

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LOWELL W. AMOS,

Petitioner,

v.

Case Number 00-10107
Honorable David M. Lawson

PAUL RENICO,

Respondent.

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

The petitioner, Lowell E. Amos, presently confined at the Muskegon Correctional Facility in Muskegon, Michigan, has filed a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petitioner was convicted of first-degree murder following a jury trial in the Recorder's Court for the City of Detroit in 1996. He was sentenced to life imprisonment without the possibility of parole. The petitioner alleges that his incarceration violates federal law because the prosecutor engaged in misconduct; irrelevant and prejudicial evidence was admitted; trial and appellate counsel were ineffective; and insufficient evidence was presented to support his conviction. The respondent filed a response to the petition asserting that the claims lack merit. The Court finds that several of the petitioner's claims lack merit, and the remaining claims are procedurally defaulted. Therefore, the petition will be denied.

I.

The petitioner's was charged with first-degree murder for the overdose death of his third wife, Roberta Mowry Amos, at the Atheneum Suite Hotel in Detroit, Michigan on December 10, 1994. The Michigan Court of Appeals described the relevant facts as follows:

The night before [the murder], defendant and the victim had attended a Christmas party hosted by defendant's company, Preferred Personnel. Defendant and the victim socialized with defendant's business colleagues and their guests until the early morning hours and eventually retired to their hotel room at 4:00 or 4:30 a.m. Some four hours later, defendant phoned his business partner, Bert Crabtree, who had likewise rented a room at the hotel, to request that Crabtree come to his room. Crabtree and Daniel Porcasi, a Preferred Personnel employee whom Crabtree had requested accompany him, arrived at defendant's room at 9:30 a.m. On entering the room, defendant told Crabtree and Porcasi that he and the victim had been using cocaine and the victim had died. Defendant requested that Porcasi remove three items from the room – a syringe, a sport jacket, and a washcloth. Porcasi complied with the request. Porcasi, Crabtree, and Crabtree's girlfriend then hastily packed their belongings and left the hotel.

Defendant called the hotel front desk after Crabtree and Porcasi departed and, at approximately 10:00 a.m., a hotel security officer visited defendant's room. The security officer subsequently notified the police of the victim's death. Defendant told the police that he and the victim had used cocaine during the previous night, claiming that he snorted the drug, while the victim inserted it in her anus and vagina. Defendant maintained that he awoke to discover the victim dead. He admitted that he disposed of the contraband before calling security.

Defendant returned to the hotel during the afternoon on the day of the victim's death to retrieve property stored in the hotel safe. Security Officer Stanley Cann testified that after he handed the defendant the victim's jewelry, defendant stated, while holding a female's Rolex watch, that "this is the bulk of the money." That evening, defendant drove to Crabtree's house. He and Crabtree then drove to Porcasi's home, where defendant retrieved the washcloth, syringe, and sport jacket.

Dr. Sawait Kanluen, the Wayne County Chief Medical Examiner, observed no signs that the victim suffered internal or external injuries, except for an abrasion on the victim's forehead and two small bruises on her body. Blood testing, however, demonstrated that the victim's blood cocaine level was 3.7, about fourteen or fifteen times the average level in deaths cause by overdose. Dr. Kanluen opined that the victim died of acute cocaine poisoning "very soon" after the cocaine was introduced and, as of 11:00 a.m. she had been dead between four and eight hours. He further opined on the basis of the police investigation that someone other than the victim had introduced the cocaine into her body.

Dr. Kanluen observed no needle marks on the victim's body and no evidence of prior drug use. Phyllis Good, a state police forensic chemist, testified that a vaginal swab taken from the victim revealed trace amounts of cocaine, but rectal and oral swabs tested negative for cocaine. The bed sheet removed from the hotel room, however, was covered with cocaine residue, with a higher concentration of cocaine in the

location where the victim's body was found. Good opined that the stain on the sheet was consistent with the introduction of cocaine into the victim's body in liquid form and a subsequent attempt to remove the substance from the body. She further opined that a syringe without a needle could be used to inject a strong concentration of cocaine solution into someone's throat, vagina, or anus. Another expert, Amy Michaud, testified that a pillow case from defendant's hotel room had blood, cosmetics, and lip impressions on it. She discovered both potassium and chlorine (in the form of chloride) on the pillow case but declined to opine that the chemicals were from potassium chloride, a substance commonly used in medicinal solutions, because cocaine could also explain the presence of chloride.

Defendant denied murdering his wife. He maintained that he and the victim used cocaine during the night before her death, with the victim administering the cocaine to herself vaginally. Defendant claimed that he discovered that the victim was dead when he awoke the next morning. He further explained that he cleaned up the room to remove cocaine residue, the syringe, and the sport jacket because he did not want the police to charge him with cocaine possession.

People v. Amos, No. 200898, 1998 WL 1990424, *1-2 (Mich. Ct. App. Aug. 18, 1998)

(unpublished).

At the close of trial, the jury found the petitioner guilty of first-degree premeditated murder and first-degree murder by poisoning. The trial court subsequently sentenced him to life imprisonment without parole on each count.

After sentencing, the petitioner filed an appeal as of right in the Michigan Court of Appeals raising the following claims through counsel and *pro se*:

- I. The prosecution engaged in misconduct by arguing that he was a bad man.
- II. The admission of evidence regarding the death of his second wife, Carolyn Amos, violated evidentiary rules and denied him a fair trial.
- III. The admission of witness Ruth Loftus' testimony concerning the petitioner's statements that he had killed a previous wife and intended to kill his next wife violated evidentiary rules and denied him a fair trial.
- IV. There was insufficient evidence that he caused his wife's cocaine overdose death.

- V. The trial court erred in denying the defense motion for judgment notwithstanding the verdict where the verdict was against the great weight of the evidence and cumulative errors denied him a fair trial.
- VI. His conviction on two counts of murder for one death was contrary to legislative intent and violated double jeopardy.
- VII. The trial court erred in ordering \$13,000 in restitution for burial expenses.
- VIII. The prosecution engaged in misconduct by using false statements, improper questions, comments, personal opinions, gender prejudice, and witness intimidation.
- IX. The trial court erred in qualifying a forensic chemist as an expert witness in the use and distribution of cocaine and related crime scene evaluation, resulting in speculative and prejudicial testimony which violated evidentiary rules and denied him due process.
- X. The admission of witness Norbert Crabtree's testimony that he saw the petitioner in a bar with women two days after his wife's death violated evidentiary rules and denied him a fair trial.

The Michigan Court of Appeals affirmed in part and reversed in part the petitioner's convictions and sentence. The court of appeals held that the petitioner's convictions and sentence for two counts of first-degree murder violated Michigan's double jeopardy clause and ordered that the judgment of sentence be amended to indicate one conviction for murder under two theories. The court further ordered that a hearing be conducted concerning the restitution order. The court denied the petitioner's other claims for relief. *People v. Amos*, No. 200898, 1998 WL 1990424 (Mich. Ct. App. Aug. 18, 1998) (unpublished).

