485 Mich. 974 (2009) (table). Petitioner filed his habeas corpus petition on April 19, 2010.

II. Mootness

Petitioner was a parolee when he filed his habeas petition. He has since been discharged from parole. Therefore, a threshold question is whether this case is moot.

Article III of the United States Constitution extends judicial power to cases and to controversies. See U.S. CONST. art. III, § 2, cl.1. “To satisfy the Article III case or controversy requirement, a litigant must have suffered some actual injury that can be redressed by a favorable judicial decision.” *Iron Arrow Honor Soc’y v. Heckler*, 464 U.S. 67, 70 (1983) (citing *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976)). “This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate.” *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). If an event occurs that makes it impossible for a court to grant any effectual relief to a prevailing party, the case must be dismissed. *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992).

In criminal cases, this [case-or-controversy] requirement means that a defendant wishing to continue his appeals after the expiration of his sentence must suffer some “continuing injury” or “collateral consequence” sufficient to satisfy Article III. When the defendant challenges his underlying *conviction*, [the Supreme] Court’s cases have long presumed the existence of collateral consequences. But when a defendant challenges only an expired *sentence*, no such presumption applies, and the defendant must bear the burden of identifying some ongoing “collateral consequenc[e]” that is “traceable” to the challenged portion of the sentence and “likely to be redressed by a favorable judicial decision.”

United States v. Juvenile Male, ___ U.S. ___, ___, 131 S.Ct. 2860, 2864 (2011) (internal and end citations omitted) (emphases in original).

Petitioner alleges that a collateral consequence of his conviction is that he must register as a sex offender. The classification, registration, and community-notification requirements of a state's sex offender statute are collateral consequences of a conviction. *Leslie v. Randle*, 296 F.3d 518, 523 (6th Cir. 2002). The Court therefore finds that Petitioner's challenge to his conviction (habeas claim two) is not moot.

Petitioner's challenge to his sentence (habeas claim one) is a closer issue because Petitioner has been discharged from supervision, and there is no longer an injury that can be redressed by a favorable decision. He nevertheless maintains that, as a result of his sentence, he will suffer the collateral consequence of having his image displayed on the website for the Michigan Department of Corrections for the next three years. Although Petitioner has not cited any case law supporting the contention that having his image on the State's website is a collateral consequence of his sentence, the Court will accept his argument and proceed to address both of his claims, using the following standard of review.

III. Standard of Review

“The statutory authority of federal courts to issue habeas corpus relief for persons in state custody is provided by 28 U.S.C. § 2254, as amended by the

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).” *Harrington v. Richter*, ___ U.S. ___, ___, 131 S. Ct. 770, 783 (2011). Pursuant to § 2254, state prisoners are entitled to the writ of habeas corpus only if the state court’s adjudication of their claims 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 in the State court proceedings.

28 U.S.C. § 2254(d).

Under the “contrary to” clause, a federal habeas court may grant the writ 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. Under the “unreasonable application” clause, a federal habeas court may grant the writ 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.

Williams v. Taylor, 529 U.S. 362, 412-13 (2000).

“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.” *Richter*, 131 S. Ct. at 786. To obtain a writ of habeas corpus from a federal court, a petitioner must show that the state court’s decision “was so lacking in justification” that it resulted in “an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Id.* at 786-87.

IV. Discussion

A. The Sentence

Petitioner alleges that he was sentenced in violation of his Sixth Amendment right to a jury trial, as interpreted by the Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004). Specifically, Petitioner claims that, when scoring offense variable thirteen of the Michigan sentencing guidelines, the trial court relied on facts that Petitioner did not admit and that were not determined by the jury beyond a reasonable doubt. As a result, alleges Petitioner, the upper limit of the sentencing guidelines range exceeded eighteen months and he was deprived of the right to an intermediate sanction of twelve months in the county jail.

The Michigan Court of Appeals stated on direct appeal that Petitioner failed to preserve his sentencing issue by raising the issue at sentencing or in a

proper motion for re-sentencing or by filing a proper motion to remand in the Court of Appeals.² The Court of Appeals also concluded that Petitioner’s claim lacked merit because the recommended range for Petitioner’s minimum sentence was twelve to twenty-four months, and “the trial court’s decision to eschew an intermediate sanction in favor of a minimum term of imprisonment of 18 months constituted no departure for purposes of bringing *Blakely, supra*, to bear.” *Kittka*, Mich. Ct. App. No. 269425, at 2-3.

