

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

LAMORRIS MCGHEE,

Petitioner,

v.

Case No. 01-10203-BC
Honorable David M. Lawson

THOMAS BIRKETT,

Respondent.

OPINION AND ORDER DENYING PETITION FOR A WRIT OF HABEAS CORPUS

Petitioner LaMorris McGhee, a state prisoner presently confined at the Southern Michigan Correctional Facility in Jackson, Michigan, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petitioner was convicted of first-degree murder and possession of a firearm in the commission of a felony (felony firearm) 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 on the murder conviction and a consecutive term of two years imprisonment on the felony firearm conviction. In his pleadings, the petitioner raises claims of judicial bias, involuntary confession, and insufficient evidence. The Court finds that the stated grounds lack merit and will deny the petition.

I.

The petitioner's convictions arise from the shooting death of Damon Nesbitt during a carjacking at a gas station in Detroit, Michigan during the early morning hours of June 15, 1995. The testimony at trial revealed that Nesbitt died from a .32 caliber gunshot wound to the chest. The petitioner's accomplice, 14-year-old Damone Cook, testified at trial pursuant to an immunity agreement in which the prosecution agreed not to use his testimony against him in his pending first-degree murder proceeding in juvenile court. Cook testified that the petitioner asked him on the night

of the incident if he wanted to go out and rob someone. The petitioner and Cook walked to a gas station. While Cook was buying some food at the window, the petitioner pulled out his gun and shot the victim. The petitioner then told Cook to get in the victim's car, and they drove away. They parked the car near Cook's house, and the petitioner told Cook to burn it. Cook admitted providing police with three different statements prior to trial about the incident and implicating other individuals in the crime.

Hashim Williams testified that the petitioner admitted both to killing the victim and stealing the victim's car. The petitioner also told Williams that he stole a kickerbox from the car's stereo system, a necklace, and a gold chain, which he was trying to sell. Williams testified that he saw the petitioner with a .32 caliber gun and knew that he carried such a weapon.

Mario Mitchell testified that he saw the petitioner and Cook together in the neighborhood after the incident. He also saw the petitioner with a gun with rubber bands on the grip.

The preliminary examination testimony of Billy Bill, a witness who invoked his Fifth Amendment privilege against self-incrimination and refused to testify at trial, was also admitted into evidence at trial. Bill testified that the petitioner told him that he committed the crime with Cook and shot the victim in the chest with a .32 caliber revolver after the victim refused to give up his property. The petitioner told him that he stole radio speakers and an amplifier and drove the victim's car to a vacant lot near Cook's house after the incident. Bill also stated that he had previously seen the petitioner with a .32 caliber revolver, and that the petitioner traded the gun after the shooting.

Charles Grant, an employee at the gas station, testified that he saw two black males approach the victim at the gas station and pull a gun on the victim. He then heard a gunshot. When he left the store to see what had happened, he saw the victim lying on the ground as his car was being driven away. Vanessa Bracey, another eyewitness to the shooting, testified that she saw a black car pull

into the gas station on the night of the incident. She saw two black males approach the car's driver and then heard gunshots.

Expert testimony established that the petitioner's fingerprints were found on the front door window of the victim's car. Damone Cook's fingerprints were found on the car as well.

Detroit Police Detective Steven Miles testified that he interviewed the petitioner after his arrest on June 23, 1995 and obtained a written statement. Prior to trial, a hearing was conducted on the admissibility of the statement. At that hearing, Detective Miles testified that he advised the petitioner of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and had the petitioner initial and sign a constitutional rights form prior to questioning. The petitioner stated that he knew and understood his rights. Detective Miles questioned the petitioner for approximately one and one-half hours from 11:30 a.m. to 1:00 p.m. and obtained a written statement, which he described as exculpatory in nature. The petitioner reviewed the statement and made corrections. Detective Miles testified that he informed the petitioner of possible evidence and witnesses implicating him in the crime, but the petitioner denied committing the shooting. Detective Miles testified that he did not make any promises or threats to the petitioner. He also denied that Sergeant Harvell hit the petitioner in the nose. Detective Miles stated that the petitioner had an extensive criminal history and a history of providing false names to police, and he had to be fingerprinted upon his arrest to verify his identity.

