

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

GREGORY JOSEPH FITZGERALD,

Petitioner,

Case No. 1:17-cv-435

v.

Honorable Janet T. Neff

TONY TRIERWEILER,

Respondent.

\_\_\_\_\_ /

**OPINION**

This is a habeas corpus action brought by a state prisoner pursuant to 28 U.S.C. § 2254. Promptly after the filing of a petition for habeas corpus, the Court must undertake a preliminary review of the petition to determine whether “it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court.” Rule 4, RULES GOVERNING § 2254 CASES; *see* 28 U.S.C. § 2243. If so, the petition must be summarily dismissed. Rule 4; *see Allen v. Perini*, 424 F.2d 134, 141 (6th Cir. 1970) (district court has the duty to “screen out” petitions that lack merit on their face). A dismissal under Rule 4 includes those petitions which raise legally frivolous claims, as well as those containing factual allegations that are palpably incredible or false. *Carson v. Burke*, 178 F.3d 434, 436-37 (6th Cir. 1999). After undertaking the review required by Rule 4, the Court concludes that the petition must be dismissed because it fails to raise a meritorious federal claim.

## Factual Allegations

Petitioner Gregory Joseph Fitzgerald is presently incarcerated with the Michigan Department of Corrections at the Bellamy Creek Correctional Facility in Ionia, Michigan. Petitioner is serving concurrent sentences of 5 years, 10 months to 22 years following his August 28, 2015 plea of *nolo contendere* to one count of second-degree fleeing and eluding, MICH. COMP. LAWS § 750.479a(4), and one count of operating while intoxicated, third-offense, MICH. COMP. LAWS §257.625, in Muskegon County Circuit Court case #15066365-FH-F; and one count of second-degree fleeing and eluding, MICH. COMP. LAWS § 750.479a(4), in Muskegon County Circuit Court case #15066366-FH-F. On September 28, 2015, the court sentenced Petitioner as a habitual offender, fourth-offense, MICH. COMP. LAWS § 769.12, pursuant to a *Cobbs* agreement<sup>1</sup> that Petitioner's minimum sentence would not exceed 71 months.

Petitioner, with the assistance of appointed appellate counsel, filed an application for leave to appeal his sentence in the Michigan Court of Appeals. He raised two issues:

- I. THE TRIAL COURT UNLAWFULLY DEPRIVED THE DEFENDANT OF HIS DUE PROCESS, EQUAL PROTECTION, AND OTHER PROTECTED RIGHTS UNDER THE UNITED STATES AND MICHIGAN CONSTITUTIONS WHEN IT SCORED 10 POINTS ON OV-9, 10 POINTS ON OV-18, AND 10 POINTS ON OV-19; ON PLAIN ERROR AND/OR INEFFECTIVE ASSISTANCE OF COUNSEL GROUNDS THIS COURT SHOULD REVIEW THIS ISSUE.
  
- II. THE TRIAL COURT UNLAWFULLY VIOLATED THE UNITED STATES AND MICHIGAN CONSTITUTIONS IN SENTENCING THE DEFENDANT TO A PRISON TERM OF 70 MONTHS TO 22 YEARS ON A HABITUAL OFFENDER 4th SUPPLEMENT ARISING OUT OF THE 2d-DEGREE FLEEING AND ELUDING A POLICE OFFICER

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<sup>1</sup>In *People v. Cobbs*, 505 N.W.2d 208 (Mich. 1993), the Michigan Supreme Court approved a process under which a judge conducts a preliminary evaluation of the case and makes a tentative offer of the sentence prior to a defendant's entry of a plea. The supreme court held that such an agreement was lawful, if the defendant was given the right to withdraw the plea when and if the judge on full review decided not to honor the earlier agreement.

CONVICTION; ON PLAIN ERROR AND/OR INEFFECTIVE ASSISTANCE OF COUNSEL GROUNDS THIS COURT SHOULD REVIEW THIS ISSUE.

