

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

MARTINEZ D. WADE,

Petitioner,

Case Number: 02-73346

v.

HONORABLE ARTHUR J. TARNOW

HAROLD WHITE,

Respondent.

**OPINION AND ORDER CONDITIONALLY GRANTING
PETITION FOR WRIT OF HABEAS CORPUS¹**

I. Introduction

Petitioner Martinez D. Wade, a state inmate currently incarcerated at the G. Robert Cotton Correctional Facility in Jackson, Michigan, has filed a *pro se* petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254. Petitioner challenges his 1998 convictions for involuntary manslaughter, receiving and concealing stolen property over \$100, and leaving the scene of a serious accident. Because the Court finds that the Michigan Court of Appeals' decision affirming Petitioner's convictions was based upon an unreasonable determination of the facts in light of the evidence and involved unreasonable applications of Supreme Court precedent, the Court shall grant Petitioner a conditional writ of habeas corpus.

II. Facts

¹ Staff Attorney Mary Beth Collery provided quality research assistance.

Petitioner's conviction arises out of the death of Kevin Eugene Marshall. On December 13, 1996, Mr. Marshall's car was struck by a stolen Chevrolet Camaro. The driver of the Camaro was involved in a police chase at the time of the accident. Mr. Marshall later died from injuries suffered in the crash.

Police Officer Kenneth Daniels testified, on December 13, 1996, at approximately 7:00 p.m., he observed a Camaro disregard a red light at Clairmount and 12th Streets in the City of Detroit. He activated his lights and followed the vehicle. After the vehicle stopped, Officer Daniels exited his vehicle. As he approached the Camaro, the vehicle sped off. Officer Daniels and his partner, Andrew Cistrunk, returned to their police vehicle and pursued the Camaro. Officer Daniels observed the Camaro proceed through a stop sign without stopping, then heard a loud crash. Officer Daniels did not witness the crash, but came upon it within seconds. The Camaro had struck Mr. Marshall's vehicle. Officer Daniels found Jason Franklin in the front passenger seat of the Camaro. The driver's side door of the Camaro was open and the driver's seat empty. Officer Daniels testified that Franklin had a large gash on his head, was hysterical and barely conscious. Officer Daniels asked Franklin to identify the driver of the Camaro. Franklin identified Daniel Smith a.k.a. Daniel Young as the driver.

Officer Daniels testified that, the day after the accident, based upon information Franklin gave to another officer the day after the accident, he went to a home on Taylor Street in Detroit to question Petitioner in connection with the accident. Petitioner was not

at the home on Taylor. Officer Daniels testified that, at that time, he had no further participation in the formal investigation.

On cross-examination, Officer Daniels testified that, as he was approaching the Camaro on foot during the failed traffic stop, he observed the reflection of the driver's face in the side-view mirror. Based upon that reflection, Officer Daniels stated in his Preliminary Complaint Record (PCR) that the driver was a black, heavy-set male. He included no other description of the driver in his PCR. Officer Daniels further testified that, seven months after the accident, he saw a picture of Petitioner and identified Petitioner as the driver of the Camaro. On re-direct examination, Officer Daniels explained that he saw Petitioner's picture in a newspaper circulated by the police department which contained pictures of "wanted felons."

Police Inspector Arlis Clarkson testified that he interviewed Franklin on the day after the accident. Inspector Clarkson testified that Franklin informed him that Petitioner had been driving the Camaro.

Police Officer Cheryle King testified that, on June 3, 1997, she received a report that Petitioner had been seen on McDougall and Charlevoix Streets in the City of Detroit. Officer King located Petitioner driving a vehicle in that area. Officer King attempted to stop Petitioner, but he fled at a high rate of speed. Officer King followed him in a high speed chase, until Petitioner turned down a dead-end alley, jumped from the car, and attempted to flee on foot. Petitioner was caught and placed under arrest.

Jason Franklin testified at trial that he was a passenger in the Camaro which struck Mr. Marshall's car on December 13, 1996. He testified that Petitioner was the driver of the Camaro. Franklin admitted that, at the scene of the accident, he told a police officer that Daniel Smith, a.k.a. Daniel Young, was the driver of the car. He said he did so because he did not want to identify Petitioner. Franklin further testified that he was questioned by police the following day and, at that time, identified Petitioner as the driver of the Camaro.

On direct examination, Franklin was questioned regarding his being shot on July 2, 1997. He testified that he was in the Hazelwood area of the City of Detroit on that date, when he was shot twenty-seven times. Franklin was in his car when another vehicle drove up along side his car. An individual in the other car shouted, "What's up with the fed stuff?" The individual, who Franklin identified as "Jeffrey" then shot him. Franklin testified that when he was ultimately released from the hospital, he fled to Ohio because he feared for his safety. He testified that he did not know of any connection between Jeffrey and Petitioner, and that he was unaware of any motive anyone would have to shoot him.

Franklin further testified that Daniel Smith, the man he originally identified as the driver of the Camaro, was a very good friend. Franklin testified that if he had to choose between sacrificing Mr. Smith and Petitioner, he would sacrifice Petitioner.

Tamera Kent, Franklin's mother, testified that, at approximately 5:00 p.m., on the

day of the accident, when she arrived home, she saw a red and black car parked in her driveway, and found Petitioner and Franklin in her home. She testified that Petitioner told her that the car was his. Later that evening, Ms. Kent learned that her son had been in a car accident. After Franklin left for Ohio, police contacted Ms. Kent several times. However, she did not inform any authorities that she saw Petitioner and a red car on the day of the accident until the day before she testified in Court, when she approached the prosecutor. The prosecutor informed the Court that he was unaware of Ms. Kent's relevance of a witness until she approached him the day before she testified.