The petitioner subsequently filed an application for leave to appeal in the Michigan Supreme Court raising the same claims, excluding those upon which relief was granted, as well as the following new claims:

- I. The Court of Appeals' decision was clearly erroneous and the court failed to review preserved issues, misinterpreted facts, and misapplied or misinterpreted case law.
- II. He was denied the effective assistance of appellate counsel because counsel failed to properly present and preserve meritorious issues for full review by the Court of Appeals.
- III. He was denied his right to the effective assistance of trial counsel because counsel failed to investigate and call witnesses, failed to seek suppression of his custodial statements, failed to seek reconsideration of an interlocutory appeal concerning the admission of Ruth Loftus' testimony, and failed to object and preserve prosecution trial errors.

The Michigan Supreme Court denied leave to appeal. *People v. Amos*, 459 Mich. 980, 593 N.W.2d 550 (1999). While this application for leave to appeal was pending, the trial court vacated its restitution order.

The petitioner filed his initial petition for writ of habeas corpus on April 7, 2000 raising the same claims presented to the Michigan Supreme Court, as well as a claim of newly-discovered evidence concerning cocaine-induced deaths and additional instances of alleged prosecutorial misconduct. The respondent filed an answer to the petition, asserting that it should be dismissed for failure to exhaust state court remedies. This Court ultimately issued an order holding the case in abeyance pending the petitioner's full exhaustion of his claims in the state courts and closing the case for administrative purposes.

The petitioner subsequently filed a motion for relief from judgment in the state trial court raising the following claims: (1) ineffective assistance of counsel; (2) a jurisdictional defect, claiming that the Michigan Supreme Court improperly issued an order permitting a witness to give prejudicial testimony; and (3) prosecutorial misconduct. The trial court denied the motion in a written opinion. *People v. Amos*, No. 96-1975 (Wayne County Cir. Ct. Aug. 1, 2002). The

petitioner filed an application for leave to appeal this decision in the Michigan Court of Appeals, which was denied “for failure to meet the burden of establishing entitlement to relief under MCR 6.508(D).” *People v. Amos*, No. 243384 (Mich. Ct. App. Apr. 1, 2003). The petitioner also filed an application for leave to appeal in the Michigan Supreme Court, which was denied on the same ground. *People v. Amos*, 468 Mich. 917, 662 N.W.2d 750 (table) (2003).

The petitioner thereafter moved to re-open his federal habeas proceedings and submitted an amended habeas petition on June 6, 2003 raising the following claims:

- I. The prosecution team deliberately committed a compendium of forensic misconduct that denied Mr. Amos’ rights to due process and a fair trial and as a result caused a miscarriage of justice.
- II. Michigan’s Supreme Court reversed the trial court in a [sic] *ex parte* and null order entered without jurisdiction that admitted Ruth Loftus’ testimony even though it was irrelevant and more prejudicial than probative, and in so ruling denied Ed Amos notice, due process, a fair hearing, the effective assistance of (appellate) counsel and a fair trial.
- III. Ed Amos was denied due process and a fair trial, where he was being tried for poisoning his wife Roberta with a cocaine overdose and the trial court erred in admitting over objections the untrue, unproven and insurmountably prejudicial allegation petitioner killed his previous wife Carolyn, particularly as the court’s objected to limiting instruction eliminated/reduced the burden of proof for an element of the charged offense of killing Roberta.
- IV. Ed Amos was denied his Sixth Amendment right to the effective assistance of trial counsel by counsel’s failure to investigate and obtain key evidence, interview and call critical witnesses, file a motion to suppress petitioner’s statement and object to trial errors.
- V. Petitioner Ed Amos was denied the effective assistance of (appellate) counsel in violation of the United States Constitution’s Sixth Amendment.
- VI. Although there was evidence Roberta Amos, petitioner’s wife, died from a cocaine overdose, there was insufficient evidence that Ed Amos caused her death and even if there had been any such evidence there was insufficient evidence *aliunde* his statements that he caused her death.

On June 13, 2003, this Court granted the petitioner's request and re-opened the case. The respondent has filed an answer to the petition asserting that the claims are procedurally defaulted and otherwise lack merit.

II.

Although the crime in this case occurred in 1994, the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996), govern this case because the petitioner filed his habeas petition after the AEDPA's effective date. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997). That Act "circumscribe[d]" the standard of review federal courts must apply when considering applications for a writ of habeas. *See Wiggins v. Smith*, 539 U.S. 510, 520 (2003).

As amended, 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 proceeding.

28 U.S.C. § 2254(d). Therefore, federal courts are bound by a state court's adjudication of a petitioner's claims unless the state court's decision was contrary to or involved an unreasonable application of clearly established federal law. *Franklin v. Francis*, 144 F.3d 429, 433 (6th Cir. 1998). Mere error by the state court will not justify issuance of the writ; rather, the state court's application of federal law "must have been objectively unreasonable." *Wiggins*, 539 U.S. at 520-21

(internal quotes omitted) (quoting *Williams v. Taylor*, 529 U.S. 362, 409 (2000)). Additionally, this Court must presume the correctness of state court factual determinations. 28 U.S.C. § 2254(e)(1) (providing that in habeas corpus proceedings by state prisoners, “a determination of a factual issue made by a State court shall be presumed to be correct”); *see also Austin v. Jackson*, 213 F.3d 298, 300 (6th Cir. 2000) (stating that “[a]ll factual findings by the state court are accepted by this Court unless they are clearly erroneous”).

The United States Supreme Court has explained the proper application of the “contrary to” clause as follows:

A state-court decision will certainly be contrary to [the Supreme Court’s] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. . . .

A state-court decision will also be contrary to this Court’s clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [the Court’s] precedent.

Williams, 529 U.S. at 405-06.

The Supreme Court has held that a federal court should analyze a claim for habeas corpus relief under the “unreasonable application” clause of § 2254(d)(1) “when a state-court decision unreasonably applies the law of this Court to the facts of a prisoner’s case.” *Id.* at 409. The Court defined “unreasonable application” as follows:

[A] federal habeas court making the “unreasonable application” inquiry should ask whether the state court’s application of clearly established federal law was objectively unreasonable. . . .

[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law. . . . Under § 2254(d)(1)’s “unreasonable application” clause, then, 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 409, 410-11. *See also King v. Bobby*, 433 F.3d 483, 489 (6th Cir. 2006); *Harbison v. Bell*, 408 F.3d 823, 828-29 (6th Cir. 2005); *McAdoo v. Elo*, 365 F.3d 487, 493 (6th Cir. 2004); *Rockwell v. Yukins*, 341 F.3d 507, 512 (6th Cir. 2003) (en banc).

A.

The petitioner first claims that he is entitled to habeas relief because prosecuting authorities engaged in misconduct that denied him a fair trial when the prosecution (1) improperly withheld evidence and presented false scientific testimony; (2) alluded to cases involving his mother and first wife; (3) made a false argument to secure the admission of testimony; (4) misrepresented evidence and argued facts not in evidence; and (5) emphasized irrelevant testimony and made improper remarks. The respondent argues that the petitioner's claims of prosecutorial misconduct are procedurally defaulted because the petitioner failed to object when they occurred at trial.

1.

The petitioner alleges that the prosecution withheld evidence and presented false testimony regarding lethal cocaine dosages through Wayne County Chief Medical Examiner Dr. Sawait Kanluen to establish the *corpus delicti* of murder. In support of this claim, the petitioner relies upon testimony from a different medical examiner in *People v. Budzyn*, 456 Mich. 77, 86, 566 N.W.2d 229 (1997), various studies reported in scientific publications, and an assertion that Dr. Kanluen destroyed Roberta Amos' original death certificate, which indicated that her death was accidental. The petitioner first raised this issue as a distinct claim in his motion for relief from judgment. The Michigan appellate courts denied leave to appeal for failure "to meet the burden of establishing entitlement to relief under MCR 6.508(D)."

