UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT E. ROCAFORT,

Petitioner,

v.

Case No. 1:06-cv-476
Hon. Robert J. Jonker

CINDI S. CURTIN,

Respondent.
_____/

REPORT AND RECOMMENDATION

Petitioner, a prisoner currently incarcerated at a Michigan correctional facility, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

I. Background

After a jury trial, petitioner was convicted of the first-degree, premeditated murder of a woman who lived in his apartment building and whose bound and strangled body was found in the woods nearby. M.C.L. § 750.316. Petitioner was sentenced to life imprisonment. *People v. Rocafort*, No. 257031 (Mich. App. Dec. 27, 2005). Petitioner, through counsel, presented five issues in his direct appeal to the Michigan Court of Appeals:

> I. Should the conviction be overturned because there was insufficient credible evidence to prove that [petitioner] committed the crimes charged?
>
> II. Did the trial court reversibly err by allowing into evidence hearsay and prejudicial testimony of prior statements by the deceased, allowing testimony about DNA results into evidence without a proper foundation, refusing to exclude video evidence, and failing to grant a motion for directed verdict, and was [petitioner] thus denied his due process and constitutional rights under the Michigan and United States Constitutions?

III. Did the prosecutor's actions deny [petitioner] a fair trial and his due process rights under the Michigan and Federal Constitutions?

IV. Did the prosecutor's actions deny [petitioner] a fair trial and his due process rights under the Michigan and Federal Constitutions?

V. Should petitioner get a new trial?

Brief on Appeal (docket no. 23). The Michigan Court of Appeals affirmed the convictions. *People v. Rocafort*, No. 257031.

In his pro per application for leave to appeal to the Michigan Supreme Court, petitioner raised three issues:

I. The court denied the motion to exclude the videotestimony . . . Although the video surveillance appears to be fine and without malfunction the admission of the video surveillance neglects the overwhelming prejudicial effect it has played. . . [1]

II. The court improperly allowed into evidence DNA for which no proper foundation had been laid in violation of MRE 703, MRE 401, 402, 403.

III. The trial court allowed into evidence hearsay of prior statements by the deceased.

Application for leave to appeal (docket no. 24). The Michigan Supreme Court denied petitioner's application. *People v. Rocafort*, No. 130468 (Mich. May 30, 2006).

Rocafort filed a handwritten "petition" for habeas corpus on July 10, 2006. *See* docket no. 1. The next day, petitioner filed a "supplement" on the court's pre-printed form § 2254 petition. *See* docket no. 2. The court accepted the "supplement" as the habeas petition. *See* docket no. 4. The habeas petition raised three issues:

[1] This issue appears to raise an insufficient evidence claim.

I. Insufficiency of credible evidence that defendant's DNA was on the deceased's right hand fingernails.

II. The trial court allowed over objection prejudicial hearsay from three witnesses pursuant to MRE 803(3).

III. Insufficiency of credible evidence of intent to kill.

Petition (docket no. 2).[2]

II. Standard of review under 28 U.S.C. § 2254

Petitioner seeks relief under 28 U.S.C. §2254, which provides that "a district judge shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." Before petitioner may seek such relief in federal court, however, he must first fairly present the substance of his claims to all available state courts, thereby exhausting all state remedies. *Picard v. Connor*, 404 U.S. 270, 277-78 (1981); *Clemmons v. Sowders*, 34 F.3d 352, 354 (6th Cir. 1994); *see* 28 U.S.C. §2254(b)(1)(A). Here, petitioner has exhausted all of the issues raised in his petition.

Where the state court has adjudicated a claim on its merits, the federal district court's habeas corpus review is limited by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which provides in pertinent part that:

> 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–

[2] The court has construed petitioner's rather cryptic claims by reviewing the narrative set forth in the original petition filed on July 10, 2006.

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

28 U.S.C. § 2254(d).

A state court's decision is "contrary to" clearly established Federal law if the state court arrived at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decided the case differently than a Supreme Court decision based upon a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000); *Lopez v. Wilson*, 426 F.3d 339, 341 (6th Cir. 2005) (*rehearing en banc*). An unreasonable application of clearly established Federal law occurs "when the state court identified the correct legal principle from the Supreme Court but unreasonably applied the principle to the facts of the case before it." *Id.*

A determination of a factual issue by a state court is presumed to be correct. 28 U.S.C. § 2254(e)(1). A habeas petitioner has the burden of rebutting the presumption of correctness by clear and convincing evidence that the state court's determination was erroneous. *Magana v. Hofbauer*, 263 F.3d 542, 546-47 (6th Cir. 2001).

III. Petitioner's habeas claims

A. Trial court improperly admitted testimony and evidence of DNA found under the deceased's fingernail.

First, petitioner contends that the trial court improperly admitted DNA evidence found under the victim's right hand fingernails by Michele Marfori, a forensic scientist at the State of Michigan forensic laboratory. Trial Trans. III at 90. By way of background, Ms. Marfori testified

that DNA analysis involved three steps: extraction (isolating the DNA); amplification (in which "we multiply 13 different regions of the DNA that vary between individuals that we look at" and insert a colored dye for later detection); and detection (the DNA fragments that we copy are separated out by size, and we use a system "which detects the colored dye, which is recorded as a data point, which is then assigned a DNA type"). *Id.* at 95. The 13 different regions of DNA examined by Ms. Marfori are the same 13 regions examined by the FBI in performing DNA testing. *Id.* at 100. Ms. Marfori testified that she extracted two types of DNA from the victim's right hand fingernail clippings. *Id.* at 102-3. The DNA types from the clippings matched the victim. *Id.* at 103. In addition, the DNA from the clippings matched petitioner at all 13 of the regions. *Id.*

Ms. Marfori testified that the amount of foreign DNA found the fingernail clippings, matching at all 13 locations, would not, in her opinion, be transferred "[j]ust by shaking hands." *Id.* at 105-6. When asked if such a transfer could occur through "casual contact," petitioner's counsel objected for lack of foundation on whether Ms. Marfori could testify about how the DNA got underneath the victim's fingernails. *Id.* at 106. The following exchange took place between the prosecutor and Ms. Marfori:

> Q. How long have you been doing DNA analysis?
>
> A. Over five years.
>
> Q. From everything you've read and from your experience, how frequently do you obtain foreign DNA, that is to say, DNA from other than the donor, the person whose fingernails they are, how often do you obtain foreign DNA on fingernails?
>
> A. From my experience, it's highly unlikely to get foreign DNA from a donor's own fingernail.
>
> Q. From your experience, is it common for people to have casual contact with foreign potential donors of DNA?

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