III. Procedural History

Following a jury trial in Wayne County Circuit Court, Petitioner was convicted of involuntary manslaughter, receiving and concealing stolen property over \$100, and leaving the scene of a serious accident. On December 1, 1998, he was sentenced as a third habitual offender to a term of ten to fifteen years imprisonment.

Petitioner filed an appeal of right in the Michigan Court of Appeals, presenting the following claims:

- I. The Prosecutor denied Mr. Wade's federal and state constitutional rights to a fair trial by introducing irrelevant and unfairly prejudicial evidence and making improper arguments.
 - A. The prosecutor denied Mr. Wade a fair trial by introducing testimony regarding the shooting of a witness, which was never connected to Mr. Wade, and making baseless and inflammatory arguments that Mr. Wade tried to silence the witness.

- B. The prosecutor denied Mr. Wade a fair trial by introducing evidence regarding the circumstances of his arrest and making improper propensity arguments regarding that evidence.
 - C. The prosecutor denied Mr. Wade a fair trial where he injected evidence that Mr. Wade had a criminal record.
 - D. The prosecutor denied Mr. Wade a fair trial where he elicited testimony from a police officer that he believed that the blood in the Camaro was Franklin's and that Franklin was the passenger.
 - E. Mr. Wade was denied a fair trial by the cumulative prejudicial effect of the prosecutor's misconduct.
- II. Mr. Wade's federal and state rights to the effective assistance of counsel were violated and he was denied a fair trial, where defense counsel failed to object to the introduction of inadmissible evidence and improper argument, and in some instances opened the door to even more damaging testimony.

The Michigan Court of Appeals affirmed Petitioner's convictions. People v. Wade, No. 217122 (Mich. Ct. App. 2001). Petitioner filed a motion for rehearing, which was denied. People v. Wade, No. 217122 (Mich. Ct. App. March 21, 2001).

Petitioner filed an application for leave to appeal to the Michigan Supreme Court, presenting the same claims presented to the Michigan Court of Appeals. The Michigan Supreme Court denied leave to appeal. People v. Wade, 465 Mich. 879 (Mich. 2001).

Petitioner then filed the pending petition for a writ of habeas corpus, presenting the same claims presented on direct review in state court.

IV. Standard of Review

28 U.S.C. § 2254(d) imposes the following standard of review for habeas cases:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

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

28 U.S.C. § 2254(d). Additionally, this Court must presume the correctness of state court factual determinations. 28 U.S.C. § 2254(e)(1).

A decision of a state court 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, 405-06 (2000). An “unreasonable application occurs” when “a state-court decision unreasonably applies the law of [the Supreme Court] to the facts of a prisoner’s case.” Id. at 409. A federal habeas court may not “issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.” Id. at 410-11.

V. Analysis

A. Testimony Regarding Shooting of Jason Franklin

At trial, the prosecutor elicited testimony that key prosecution witness Jason Franklin was shot twenty-seven times shortly after Petitioner's arrest. Petitioner claims that the prosecutor committed misconduct in eliciting this testimony when no evidence was presented linking Petitioner to the shooting, and in suggesting that Petitioner had some involvement in the shooting. Petitioner also claims that his attorney was ineffective in failing to object to the prosecutor's conduct.

Respondent argues that Petitioner's claim of prosecutorial misconduct is procedurally defaulted. The doctrine of procedural default provides:

In all cases in which 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 claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991). Such a default may occur if a petitioner fails to comply with a state procedural rule that required him to have done something at trial to preserve his claimed error for appellate review, e.g., to make a contemporaneous objection. United States v. Frady, 456 U.S. 152, 167-69 (1982); Simpson v. Sparkman, 94 F.3d 199, 202 (6th Cir. 1996). Application of the cause and prejudice test may be excused if a petitioner "presents an extraordinary case whereby a constitutional violation resulted in the conviction of one who is actually innocent." Rust,

17 F.3d at 162; Murray v. Carrier, 477 U.S. 478, 496 (1986).

For the doctrine of procedural default to apply, a firmly established state procedural rule applicable to the petitioner's claim must exist, and the petitioner must have failed to comply with that state procedural rule. Warner v. United States, 975 F.2d 1207, 1213-14 (6th Cir. 1992), *cert. denied*, 507 U.S. 932 (1993). Additionally, the last state court from which the petitioner sought review must have invoked the state procedural rule as a basis for its decision to reject review of the petitioner's federal claim. Coleman, 501 U.S. at 729-30.

If the last state court from which the petitioner sought review affirmed the conviction both on the merits, and, alternatively, on a procedural ground, the procedural default bar is invoked and the petitioner must establish cause and prejudice in order for the federal court to review the petition. Rust, 17 F.3d at 161. If the last state court judgment contains no reasoning, but simply affirms the conviction in a standard order, the federal habeas court must look to the last reasoned state court judgment rejecting the federal claim and apply a presumption that later unexplained orders upholding the judgment or rejecting the same claim rested upon the same ground. Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991).

This Court begins its analysis of whether Petitioner's prosecutorial misconduct claim is procedurally defaulted by looking to the last reasoned state court judgment denying Petitioner's claim. *See* Coleman, 501 U.S. at 729-30. The last state court to

issue a reasoned opinion regarding Petitioner’s prosecutorial misconduct claim, the Michigan Court of Appeals, held that the claim was not preserved for review because defense counsel failed to timely and specifically object to the alleged prosecutorial misconduct. People v. Wade, slip op. at 1. The Michigan Court of Appeals further found “no errors that resulted in manifest injustice or that could not have been corrected by a curative instruction,” which would have excused the procedural default. Id. at 2. The failure to make a contemporaneous objection is recognized as an independent and adequate state law ground for refusing to review trial errors. Coleman, 501 U.S. at 750-51. Thus, Petitioner’s claim is procedurally defaulted unless he can establish cause and prejudice to excuse his procedural default.