(Pet'r's Mich. Ct. App. Br., ECF No. 1-1, PageID.22.) The Michigan Court of Appeals denied leave initially on May 5, 2016 (Mich. Ct. App. Ord., ECF No. 1-1, PageID.62), and upon reconsideration on June 13, 2016 (Mich. Ct. App. Ord., ECF No. 1-1, PageID.61), for lack of merit in the grounds presented. Petitioner then filed a pro per application for leave to appeal in the Michigan Supreme Court raising the same issues. The supreme court denied leave by order entered April 4, 2017 (Mich. Ord., ECF No. 1-1, PageID.86). Petitioner did not file a petition for writ of certiorari in the United States Supreme Court. (Pet., ECF No. 1, PageID.3.) Instead, he filed his habeas petition in this Court raising the same issues he raised in the Michigan appellate courts.

**Discussion**

This action is governed by the Antiterrorism and Effective Death Penalty Act of 1996, PUB.L. 104-132, 110 STAT. 1214 (AEDPA). *See Penry v. Johnson*, 532 U.S. 782, 792 (2001). The AEDPA “prevents federal habeas ‘retrials’” and ensures that state court convictions are given effect to the extent possible under the law. *Bell v. Cone*, 535 U.S. 685, 693-94 (2002). The AEDPA has “drastically changed” the nature of habeas review. *Bailey v. Mitchell*, 271 F.3d 652, 655 (6th Cir. 2001). An application for writ of habeas corpus on behalf of a person who is incarcerated pursuant to a state conviction cannot be granted with respect to any claim that was adjudicated on the merits in state court unless the adjudication: “(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the state court

proceeding.” 28 U.S.C. § 2254(d). This standard is “intentionally difficult to meet.” *Woods v. Donald*, 575 U.S. \_\_\_, 135 S. Ct. 1372, 1376 (2015) (internal quotation marks omitted).

The AEDPA limits the source of law to cases decided by the United States Supreme Court. 28 U.S.C. § 2254(d). This Court may consider only the “clearly established” holdings, and not the dicta, of the Supreme Court. *Williams v. Taylor*, 529 U.S. 362, 412 (2000); *Bailey*, 271 F.3d at 655. In determining whether federal law is clearly established, the Court may not consider the decisions of lower federal courts. *Lopez v. Smith*, 135 S. Ct. 1, 3 (2014); *Bailey*, 271 F.3d at 655. Moreover, “clearly established Federal law” does not include decisions of the Supreme Court announced after the last adjudication of the merits in state court. *Greene v. Fisher*, 132 S. Ct. 38 (2011). Thus, the inquiry is limited to an examination of the legal landscape as it would have appeared to the Michigan state courts in light of Supreme Court precedent at the time of the state-court adjudication on the merits. *Miller v. Stovall*, 742 F.3d 642, 644 (6th Cir. 2014) (citing *Greene*, 132 S. Ct. at 44).

A federal habeas court may issue the writ under the “contrary to” clause if the state court applies a rule different from the governing law set forth in the Supreme Court’s cases, or if it decides a case differently than the Supreme Court has done on a set of materially indistinguishable facts. *Bell*, 535 U.S. at 694 (citing *Williams*, 529 U.S. at 405-06). “To satisfy this high bar, a habeas petitioner is required to ‘show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.’” *Woods*, 2015 WL 1400852, at \*3 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). In other words, “[w]here the precise contours of the right remain unclear, state courts enjoy broad discretion in their adjudication of a

prisoner’s claims.” *White v. Woodall*, 572 U.S. \_\_\_, 134 S. Ct. 1697, 1705 (2014) (quotations marks omitted).

The AEDPA requires heightened respect for state factual findings. *Herbert v. Billy*, 160 F.3d 1131, 1134 (6th Cir. 1998). A determination of a factual issue made by a state court is presumed to be correct, and the petitioner has the burden of rebutting the presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Lancaster v. Adams*, 324 F.3d 423, 429 (6th Cir. 2003); *Bailey*, 271 F.3d at 656. This presumption of correctness is accorded to findings of state appellate courts, as well as the trial court. *See Sumner v. Mata*, 449 U.S. 539, 546 (1981); *Smith v. Jago*, 888 F.2d 399, 407 n.4 (6th Cir. 1989).

Petitioner provides no detail with respect to his constitutional arguments beyond attaching his state court appellate briefs. Although this petition and Petitioner’s appellate briefs purport to raise two issues, an examination of Petitioner’s arguments reveal he has raised several more, all relating to his sentence.