Detroit Police Sergeant Reginald Harvell testified that he participated in the investigation of the incident and helped verify the petitioner's identity on the day of his arrest. He also testified that he did not have substantial contact with the petitioner, interview him, or punch him in the nose.

The petitioner also testified at the pretrial hearing. He admitted that he had numerous prior contacts with police and had lied about his identity and events to get himself out of trouble. He stated that he understood his rights and knew he had a right to remain silent before giving his

statement to police. The petitioner claimed that Sergeant Harvell hit him in the nose, which coerced him into making a statement to police. The petitioner also claimed that he requested an attorney during his interview, but admitted that he spoke freely to Detective Miles after being advised of his constitutional rights.

At the end of the hearing, the trial court acknowledged that the petitioner had appeared before the court in the past and had lied in the past. The court found the police officers' version of events more credible than that of the petitioner and concluded that his statement was voluntary and admissible at trial.

The petitioner's statement was admitted into evidence at trial; he did not testify in his own behalf. In his statement, the petitioner claimed that he saw two men with hoods approach a man in a black car. He then heard one or two gunshots and saw the men drive away in the victim's car. The petitioner said that he saw the same car near Damone Cook's house and he messed around with the radio, which is why his fingerprints were in the car. The petitioner told Detective Miles that the victim was shot with a .32 caliber weapon, although Detective Miles did not know this yet since he had not yet received the ballistics report.

At the conclusion of trial, the jury found the petitioner guilty of first-degree murder and felony firearm. The trial court subsequently sentenced him to consecutive terms of life imprisonment without parole and two years imprisonment on those convictions.

Following his convictions and sentencing, the petitioner filed a direct appeal in the Michigan Court of Appeals asserting that: (1) the trial judge improperly failed to recuse himself from an evidentiary hearing, (2) the trial court erred in finding his pretrial statements to be voluntary, and (3) the prosecution presented insufficient evidence of guilt. While the matter was pending before the Michigan Court of Appeals, the petitioner filed a motion to remand the case to the trial court for a hearing on a motion for new trial based upon a recanting witness' affidavit. The court granted the

motion and remanded the matter to the trial court for a hearing. The trial court conducted the hearing on August 7, 1998 and denied the petitioner's motion for new trial. The Michigan Court of Appeals thereafter affirmed the petitioner's convictions in an unpublished per curiam decision. *People v. McGhee*, No. 198442, 1999 WL 33433522 (Mich. Ct. App. Oct. 26, 1999). The petitioner filed a delayed application for leave to appeal in the Michigan Supreme Court, which was denied. *People v. McGhee*, 462 Mich. 869, 616 N.W.2d 688 (2000).

The petitioner filed an initial petition for a writ of habeas corpus on May 14, 2001, asserting that (1) trial counsel was ineffective for failing to seek a continuance at trial, (2) the prosecutor engaged in misconduct, (3) his conviction was obtained in violation of the privilege against self-incrimination because his police statement was involuntary, and (4) trial counsel was ineffective for failing to make objections and for making certain decisions during trial. On May 31, 2001, this Court conditionally dismissed the petition without prejudice for failing to fully exhaust state court remedies as to those claims.

The petitioner filed an amended petition for a writ of habeas corpus on June 8, 2001 raising the same claims presented to the Michigan courts on direct appeal of his convictions. The respondent filed an answer to the petition on September 24, 2001 asserting that the petitioner's claims were either procedurally defaulted or devoid of merit.

II.

The provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (April 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). This Act "circumscribe[d]" the standard of review federal courts must apply when considering applications for a writ of habeas corpus. *See Wiggins v. Smith*, 123 S. Ct. 2527, 2534 (2003).