Petitioner asserts ineffective assistance of counsel as cause to excuse his procedural default. The Supreme Court has held that “cause” under the cause and prejudice standard must be “something external to the petitioner, something that cannot fairly be attributable to him.” Coleman, 501 U.S. at 753. The Court further held that “[a]ttorney ignorance or inadvertence is not ‘cause’ because the attorney is the petitioner’s agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must bear the risk of attorney error. . . . Attorney error that constitutes ineffective assistance of counsel is cause, however.” Id. at 753-54 (internal citations omitted).

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court established

a 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 counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Id. at 687.

Second, a petitioner must show that counsel's deficient performance prejudiced petitioner. A petitioner may establish prejudice by "showing that counsel's errors were so serious as to deprive the defendant of a fair trial." Id.

The Supreme Court emphasized that, when considering an ineffective assistance of counsel claim, the reviewing court should afford counsel a great deal of deference:

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Id. at 689 (internal citations omitted).

The Court further explained that, to establish deficient performance, a petitioner must identify acts that were "outside the wide range of professionally competent

assistance.” Id. 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. at 694. The Sixth Circuit, applying the Strickland standard, has held that a reviewing court therefore must focus on whether counsel’s alleged errors “have undermined the reliability of and confidence in the result.” McQueen v. Scroggy, 99 F.3d 1302, 1311 (6th Cir. 1996), *cert. denied* 520 U.S. 1257 (1997).

Petitioner presented this ineffective assistance of counsel claim on direct review in state court. The Michigan Court of Appeals held that Petitioner’s trial attorney was not ineffective in failing to object to this testimony at trial, stating:

Defendant’s final clam, that his trial counsel was ineffective, is also without merit. When claiming ineffective assistance of trial counsel, defendant has the burden of showing that his counsel’s performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel’s alleged errors, the result of the proceeding would have been different. People v. Hoag, 460 Mich. 1, 5-6; 594 N.W.2d 57 (1999). Here, defendant claims that his counsel was ineffective by failing to object to the alleged prosecutorial misconduct. However, because there was no misconduct by the prosecutor, counsel’s failure to object was not objectively unreasonable.

Wade, slip op. at 3.

The Michigan Court of Appeals’ decision that Petitioner’s trial attorney was not ineffective in failing to object to the prosecutor’s conduct is based upon its finding that no

misconduct occurred. To determine whether the Michigan Court of Appeals' decision that counsel was not ineffective was an unreasonable application of Supreme Court precedent this Court must first consider the Michigan Court of Appeals' decision that there was no misconduct by the prosecutor.

Prosecutorial misconduct may warrant habeas corpus relief only if the misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). The determination whether the trial was fundamentally unfair is "made by evaluating the totality of the circumstances." Angel v. Overberg, 682 F.2d 605 (6th Cir. 1982). The court must examine "the fairness of the trial, not the culpability of the prosecutor." Pritchett v. Pitcher, 117 F.3d 959, 964 (6th Cir. 1997), (*quoting* Serra v. Michigan Department of Corrections, 4 F.3d 1348, 1355 (6th Cir. 1993)). The Sixth Circuit Court of Appeals applies a four-factor test to any inappropriate prosecutorial conduct to determine whether it rendered the trial fundamentally unfair: "(1) whether the conduct and remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) whether the conduct or remarks were isolated or extensive; (3) whether the remarks were deliberate or accidentally made; and (4) whether the evidence against the defendant was strong." Frazier v. Huffman, 343 F.3d 780, 791 (6th Cir. 2003) (internal quotation omitted).

The Michigan Court of Appeals held that the prosecutor did not engage in misconduct in presenting evidence regarding the Franklin shooting, stating:

Defendant alleges several instances of prosecutorial misconduct, including (1) introducing evidence that prosecution witness Jason Franklin¹ was shot shortly after defendant's arrest, . . .

¹Franklin was a passenger in the stolen Camaro and identified defendant as the driver of the vehicle at the time of the fatal accident.

The test for prosecutorial misconduct requiring reversal of the conviction is whether defendant was denied his right to a fair and impartial jury. . . . We examine the pertinent portions of the record and evaluate the alleged misconduct in context. People v. Schutte, 240 Mich. App. 713, 721; 613 N.W.2d 370 (2000). . . .

Here, we find no errors that resulted in manifest injustice or that could not have been corrected by a curative instruction. The prosecution did not engage in misconduct by introducing evidence that defendant shot a key prosecution witness prior to trial because it was probative of defendant's consciousness of guilt. *See People v. Sholl*, 453 Mich. 730, 740; 556 N.W.2d 851 (1996) (a defendant's threat against a witness is admissible as conduct demonstrating consciousness of guilt). Further, the evidence regarding Franklin's shooting was necessary to respond to arguments of defense counsel implying that Franklin had something to gain by naming defendant as the Camaro's driver. Schutte, *supra*, at 721. Likewise, the prosecutor's argument that defendant would benefit from Franklin's disappearance was not improper. Although the prosecutor could not make statements of fact that were unsupported by the evidence, the prosecutor was free to argue the evidence and all reasonable inferences arising from it. Id.

Wade, slip op. at 1-2.

The Michigan Court of Appeals correctly identified the law governing prosecutorial misconduct claims. However, its decision both was based upon an unreasonable application of clearly established Federal law and an unreasonable determination of the facts in light of the evidence.