I. State law sentencing claims

“[A] federal court may issue the writ to a state prisoner ‘only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.’” *Wilson v. Corcoran*, 131 S. Ct. 13, 16 (2010) (quoting 28 U.S.C. § 2254(a)). A habeas petition must “state facts that point to a ‘real possibility of constitutional error.’” *Blackledge v. Allison*, 431 U.S. 63, 75 n.7 (1977) (quoting Advisory Committee Notes on Rule 4, RULES GOVERNING HABEAS CORPUS CASES). The federal courts have no power to intervene on the basis of a perceived error of state law.

*Wilson*, 131 S. Ct. at 14; *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005); *Estelle v. McGuire*, 502 U.S. 67-68 (1991); *Pulley v. Harris*, 465 U.S. 37, 41 (1984).<sup>2</sup>

A. Improper scoring and application of the sentencing guidelines

Many of Petitioner’s challenges are based on perceived errors of state law and, thus, are not cognizable on habeas review. For example, claims concerning the improper application of sentencing guidelines or improper scoring of guidelines variables are state-law claims and typically are not cognizable in habeas corpus proceedings. *See Hutto v. Davis*, 454 U.S. 370, 373-74 (1982) (federal courts normally do not review a sentence for a term of years that falls within the limits prescribed by the state legislature); *Austin v. Jackson*, 213 F.3d 298, 301-02 (6th Cir. 2000) (alleged violation of state law with respect to sentencing is not subject to federal habeas relief). Moreover, a criminal defendant has “no federal constitutional right to be sentenced within Michigan’s guideline minimum sentence recommendations.” *Doyle v. Scutt*, 347 F. Supp. 2d 474, 485 (E.D. Mich. 2004); *accord Austin*, 213 F.3d at 300; *Lovely v. Jackson*, 337 F. Supp. 2d 969, 977 (E.D. Mich. 2004); *Thomas v. Foltz*, 654 F. Supp. 105, 106-07 (E.D. Mich. 1987).

B. Proportionality

Similarly, Petitioner raises the issue of proportionality under *People v. Milbourn*, 461 N.W.2d 1 (Mich. 1990). In *Milbourn*, the Michigan Supreme Court held that a sentencing court must exercise its discretion within the bounds of Michigan’s legislatively prescribed sentence range

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<sup>2</sup>Moreover, with respect to Petitioner’s state law claims, the Michigan Court of Appeals has ruled against Petitioner, concluding that Petitioner’s arguments lack merit. It is not the province of a federal habeas court to re-examine state-law determinations on state-law questions. *Bradshaw*, 546 U.S. at 76; *Estelle*, 502 U.S. at 68. The decision of the state courts on a state-law issue is binding on a federal court. *See Wainwright v. Goode*, 464 U.S. 78, 84 (1983). The Sixth Circuit repeatedly has recognized “that a state court’s interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus.” *Stumpf v. Robinson*, 722 F.3d 739, 746 n.6 (6th Cir. 2013) (quoting *Bradshaw*, 546 U.S. at 76). Thus, this Court must accept that Petitioner’s state law arguments are simply meritless.

and pursuant to the intent of Michigan’s legislative scheme of dispensing punishment according to the nature of the offense and the background of the offender. *Milbourn*, 461 N.W.2d at 9-10; *People v. Babcock*, 666 N.W.2d 231, 236 (Mich. 2003). It is plain that *Milbourn* was decided under state, not federal, principles. See *Lunsford v. Hofbauer*, No. 94-2128, 1995 WL 236677, at \* 2 (6th Cir. Apr. 21, 1995); *Atkins v. Overton*, 843 F. Supp. 258, 260 (E.D. Mich. 1994).

Federal constitutional principles do not support *Milbourn*’s mandate for individualized sentencing. There is no constitutional right to individualized sentencing in non-capital cases. *Harmelin v. Michigan*, 501 U.S. 957, 995 (1991); *United States v. Thomas*, 49 F.3d 253, 261 (6th Cir. 1995); see also *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978) (in a case holding that mitigating factors must be fully considered in death penalty cases, the Court “recognize[d] that, in noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes.”). Because Petitioner was convicted of non-capital offenses, the federal constitution does not guarantee him a right to individualized sentencing or consideration of mitigating factors. Thus, Petitioner’s claim based on *Milbourn* is only a state-law claim and it is not cognizable in a habeas corpus action.