The respondent argues that the petitioner's claims are procedurally defaulted because the petitioner did not raise his claims on direct review and the trial court denied relief on that basis. 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). 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 v. Zent*, 17 F.3d 155, 162 (6th Cir.1994); see *Murray v. Carrier*, 477 U.S. 478, 496 (1986). Actual innocence, which would permit collateral review of a procedurally defaulted claim, means factual innocence, not mere legal insufficiency. *Bousley v. United States*, 523 U.S. 614, 623 (1998).

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. *Williams v. Coyle*, 260 F.3d 684, 693 (6th Cir. 2001); see also *Warner v. United States*, 975 F.2d 1207, 1213-14 (6th Cir. 1992). 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. Finally, the procedural default must rest on an "adequate and independent" state ground. *Howard v. Bouchard*, 405 F.3d 459, 477 (6th Cir. 2005). Whether the independent state ground is adequate to support the judgment is itself a federal question. *Lee v. Kemna*, 534 U.S. 362, 375 (2002).

In this case, a state procedural rule was in place during the relevant time, namely that a Michigan court will not grant relief upon a motion for relief from judgment if the grounds for relief in the motion could have been raised on appeal from the conviction or in a prior motion. *See Mich. Ct. R. 6.508(D)*. The Sixth Circuit Court of Appeals has held that Rule 6.508(D) is an independent and adequate ground for procedural default. *Howard*, 405 F.3d at 477; *Simpson v. Jones*, 238 F.3d 399, 407 (6th Cir. 2000). It also appears that the Michigan courts actually enforced the procedural rule in this case. The Michigan Supreme Court held that the petitioner's claims were barred from review pursuant to Michigan Court Rule 6.508(D). The supreme court's reliance on Rule 6.508(D) was a sufficient explanation for this Court to conclude that the order was based on a procedural bar. *Burroughs v. Makowski*, 282 F.3d 410, 414 (6th Cir. 2002), *modified on other grounds*, 35 Fed. Appx. 402 (6th Cir. 2002). The state court's decision, although brief, was based upon an independent and adequate state procedural rule. *See Simpson v. Jones*, 238 F.3d 399, 407 (6th Cir. 2000). The record indicates that the petitioner failed to raise this specific issue on direct appeal of his conviction despite the opportunity to do so.

Because it appears that the petitioner has procedurally defaulted these prosecutorial misconduct claims, the remaining question is whether the petitioner has demonstrated "cause" for the failure to adhere to the procedure in place, and "prejudice" that flows the application of the rule. *See Broom v. Mitchell*, 441 F.3d 392, 401 (6th Cir. 2006). Ineffective assistance of counsel may serve as "cause" for a procedural default if it rises to the level of a constitutional violation. *Martin v. Mitchell*, 280 F.3d 594, 605 (6th Cir. 2002). In fact, a "claim of ineffective assistance of counsel . . . can serve as both cause and prejudice, excusing a procedural default in an underlying substantive claim." *Franklin v. Anderson*, 434 F.3d 412, 418 (6th Cir. 2006).

The petitioner alleges in his fifth ground for relief that his appellate attorney was ineffective by failing to present the claims on direct review. The two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), governs claims of ineffective assistance of counsel. *Towns v. Smith*, 395 F.3d 251, 258 (6th Cir. 2005). To show a violation of the Sixth Amendment right to effective assistance of counsel, a petitioner must establish that his attorney's performance was deficient and that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. An attorney's performance is deficient if counsel's representation falls below an "objective standard of reasonableness." *Id.* at 688. The defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689.

An attorney's deficient performance is prejudicial if "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. The defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Unless the petitioner demonstrates both deficient performance and prejudice, "it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687.

Appellate counsel need not raise every nonfrivolous argument on direct appeal, but he or she must exercise reasonable professional judgment. *Joshua v. DeWitt*, 341 F.3d 430, 441 (6th Cir. 2003) (citing *Jones v. Barnes*, 463 U.S. 745, 751-53 (1983)). When omitted issues are clearly stronger than those presented, the presumption of effective assistance of appellate counsel is overcome. *Ibid.* A petitioner is prejudiced by appellate counsel's deficient performance if a

reasonable probability exists that, but for counsel's deficient performance, he would have prevailed on appeal. However, strategic and tactical choices regarding which issues to pursue on appeal are "properly left to the sound professional judgment of counsel." *United States v. Perry*, 908 F.2d 56, 59 (6th Cir. 1990).

The petitioner has failed to show that by omitting the claims presented in his subsequent motion for relief from judgment, appellate counsel's performance fell outside the wide range of professionally competent assistance. Appellate counsel presented multiple claims on direct appeal, including several other claims of prosecutorial misconduct, several claims challenging the admission of certain pieces of evidence, claims concerning the sufficiency and weight of the evidence, a claim that the prosecution failed to establish the *corpus delicti* of murder, as well as successful claims regarding double jeopardy and restitution. The petitioner has not shown that appellate counsel's strategy in presenting those claims and choosing not to raise other claims was deficient or unreasonable. He has thus failed to establish that he was denied the effective assistance of appellate counsel.

Nor has the petitioner established that a fundamental miscarriage of justice has occurred. The miscarriage of justice exception requires a showing that a constitutional violation probably resulted in the conviction of one who is actually innocent. *Schlup v. Delo*, 513 U.S. 298, 326-27 (1995). “[A]ctual innocence’ means factual innocence, not mere legal insufficiency.” *Bousley v. United States*, 523 U.S. 614, 624 (1998). “To be credible, [a claim of actual innocence] requires petitioner to support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that

was not presented at trial.” *Schlup*, 513 U.S. at 324. The petitioner has made no such showing.

This claim therefore is barred by procedural default and does not warrant habeas relief.

2.

The petitioner next claims that the prosecution engaged in misconduct by referring to cases involving his mother and first wife during trial when such matters had been deemed inadmissible by the trial court judge. Apparently these relatives of the petitioner also died under suspicious circumstances. The respondent contends that this claim lacks merit. The following exchange occurred during defense counsel’s cross-examination of Detective Patrick Henahan:

Q: At the time you arrested – arrested Mr. Amos for the murder of Mrs. Amos, you were armed with the same evidence as been presented here to this jury, isn’t that right?

A: As well as additional information regarding his mother and his first wife.

Trial Tr. 9, Oct. 2, 1996. Shortly thereafter, the prosecutor began re-direct examination by asking Detective Henahan:

Q: Tell the jury what you did during your investigation that took up that time and alleged money that [defense counsel] says we spent. Go into every single person you spoke to and every case you investigated.

Id. at 14. Defense counsel objected to this question. The objection was sustained, and Henahan did not respond to the question. The trial court subsequently declared a mistrial. On interlocutory appeal, the Michigan Court of Appeals reversed in a one-page opinion that does not cite any law and ordered the trial court to strike the prosecutor’s question and continue the trial. *See People v. Amos*, No. 198070 (Mich. Ct. App. Oct. 7, 1996). The trial court did as instructed, and the trial resumed. On direct appeal, the Michigan Court of Appeals declined to review the prior panel’s decision reversing the grant of the mistrial based upon the law of the case doctrine. *See Amos*, 1998 WL 1990424 at *4.

