UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ERWIN HARRIS,

Petitioner,

v.

CASE NO. 04-CV-74766-DT
HONORABLE AVERN COHN

RAYMOND BOOKER,

Respondent.
_____/

MEMORANDUM AND ORDER DENYING HABEAS RELIEF ON SUPPLEMENTAL CLAIM AND GRANTING A CERTIFICATE OF APPEALABILITY

I. Introduction

This is a habeas case under 28 U.S.C. § 2254. Michigan prisoner Erwin Harris ("Petitioner") was convicted of two counts of armed robbery and two counts of possession of a firearm during the commission of a felony which were imposed following a jury trial in the Washtenaw County Circuit Court in 1999. He was sentenced to concurrent terms of 10 to 20 years on the armed robbery convictions and to concurrent terms of two years imprisonment on the felony firearm convictions, to be served consecutively to the armed robbery sentences. In his petition, Petitioner raised claims challenging the sufficiency of the evidence for one of the armed robbery convictions and for both of the felony firearm convictions, as well as a due process claim. On October 16, 2006, the Court issued a Memorandum and Order denying

Petitioner relief on his insufficient evidence claims, but dismissing the due process claim without prejudice to allow him to properly exhaust that issue in the state courts. *See* Doc. No. 24. Petitioner has completed his remedies in the state courts and has returned to this Court to proceed on the now-exhausted due process claim. The parties have filed supplemental pleadings in support of their positions. The matter is ready for decision. For the reasons that follow, the petition will be denied.

II. Standard of Review

28 U.S.C. § 2254 provides in relevant part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §2254(d).

"A state court's decision is 'contrary to' . . . clearly established law if it 'applies a rule that contradicts the governing law set forth in [Supreme Court cases]' or if it 'confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [this] precedent.'" *Mitchell v. Esparza*, 540 U.S. 12, 15-16 (2003) (per curiam) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)); *see also Bell v. Cone*, 535 U.S. 685, 694 (2002). "[T]he 'unreasonable application' prong of § 2254(d)(1) permits a federal habeas court to

'grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court but unreasonably applies that principle to the facts' of petitioner's case." *Wiggins v. Smith*, 539 U.S. 510, 520 (2003) (quoting *Williams*, 529 U.S. at 413); *see also Bell*, 535 U.S. at 694. "In order for a federal court find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous. The state court's application must have been 'objectively unreasonable.'" *Wiggins*, 539 U.S. at 520-21 (citations omitted); *see also Williams*, 529 U.S. at 409.

Section 2254(d)(1) limits a federal habeas court's review to a determination of whether the state court's decision comports with clearly established federal law as determined by the Supreme Court at the time the state court renders its decision. *See Williams*, 529 U.S. at 412; *see also Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). Section 2254(d) "does not require citation of [Supreme Court] cases–indeed, it does not even require *awareness* of [Supreme Court] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8 (2002); *see also Mitchell*, 540 U.S. at 16. While the requirements of "clearly established law" are to be determined solely by the Supreme Court's holdings, the decisions of lower federal courts are useful in assessing the reasonableness of the state court's resolution of an issue. *See Williams v. Bowersox*, 340 F.3d 667, 671 (8th Cir. 2003); *Dickens v. Jones*, 203 F. Supp. 354, 359 (E.D. Mich. 2002).

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

(6th Cir. 1998).

III. Discussion

Petitioner says that he is entitled to habeas relief because the Michigan Supreme Court's decision in his case overruling prior precedent, *People v. Johnson*, 411 Mich. 50, 303 N.W.2d 442 (1981), and imposing a new test for aiding and abetting felony firearm in Michigan violates due process and runs contrary to *Bouie v. City of Columbia*, 347 U.S. 347, 354-55 (1964) (retroactively applying an unforeseeable state court interpretation of a criminal statute violates due process).[1] Respondent says that the due process claim lacks merit because the Michigan Supreme Court's interpretation of the statute was based upon the language of the statute and was foreseeable.

On collateral review, the trial court denied relief on Petitioner's due process claim finding that the Michigan Supreme Court's decision "did not amount to an unexpected or indefensible interpretation of MCL 767.39." *People v. Harris*, No. 98-11081-FC (Washtenaw Co. Cir. Ct. May 18, 2007). The trial court further explained:

> [The] testimony showed that [Harris] drove his accomplice, Mays, to the gas station. Harris 'cased' the interior of the store. Harris left the store and re-entered with Mays. Harris used Mays' possession of the firearm to intimidate and rob a store customer. Harris also encouraged Mays to 'pop' or shoot the store clerk when the clerk locked the register and refused to hand over the money. [Harris] ultimately drove away with Mays

[1]Petitioner relatedly asserts that, under the old test for aiding and abetting felony firearm, the prosecution presented insufficient evidence to support his felony firearm convictions. Because the Court concludes that the Michigan Supreme Court's interpretation passes constitutional muster, *see* discussion *infra*, and the Court has previously ruled that the prosecution presented sufficient evidence to support his felony firearm convictions under the Michigan Supreme's Court's revised interpretation, this argument must fail.

and the firearm.

Harris did in fact counsel, aid, or abet Mays in the commission of a felony firearm.

Id. The Michigan Court of Appeals denied leave to appeal because Petitioner "failed to meet the burden of establishing entitlement to relief under MCR 6.508(D)." *See People v. Harris*, No. 280406 (Mich. Ct. App. Dec. 13, 2007). The Michigan Supreme Court similarly denied leave to appeal. *People v. Harris*, 482 Mich. 880, 752 N.W.2d 464 (2008).