## II. Federal law sentencing claims

### A. Eighth Amendment

Petitioner also contends that his sentence violates the federal constitution. For example, Petitioner argues that his sentence is excessive under the Eighth Amendment. (Pet. Mich. Ct. App. Br., ECF No. 1-1, PageID.58-59.) The United States Constitution does not require strict proportionality between a crime and its punishment. *Harmelin*, 501 U.S. at 965; *United States v. Marks*, 209 F.3d 577, 583 (6th Cir. 2000). “Consequently, only an extreme disparity between crime

and sentence offends the Eighth Amendment.” *Marks*, 209 F.3d at 583; *see also Lockyer v. Andrade*, 538 U.S. 63, 77 (2003) (gross disproportionality principle applies only in the extraordinary case); *Ewing v. California*, 538 U.S. 11, 36 (2003) (principle applies only in “the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality”) (quoting *Rummel v. Estelle*, 445 U.S. 263, 285 (1980)). A sentence that falls within the maximum penalty authorized by statute “generally does not constitute ‘cruel and unusual punishment.’” *Austin*, 213 F.3d at 302 (quoting *United States v. Organek*, 65 F.3d 60, 62 (6th Cir. 1995)). Ordinarily, “[f]ederal courts will not engage in a proportionality analysis except in cases where the penalty imposed is death or life in prison without possibility of parole.” *United States v. Thomas*, 49 F.3d 253, 261 (6th Cir. 1995). Petitioner was not sentenced to death or life in prison without the possibility of parole, and his sentence falls within the maximum penalty under state law. Petitioner’s sentence, therefore, does not present the extraordinary case that runs afoul of the Eighth Amendment’s ban of cruel and unusual punishment. The court of appeals’ conclusion that Petitioner’s Eighth Amendment argument had no merit was neither contrary to, nor an unreasonable application of, clearly established federal law.

#### B. Fourteenth Amendment

Petitioner also challenges his sentence as a due process violation under the Fourteenth Amendment. A sentence may violate due process if it is based upon material “misinformation of constitutional magnitude.” *Roberts v. United States*, 445 U.S. 552, 556 (1980), *quoted in Koras v. Robinson*, 123 F. App’x 207, 213 (6th Cir. Feb. 15, 2005); *see also United States v. Tucker*, 404 U.S. 443, 447 (1972); *Townsend v. Burke*, 334 U.S. 736, 741 (1948). To prevail on such a claim, the petitioner must show (1) that the information before the sentencing court was



materially false, and (2) that the court relied on the false information in imposing the sentence. *Tucker*, 404 U.S. at 447; *United States v. Polselli*, 747 F.2d 356, 358 (6th Cir. 1984); *Koras*, 123 F. App'x at 213 (quoting *United States v. Stevens*, 851 F.2d 140, 143 (6th Cir. 1988)). A sentencing court demonstrates actual reliance on misinformation when the court gives “explicit attention” to it, “found[s]” its sentence “at least in part” on it, or gives “specific consideration” to the information before imposing sentence. *Tucker*, 404 U.S. at 444, 447.

Petitioner does not identify any facts found by the court at sentencing that were either materially false or based on false information. Instead, he claims that the evidence before the trial court was insufficient or incomplete.

The factual findings of the trial court with regard to the offense variables are presumed to be correct. To overcome that presumption, Petitioner must provide clear and convincing evidence to the contrary. Petitioner cannot simply claim the evidence relied upon by the trial court was insufficient. Petitioner, therefore, has failed to demonstrate that his sentence violated due process. *Tucker*, 404 U.S. at 447; *United States v. Lanning*, 633 F.3d 469, 477 (6th Cir. 2011) (rejecting due process claim where the petitioner failed to point to specific inaccurate information relied upon by the court). The Michigan Court of Appeals’ conclusion that Petitioner’s Fourteenth Amendment claim was meritless is neither contrary to, nor an unreasonable application of, clearly established federal law.

### C. Sixth Amendment

Finally, Petitioner challenges his sentence under the Sixth Amendment. Petitioner contends that the sentence is unconstitutional because it is based on facts found by the judge when

the Sixth Amendment requires that it be based only on facts found by the jury or admitted by Petitioner. Petitioner misconstrues the constitutional requirement.