The Supreme Court has stated that prosecutors must “refrain from improper methods calculated to produce a wrongful conviction.” *Berger v. United States*, 295 U.S. 78, 88 (1935). However, prosecutorial misconduct will form the basis for a new trial and habeas relief only if the relevant misstatements were so egregious so as to render the entire trial fundamentally unfair based on the totality of the circumstances. *Donnelly v. DeChristoforo*, 416 U.S. 637, 639, 643 (1974); *Caldwell v. Russell*, 181 F.3d 731, 736 (6th Cir. 1999) (stating that “[p]rosecutorial misconduct may warrant habeas relief only if the relevant misstatements were so egregious as to render the entire trial fundamentally unfair to a degree tantamount to a due process deprivation”). The determination whether the trial was fundamentally unfair is “made by evaluating the totality of the circumstances surrounding each individual case.” *Angel v. Overberg*, 682 F.2d 605, 608 (6th Cir. 1982). The Court must focus on “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 Dep’t of Corr.*, 4 F.3d 1348, 1355 (6th Cir. 1993)).

The first question to consider on review of an allegation of prosecutorial misconduct is whether the prosecutor’s statements were improper. *Macias v. Makowski*, 291 F.3d 447, 452 (6th Cir. 2002). If the remarks were improper, the Court then considers whether the impropriety was so flagrant as to violate the defendant’s right to due process. *Ibid.* The four factors for determining flagrancy are:

- (1) whether the remarks tended to mislead the jury or to prejudice the accused; (2) whether they were isolated or extensive; (3) whether they were deliberately or accidentally placed before the jury; and (4) the strength of the evidence against the accused.

United States v. Carroll, 26 F.3d 1380, 1385 (6th Cir. 1994).

In reversing the mistrial grant, the Michigan Court of Appeals did not clearly address this prosecutorial misconduct issue as a matter of federal law. When the record does not contain the state court's reasoning for its decision, a federal habeas court is to focus on the result of the state court proceedings and "conduct an independent review of the record and applicable law to determine whether the state court decision is contrary to federal law, unreasonably applies clearly established law, or is based on an unreasonable determination of the facts in light of the evidence presented." *Harris v. Stovall*, 212 F.3d 940, 943 (6th Cir. 2000). The review, however, is not to be a "full *de novo* review" of the claims, but rather is to remain deferential in light of the AEDPA's standards.

Ibid.

Considering the factors set forth in *Macias*, this Court concludes that the Michigan Court of Appeals' decision that the prosecutor's error was not sufficiently prejudicial so as to warrant the grant of a mistrial is consistent with Supreme Court precedent and constitutes a reasonable application thereof. Although the detective's reference to the petitioner's mother and first wife and the prosecutor's subsequent question were clearly improper, they were not so flagrant as to result in a violation of due process. The references did not tend to mislead the jury as neither the detective nor the prosecutor stated they were dead or had been murdered. Further, the prejudice to the petitioner was alleviated by the trial court's corrective action in striking the prosecutor's question and instructing the jury to disregard the remarks. Additionally, the detective's reference to the mother and first wife, although deliberate, was isolated, as was the prosecutor's subsequent question. Lastly, as discussed *infra*, there was significant evidence establishing the petitioner's guilt, including the nature of his wife's death, his conduct in concealing evidence, and his own statements before and after the incident. The Court concludes therefore that the petitioner has failed to establish

that the prosecution's misconduct in this instance rendered his trial fundamentally unfair. Habeas relief is not warranted on this claim.

3.

The petitioner also argues that the prosecutor made false arguments to the trial court about Ruth Loftus's testimony in order to obtain a favorable evidentiary ruling. This conduct, the petitioner claims, denied him due process. Ms. Loftus testified that in Indianapolis, Indiana in August 1991, the petitioner told her that he killed his second wife:

A. I saw him again in August of '91.
...

Q. When you saw him in August of 1991, did he have anything interesting to tell you then?

A. Yeah. He told me that he killed her.
...

Q. And did you see him again after that—

A. Yeah. The end of August of '91, I saw him one more time, and that was my last encounter with Mr. Amos.

Trial Tr. 27-28, 30, Oct. 14, 1996. To impeach Ms. Loftus, the petitioner called Carol Simpson, the petitioner's secretary, to testify that the petitioner was not in Indianapolis in August of 1991. The petitioner introduced business records supporting this testimony. On cross-examination, the prosecutor sought admission of business records from September 1991 showing that the petitioner was in Indianapolis at that time. The petitioner's attorney objected, arguing that the evidence was irrelevant because Ms. Loftus clearly testified that the events occurred in August. The prosecutor told the trial court as follows:

My notes indicate that she said the first time she [saw] him again in '91 was August, and the second time she saw him was either August or early September. And the Rule of Completeness says that I can finish out what is done by another party, and that's what the testimony reflected.

Trial Tr. 42, Oct. 16 1996. The trial court overruled the petitioner's objection and allowed the introduction of business records from September 1991, which showed that the petitioner was in Indianapolis around September 5, 1991.

The Michigan Court of Appeals did not specifically address this issue. Therefore, the Court will review the issue under a relaxed standard. *See Harris*, 212 F.3d at 943. Considering the *Macias* factors, this Court concludes that this claim lacks merit. The fact that the prosecutor may have been mistaken as to the exact dates of Loftus' meetings with the petitioner does not constitute misconduct. The petitioner has not shown any intent by the prosecutor to deliberately mislead the court except, perhaps, by her reference to the "rule of completeness," which does not apply under the circumstances. See Mich. R. Evid. 106 (dealing with excerpts from "writings or recorded statements"). The petitioner also has failed to establish that the admission of the September records was unfairly prejudicial. The prosecution could argue reasonably that Ruth Loftus' recollection of the dates was not exact, and defense counsel was free to argue to the jury that the September documents were irrelevant given Loftus' testimony that she met with the petitioner in August of 1991. Further, Loftus' credibility was subject to significant challenge by defense counsel. Habeas relief is not warranted on this claim.

4.

The petitioner next claims that the prosecution engaged in misconduct by misrepresenting evidence and arguing facts not in evidence. The petitioner first claims that the prosecutor improperly argued to the jury that he had murdered his second wife, Carolyn Amos, by smothering her because the cause of her death was undetermined. The respondent contends that this claim lacks merit.

Although prosecutors may not “assum[e] prejudicial facts not in evidence,” *Berger v. United States*, 295 U.S. 78, 84 (1935), they are entitled to make reasonable inferences from the evidence. *Byrd v. Collins*, 209 F.3d 486, 535 (6th Cir. 2000) (quoting *United States v. Collins*, 78 F.3d 1021, 1040 (6th Cir. 1996)). The comment that Carolyn Amos died after being smothered was a reasonable inference from pathologist’s testimony. The pathologist found “intense pulmonary congestion, slight pulmonary edema, and frothing at the mouth” which suggested “terminal blockage of the respiratory system” although the signs of asphyxia were minimal and inconclusive. *See Amos*, 1998 WL 1990424 at *3. The Court therefore finds that the prosecutor’s comment was proper.

The Michigan Court of Appeals concluded that the prosecutor’s remarks were proper based on the evidence and the reasonable inferences drawn therefrom. This conclusion was not contrary to or an unreasonable application of clearly established federal law. The petitioner is not entitled to relief on this claim.