The Michigan Court of Appeals stated that the prosecutor did not engage in misconduct when the prosecutor introduced evidence that “*defendant* shot a key prosecution witness prior to trial.” Id. (emphasis supplied). There was no evidence admitted at trial to support the finding that *defendant* shot Franklin. Franklin testified that he knew the person who shot him, and that person’s name was Jeffrey. Franklin had no personal knowledge as to why the shooter targeted him. He testified that the shooter asked him, “What’s up with the fed stuff,” before shooting him. But, Franklin, who was serving probation at the time of the shooting, also testified that he knew of no relationship between the shooter and Petitioner. Further, Franklin denied being fearful of testifying. Franklin’s testimony on this subject is uncontroverted. In addition, although one of the investigating officers, Officer Snarski, testified that it was his personal belief that the shooting had some connection with Petitioner’s case, that opinion was based only upon a hunch, not upon any concrete information.

Thus, the Court concludes that Petitioner has presented clear and convincing evidence that the Michigan Court of Appeals’ finding that Petitioner shot Franklin was incorrect, and, under 28 U.S.C. § 2254(e)(1), the Court declines to defer to this factual finding.

Given that Petitioner was not the shooter and that no evidence was presented linking him to the shooting, the Court considers whether admission of this highly inflammatory evidence rendered Petitioner’s trial fundamentally unfair.

The remarks of the prosecutor tended to mislead the jury and prejudice the defendant. Franklin was the key prosecution witness. During his direct examination of Franklin, the prosecutor strongly implied that Petitioner was somehow involved in the shooting. The prosecutor also elicited testimony from Officer Snarski that Petitioner was involved in the shooting. In addition, in his closing argument, the prosecutor again focused upon the shooting, stating:

[Petitioner] was caught on June 3rd of 1997.

Now, naturally, you're caught, you're going to know what you're being charged with. You're going to have an attorney. You're going to know the importance of your case. You're going to know the evidence that they have against you. You're going to know the importance of Mr. Franklin. Without Mr. Franklin, there is no case.

Now, what's the best thing that can happen for Mr. Wade? For Mr. Franklin to disappear. That's the best thing that could happen. Now, we know that on June 2nd, which was less than 30 days from the time he's arrested, that Mr. Franklin was shot. And I don't have to repeat what the shooter told him, 'cause you heard it. And of course, Mr. Franklin – now, at this point, of course he's going to be upset with Mr. Wade. . . . But in order to have the case, we have to have Mr. Franklin here in person and breathing.

Now, one thing that's very important is that you have to watch out for distractions, okay? The issue here again is identification. And we know that the defendant knew he was wanted. We know that he was on the run for about six months.

We know that on cross-examination, defense counsel never got into what happened with the shooter. And Mr. Brown's a very good attorney. But those are the things –

Mr. Brown: I don't usually, but I have to object during the course of this

argument. Shifting the burden.

Prosecutor: Your Honor, there's not burden as to the shooter or how he was shot.

Mr. Brown: He's saying what I didn't do. That's what he just – he said defense counsel never did something.

Prosecutor: Yeah, I said defense counsel never cross-examined on the shooter.

Mr. Brown: Okay. Well –

The Court: He doesn't have to.

Prosecutor: Well, okay. That's fine.

...

We know that [Petitioner was] located on June 3rd of '97. We know that when they located him, he tried to flee, but he's interrupted.

We know that Mr. Franklin, less than a month later, is shot.

We know that the case was dismissed.

We know that the case was re-issued.

We know that – from Officer Snarski, we know that he couldn't find Mr. Franklin. We had to get a different investigator to finally track him down and bring him back from Ohio to testify.

Tr., 10/14/98, pp. 110-13.

The testimony elicited and remarks made by the prosecutor tended to mislead the jury to believe some connection existed between the shooting and Petitioner and as such prejudiced Petitioner. The remarks made by the prosecutor cannot fairly be characterized

as isolated. While the improper testimony and remarks may not have been overwhelming in terms of the number of occurrences, they were certainly overwhelming in that they remained a backdrop throughout the trial, particularly vis-à-vis the key prosecution witness. The remarks appear to have been deliberately made and repeated.

Finally, the evidence against Petitioner was not overwhelming, and Franklin's testimony was essential to the prosecution's case. The Court need not speculate about the relative importance of Jason Franklin's testimony to the prosecution's case against Petitioner. The importance of Franklin's testimony already has been established. When Franklin could not be located to testify during the original preliminary examination, the case was dismissed. Without Franklin's testimony, there was no case. The prejudice was compounded when the jury was informed that the charges earlier had been dismissed because of Franklin's absence. From the jury's standpoint this could only more clearly serve to show Petitioner's motive for getting rid of Franklin, and, consequently, serve as further evidence of Petitioner's consciousness of guilt. All of these inferences were based upon a presumption that Petitioner was involved in the shooting. A presumption which was never substantiated.

The only testimony besides Franklin's identifying Petitioner as the driver of the Camaro was Officer Snarski's testimony. While the jury was free to believe Officer Snarski, the identification was questionable for several reasons: Officer Snarski failed to record any significant physical description of the Camaro's driver in his contemporaneous

report; Officer Snarski identified Petitioner as the driver based upon a photograph he saw seven months after the accident; Officer Snarski's identification was based upon seeing the driver's reflection in a side-view mirror, at night, from a distance of several feet; and, even after identifying Petitioner as the driver, Officer Snarski failed to contact the officer in charge of the investigation. The Court does not highlight these weaknesses in Officer Snarski's testimony in order to usurp the role of the jury by ruling upon Officer Snarski's credibility. Instead, the weaknesses in Officer Snarski's testimony show that the evidence against Petitioner was not overwhelming, thereby heightening the significance of the improperly admitted evidence.

The Sixth Circuit Court of Appeals has granted habeas corpus relief when a prosecutor engaged in conduct similar to that at issue in this case. In Gordon v. Kelly, 2000 WL 145144 (6th Cir. 2000), habeas petitioner Mark Gordon challenged the prosecutor's attempt to introduce and argue the element of fear where an insubstantial basis existed to warrant introduction of such testimony. Gordon was convicted of first-degree murder in the shooting death of Chauncey Jones. Jones was shot and killed by two armed men, who fled the scene of the shooting in a Tempo driven by a third man.