Petitioner bases his argument on a line of cases beginning with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), continuing with *Blakely v. Washington*, 542 U.S. 296 (2004) and *United States v. Booker*, 543 U.S. 220 (2005), then ending with *Alleyne v. United States*, 570 U.S. \_\_\_, 133 S. Ct. 2151 (2013).<sup>3</sup> In *Apprendi*, the Supreme Court 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.” 530 U.S. at 490. *Apprendi* enunciated a new rule of Sixth Amendment jurisprudence. In the subsequent case of *Blakely*, the Court applied the rule of *Apprendi* to a state sentencing guideline scheme, under which the maximum penalty could be increased by judicial fact-finding. The *Blakely* Court held that the state guideline scheme violated Sixth Amendment rights, and reiterated the rule that any fact that increased the maximum sentence must be “admitted by the defendant or proved to a jury beyond a reasonable doubt.” See *Booker*, 543 U.S. at 232 (citing *Blakely*, 542 U.S. at 303).

Unlike the State of Washington’s determinate sentencing system at issue in *Blakely*, the State of Michigan has an indeterminate sentencing system in which the defendant is given a sentence with a minimum and a maximum term. The maximum sentence is not determined by the trial judge, but is set by law. See *People v. Drohan*, 715 N.W.2d 778, 789-91 (Mich. 2006) (citing MICH. COMP. LAWS § 769.8). Only the minimum sentence is based on the applicable sentencing guideline range. *Id.*; and see *People v. Babcock*, 666 N.W.2d 231, 236 n.7 (Mich. 2003) (citing MICH. COMP. LAWS § 769.34(2)). The Sixth Circuit authoritatively has held that the Michigan

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<sup>3</sup>Although not cited by Petitioner, this line of cases also includes *Ring v. Arizona*, 536 US 584 (2002).

indeterminate sentencing system does not run afoul of *Blakely*. See *Chontos v. Berghuis*, 585 F.3d 1000, 1002 (6th Cir. 2009) (affirming district court’s dismissal of prisoner’s claim under *Blakely v. Washington* because it does not apply to Michigan’s indeterminate sentencing scheme); *Tironi v. Birkett*, 252 F. App’x 724, 725 (6th Cir. 2007).

The Supreme Court expanded the *Blakely* reasoning to mandatory minimum sentences in *Alleyne v. United States*, 570 U.S. \_\_\_, 133 S. Ct. 2151 (2013). Shortly thereafter, the Michigan Court of Appeals concluded that *Alleyne* only prohibited judicial factfinding used to determine a mandatory minimum sentence, but had no impact on judicial factfinding in scoring the sentencing guidelines producing a minimum range for an indeterminate sentence, the maximum of which is set by law. See *People v. Herron*, 845 N.W.2d 533, 539 (Mich. App. 2013), *rev’d* 870 N.W.2d 561 (2015).<sup>4</sup> The Sixth Circuit also concluded that *Alleyne* did not decide the question whether judicial factfinding under Michigan’s indeterminate sentencing scheme violated the Sixth Amendment. See *Kittka v. Franks*, 539 F. App’x 668, 673 (6th Cir. 2013). As a consequence, the Sixth Circuit held, the question is not a matter of clearly established Supreme Court precedent. *Id.* (citing *Montes v. Trombley*, 599 F.3d 490, 498 (6th Cir. 2010)); see also *Saccoccia v. Farley*, 573 F. App’x 483, 485 6th Cir. 2014) (“But *Alleyne* held only that ‘facts that increase a mandatory statutory minimum [are] part of the substantive offense.’ . . . It said nothing about guidelines sentencing factors . . . .”) (quoting *Alleyne*, 133 S. Ct. at 2161 (emphasis added)).

Shortly before Petitioner was sentenced, however, in *People v. Lockridge*, 870 N.W.2d 502 (Mich. 2015), in a 5-2 decision, the Michigan Supreme Court considered the question the Michigan Court of Appeals had faced in *Herron* and reached the opposite conclusion. The

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<sup>4</sup>*Herron* was reversed following the decision in *People v. Lockridge*, 870 N.W.2d 502 (Mich. 2015). *Lockridge* is discussed in detail below.

*Lockridge* court reasoned that, because the “guidelines *require* judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that *mandatorily* increase the floor of the guidelines minimum sentence range,” they increase the “mandatory minimum” sentence under *Alleyne*. *Lockridge*, 870 N.W.2d at 506. As a consequence, the *Lockridge* court held that the mandatory application of Michigan’s sentencing guidelines was unconstitutional, and the remedy was to make them advisory only. *Id.* at 520-521.