The petitioner also raises four other instances in which he believes that the prosecutor misstated the evidence or argued facts not in evidence. They concern comments about an April 1, 1989 bank loan, the state of Carolyn Amos’ body when found, Roberta Amos’ sinus condition, and Roberta Amos’ underwear on the night of her death. The petitioner first raised these issues in his motion for relief from judgment in his arguments challenging the effectiveness of trial counsel. The state courts denied relief based upon the petitioner’s failure to establish entitlement to relief under Michigan Court Rule 6.508(D). As discussed earlier, federal habeas relief may be precluded on claims that a petitioner has not presented to the state courts in accordance with the state’s procedural rules. *See Wainwright*, 433 U.S. at 85-87; *Coleman*, 244 F.3d at 539. Although the Michigan Supreme Court did not fully explain its decision, the record indicates that the petitioner failed to

raise these matters on direct appeal of his conviction despite the opportunity to do so. A state prisoner who fails to comply with a state's procedural rules waives the right to federal habeas review absent a showing of cause for noncompliance and actual prejudice resulting from the alleged constitutional violation, or a showing of a fundamental miscarriage of justice. *See Coleman*, 501 U.S. at 753; *Gravley*, 87 F.3d at 784-85.

The petitioner again alleges ineffective assistance of appellate counsel as cause to excuse his procedural default. As discussed previously, however, he has not shown that appellate counsel was ineffective under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *See also Jones*, 463 U.S. at 754. The petitioner has failed to show that by omitting the claims presented in his subsequent motion for relief from judgment, appellate counsel's performance fell outside the wide range of professionally competent assistance. The petitioner has not shown that appellate counsel's strategy in presenting several claims of prosecutorial misconduct and not raising these additional claims was deficient or unreasonable. Therefore, the petitioner has failed to establish that he was denied the effective assistance of appellate counsel, and correspondingly he has not shown cause for the procedural default.

Further, even assuming that the petitioner could establish cause to excuse his default, he cannot establish prejudice as his claims lack merit. A prosecutor may argue reasonable inferences from the evidence. *See, e.g., Byrd v. Collins*, 209 F.3d 486, 535 (6th Cir. 2000). The prosecutor's disputed comments were based upon reasonable inferences from the evidence and were not improper. Further, considered in the context of the entire trial, such comments, even if unwarranted, did not render the petitioner's trial fundamentally unfair. The petitioner cannot demonstrate that he was prejudiced by appellate counsel's failure to raise these matters on direct appeal. The petitioner

has not established that a fundamental miscarriage of justice has occurred in this case. *See Schlup*, 513 U.S. at 326-27; *see also Bousley*, 523 U.S. at 624. These claims of prosecutorial misconduct are barred by procedural default, otherwise lack merit, and do not warrant federal habeas relief.

Next, the petitioner claims that the prosecution engaged in misconduct by introducing irrelevant evidence and making improper remarks consisting of introducing: (1) Mary Zellinger's and Martha Ross' testimony regarding sexual relationships and extramarital affairs with the petitioner; (2) Patsy Scott's impeachment testimony that the petitioner's secretary, Carol Simpson, told her that she was surprised that Roberta Amos would marry the petitioner because he had killed Carolyn Amos; and (3) evidence of the petitioner's false representations about his military record.

The Michigan Court of Appeals found these claims of prosecutorial misconduct to be without merit because the trial court admitted the evidence and the prosecutor limited her argument regarding the impeachment evidence to witness credibility. *See Amos*, 1998 WL 1990424 at *2. This Court finds that the Court of Appeals' decision is consistent with Supreme Court precedent and constitutes a reasonable application thereof. The prosecutor did not commit misconduct by seeking the admission of testimony deemed relevant by the state courts. Further, the prosecutor did not err in seeking admission of the impeachment evidence and relying upon that evidence to challenge the credibility of witnesses. Habeas relief is not warranted on these claims.

5.

The petitioner also asserts that the prosecutor improperly expressed personal beliefs, argued that the petitioner had problems with women, and denigrated the defense by asking various questions and making side comments during trial. The Michigan Court of Appeals addressed these claims briefly, noting that some were defaulted for failure to object at trial and finding the claims to be

without merit because the trial court instructed the jury that the attorneys' questions and comments were not evidence and the petitioner could not be convicted based upon his infidelities. *See Amos*, 1998 WL 1990424 at *3-4.

A prosecutor generally may not convey his personal opinion regarding the defendant's guilt or the credibility of witnesses, but he may argue that the jury should reach a particular conclusion based on certain evidence. *Caldwell v. Russell*, 181 F.3d 731, 737 (6th Cir. 1999). The Sixth Circuit Court of Appeals has explained:

Courts frown upon such statements [expressing personal belief in the defendant's guilt] for two reasons: "such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *United States v. Young*, 470 U.S. 1, 18, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985); *see also Caldwell*, 181 F.3d at 737 (stating that personal appeals exceed "the legitimate advocate's role by improperly inviting the jurors to convict the defendants on a basis other than a neutral independent assessment of the record proof").

Gall v. Parker, 231 F.3d 265, 312 (6th Cir. 2000). It is unprofessional to personally attack the defense; however, a prosecutor may comment on the reasonable inferences to be drawn from defense counsel's presentation of evidence and argument. When the testimony conflicts, "it may be reasonable to infer, and accordingly to argue, that one of the two sides is lying." *United States v. Collins*, 78 F.3d 1021, 1040 (6th Cir. 1996).

Having reviewed the record, this Court concludes that the Michigan Court of Appeals' decision is consistent with Supreme Court precedent and constitutes a reasonable application thereof. The prosecutor may have overstepped her bounds on a few occasions in making side comments while questioning witnesses including the petitioner, but those comments were not so

pervasive or flagrant as to render the trial fundamentally unfair. Although the prosecutor used strong language to discredit the petitioner's testimony and attack the defense, she did not personally attest to the petitioner's guilt or denigrate the defense. Moreover, the trial court struck from the record inappropriate comments and instructed the jury to disregard the offending remarks. Habeas relief is not warranted on the claims of prosecutorial misconduct.

B.

The petitioner next claims that he is entitled to habeas relief because the Michigan Supreme Court violated his rights by ruling that Ruth Loftus's testimony was admissible. The petitioner challenges the Michigan Supreme Court's decision to allow admission of Ruth Loftus' testimony, as well as that court's "jurisdiction" to decide the interlocutory appeal *ex parte* prior to him having an opportunity to be heard.

On July 26, 1996, the trial court ruled that Ms. Loftus's testimony relating to the death of the petitioner's second wife was inadmissible. The prosecution appealed this decision to the Michigan Court of Appeals, which affirmed the trial court's decision. On September 20, 1996, the prosecution applied for leave to appeal to the Michigan Supreme Court but failed to serve the petitioner with copies of the appeal. The petitioner's trial counsel learned of the appeal on September 23, 1996 and immediately contacted the Michigan Supreme Court. The petitioner's trial counsel was told by the clerk that a decision would not be issued until the petitioner had been given an opportunity to respond. However, the supreme court ruled on September 24, 1996, reversing the trial court's decision, stating:

The proposed testimony of Ruth Loftus regarding defendant's alleged statements that he killed his second wife, Carolyn Amos, and intended to kill his next wife, are admissible. Evidence of an intent to kill the decedent is of the utmost relevance. *See People v. Goddard*, 429 Mich. 505, 523, 418 N.W.2d 881 (1988) (Boyle J.

dissenting). Further, given the trial court's ruling that the circumstances of Carolyn Amos' death and defendant's receipt of the insurance proceeds may be admitted, his statement that he killed her is admissible. Neither admission is unfairly prejudicial, MRE 403.