Lamont Richardson was the only person to identify Gordon as the driver of the Tempo. He was questioned on the night of the shooting and denied having any information related to the murder. Eight days later, he identified Gordon as the driver. Richardson testified at the preliminary examination. At the preliminary examination, in

response to a question from Gordon's attorney, Richardson denied being afraid of Gordon. He explained that he delayed contacting police to identify Gordon because he had been friends with the victim and was in mourning. Richardson was murdered the day after his preliminary examination testimony. Richardson's preliminary examination testimony was read into the trial record. Prior to trial, the judge ruled that the jury would be told that Richardson was unavailable because he was dead, but would not be told that he had been murdered. Id. at *2-4.

During Gordon's trial, the prosecutor repeatedly asked prosecution witnesses about their fear of testifying. In his closing and rebuttal arguments, the prosecutor repeatedly referenced the witnesses' fear, including Richardson's purported fear. The Court found that the prosecutor's suggestions that Richardson was fearful and questions to other witnesses regarding their fear constituted constitutional error:

Richardson specifically denied being afraid of Gordon. Richardson testified that during the succeeding eight days, he did not come forward because he was in mourning.

Richardson's own testimony, therefore, denied the very motive the prosecutor sought to imply. In the face of Richardson's denial that he was afraid of Gordon, the prosecutor had no right to suggest either that Richardson was afraid of Gordon or that his fear was demonstrated to be justified when he was subsequently killed. The prosecutor was not entitled to create out of whole cloth a reason for Richardson's fear that Richardson himself denied. . . . The injection of speculation into the cause and manner of Richardson's death was not responsive to any argument made by the defense, was unsupported by any evidence, and clearly was improper in evaluating Gordon's responsibility for the crime for which he was being charged. . . . Gordon was not charged in the killing of Richardson, nor was

he being tried for that killing. Raising a speculation in the jury's mind on Gordon's guilt in the killing of witness Richardson unquestionably was impermissible and clear error in his trial for the death of Jones.

Similarly, the prosecutor had no right to suggest that other witnesses were afraid of Gordon or that they would be killed if they testified.

Gordon, 2000 WL at *8.

The Sixth Circuit Court of Appeals held that the state court's decision that the prosecutor's conduct did not deprive Gordon of a fair trial was an unreasonable application of clearly established federal law. Id. at *13. The Court therefore granted a writ of habeas corpus.

In this case, while the jury was entitled to believe the testimony of Franklin and Officer Snarski, Petitioner also was entitled to a jury that was not swayed by improper innuendos and suggestions by the prosecutor that Petitioner sought to kill or have killed the essential witness against him.

The Court concludes that the admission of testimony regarding Franklin's shooting so infected the entire trial as to deprive Petitioner of a fair trial. The Michigan Court of Appeals' contrary conclusion was an unreasonable application of Supreme Court precedent. The Court further concludes that the prosecutor's conduct was not harmless because it "had substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 623 (1993), *quoting* Kotteakos v. U.S., 328 U.S. 750, 776 (1946).

The Court, however, may not grant habeas relief on this claim unless Petitioner establishes that his attorney rendered ineffective assistance of counsel in failing to preserve this claim for review, thereby establishing cause and prejudice to excuse his procedural default.

Petitioner claims that his attorney, Mark Brown, was ineffective in failing to object to the prosecutor's introduction of testimony that Franklin was shot prior to trial. As discussed above, the last state court to issue a reasoned opinion regarding this claim, the Michigan Court of Appeals, held that Petitioner's attorney was not ineffective in failing to object because the prosecutor's conduct was not improper. Wade, slip op. at 3. Petitioner argues that this decision is an unreasonable application of Supreme Court precedent.

Petitioner's trial attorney failed to object to the admission of evidence of the shooting, despite the prosecution's failure to present any evidence linking Petitioner to the shooting. Franklin identified a man named Jeffrey as the shooter. He further testified that he had no reason to believe Petitioner had any connection to the shooting. Yet, the prosecutor argued in closing statement that Petitioner served to benefit from Franklin's disappearance. Mr. Brown's failure to object to the admission of any of this evidence, which was clearly offered to show his client's consciousness of guilt, fell outside the wide range of professionally competent assistance. The Michigan Court of Appeals' finding that it did not is unreasonable.

Next, Petitioner must prove that he was prejudiced by his attorney's error. Courts

generally permit testimony that a defendant threatened a witness because it tends to show a defendant's consciousness of guilt. Based upon the testimony presented that Jason Franklin was shot, the prosecutor's references in his closing argument to the shooting, and the prosecutor's argument that Petitioner served to benefit from Franklin's disappearance, a juror reasonably could have inferred that this evidence tended to show Petitioner's consciousness of guilt, even though the shooting was never linked to Petitioner. The gravity of this improper inference is magnified by the importance of Franklin's testimony and the relative weakness of the remaining testimony implicating Petitioner.

The Court finds that the admission of this testimony and counsel's failure to object to its admission eviscerate the Court's confidence in and the reliability of the jury's finding of guilt. The Court further finds that the Michigan Court of Appeals' finding to the contrary is based upon a failure to apprehend the relative weakness of the evidence against Petitioner, the importance of Franklin's testimony to the case against Petitioner, and, most importantly, the absence of any link between Petitioner and the shooting of Franklin. As such, the Court finds that the Michigan Court of Appeals' decision was an unreasonable application of Strickland, and shall grant habeas corpus relief on this claim. Further, by establishing ineffective assistance of counsel, Petitioner has established cause to excuse the procedural default of his first prosecutorial misconduct claim. The prejudice suffered from the actions of counsel and the prosecutorial misconduct already

have been discussed. Thus, Petitioner's procedural default of his prosecutorial misconduct claim is excused and the Court grants habeas corpus relief on that claim as well.