As amended by the AEDPA, 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 must accept 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*, 123 S. Ct. at 2535 (quoting *Williams v. Taylor*, 529 U.S. 362, 409 (2000); internal quotes omitted). Additionally, this Court must presume the correctness of state court factual determinations. 28 U.S.C. § 2254(e)(1) ("In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct."); *see also Cremeans v. Chapleau*, 62 F.3d 167, 169 (6th Cir. 1995) ("We give complete deference to state court findings 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 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* *McAdoo v. Elo*, 346 F.3d 159, 165-66 (6th Cir. 2003); *Rockwell v. Yukins*, 341 F.3d 507, 512 (6th Cir. 2003) (en banc); *Lewis v. Wilkinson*, 307 F.3d 413, 418 (6th Cir. 2002).

A.

The petitioner first asserts that he is entitled to habeas relief because the trial judge failed to recuse himself from presiding over the case after he expressed an opinion adverse to the petitioner’s credibility during pretrial proceedings based on a prior judicial encounter with him. The respondent contends that this claim is barred by procedural default.

The doctrine of procedural default provides:

In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and

actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991). Such a default may occur if the state prisoner files an untimely appeal, *id.* at 752, if he fails to present an issue to a state appellate court at his only opportunity to do so, *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994), or if he fails to comply with a state-procedural rule that required him to have done something at trial to preserve his claimed error for appellate review, e.g., to make a contemporaneous objection, or file a motion for a directed verdict. *United States v. Frady*, 456 U.S. 152, 167-69 (1982); *Simpson v. Sparkman*, 94 F.3d 199, 202 (6th Cir. 1996). Application of the cause and prejudice test may be excused if a petitioner “presents an extraordinary case whereby a constitutional violation resulted in the conviction of one who is actually innocent” *Rust*, 17 F.3d at 162; *see Murray v. Carrier*, 477 U.S. 478, 496 (1986).

For the doctrine of procedural default to apply, a firmly established state-procedural rule applicable to the petitioner’s claim must exist, and the petitioner must have failed to comply with that state-procedural rule. *Williams v. Coyle*, 260 F.3d 684, 693 (6th Cir. 2001), *cert. denied*, 536 U.S. 947 (2002); *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. “When a state court judgment appears to have rested primarily on federal law or was interwoven with federal law, a state procedural rule is an independent and adequate state ground[] only if the state court rendering judgment in the case clearly and expressly stated that its judgment rested on a procedural bar.” *Simpson*, 94 F.3d at 202. 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).

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

Here, the Michigan Court of Appeals rendered the last reasoned opinion discussing the judicial bias issue. The court denied the claim, finding that the petitioner had failed to timely state an objection or seek recusal of the trial judge prior to the hearing. The court reviewed the issue for plain error and found none based upon its review of the record. *People v. McGhee*, 1999 WL 33433522 at *1. The failure to make a contemporaneous objection is a recognized, firmly established, and independent and adequate state law ground for refusing to review trial errors. *Coleman*, 501 U.S. at 750-51. Although Michigan does not uniformly apply the contemporaneous objection rule to double jeopardy and certain due process claims, *see Bentley v. Bock*, 239 F. Supp. 2d 686, 694 (E.D. Mich. 2002), the Michigan Court of Appeals has regularly invoked Michigan Court Rule 2.003(C)(1) to bar appellate review of bias claims that were not timely raised below. *See, e.g., People v. Mixon*, 170 Mich. App. 508, 514, 429 N.W.2d 197, 200 (1988), *overruled on other grounds*, 433 Mich. 852, 443 N.W.2d 167 (1989); *People v. Hampton*, 184 Mich. App. 434, 442, 459 N.W.2d 309, 313, *vacated on other grounds*, 436 Mich. 884, 461 N.W.2d 372 (1990). In this case, the Michigan Court of Appeals dismissed the petitioner's judicial bias claim based upon procedural default – his failure to timely object or seek recusal of the trial court judge. The petitioner neither alleges nor establishes cause for this lapse. This Court need not address the issue

of prejudice when a petitioner fails to establish cause to excuse a procedural default. *See, e.g., Smith v. Murray*, 477 U.S. 527, 533 (1986); *Long v. McKeen*, 722 F.2d 286, 288 (6th Cir. 1983).