People v. Amos, 453 Mich. 885, 552 N.W.2d 917 (1996).

The Court will first address the admission of Ruth Loftus' testimony. It is well established that trial court errors in the application of state procedure or evidentiary law, particularly regarding the admissibility of evidence, generally are not cognizable as grounds for federal habeas relief. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Serra v. Mich. Dep't of Corr.*, 4 F.3d 1348, 1354 (6th Cir. 1993). On habeas review, this Court is bound by the state court's interpretation of state law. *Bradshaw v. Richey*, 546 U.S. 74, ___, 126 S.Ct. 602, 604 (2005). Only where admission of the disputed evidence rendered the trial "so fundamentally unfair as to deprive the petitioner of due process" may the writ of habeas corpus be granted. *Broom v. Mitchell*, 441 F.3d 392, 406 (6th Cir. 2006) (quoting *McAdoo v. Elo*, 365 F.3d 487, 494 (6th Cir. 2004)).

This Court finds that the testimony did not render the petitioner's trial fundamentally unfair. Although the Sixth Circuit has suggested that due process is violated whenever the State seeks to introduce evidence that is not rationally connected to the crimes charged, *see Manning v. Rose*, 507 F.2d 889, 894-95 (6th Cir. 1974), this rule has no application here where there was a proper evidentiary purpose for the evidence. In this case, the Michigan Supreme Court determined that Ruth Loftus' testimony regarding the petitioner's statements that he killed his second wife, Carolyn Amos, and would kill his next wife was admissible to establish the petitioner's intent. *See People v. Amos*, 453 Mich. 885, 552 N.W.2d 917 (1996). The Michigan Supreme Court properly decided the issue. The petitioner has not shown that this state court decision is contrary to or an unreasonable application of United States Supreme Court precedent. Therefore, habeas relief is not warranted.

The petitioner also asserts that his constitutional rights were violated because the Michigan Supreme Court lacked “jurisdiction” to issue an *ex parte* order admitting Loftus’ testimony as the petitioner was not given an opportunity to be heard on the matter. The petitioner first raised this issue as a distinct claim in his motion for relief from judgment. The state appellate courts denied relief based upon the petitioner’s failure to establish entitlement to relief under Michigan Court Rule 6.508(D). As discussed above, federal habeas relief may be precluded on claims that a petitioner has not presented to the state courts in accordance with the state’s procedural rules. *See Wainwright*, 433 U.S. at 85-87; *Coleman*, 244 F.3d at 539. The record indicates that the petitioner failed to raise this issue on direct appeal of his conviction despite the opportunity to do so. A state prisoner who fails to comply with a state’s procedural rules waives the right to federal habeas review absent a showing of cause for noncompliance and actual prejudice resulting from the alleged constitutional violation, or a showing of a fundamental miscarriage of justice. *See Coleman*, 501 U.S. at 753; *Gravley*, 87 F.3d at 784-85.

The petitioner does not allege cause to excuse his default. Even assuming that the petitioner could establish cause to excuse his default, he cannot establish prejudice. The Michigan Supreme Court’s practice of deciding cases without allowing a litigant the opportunity to be heard raises serious procedural due process concerns. However, the petitioner could have sought reconsideration of that court’s decision, but apparently elected not to do so. Further, even if Ms. Loftus’ testimony had been deemed inadmissible, there was ample evidence to support the petitioner’s conviction as discussed *infra*. Nor has the petitioner established that a fundamental miscarriage of justice has occurred in this case. *See Schlup*, 513 U.S. at 326-27; *see also Bousley*, 523 U.S. at 624. This claim lacks merit, is barred by procedural default in part, and does not warrant relief.

C.

The petitioner next claims that he is entitled to habeas relief because the trial court erred in admitting the “other acts” evidence beyond the testimony of Ruth Loftus concerning the death of his second wife, Carolyn Amos, which resulted in a violation of due process. The respondent contends that this claim lacks merit.

As noted, alleged trial court errors in the application of state evidentiary law are generally not cognizable as grounds for federal habeas relief. *See Estelle*, 502 U.S. at 67-68; *Serra*, 4 F.3d at 1354. Only when an evidentiary ruling is “so egregious that it results in a denial of fundamental fairness,” may it violate due process and warrant habeas relief. *See, e.g., Bugh*, 329 F.3d at 512. The Supreme Court has not yet held that similar “other acts” evidence is so extremely unfair that its admission violates fundamental conceptions of justice. *See Dowling v. United States*, 493 U.S. 342, 352-53 (1990). Rather, the Supreme Court’s view is that such matters are more appropriately addressed in codes of evidence and civil procedure than under the Due Process Clause. *Id.* at 352.

Although the Sixth Circuit has suggested that procedural due process is violated whenever the State seeks to introduce evidence that is not rationally connected to the crimes charged, *see Manning v. Rose*, 507 F.2d 889, 894-95 (6th Cir. 1974), this rule has no application here where there was a proper evidentiary purpose for the evidence. *Dowling* makes clear that the Michigan courts’ preference for such evidence is beyond the scope of this Court’s purview. *See also Lisenba v. California*, 314 U.S. 219, 227-28 (1941) (“The Fourteenth Amendment leaves California free to adopt a rule of relevance which the court below holds was applied here in accordance with the State’s law.”). Habeas relief is not warranted.

D.

The petitioner next claims that he is entitled to habeas relief because trial counsel was ineffective because he (1) failed to investigate, contact experts, and call witnesses to challenge the forensic evidence; (2) failed to investigate and obtain information that Ruth Loftus was mentally incompetent and had made false reports to law enforcement and the media; (3) failed to pursue a motion to suppress the petitioner's statements to police; and (4) withdrew an objection to Phyllis Good's qualifications and failed to object to the prosecution's improper remarks. The respondent contends that these claims lack merit and are barred by procedural default.

The petitioner first raised this issue in his motion for relief from judgment. The state courts denied relief based upon the petitioner's failure to establish entitlement to relief under Michigan Court Rule 6.508(D). As discussed *supra*, federal habeas relief may be precluded on claims that a petitioner has not presented to the state courts in accordance with the state's procedural rules. *See Wainwright*, 433 U.S. at 85-87; *Coleman*, 244 F.3d at 539. The record indicates that the petitioner failed to raise this issue on direct appeal of his conviction despite the opportunity to do so. A state prisoner who fails to comply with a state's procedural rules waives the right to federal habeas review absent a showing of cause for noncompliance and actual prejudice resulting from the alleged constitutional violation, or a showing of a fundamental miscarriage of justice. *See Coleman*, 501 U.S. at 753; *Gravley*, 87 F.3d at 784-85.

The petitioner asserts ineffective assistance of appellate counsel as cause to excuse his default. As discussed above, however, he has not shown that appellate counsel was ineffective under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Jones*, 463 U.S. at 754. The petitioner has failed to show that by omitting an ineffective assistance of trial counsel claim appellate counsel's performance fell outside the wide range of professionally competent

assistance. The petitioner has not shown that appellate counsel's strategy in presenting numerous other claims on direct appeal and not raising this claim was deficient or unreasonable. Therefore, the petitioner has not established cause for the procedural default.