The Court further concludes another basis exists for granting habeas corpus relief on this prosecutorial misconduct claim. The Michigan Court of Appeals' decision was based upon an unreasonable determination of the facts in light of the evidence under 28 U.S.C. § 2254(b)(2).

Section 2254(d)(2) provides that habeas relief may be granted where a state court's adjudication of a claim:

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

28 U.S.C. § 2254(d)(2).

To determine whether Petitioner is entitled to relief under § 2254(d)(2), the Court first considers whether Petitioner has rebutted by clear and convincing evidence the presumption that the state court's factual finding was correct. Second, the Court considers whether the state court's decision was based upon this factual finding.

In its opinion affirming Petitioner's convictions, the Michigan Court of Appeals stated that "the prosecutor did not engage in misconduct by introducing evidence that defendant shot a key prosecution witness prior to trial." Wade, slip op. at 2. No evidence admitted at trial supports the factual finding that Petitioner shot Franklin. Franklin's

testimony that a man named Jeffrey shot him was unchallenged at trial. Thus, the Michigan Court of Appeals' finding that Petitioner shot Franklin was an unreasonable determination of the facts in light of the evidence.²

The Court now considers whether the Michigan Court of Appeals decision was *based* upon this unreasonable determination of the facts. Under Michigan law, a defendant's threat against a witness is generally admissible. See People v. Sholl, 453 Mich. 730, 740 (Mich. 1996), *cited in* Wade, slip op. at 2. This evidence is generally admissible because “[i]t is conduct that can demonstrate consciousness of guilt.” Id. However, where there is no apparent link between the threat and the defendant, the threat “cannot be considered as evidence of defendant’s consciousness of guilt.” People v. Williams, 2002 WL 31956962 *2 (Mich. Ct. App. Dec. 20, 2002). In this case, the analysis governing the propriety of the prosecutor’s conduct would have been wholly different had the Michigan Court of Appeals recognized that it was considering the admission of evidence of an unrelated shooting of the key prosecution witness rather than the admission of evidence that the *defendant* shot a key prosecution witness.

² The Michigan Court of Appeals’ finding that Franklin identified Petitioner as the driver of the Camaro at the time of the accident was also incorrect. Wade, slip op. at 2, n.1. As discussed above, uncontroverted evidence showed that Franklin identified Daniel Young a.k.a. Daniel Smith as the driver at the scene of the accident. Thus, Petitioner rebutted the state’s factual finding in this regard by clear and convincing evidence. Although this factual error contributes to the unreasonableness of the state court’s decision and further evidences the state court’s failure to comprehend the issues presented and their context, the Court shall not grant relief under § 2254(d)(2) with respect to this claim of error because the state court’s decision was not *based* upon this unreasonable determination of the facts.

Thus, the Court concludes that the Michigan Court of Appeals' decision that the prosecutor did not engage in misconduct in admitting evidence regarding the shooting of Franklin was based upon an unreasonable determination of the facts in light of the evidence. The Court shall therefore conditionally grant Petitioner habeas relief pursuant to 28 U.S.C. § 2254(d)(2).³

B. Reference to Petitioner as a “Wanted Felon” and to Petitioner’s “Mug Shot”, and Admission Into Evidence of Mug Shot

Petitioner next claims that the prosecutor engaged in misconduct by referring to a picture of Petitioner as a “mug shot,” eliciting mug shot references during Police Officers Daniels' and Snarski's testimony, and admitting into evidence Petitioner's mug shot. In addition, Officer Daniels referred to Petitioner as a “wanted felon.”

While “the use of mug shots has been strongly condemned in federal trials,” Eberhardt v. Bordenkircher, 605 F.2d 275, 280 (6th Cir. 1979), it does not automatically give rise to reversible error in a habeas corpus proceeding. Murray v. Superintendent,

³ Relief under 28 U.S.C. § 2254(d)(2) is not impacted by the procedural default analysis undertaken with respect to § 2254(d)(1). Petitioner raised the claim that the state court's finding was based upon an unreasonable determination of the facts in light of the evidence at his first opportunity to do so, in his Motion for Rehearing filed before the Michigan Court of Appeals. The Michigan Court of Appeals' order denying the motion stated, in its entirety: The Court orders that the motion for rehearing is denied.” People v. Wade, No. 217122 (Mich. Ct. App. March 21, 2001). Petitioner then presented this claim to the Michigan Supreme Court in a delayed application for leave to appeal. The Michigan Supreme Court denied leave to appeal because the court was “not persuaded that the questions presented should be reviewed by this Court.” People v. Wade, No. 118957 (Mich. Sept. 25, 2001). Neither of these state court opinions invoked a state procedural rule as a basis for rejecting review of this claim. Therefore, this claim is not procedurally defaulted. Coleman, 501 U.S. at 729-30.

651 F.2d 451, 454-55 (6th Cir. 1981). On habeas review, a federal court must determine whether the admission of mug shots had a “substantial and injurious effect or influence in determining the jury’s verdict.” Brecht v. Abrahamson, 507 U.S. 619, 637 (1993); *quoting* Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

Respondent argues that this claim is barred from federal habeas review because it is procedurally defaulted. The last state court to issue a reasoned opinion regarding this claim, the Michigan Court of Appeals, held that it was not preserved for review because defense counsel failed to make a contemporaneous objection. People v. Wade, slip op. at 1. As discussed *supra*, the failure to make a contemporaneous objection is an independent and adequate state law ground for refusing to review trial errors. Coleman, 501 U.S. at 750-51. Thus, this claim of prosecutorial misconduct is procedurally defaulted and barred from habeas review unless Petitioner can establish cause and prejudice to excuse the default. Petitioner claims that his trial attorney was ineffective in failing to object to the mug shot and “wanted felon” testimony at trial, and that the procedural default is therefore excused. Petitioner asserts this ineffective assistance of counsel claim both as a separate claim and as cause to excuse his procedural default.