Nonetheless, the petitioner cannot establish prejudice in this case. The Due Process Clause of the Fourteenth Amendment requires a fair trial in a fair tribunal before a judge with no actual bias against the defendant or an interest in the outcome of the case. *See Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997). To state a claim that a judge is biased, a petitioner must show either actual bias or the appearance of bias creating a conclusive presumption of actual bias. *United States v. Lowe*, 106 F.3d 1498, 1504 (10th Cir. 1997). Adverse rulings are not themselves sufficient to establish bias or prejudice which will disqualify a judge. *Hence v. Smith*, 49 F. Supp. 2d 547, 549 (E.D. Mich. 1999). The petitioner's sole claim of bias in this case is that the trial judge expressed familiarity with him from prior, unrelated criminal proceedings. This is insufficient to demonstrate judicial bias warranting habeas relief. The Supreme Court has made clear that "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994). The record in this case does not reveal any deep-seated antagonism or bias on the part of the trial judge.

The petitioner has also failed to demonstrate actual innocence that would overcome the procedural default. "[A]ctual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (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 v. Delo*, 513 U.S. 298, 324 (1995). The petitioner has made no such showing in this case. The evidence presented at trial, including

fingerprint analysis, the petitioner's statement to police, and the testimony of the petitioner's accomplice and other witnesses, established the petitioner's guilt of the charged offenses. The petitioner's judicial bias claim is thus barred by procedural default and does not warrant habeas relief.

B.

The petitioner next asserts that he is entitled to habeas relief because the trial court erred in finding that his statement to police was voluntary and admissible at trial. He insists that he was physically assaulted by police and made his statement out of fear of further violence. The Fifth Amendment privilege against compulsory self-incrimination bars the admission of involuntary confessions. *Colorado v. Connelly*, 479 U.S. 157, 163-65 (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 voluntariness of a confession is a mixed question of law and fact to which the presumption of correctness embodied in 28 U.S.C. § 2254(e) does not apply. *Thompson v. Keohane*, 516 U.S. 99, 111-12 (1995). In determining whether a confession is voluntary, 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). Those circumstances include whether there was police coercion (a "crucial element"), the length of interrogation, the location of the interrogation, the continuity of interrogation, the suspect's maturity, his education, his physical condition and mental health, and whether the suspect was advised of his *Miranda* rights. See *Withrow v. Williams*, 507 U.S. 680, 693-94 (1993). All of the factors involved in the giving of the statement should be closely scrutinized. *Culombe v.*

Connecticut, 367 U.S. 568, 602 (1961). Without coercive police activity, however, a confession should not be deemed involuntary. *Connelly*, 479 U.S. at 167 (holding 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 burden of proving that a confession was given involuntarily rests with the petitioner. *Boles v. Foltz*, 816 F.2d 1132, 1136 (6th Cir. 1987). Voluntariness need only be established by a preponderance of the evidence. *Ibid*.

In this case, the Michigan Court of Appeals concluded that the prosecution established by a preponderance of the evidence that the petitioner’s confession was voluntary and obtained after he knowingly and intelligently waived his Fifth Amendment rights. *People v. McGhee*, 1999 WL 33433522 at *1-2. Having reviewed the record, this Court is convinced that the state court’s determination that the petitioner’s confession was voluntary is consistent with Supreme Court precedent and constitutes a reasonable application thereof. Although the petitioner claims that a police officer physically assaulted him while he was in custody, the investigating officers denied the allegation. The trial court found the police version of events more credible. The credibility of witnesses and whether in fact the police engaged in coercive activity fall within the category of issues to which the presumption of correctness applies. *See* 28 U.S.C. § 2254(e)(1); *Miller*, 474 U.S. at 112. The petitioner has not rebutted the state court’s factual findings with clear and convincing evidence.

The petitioner was approximately 19 years old at the time he made his statement and was familiar with criminal procedures through his prior police contacts. The petitioner was advised of his *Miranda* rights after being taken into custody and initialed and signed a constitutional rights form before making his statement. Although the petitioner claims that he asked for counsel, police officers testified that he never expressed a desire to remain silent or consult with counsel. Again, the trial court found the police testimony more credible, and the petitioner has not rebutted this finding

with clear and convincing evidence. The record also establishes that the petitioner was only in custody for a few hours before making his statement, and he was not denied food, water, sleep, or other necessities. The investigating officers obtained a five-page written statement from the petitioner, which was exculpatory in nature. The petitioner reviewed the statement and made corrections.