Even assuming that the petitioner could establish cause to excuse his default, he cannot establish prejudice as this claim lacks merit. To demonstrate that point, the Court will examine each of the petitioner's claimed instances of ineffective counsel under *Strickland*'s two-part test, discussed earlier.

1.

The petitioner first asserts that trial counsel was ineffective for failing to investigate, contact experts, and call witnesses to challenge the forensic evidence in Roberta Amos' and Carolyn Amos' deaths. As to Roberta Amos, the petitioner claims that counsel should have obtained an expert to challenge the findings of Dr. Kanluen as to lethal cocaine dosages and the purported destruction of the original death certificate.

Dr. Kanluen testified that Roberta Amos' blood cocaine level was 3.7 and that a blood cocaine level of .25 was the norm in cocaine overdose death. That quantity of drugs establishes a massive overdose. The petitioner has not suggested how a defense expert might have responded to that evidence. The fact that an expert may have testified that other people have been found with lethal blood cocaine levels greater than .25 would not have significantly challenged Dr. Kanluen's findings as to the cause and manner of death. The petitioner's speculation that some expert somewhere might have something helpful to say does not establish deficient performance by trial counsel. Nor do the petitioner's submissions tend to suggest prejudice. *See Ashker v. Class*, 152 F.3d 863, 876 (8th Cir. 1998) (holding that petitioner "made no showing that the relevant tests by an

expert witness would have exculpated him” and “failed to demonstrate any prejudice to him occasioned by his trial counsel’s decision in that regard”).

Nor has the petitioner supported his allegation concerning destruction of the original death certificate. Defense counsel argued that Dr. Kanluen altered his opinion as to the manner of death based upon the fact that an amended death certificate was filed in the case. The petitioner has not shown what more counsel could have done. The petitioner has failed to establish that trial counsel was deficient for failing to call an expert witness or that he was prejudiced by counsel’s performance as required by *Strickland*.

2.

The petitioner also claims that defense counsel should have produced an expert, such as Dr. Werner Spitz, to testify that Carolyn Amos’ death could have been caused by electrocution. The experts at trial acknowledged that the cause and manner of Carolyn Amos’ death was undetermined. Defense counsel was aware of Dr. Spitz’ report at the time of trial, but chose not to produce him. At most, Dr. Spitz could have testified that electrocution could not be ruled out as a cause of Carolyn Amos’ death. He could not have testified as to an exact cause of death, nor could he have ruled out asphyxiation as a cause, or ruled out non-accidental death by either means. Given these circumstances, the Court cannot conclude that counsel was deficient for choosing not to call such an expert or that the petitioner was prejudiced by counsel’s conduct. Habeas relief is not warranted.

3.

The petitioner next claims that trial counsel was ineffective for failing to investigate and obtain information that Ruth Loftus’ was mentally incompetent and had made false reports in other cases. However, the trial record shows that defense counsel effectively cross-examined Ruth Loftus

and challenged her credibility on numerous fronts, including her recall of events, her work, and her personal history. Defense counsel also called Scott Robinett, a retired county sheriff's deputy from Indiana, to testify that Ms. Loftus had a poor reputation for veracity, including making false reports to law enforcement officials. Further inquiry into such matters would have been cumulative. Defense counsel is not ineffective for electing not to produce cumulative impeachment evidence. *See Malcum v. Burt*, 276 F. Supp. 2d 664, 685 (E.D. Mich. 2003). Moreover, defense counsel attempted to ask Mr. Robinett about Ms. Loftus' confinement in a mental institution, but the trial court disallowed inquiry. The Court cannot conclude that defense counsel's performance was deficient or that the petitioner was prejudiced thereby. Habeas relief is not warranted on this claim.

4.

The petitioner also contends that trial counsel was ineffective for failing to pursue a motion to suppress his statements to police. The petitioner, however, has failed to set forth legitimate grounds upon which his statements should have been suppressed. The petitioner first claims that counsel should have sought to suppress the statement he gave to police in his hotel room that he administered cocaine to his wife vaginally and rectally. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the United States Supreme Court held that statements made during a custodial interrogation of a suspect are inadmissible at trial unless the defendant has voluntarily and knowingly waived certain rights prior to making the statements. The Supreme Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444. The Supreme Court has distinguished "custodial interrogation" from the mere questioning of a suspect in a "coercive environment":

[A] noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a “coercive environment.” Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question.

Oregon v. Mathiason, 429 U.S. 492, 495 (1977). The “relevant inquiry is how a reasonable man in the suspect’s position would have understood his situation.” *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984). This objective standard prevails over the suspect’s subjective beliefs. A determination of whether a person is in custody also does not depend on the subjective, unexpressed intent of the interrogating police officer. *United States v. Salvo*, 133 F.3d 943, 948 (6th Cir. 1998) (citing *Stansbury v. California*, 511 U.S. 318, 322-24 (1994)). The petitioner was not in custody when the police asked him what had happened in his own hotel room. The police had not placed him under arrest, told him that he was in custody, or told him that he had to remain in the room. Although one officer testified at the preliminary examination that he would not have let the petitioner leave without talking to him, the officer did not express this opinion to the petitioner. Given these circumstances, defense counsel could have determined reasonably that moving to suppress the petitioner’s statement would be futile. The petitioner, therefore, has failed to show that counsel was ineffective in this regard by not moving to suppress the verbal statement.

The petitioner also claims that defense counsel should have moved to suppress his written statement, which was given while he was in custody at the police station. He does not contend that he was not informed of his *Miranda* rights, but rather he argues his statement was not voluntary. The Fifth Amendment privilege against compulsory self-incrimination bars the admission of involuntary confessions. See *Colorado v. Connelly*, 479 U.S. 157, 163-64 (1986). A confession is

considered involuntary if (1) the police extorted the confession by means of coercive activity; (2) the coercion in question was sufficient to overbear the will of the accused; and (3) the will of the accused was in fact overborne “because of the coercive police activity in question.” *McCall v. Dutton*, 863 F.2d 454, 459 (6th Cir. 1988). The ultimate question is “whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution.” *Miller v. Fenton*, 474 U.S. 104, 112 (1985). Factors to consider include the presence or absence of police coercion (a “crucial element”), length of interrogation, location of interrogation, continuity of interrogation, the suspect’s maturity and education, the suspect’s physical condition and mental health, and whether the suspect was advised of his or her *Miranda* rights. *Withrow v. Williams*, 507 U.S. 680, 693-94 (1993). Without coercive police activity, however, a confession should not be deemed involuntary. *Connelly*, 479 U.S. at 167 (stating that “coercive police activity is a necessary predicate to the finding that a confession is not ‘voluntary’ within the meaning of the Due Process Clause”).