The Michigan Supreme Court’s decision in *Lockridge* does not render the result “clearly established” for purposes of habeas review. This Court may consider only the “clearly established” holdings of the United States Supreme Court. *Williams v. Taylor*, 529 U.S. 362, 412 (2000); *Bailey*, 271 F.3d at 655. In determining whether federal law is clearly established, the Court may not consider the decisions of lower federal courts. *Lopez v. Smith*, 135 S. Ct. 1, 3 (2014); *Bailey*, 271 F.3d at 655. For the same reasons, it may not consider the holdings of state courts. Instead, this Court may only grant relief on habeas review if the state court’s application of clearly established federal law is “objectively unreasonable.” *Id.* at 410. “[R]elief is available under § 2254(d)(1)’s unreasonable-application clause if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no ‘fairminded disagreement’ on the question.” *White v. Woodall*, 572 U.S. \_\_\_, 134 S. Ct. 1697, 1706-07 (2014) (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

As is apparent from the reasoned decisions of the Michigan Court of Appeals in *Herron*, 845 N.W.2d at 539, and the Sixth Circuit in *Kittka*, 539 F. App’x at 673, and *Saccoccia*, 573 F. App’x at 485, as well as the decision of the dissenting justices in *Lockridge* itself, reasonable jurists could and did disagree about whether *Alleyne* applied to the calculation of Michigan’s

minimum sentencing guidelines. *Alleyne* therefore did not clearly establish the unconstitutionality of the Michigan sentencing scheme and cannot form the basis for habeas corpus relief.

Even if it could be said that the decision in *Alleyne*, as applied to the Michigan sentencing scheme, and as that scheme was interpreted by the *Lockridge* court, represented “clearly established” federal authority for purposes of collateral habeas corpus review, Petitioner could not prevail. The judicial fact-finding to which Petitioner now objects had no bearing on the determination of Petitioner’s guidelines minimum range. Thus, *Alleyne* does not apply here. From the inception of this line of authority in *Apprendi* to its most recent refinement in *Alleyne*, the United States Supreme Court has never suggested that judicial fact-finding in support of the sentencing court’s exercise of discretion violates the Sixth Amendment.

The distinction is apparent in the remedy adopted to correct the constitutional infirmity in mandatory minimum guidelines sentencing schemes. In *Lockridge*, the Michigan Supreme Court determined it could eliminate the Sixth Amendment problem by making the guideline minimum range advisory and the minimum sentence a matter for the court’s discretion. That was the same remedy the United States Supreme Court had adopted previously in *Booker*, 543 U.S. at 245. The *Booker* court reasoned that if the sentencing rules were not mandatory and did not impose binding requirements on sentencing judges “the statute falls outside the scope of *Apprendi*’s requirement.” *Booker*, 543 U.S. at 259.

After *Lockridge*, a trial court’s imposition of a sentence, no matter how it may be guided by the sentencing guidelines, represents an exercise of the court’s discretion. The facts found to support the exercise of that discretion do not “increase[ ] the penalty for the crime beyond the prescribed statutory maximum[.]” *Apprendi*, 530 U.S. at 490, or “increas[e] the mandatory

minimum[,]” *Alleyne*, 133 S.Ct. at 1260, and therefore need not “be submitted to a jury, [or be] proved beyond a reasonable doubt.” *Apprendi*, 530 U.S. at 490. Petitioner’s sentence was imposed after the decision in *Lockridge*.<sup>5</sup> The sentencing guidelines were no longer mandatory at that time. The trial court’s sentence was an exercise of discretion. Facts the trial court may have found in support of its exercise of discretion do not implicate the Sixth Amendment. Petitioner has failed to demonstrate that the Michigan Court of Appeals rejection of his Sixth Amendment claim is contrary to, or an unreasonable application of, clearly established federal law. Accordingly, he is not entitled to habeas relief.