The Michigan Court of Appeals held that the prosecutor’s conduct was not improper, stating, in pertinent part:

[D]efendant was not denied a fair trial by references to a mug shot. We have held that admission of a mug shot was not prejudicial where the photograph was edited to prevent inference of a prior conviction. . . . Here,

there was a reference during a police officer's testimony to a mug shot of defendant, however, there was no evidence introduced that defendant had prior convictions. Further, defendant invited the challenged testimony by repeatedly questioning the police officer's ability to recognize the defendant knowing that the identification was made through the use of mug shot. . . .

Wade, slip op. at 2. The state court further held that, because no prosecutorial misconduct occurred, Petitioner's attorney was not ineffective. Wade, slip op. at 3.

To evaluate the Michigan Court of Appeals' analysis of Petitioner's ineffective assistance of counsel claim, the Court must determine the reasonableness of the Michigan Court of Appeals' decision that no prosecutorial misconduct occurred.

In its opinion that the mug shot evidence was properly admitted, the Michigan Court of Appeals conflates two instances where references to mug shots were made. In fact, the transcript reflects two separate instances in which mug shot evidence was introduced, involving two different witnesses, Officer Daniels and Officer Snarski. The Court shall recount in some detail the introduction of mug shot evidence because the context and extent of its introduction informs the Court's assessment of its impact.

Police Officer Daniels was involved in the original traffic stop of the Camaro, from which the Camaro suddenly sped off, striking the car which the victim was driving. Officer Daniels testified that he reached the rear, driver's side bumper of the Camaro before it sped off. He testified that he was able to view the reflection of the driver in the Camaro's side-view mirror. Immediately after the incident, Officer Daniels wrote a report in which he gave the following physical description of the Camaro's driver: a

black, heavy-set male. Officer Daniels further indicated “NOD”, no other description, on his incident report. However, at the preliminary examination, which occurred on January 20, 1998, over one year after the incident, Officer Daniels testified that the driver had a raggedy beard and close cut fade. At trial, Officer Daniels testified that he erred in failing to provide that additional information in his incident report, but he did not think it was important at the time. At trial, he positively identified Petitioner as the driver.

On cross-examination, defense counsel asked Officer Daniels whether he had identified Petitioner in a picture. Officer Daniels testified that approximately seven months after the accident, he saw a picture of Petitioner and identified him as the driver. On cross-examination, Petitioner’s attorney did not refer to the photograph as a mug shot.

On re-direct examination, the prosecutor three times referred to the photograph as a mug shot. In response, Officer Daniels also twice referred to the photograph as a mug shot. In addition, Officer Daniels explained that he saw the photograph in a newspaper circulated in the police department which depicts “wanted felons.” He testified that after seeing this photograph of Petitioner he did not contact the Fatal Squad Unit to advise them that he had positively identified the driver. Instead, although neither of them had any formal role in the investigation, he simply told his partner, Officer Cistrunk that he had identified Petitioner.

Testimony regarding a mug shot was also introduced through Officer Snarski. Officer Snarski worked with the Fatal Squad Unit and was assigned to the accident at

issue in this case. On re-direct examination, Officer Snarski testified that, on January 29, 1997, he showed a photographic lineup to Franklin. He stated that the photographic lineup included a mug shot of Petitioner. Further, he stated that every mug shot he used in the photographic lineup had a City of Detroit identification number. The trial court admitted this array of photographs into evidence.

Contrary to the Michigan Court of Appeals' statement that "admission of a mug shot [is] not prejudicial where the photograph was edited to prevent inference of a prior conviction," Wade, slip op. at 2, there is no evidence that the photograph was edited to remove any indication that it was a mug shot. Further, even if it were edited to remove such indication, witnesses and the prosecutor repeatedly referring to it as a mug shot served to negate any benefit achieved by editing the photograph.

Each reference to Petitioner's mug shot, the admission of the photographic array, and the reference to Petitioner as a wanted felon, occurring separately and absent other errors, may not have deprived Petitioner of a fair trial. But, the cumulative effect of these references, absent a limiting instruction, served to undermine the presumption of innocence owed Petitioner.

This case is distinguishable from Matthews v. Abramajtyis, 319 F.3d 780 (6th Cir. 2003), in which the Sixth Circuit found that the introduction of mug shot evidence was "inconsequential." Id. at 789. First, Matthews involved a bench trial. Judges are presumably better able to sort out and disregard potentially prejudicial information and,

nevertheless, apply a presumption of innocence standard. In contrast, the case at bar was a jury trial. Second, in Matthews, the defendant's lawyer informed the trial judge that the defendant had previously been arrested. Thus, there, the mug shot did not introduce any new evidence of criminal history. In contrast, in this case, the defense did not introduce any evidence regarding any of Petitioner's prior arrests. Officer Snarski testified that Petitioner's photograph was shown to Franklin on January 29, 1997, well before Petitioner's arrest on June 3, 1997. Thus, the jury could not have concluded that the mug shot was taken in connection with the charges for which Petitioner was being tried. *C.f.* Holifield v. Davis, 662 F.2d 710, 711 (11th Cir. 1981) (holding that brief references to mug shot not prejudicial when jury could have assumed photograph taken during investigative stages of crime for which defendant was on trial); Cobbin v. Zavares, 32 F. Supp. 2d 1225, 1232 (D. Colo. 1999) (finding that admission of mug shots was not reversible error where jury could reasonably conclude from the date the photograph was taken that it was the result of the defendant's arrest on the charges in the case being tried and not some other criminal matter).