Having considered the matter, the Court concludes that the state courts' decisions denying relief on this claim are neither contrary to Supreme Court precedent nor an unreasonable application of federal law or the facts. The Supreme Court has clearly established that an unforeseeable judicial enlargement of a criminal statute, applied retroactively, violates the federal due process right to fair warning of what constitutes criminal conduct. *See Bouie*, 378 U.S. at 354-55; *see also Marks v. United States*, 430 U.S. 188, 191-92 (1977) (stating that people have a fundamental right to fair warning of conduct which will give rise to criminal penalties and "that right is protected against judicial action by the Due Process Clause of the Fifth Amendment").

In *Rogers v. Tennessee*, 532 U.S. 451, 462 (2001), the Supreme Court clarified and somewhat limited *Bouie* when it ruled that "judicial alteration of a common law doctrine of criminal law violates the principles of fair warning, and hence must not be given retroactive effect, only where it is unexpected and indefensible by reference to the law which had been expressed prior to the conduct at issue." *Id*. at 462; *see also United States v. Barton*, 455 F.3d 649, 654 (6th Cir. 2006) (interpreting *Rogers* and

stating that "when addressing ex post facto-type due process concerns, questions of notice, foreseeability, and fair warning are paramount").

The resolution of Petitioner's due process claim thus rests on whether the Michigan Supreme Court's decision overruling its prior precedent in *Johnson, supra*, and imposing a broader construction of aiding and abetting felony firearm in Michigan was foreseeable, *i.e.* not "unexpected or indefensible," in light of pre-existing law. The state courts concluded that the new interpretation was foreseeable. This Court agrees. Michigan's felony firearm statute provides, in relevant part:

> A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony . . . is guilty of a felony, and shall be imprisoned for 2 years.

Mich. Comp. Laws § 750.227b(1). The purpose of the felony firearm statute is to enhance the penalty for possessing firearms during the commission of felonies and to deter the use of guns. *See Wayne Co. Prosecutor v. Recorder's Ct. Judge*, 406 Mich. 374 391; 280 N.W.2d 793 (1979), *overruled in part on other grounds*, *People v. Robideau*, 419 Mich. 458, 355 N.W.2d 592 (1984). The aiding and abetting statute provides:

> Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission my hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

Mich. Comp. Laws § 767.39. The purpose of the aiding and abetting statute is to abolish the distinction between accessories and principals to an offense so that both may be punished equally upon conviction for the crime. *See People v. Palmer*, 392 Mich. 370, 378, 220 N.W.2d 393 (1974).

In *Johnson*, the Michigan Supreme Court held that a person could be convicted of aiding and abetting felony firearm only if he or she aided the principal in either "obtaining" or "retaining" the firearm used during the attempted or completed felony. *Johnson*, 411 Mich. at 54. In the present case, the Michigan Supreme Court overruled *Johnson*, finding that its holding was overly narrow, and held that while a person may still be convicted of aiding and abetting felony firearm upon proof that he or she aided the principal in obtaining or retaining the firearm, a person may also be convicted of aiding and abetting felony firearm upon proof that he or she "aided and abetted another in carrying or having in his possession a firearm while that other commits or attempts to commit a felony." *Harris*, 470 Mich. at 68.

The Michigan Supreme Court's decision in this case was foreseeable as it is consistent with the plain language of both the felony firearm statute and the aiding and abetting statute, as well as their intended purposes. The *Bouie* line of cases are concerned with situations when a court applies a clear criminal statute in a way that a defendant could not anticipate or applies a vague criminal statute in a new and unexpected fashion. *See United States v. Mitra*, 405 F.3d 492, 496 (7th Cir. 2005). Such is not the case here. The Michigan Supreme Court did not interpret the relevant statutes in a way that would surprise most reasonable people, rather it construed the pertinent statutes in a way that makes more, not less, sense given the statutes' terms and purposes. The Michigan Supreme Court's decision was also in keeping with the general application of the aiding and abetting statute in other criminal contexts. In other words, the statutes themselves provided Petitioner with fair warning that his conduct could subject him to criminal prosecution as an aider and abettor to felony

firearm. That is all the notice that the Constitution required. Habeas relief is not warranted on this claim.

IV. Certificate of Appealability

Before Petitioner may appeal this decision, a certificate of appealability must issue.[2] *See* 28 U.S.C. § 2253(c)(1)(a); Fed. R. App. P. 22(b). A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a court rejects a habeas claim on the merits, the substantial showing threshold is met if the petitioner demonstrates that reasonable jurists would find the district court's assessment of the constitutional claim debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). "A petitioner satisfies this standard by demonstrating that . . . jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). In applying this standard, the court may not conduct a full merits review, but must limit its examination to a threshold inquiry into the underlying merit of the claims. *Id*. at 336-37.

Although the Court believes that its conclusion is correct, it nonetheless finds that Petitioner has made a substantial showing of the denial of a constitutional right as to his due process claim and that the issue is deserving of further appellate review.

V. Conclusion

For the reasons stated above, Petitioner is not entitled to habeas relief on his

[2]Effective December 1, 2009, the newly created Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254, provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11(a), 28 U.S.C. foll. § 2254.

due process claim but is entitled to a certificate of appealability. Accordingly, the petition is DENIED. A certificate of appealability is GRANTED.

SO ORDERED.

S/Avern Cohn
AVERN COHN
UNITED STATES DISTRICT JUDGE

Dated: August 26, 2010

I hereby certify that a copy of the foregoing document was mailed to the attorneys of record on this date, August 26, 2010, by electronic and/or ordinary mail.

S/Julie Owens
Case Manager, (313) 234-5160