### III. Ineffective assistance of trial counsel

In his appellate court briefs, the Petitioner contends that his trial counsel was constitutionally ineffective for failing to raise the sentencing issues discussed above. In *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984), the Supreme Court established a two-prong test by which to evaluate claims of ineffective assistance of counsel. To establish a claim of ineffective assistance of counsel, the petitioner must prove: (1) that counsel’s performance fell below an objective standard of reasonableness; and (2) that counsel’s deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome. A court considering a claim of ineffective assistance must “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Id.* at 689. The defendant bears the burden of

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<sup>5</sup>Petitioner’s arguments in the Michigan Court of Appeals were based on the premise that he had been sentenced before *Lockridge* and, thus, required that his sentence be evaluated as if the guidelines had been mandatory. That premise is inaccurate. Petitioner was sentenced on September 28, 2015 (Judgments of Sentence, ECF No. 1-1, PageID.17-20). *Lockridge* was decided July 29, 2015. *Lockridge*, 870 N.W.2d at 502. The Michigan Supreme Court indicated its decision would certainly apply to all cases thereafter. *Id.*, at 521 (“Because sentencing courts will hereafter not be *bound* by the applicable sentencing guidelines range, this remedy cures the Sixth Amendment flaw in our guidelines scheme by removing the unconstitutional constraint on the court’s discretion.”)

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

As set forth fully above, all of Petitioner’s sentencing arguments are meritless. Counsel’s failure to raise a meritless issue does not constitute ineffective assistance of counsel. *See Smith v. Bradshaw*, 591 F.3d 517, 523 (6th Cir. 2010); *O’Hara v. Brigano*, 499 F.3d 492, 506 (6th Cir. 2007); *Chegwidden v. Kapture*, 92 F. App’x 309, 311 (6th Cir. 2004); *Harris v. United States*, 204 F.3d 681, 683 (6th Cir. 2000). “Omitting meritless arguments is neither professionally unreasonable nor prejudicial.” *Coley v. Bagley*, 706 F.3d 741, 752 (6th Cir. 2013). Accordingly, the Michigan Court of Appeals decision rejecting Petitioner’s ineffective assistance of counsel claims is neither contrary to, nor an unreasonable application of, *Strickland*.

### **Conclusion**

In light of the foregoing, the Court will summarily dismiss Petitioner’s application pursuant to Rule 4 because it fails to raise a meritorious federal claim.

### Certificate of Appealability

Under 28 U.S.C. § 2253(c)(2), the Court must determine whether a certificate of appealability should be granted. A certificate should issue if Petitioner has demonstrated a “substantial showing of a denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). This Court’s dismissal of Petitioner’s action under Rule 4 of the Rules Governing § 2254 Cases is a determination that the habeas action, on its face, lacks sufficient merit to warrant service. It would be highly unlikely for this Court to grant a certificate, thus indicating to the Sixth Circuit Court of Appeals that an issue merits review, when the Court has already determined that the action is so lacking in merit that service is not warranted. *See Love v. Butler*, 952 F.2d 10 (1st Cir. 1991) (it is “somewhat anomalous” for the court to summarily dismiss under Rule 4 and grant a certificate); *Hendricks v. Vasquez*, 908 F.2d 490 (9th Cir. 1990) (requiring reversal where court summarily dismissed under Rule 4 but granted certificate); *Dory v. Comm’r of Corr. of New York*, 865 F.2d 44, 46 (2d Cir. 1989) (it was “intrinsically contradictory” to grant a certificate when habeas action does not warrant service under Rule 4); *Williams v. Kullman*, 722 F.2d 1048, 1050 n.1 (2d Cir. 1983) (issuing certificate would be inconsistent with a summary dismissal).

The Sixth Circuit Court of Appeals has disapproved issuance of blanket denials of a certificate of appealability. *Murphy v. Ohio*, 263 F.3d 466 (6th Cir. 2001). Rather, the district court must “engage in a reasoned assessment of each claim” to determine whether a certificate is warranted. *Id.* at 467. Each issue must be considered under the standards set forth by the Supreme Court in *Slack v. McDaniel*, 529 U.S. 473 (2000). *Murphy*, 263 F.3d at 467. Consequently, this Court has examined each of Petitioner’s claims under the *Slack* standard. Under *Slack*, 529 U.S. at 484, to warrant a grant of the certificate, “[t]he petitioner must demonstrate that reasonable jurists



would find the district court’s assessment of the constitutional claims debatable or wrong.” *Id.* “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 Petitioner’s claims. *Id.*

The Court finds that reasonable jurists could not conclude that this Court’s dismissal of Petitioner’s claims was debatable or wrong. Therefore, the Court will deny Petitioner a certificate of appealability.

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

Dated: June 28, 2017

/s/ Janet T. Neff  
Janet T. Neff  
United States District Judge