The petitioner has not demonstrated that the police engaged in coercive or abusive tactics in obtaining his statement. The petitioner was an educated businessman in his early fifties at the time of the questioning. He had been in custody for only a few hours when he made his statement. He was advised of his *Miranda* rights and signed a form waiving his constitutional rights. He gave an oral statement and signed a written one prepared by the investigating officer. He then made corrections to the written statement as he saw fit and signed the statement. Although the petitioner claims that he was suffering from shock and the after-effects of alcohol and cocaine use, he does not explain how this negatively impacted his statement. The investigating officer testified at trial that the petitioner was calm and coherent during questioning. The petitioner’s allegations of

discrepancies in the police testimony do not establish that his statement was involuntary. The petitioner has not shown that defense counsel had a basis for seeking its suppression. Further, because the statement is somewhat exculpatory or, at the very least, not inculpatory, defense counsel may have determined reasonably that its admission was favorable to the defense. The petitioner has not established that counsel was ineffective. Habeas relief is not warranted on this claim.

5.

The petitioner next claims that trial counsel was ineffective for withdrawing an objection to Phyllis Good's qualifications as an expert witness and not objecting to all of the prosecutor's improper remarks. This claim is without merit. First, the petitioner has not set forth any rational basis upon which defense counsel could have objected to Phyllis Good's qualifications as an expert witness. Conclusory allegations are insufficient to support a claim for habeas relief. *See Workman*, 160 F.3d at 287. Further, Ms. Good's credentials are set forth in the record and have not been disputed. At trial, she testified about her knowledge of cocaine usage and the results of her tests on pieces of evidence from the crime scene. The fact that the petitioner disagrees with some of her findings does not mean that she was unqualified to be deemed an expert witness. The petitioner has not shown that counsel's withdrawal of his objection was deficient or that he was prejudiced thereby.

Similarly, the petitioner has not established that counsel was ineffective for failing to object to some of the prosecutor's remarks at trial. The record reveals that defense counsel made numerous objections to the prosecutor's actions throughout the trial. Counsel may have decided not to contest other perceived prosecutorial errors in order to avoid emphasizing their effect on the jury, to appear congenial to the jurors, to appease the judge, or to focus on more important matters. These strategic

choices have not been shown to have been unreasonable. The petitioner has not shown that counsel's performance was deficient. Further, he cannot establish that he was prejudiced by counsel's performance given this Court's determination that the alleged instances of prosecutorial misconduct did not deprive him of a fair trial. The petitioner is not entitled to habeas relief on this claim.

E.

The petitioner also claims that he is entitled to habeas relief because appellate counsel was ineffective for failing to raise some of the aforementioned issues on direct appeal of his conviction. The respondent contends that this claim lacks merit. As discussed above, the petitioner's underlying habeas claims do not warrant habeas relief. Consequently, the petitioner cannot establish that he was prejudiced by appellate counsel's alleged deficient performance as required by *Strickland*. Therefore, he is not entitled to habeas relief on this ineffective assistance claim.

F.

Finally, the petitioner claims that he is entitled to habeas relief because the prosecution presented insufficient evidence of causation to support his first-degree murder conviction. The respondent asserts that this claim is without merit.

In *Jackson v. Virginia*, 443 U.S. 307 (1979), the Supreme Court established the standard for reviewing a sufficiency of the evidence claim: a court must decide whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319; see also *DeLisle v. Rivers*, 161 F.3d 370, 389 (6th Cir. 1998). Because a claim of insufficiency of the evidence presents a mixed question of law and fact, *Huynh v. King*, 95 F.3d 1052, 1059 (11th Cir. 1996); *Maes v.*

Thomas, 46 F.3d 979, 988 (10th Cir. 1995), this Court must determine whether the state court's application of the *Jackson* standard was reasonable. The Court must presume that the state court's factual findings are correct, unless rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Warren*, 161 F.3d at 360-61.

The petitioner was convicted of first-degree murder under two theories: premeditated murder and murder by poisoning. Under Michigan law, first-degree premeditated murder requires proof that the defendant intentionally killed the victim, and the act of killing was premeditated and deliberate. *People v. Schollaert*, 194 Mich. App. 158, 170, 486 N.W.2d 312 (1992). Premeditation and deliberation require sufficient time to allow the defendant to take a second look at his actions. *Ibid.* Premeditation and deliberation may be established by evidence of "(1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide." *Ibid.* Similarly, to support a conviction of first-degree murder by poisoning, the prosecution must prove that the defendant intentionally administered the poison with the intent to kill. See *People v. Austin*, 221 Mich. 635, 644, 192 NW 590 (1923). Poison for purposes of the statute includes narcotics. See *People v. Brown*, 37 Mich. App. 192, 193, 194 N.W.2d 560 (1971). Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of the crime. See *People v. Jolly*, 442 Mich. 458, 466, 502 N.W.2d 177 (1993).

The Michigan Court of Appeals applied the *Jackson* standard in this case and concluded that sufficient evidence was presented to support the petitioner's first-degree murder conviction under both theories. See *Amos*, 1998 WL 1990424 at *9-10. Having carefully reviewed the record, this Court concludes that the Michigan Court of Appeals' determination that the facts demonstrated that

the petitioner acted with premeditation and deliberation and caused the death of Roberta Amos is consistent with federal law and constitutes a reasonable application thereof. The testimony at trial revealed that Roberta Amos was planning to divorce the petitioner, the petitioner was having financial troubles, the cause of Roberta Amos' death was a cocaine overdose with a blood cocaine level of 3.7 (significantly higher than a normal lethal level), the petitioner was using cocaine with Roberta Amos prior to her death and was the last person to see her alive, the petitioner altered the crime scene and removed critical evidence, the petitioner had expressed an intent to kill his wife prior to marrying her, and the petitioner was out socializing with a woman shortly after Roberta's death. A rational trier of fact could find beyond a reasonable doubt that this evidence proved the petitioner intentionally caused Roberta Amos' death.

There is no question that the State's case was circumstantial, and the jury was required to draw inferences from the facts. Perhaps there were innocent inferences that could have been drawn as well. However, it is well-settled that “[a] federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume – even if it does not affirmatively appear in the record – that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.” *Walker v. Engle*, 703 F.2d 959, 969-70 (6th Cir. 1983). Given the evidence presented at trial, including the scientific evidence and the testimony describing the petitioner's conduct before and after the incident, this Court finds that a rational trier of fact could have found beyond a reasonable doubt that the petitioner acted with premeditation and deliberation and intentionally caused the death of Roberta Amos. The petitioner is therefore not entitled to relief on this claim.

The petitioner also argues that the prosecution failed to establish the *corpus delicti* of the crime. Michigan has a *corpus delicti* rule that requires that the prosecution establish the substance of the crime charged independent of the defendant's own extrajudicial statements. *See People v. Williams*, 422 Mich. 381, 388 (1985). The Michigan Court of Appeals resolved this state law issue. *See Amos*, 1998 WL 1990424 at *10. A federal habeas corpus court may not review a state court's decision applying purely state law. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("it is not the province of a federal habeas court to reexamine state court determinations on state law questions"). Michigan's *corpus delicti* rule has no independent constitutional basis and is not constitutionally mandated. *See Williams v. LeCureaux*, 9 F.3d 111 (table), 1993 WL 445090, *1 (6th Cir. Nov. 2, 1993) (unpublished); *accord Lucas v. Johnson*, 132 F.3d 1069, 1077 (5th Cir. 1998). Habeas relief, therefore, is not warranted on this claim.

III.

The petitioner has not established that he is in the State of Michigan's custody in violation of the Constitution or laws of the United States.

Accordingly, it is **ORDERED** that the petition for a writ of habeas corpus [dkt # 1] is **DENIED**.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: January 10, 2007