1. Legal Framework

Ordinarily, a claim that the State’s sentencing guidelines were incorrectly scored is not cognizable on habeas review because “[a] state court’s alleged misinterpretation and application of its sentencing laws and guidelines is a matter of state concern only.” *Howard v. White*, 76 F. App’x 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)); see also *McPhail v. Renico*, 412 F. Supp. 2d 647, 656 (E.D. Mich. 2006); *Robinson v. Stegall*, 157 F. Supp. 2d 802, 823 (E.D. Mich. 2001). Petitioner, however, alleges that his sentence violates his constitutional right to a jury trial, as set forth in

² Respondent has not argued that Petitioner’s claim is procedurally defaulted, and the Court is not required to raise the issue *sua sponte*. *Trest v. Cain*, 522 U.S. 87, 89 (1997).

the Sixth Amendment to the United States Constitution.

The Supreme Court interpreted the Sixth Amendment right to a jury trial in *Apprendi* and held that, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi*, 530 U.S. at 490. In *Blakely*, the Supreme Court stated that “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” *Blakely*, 542 U.S. at 303 (emphasis omitted). In other words,

the 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. “[T]he relevant ‘statutory maximum,’” . . . “is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.”

Cunningham v. California, 549 U.S. 270, 274-275 (2007) (internal and end citations omitted).

2. Application

Unlike the determinate sentencing schemes at issue in *Blakely* and *Cunningham*, Michigan has an indeterminate sentencing scheme in which “a defendant receives a minimum sentence and a maximum sentence.” *People v. Harper*, 479 Mich. 599, 612 (2007). “[T]he maximum penalty is set by statute, but the minimum penalty is determined by the sentencing court and must fall within a mandated guidelines range.” *Montes v. Trombley*, 599 F.3d 490, 496 (6th Cir. 2010) (citing *People v. Drohan*, 475 Mich. 140 (2006)); see also Mich. Comp. Laws § 769.8(1). The sentencing guidelines are determined by scoring an offender’s prior record variables (prior convictions) and offense variables (circumstances of the crime). *Harper*, 479 Mich. at 613, 616; *People v. McCuller*, 479 Mich. 672, 677 (2007). There is a lower limit and an upper limit to the guidelines. When the upper limit of the sentencing guidelines range is eighteen months or less, the defendant is entitled to be sentenced to an intermediate sanction, which can include a jail term of only twelve months. Mich. Comp. Laws § 769.34(4)(a).

Petitioner’s claim stems from the trial court’s scoring of offense variable thirteen, which assesses whether the defendant’s offense was part of a continuing pattern of criminal behavior. See Mich. Comp. Laws § 777.43. The trial court assessed twenty-five points for offense variable thirteen on the ground that Petitioner’s offense “was part of a pattern of felonious criminal activity involving 3 or more crimes against a person.” Mich. Comp. Laws § 777.43(1)(c). Petitioner

argues that the twenty-five points for offense variable thirteen put him in a sentencing guidelines range of twelve to twenty-four months and deprived him of an intermediate sanction under § 769.34(4)(a).

The United States Court of Appeals for the Sixth Circuit has held that, because the sentencing scheme in Michigan is indeterminate, the procedures used to determine a minimum sentence under the Michigan sentencing guidelines do not violate a defendant's right to due process or the right to a jury trial. *Montes*, 599 F.3d at 497-98; *Chontos v. Berghuis*, 585 F.3d 1000, 1002 (6th Cir. 2009), *cert. denied*, ___ U.S. ___, 130 S. Ct. 3413 (2010). Neither *Montes*, nor *Chontos*, addressed the applicability of the Sixth Amendment to the intermediate-sanctions provision of § 769.34(4)(a). *See Montes*, 599 F.3d at 498, and *Chontos*, 585 F.3d 1002 n.3. This Court nevertheless finds no merit in Petitioner's claim because "[a] sentencing court scores the [offense variables] to calculate the recommended range for the *minimum* portion of the defendant's sentence, not to arrive at the defendant's maximum sentence, which is set by statute." *McCuller*, 479 Mich. at 677 (emphasis in original). In other words, a "sentencing court's factual findings do not elevate the defendant's maximum sentence, but merely determine the defendant's recommended minimum sentence range, which may consequently qualify the defendant for an intermediate sanction." *Id.* at 690.