Petitioner's trial attorney Mark Brown failed to object to the repeated references to the mug shot, failed to object to the admission of the mug shot, and failed to object to the characterization of Petitioner as a wanted felon. One of the essential elements of a fair trial is the presumption of innocence. The repeated references to mug shots and labeling Petitioner a wanted felon placed that presumption in serious jeopardy. Any attorney,

acting reasonably, would have objected to such repeated references. The Court concludes that Brown's failure to do so fell outside the wide range of reasonably competent assistance, and the Michigan Court of Appeals' failure to so find was an unreasonable application of the first prong of Strickland.

The Court now considers whether Petitioner was prejudiced by his attorney's conduct. As discussed above, the evidence incriminating Petitioner in this case was far from overwhelming. It hinged upon the identification testimony of Franklin and Officer Daniels. At the scene of the accident, after having suffered an injury, Franklin identified Daniel Young as the driver. The next day, after time for reflection, Franklin changed his story and identified Petitioner. Franklin testified that he was closer to Young than Petitioner, and if he had to choose between sacrificing one or the other would sacrifice Petitioner. Officer Daniels' identification testimony was also far from overwhelming given that he identified Petitioner as the driver of the Camaro based upon the driver's reflection in the side-view mirror, seen from some distance away at night.

Thus, the Court concludes that Petitioner's attorney was ineffective in failing to object to the admission of this evidence and the Michigan Court of Appeals's decision to the contrary was an unreasonable application of Strickland. The Court shall grant a conditional writ of habeas corpus on this claim. Further, Petitioner's attorney's ineffectiveness and the prejudice arising therefrom excuse the procedural default of Petitioner's prosecutorial misconduct claim. The Court finds that the prosecutorial

misconduct in eliciting this testimony and repeatedly referencing Petitioner's mug shot, had a substantial and injurious effect in determining the jury's verdict. The Michigan Court of Appeals' contrary conclusion was an unreasonable application of Supreme Court precedent. Thus, the Court grants a conditional writ of habeas corpus with respect to this claim as well.

C. Evidence of Flight

Petitioner claims that his attorney was ineffective in failing to object to the prosecutor eliciting testimony that Petitioner attempted to flee from the police, both at the time of the accident and at his arrest, and arguing that the attempted flight implied consciousness of guilt.

The Michigan Court of Appeals held that the evidence was properly admitted, finding that evidence of flight is admissible because it may indicate consciousness of guilt. Ward, slip op. at 2, *citing* People v. Coleman, 210 Mich. App. 1, 4; 532 N.W.2d 885 (1995). Petitioner has failed to show that the state court's determination regarding the admissibility of this evidence was contrary to or an unreasonable application of Supreme Court precedent. Therefore, Petitioner's trial attorney was not ineffective for failing to object to properly admitted testimony.

D. Testimony Regarding Source of Blood Found in Camaro

Petitioner also claims that the prosecutor engaged in misconduct when he elicited testimony regarding the source of the blood found in the Camaro. After his arrest,

Petitioner requested that the blood found in the Camaro be compared to his blood. The blood was inconsistent with Petitioner's blood. It was not, however, compared to Franklin's blood. Nevertheless, Officer Snarski testified that, in his opinion, Franklin was the source of the blood. He testified that he based this opinion on Franklin's injuries. Petitioner maintains that the driver of the Camaro could have been the source of the blood, and that, where the blood was never compared to Franklin's, the prosecutor committed misconduct when he elicited opinion testimony from Officer Snarski as to the source of the blood.

The Michigan Court of Appeals held that the prosecutor did not commit misconduct, stating, in pertinent part:

[T]he prosecutor did not vouch for defendant's guilt by eliciting a police officer's testimony that he "believed" that the blood found in the Camaro came from Franklin. The prosecutor merely asked the officer to explain why he did not have DNA tests performed to see if the blood found in the Camaro belonged to Franklin and why he waited until over a year after the fatal accident to have any DNA testing performed on the blood samples. The prosecutor's questioning and the officer's testimony in this regard were responsive to issues raised by defense counsel and did not constitute misconduct. . . . Moreover, the officer was entitled to state his opinion that the blood was Franklin's where that opinion was rationally based upon his observations and investigation, and his opinion was helpful in explaining his actions.

Wade, slip op. at 2-3.

Defense counsel questioned Officer Snarski regarding his failure to have the blood tested and compared to Franklin's. Defense counsel highlighted for the jury the fact that

the blood was not Petitioner's and explored the possibility that the blood may have been the driver's, not Franklin's. On re-direct examination, the prosecutor simply permitted Officer Snarski to explain why he chose not to have the blood tested. The Court finds that the Michigan Court of Appeals' decision that this was not prosecutorial misconduct was not an unreasonable application of Supreme Court precedent.

E. Ineffective Assistance of Trial Counsel

Petitioner asserts several claims of ineffective assistance of trial counsel, all but one of these ineffective assistance of counsel claims are addressed in the previous sections. In his remaining ineffective assistance of counsel claim, Petitioner argues that his attorney was ineffective because he opened the door to damaging testimony when he cross-examined Officer Daniels and Franklin regarding their identification of Petitioner. Counsel's cross-examination of Officer Daniels highlighted for the jury the weaknesses in his identification of Petitioner. On cross-examination, Officer Daniels admitted that his identification was based upon a side-view mirror reflection of the driver, seen from some distance away, and at night. This line of cross-examination was a reasonable attempt by counsel to discredit Daniels and did not fall outside the wide range of professionally competent assistance.

Petitioner argues that counsel's cross-examination of Franklin was also deficient because counsel allowed Franklin to explain that he misidentified the driver of the Camaro at the accident scene because he was on probation and was violating his