Having scrutinized the relevant factors, the Court is satisfied that the petitioner's statement to police was voluntary and that his constitutional rights were not violated by the admission of that statement in evidence at trial. The petitioner is thus not entitled to relief on this claim.

C.

Lastly, the petitioner claims that he is entitled to habeas relief because the prosecution failed to present sufficient evidence to support his convictions. There is no question that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). But the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction is "whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318 (1979).

[T]his inquiry does not require a court to "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." Instead, the relevant question is 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 318-19 (internal citation and footnote omitted). This "standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law." *Id.* at 324 n.16. Normally, pursuant to 28 U.S.C. § 2254(d)(1), this Court must determine whether the state court's application of the *Jackson* standard was contrary to or an unreasonable application of Supreme Court precedent. However, where a state court, although deciding a claim, does not offer

some explanation of its decision, a federal court must conduct an independent review of the state court's decision. This independent review requires the federal court to “review 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).

Under Michigan law, a person who commits murder during the perpetration of a felony is guilty of first-degree murder punishable by life imprisonment. *See Mich. Comp. Laws § 750.316*. The elements of first-degree felony murder are (1) the killing of a human being, (2) by committing an act with the intent to kill, do great bodily harm, or create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in the statute. *People v. Carines*, 460 Mich. 750, 759, 597 N.W.2d 130, 136 (1999) (citing *People v. Turner*, 213 Mich. App. 558, 566, 540 N.W.2d 728 (1995)). The facts and circumstances of the killing may give rise to an inference of malice, including evidence that the defendant used a deadly weapon. *Turner*, 213 Mich. App. at 566, 540 N.W.2d 728. The predicate felony charged in this case was larceny. The elements of larceny from a person are (1) the taking and carrying away of personal property of another, (2) from the victim’s presence or person, (3) with felonious intent, and (4) without the owner’s consent. *People v. Gimotty*, 216 Mich. App. 254, 257-58, 549 N.W.2d 39, 41 (1996). To prove the crime of felony-firearm, the prosecution must establish that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony. *People v. Avant*, 235 Mich. App 499, 505, 597 N.W.2d 864, 869 (1999).

In this case, the Michigan Court of Appeals concluded that there was sufficient evidence to prove the petitioner’s guilt of first-degree felony murder and felony firearm. *People v. McGhee*, 1999 WL 33433522 at *2-3. This Court agrees. The petitioner’s accomplice testified that the

petitioner wanted to rob someone on the night in question, the petitioner shot and killed the victim at the gas station, and the petitioner took personal property from the victim and drove away in the victim's car. Witnesses testified that they saw the petitioner and his accomplice together shortly before the incident, the petitioner was armed with a .32 caliber handgun, the petitioner admitted his participation in the crime, and he was trying to sell the victim's property. Police also found the fingerprints of the petitioner and his accomplice on the stolen automobile. Additionally, the petitioner's statement to police showed that he was in the vicinity of the crime scene and reflected particularized knowledge about the incident.

The petitioner's insufficient evidence claim essentially challenges the inferences the jury drew from the evidence at trial. However, "[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, 970 (6th Cir. 1983) (citation omitted).

The state appellate court held that a rational trier of fact could readily have found from the evidence presented at trial the elements of first-degree felony murder and felony firearm beyond a reasonable doubt. This decision is neither contrary to nor an unreasonable application of federal law as established by the Supreme Court. The petitioner is not entitled to habeas relief on this claim.

III.

The petitioner's conviction was not tainted by constitutional error; he is not in custody in violation of the Constitution, laws, or treaties of the United States.

Accordingly, it is **ORDERED** that the amended petition for writ of habeas corpus [dkt #3] is **DENIED**.

_____/s/_____
DAVID M. LAWSON
United States District Judge

Dated: February 10, 2004

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