Intermediate sanctions are a component of Michigan's statutory scheme for setting a defendant's minimum sentence, *Harper*, 479 Mich. at 624, and

merely give the defendant the opportunity to be incarcerated for less than the sentence authorized by the jury verdict or guilty plea. *Id.* at 603-04. Because the trial court's findings of fact did not increase Petitioner's statutory maximum sentence, *Blakely* is not implicated, and Petitioner's sentence did not violate his Sixth Amendment right to a jury trial. He has no right to relief on the basis of his first claim.

B. Trial and Appellate Counsel

Petitioner's second and final habeas claim alleges that he received ineffective assistance of counsel at trial, during sentencing, and on direct appeal. Petitioner contends that, at trial, his attorney failed to object to hearsay testimony and, at sentencing, his attorney failed to object to the manner in which his sentence was enhanced. Petitioner alleges that his appellate attorney was ineffective for failing to raise a claim about trial counsel and for failing to file a timely motion to remand for re-sentencing. Respondent asserts that Petitioner's ineffective-assistance-of-counsel claim is procedurally defaulted because Petitioner failed to raised [sic] the claim on direct appeal.

1. The Doctrine of Procedural Default

A procedural default is "a critical failure to comply with state procedural law." *Trest*, 522 U.S. at 89. Under the doctrine of procedural default, "a federal court will not review the merits of claims, including constitutional claims, that a state court

declined to hear because the prisoner failed to abide by a state procedural rule.” *Martinez v. Ryan*, ___ U.S. ___, ___, 132 S. Ct. 1309, 1316 (2012). Stated differently, a claim is procedurally defaulted and may not be considered by a federal court on habeas review “[w]hen a habeas petitioner fails to obtain consideration of a claim by a state court . . . due to a state procedural rule that prevents the state courts from reaching the merits of the petitioner’s claim.” *Seymour v. Walker*, 224 F.3d 542, 549-50 (6th Cir. 2000) (citing *Wainwright v. Sykes*, 433 U.S. 72, 80, 84-87 (1977), and *Picard v. Connor*, 404 U.S. 270, 275-80 (1971)). Three elements must be satisfied before a claim may be considered procedurally defaulted: “(1) the petitioner failed to comply with a state procedural rule that is applicable to the petitioner’s claim; (2) the state courts actually enforced the procedural rule in the petitioner’s case; and (3) the procedural forfeiture is an ‘adequate and independent’ state ground foreclosing review of a federal constitutional claim.” *Willis v. Smith*, 351 F.3d 741, 744 (6th Cir. 2003).

2. Application

The state procedural rule at issue here is Michigan Court Rule 6.508(D), which governs motions for relief from judgment in state court. The rule reads in relevant part:

(D) Entitlement to Relief. The defendant has the burden of establishing entitlement to the relief requested. The court

may not grant relief to the defendant if the motion

....

(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence . . . unless the defendant demonstrates

(a) good cause for failure to raise such grounds on appeal . . . , and

(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, “actual prejudice” means that

(i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal. . . .

Mich. Ct. R. 6.508(D)(3).

Petitioner violated Rule 6.508(D)(3) by failing to raise his claim about trial counsel on direct appeal and by asserting the claim for the first time in his motion for relief from judgment and subsequent appeals. Thus, the first element of procedural default is satisfied.

The second element requires a determination of whether the state court enforced Rule 6.508(D)(3).

Both the Michigan Court of Appeals and the Michigan Supreme Court issued one-sentence orders denying leave to appeal for failure to establish entitlement to relief under Michigan Court Rule 6.508(D). These “[b]rief orders citing Michigan Court Rule 6.508(D) are not explained orders invoking a procedural bar.” *Guilmette v. Howes*, 624 F.3d 286, 289 (6th Cir. 2010). The Court therefore must look to the last reasoned state court opinion to determine the basis for the state courts’ rejection of Petitioner’s claim. *Id.* at 291.

The last state court to issue a reasoned opinion on Petitioner’s claim about trial counsel was the trial court, and it specifically rejected Petitioner’s claim on the basis of Rule 6.508(D)(3)(b)(i). The trial court determined that Petitioner would not have had a reasonably likely chance of acquittal absent the alleged errors raised in his motion and, therefore, he had not demonstrated “actual prejudice” under the rule. Because the trial court actually enforced Rule 6.508(D)(3), the second element of procedural default is satisfied.

The third element of procedural default requires asking whether the state court’s decision rested “on a state law ground that is independent of the federal question and adequate to support the judgment.” *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). “To qualify as an ‘adequate’ procedural ground, a state rule must be ‘firmly established and regularly followed.’” *Walker v. Martin*, ___ U.S. ___, ___, 131 S. Ct. 1120, 1127 (2011) (citing *Beard v. Kindler*, 558 U.S. at ___, 130 S.Ct. 612, 618 (2009)). Rule 6.508(D)

has been firmly established and regularly followed since 1989 when it went into effect, and the trial court's decision on Petitioner's claim rested entirely on state law. Therefore, the third element of procedural default also is satisfied.

To summarize, Petitioner violated Rule 6.508(D)(3) by failing to raise his claim about trial counsel on direct appeal. The last state court to issue a reasoned order relied on the rule to deny relief, and the rule was an adequate and independent state ground for denying relief. Therefore, "federal habeas review of [Petitioner's] claim[] is barred unless [he] 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*, 501 U.S. at 750.

3. "Cause"

Petitioner claims that his appellate attorney was "cause" for his failure to raise his claim about trial counsel on direct appeal. "Ineffective assistance of appellate counsel can constitute cause to excuse a procedural default." *Hoffner v. Bradshaw*, 622 F.3d 487, 499 (6th Cir. 2010) (citing *Murray v. Carrier*, 477 U.S. 478, 492 (1986), and *Howard v. Bouchard*, 459, 478 (6th Cir. 2005)), *cert. denied*, ___ U.S. ___, 131 S. Ct. 2117 (2011). But "[a]ttorney error short of ineffective assistance of counsel . . . does not constitute cause and will not excuse a procedural default."

McCleskey v. Zant, 499 U.S. 467, 494 (1991) (citing *Carrier*, 477 U.S. at 486-88). “[C]ounsel has no obligation to raise every possible claim and ‘the decision of which among the possible claims to pursue is ordinarily entrusted to counsel’s professional judgment.” *Jalowiec v. Bradshaw*, 657 F.3d 293, 321 (6th Cir. 2011) (quoting *McFarland v. Yukins*, 356 F.3d 688, 710 (6th Cir. 2004)), *petition for cert filed*, No. 11-9704 (U.S. Apr. 3, 2012).

Petitioner must show that (1) his appellate attorney was objectively unreasonable in failing to raise a nonfrivolous issue on appeal and (2) there is a reasonable probability that he would have prevailed on appeal were it not for his attorney’s unprofessional errors. *Smith v. Robbins*, 528 U.S. 259, 285 (2000) (citing *Strickland v. Washington*, 466 U.S. 668, 694 (1984)); *see also Thompson v. Warden, Belmont Corr. Inst.*, 598 F.3d 281, 285 (6th Cir. 2010). In order to assess Petitioner’s claim about appellate counsel, the Court must look at Petitioner’s underlying claim about trial counsel.

Petitioner’s first allegation about trial counsel is that counsel failed to take adequate precautions to avoid having the jury hear about a second niece whom Petitioner allegedly touched inappropriately. As noted, Petitioner was charged with two counts of criminal sexual conduct involving M.M. A second niece, whom the Court will refer to as K.M., reported that Petitioner also touched her inappropriately. K.M.’s allegations about Petitioner were mentioned at trial during Detective Boody’s testimony and during

Boody's videotaped interview with Petitioner, which was played for the jury. Petitioner claims that trial counsel should have attempted to excise the references to K.M. from the interview and should not have asked Detective Boody about an incident when Petitioner supposedly put his hand on K.M.'s thigh and a different incident when Petitioner allegedly touched K.M. inappropriately while they wrestled. Detective Boody answered trial counsel's questions by stating that K.M. had said it always happened when they were wrestling and that the touching was above the clothing. (Tr. Jan. 31, 2006, at 274.) Petitioner claims that trial counsel's questions and Detective Boody's testimony opened the door for the prosecutor to ask Detective Boody on re-direct examination whether Petitioner had touched K.M.'s breast and vagina for a matter of seconds. Boody responded, "Yes." (*Id.* at 275.) This evidence, contends Petitioner, made him appear to be a serial child molester and seriously compromised his defense that the touching was unconscious.

Trial counsel, no doubt, was attempting to establish that the touching of K.M., like the touching of M.M., was unintentional and not done for a sexual purpose. "Simply because counsel's trial strategy was unsuccessful or backfired, does not indicate in any way that petitioner was deprived of effective assistance of counsel," because "the term 'effective' assistance of counsel does not necessarily mean the same as 'successful.'" *Kapsalis v. United States*, 345 F.2d 392, 394 (7th Cir. 1965).

While it is true that trial counsel could have attempted to prevent the prosecution from eliciting any references to K.M., such an attempt likely would have failed. Evidence of other crimes, wrongs, or acts is admissible to show intent or the absence of mistake or accident, Mich. R. Evid. 404(b)(1), and evidence regarding Petitioner's conduct with K.M. tended to show that his touching of M.M. was not accidental or inadvertent. Thus, a motion to prevent the prosecution from eliciting testimony or presenting any evidence of Petitioner's conduct toward K.M. in all likelihood would have been denied. An attorney is not constitutionally ineffective for failing to make a futile objection. *Harris v. United States*, 204 F.3d 681, 683 (6th Cir. 2000).

Even assuming that trial counsel's performance was deficient, the deficient performance did not prejudice the defense due to the strength of the evidence against Petitioner. During his interview with Detective Boody, Petitioner acknowledged inappropriately touching M.M. under her underwear. (Tr. Jan. 30, 2006, at 218). Although he claimed that his touching of M.M. was not intentional (*id.* at 205-06; Tr. Jan. 31, 2006, at 233), M.M. testified that Petitioner unbuttoned her pajamas, stuck his hand under her underwear, and moved his fingers. (Tr. Jan. 30, 2006, at 116-17, 135.) She made similar allegations during a forensic interview and claimed that this happened multiple times. (Tr. Jan. 31, 2006, at 267-68.) The jury could have inferred from this testimony

that Petitioner's conduct was intentional and done for a sexual purpose.

The Court concludes that trial counsel's questions to Detective Boody about K.M. and counsel's failure to attempt to excise the videotape did not amount to deficient performance, and even if it did, the deficient performance did not prejudice the defense. Therefore, appellate counsel was not ineffective for failing to raising [sic] a claim about trial counsel's failure to attempt to eliminate, or object to, references to K.M. "[B]y definition, appellate counsel cannot be ineffective for a failure to raise an issue that lacks merit." *Greer v. Mitchell*, 264 F.3d 663, 676 (6th Cir. 2001).

Petitioner also claims that trial counsel was ineffective for failing to challenge the trial court's scoring of offense variable thirteen and that appellate counsel was ineffective for failing to preserve the sentencing issue by filing a timely motion to remand for re-sentencing. Petitioner's claim about the scoring of offense variable thirteen lacks merit. *See supra*, section IV.A. Consequently, trial counsel was not ineffective for failing to challenge the scoring of the offense variable thirteen, and appellate counsel's failure to file a timely motion to remand for re-sentencing did not prejudice Petitioner.

The Court concludes for the reasons given above that appellate counsel was not ineffective for failing

to raise a claim about trial counsel on direct appeal.³ Thus, Petitioner has failed to show “cause” for his procedural default, and the Court need not consider whether he was prejudiced by the alleged constitutional errors. *Tolliver v. Sheets*, 594 F.3d 900, 930 n.13 (6th Cir.), *cert. denied*, ___ U.S. ___, 131 S. Ct. 605 (2010).

4. Miscarriage of Justice

The “cause and prejudice” requirement may be overlooked and habeas relief granted “[i]f a petitioner presents an extraordinary case whereby a constitutional violation resulted in the conviction of one who is actually innocent.” *Rust v. Zent*, 17 F.3d 155, 162 (6th Cir. 1994) (citing *Carrier*, 477 U.S. at 496). To be credible, however, “such a claim requires [the] petitioner to support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial.” *Schlup v. Delo*, 513 U.S. 298, 324 (1995).

Petitioner has not submitted any new evidence to support a claim of actual innocence. Therefore, a miscarriage of justice will not occur as a result of the Court’s failure to adjudicate the substantive merits of his second claim.

³ For the same reason, Petitioner has failed to state an independent claim of ineffective assistance of appellate counsel.

V. Conclusion

Petitioner's ineffective-assistance-of-counsel claim is procedurally defaulted, and his sentencing claim lacks merit because the state court's adjudication of the claim was objectively reasonable. Accordingly, the petition for a writ of habeas corpus is **DENIED**.

Reasonable jurists could debate the Court's procedural ruling and assessment of Petitioner's claims. Therefore, a certificate of appealability may issue on both of Petitioner's claims. "[A] claim can be debatable even though every jurist of reason might agree, after the [certificate of appealability] has been granted and the case has received full consideration, that [the] petitioner will not prevail." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003).

s/Gerald E. Rosen
Chief Judge, United States District Court

Dated: June 21, 2012

I hereby certify that a copy of the foregoing document was served upon counsel of record on June 21, 2012, by electronic and/or ordinary mail.

s/Ruth A. Gunther
Case Manager
