No. _____

IN THE

Supreme Court of the United States

CHARLES NASH,

Petitioner,

v.

SHAWN PHILLIPS, WARDEN,

Respondent.

On Petition For A Writ Of Certiorari To The
United States Court of Appeals
For the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

TEENAGER CHARLES NASH WAS SUBJECT TO TALK FIRST INTERROGATION TACTICS YET DEFENSE COUNSEL SOUGHT SUPPRESSION OF HIS STATEMENT ONLY BECAUSE OF HIS HAVING INVOKED HIS RIGHT TO COUNSEL. THE SIXTH CIRCUIT, DISTRICT AND STATE COURTS FAULTED NASH FOR HAVING FAILED TO KNOW AN ISSUE EXISTED RELATIVE A TALK FIRST CHALLENGE. ON RECORD EVIDENCE COMMANDING CONTRARY, THE SIXTH CIRCUIT ADDITIONALLY RAISED THE BAR FOR A COA; AND FURTHER DENIES A COA WHERE POST-CONVICTION COUNSEL FAILS TO SUBSTANTIATE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIMS WITH ARGUMENT-PROOF.

THE QUESTIONS ASK:

I. CAN A POST-CONVICTION ATTORNEY'S FAILURE TO ARGUE OR PRESENT PROOF IN SUPPORT OF RAISED SUBSTANTIAL IATC CLAIMS, CONSTITUTE CAUSE TO EXCUSE PROCEDURAL DEFAULT OF SUCH CLAIM UNDER *MARTINEZ* AND *TREVINO*, AND AT LEAST BE COA DEBATABLE UNDER THE CONCURRENCE IN *GALLOW V. COOPER*?

II. WHERE TENNESSEE LAW ONLY REQUIRED COUNSEL'S PROMISED DEFENSE OF DURESS/NECESSITY TO BE FAIRLY RAISED BY THE PROOF, AND NOT AFFIRMATIVELY PROVEN BY THE DEFENSE IN ORDER FOR A JURY INSTRUCTION THEREON, DID THE SIXTH CIRCUIT IN TURN HOLD MR. NASH TO A HIGHER COA BURDEN AS IT RELATES TO COUNSEL'S INEFFECTIVENESS IN HAVING PROMISED YET FAILED TO PROPERLY RAISE THE BASICS THEREOF, AND/OR SEEK A JURY INSTRUCTION THEREON?

III. WHERE THE SIXTH CIRCUIT HAS UPHELD A STATE COURT *STRICKLAND* FINDING THAT ESSENTIALLY SHIFTS THE BURDEN TO THE PETITIONER TO HAVE KNOWN THE LAW AND HENCE INFORMED COUNSEL OF WHAT WAS AN ISSUE VERSUS COUNSEL HAVING GLEANED INFERENCES FROM THE RECORD THAT SUPPORTED AN ISSUE AND THUS INQUIRED OF PETITIONER FACTS RELATIVE THERETO, IS SUPREME COURT REVIEW WARRANTED?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Charles Nash, respectfully petitions this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

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JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254 (1). On September 9, 2017, the United States District Court for the Eastern District of Tennessee at Chattanooga denied federal habeas corpus relief. The Sixth Circuit entered its judgment denying a COA on April 5, 2018, and denied a timely Petition to Rehear on June 27, 2018 and a Petitioner to Rehear Enbanc on July 16, 2018.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution made applicable to the states through the Fourteenth Amendment to the United States Constitution provides that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Federal Habeas Petition was filed under 28 U.S.C. §2254.

INTRODUCTION AND SUMMARY

At the time of the offenses in this case, Mr. Nash was a 19 year old teenager who had been raised by his grandmother due to his mother's life of drugs, prostitution and domestic violence, and his father's life of drugs and imprisonment.

This case is another reflection where, despite those raised in poverty stricken neighborhoods and in many instances who are trying to do good, are faced or otherwise confronted with other realities of their community, surroundings, and the Courts of which, in most instances, lead to unjust outcomes for them.

A whole record review, reveals the trial evidence as being reflective of Mr. Nash having been charged with two counts of first-degree murder and especially aggravated robbery based upon his having committed a robbery of a convenience store wherein resulted in an unfortunate circumstance of the victim pulling a firearm and subsequently being shot and killed by Mr. Nash.

A summary of the case actually reveals that Mr. Nash, a student in college who was working full time and under pressure to save the life of his grandmother, went on a desperate spree of robberies where moments before the offense, of which resulted in the present offenses, he committed a similar robbery, without injury. Although the video tape was never disclosed to the defense, this first robbery was caught on video surveillance and in possession of the prosecution.

Pretrial statements made by Mr. Nash's defense attorney to the local news paper further gives light on the matter:

"Mr. Ripper said there was no premeditation involved in the crime."

"I think the direction we would be moving is that (Mr. Nash) didn't intend for anyone to get killed," "he said.

Mr. Ripper said Mr. Nash could be found guilty if prosecutors prove a death occurred during a robbery."

"If the state proves it was a death that occurred during the commission of a felony, then (jurors) would be authorized in finding him guilty of first-degree murder," he said. "That's why we try these things. That's a question for the jury."

Monday October 22, 2007 Chattanocga News Free Press Article.

During opening argument at trial, yet without specifics, defense counsel further informed the jury of the essence of the defense:

OPENING STATEMENT BY MR. RIPPER

Mr. Ripper: Charles Nash was working at the Chattanoogan, he was a conference clerk, helping set up conferences there at the place. Doing well, had a good job, but everything wasn't going perfectly for him. As you will hear in his statement, there had been a dope dealer robbed, and that dope dealer, for whatever reason, had accused Mr. Nash of this and had put a ransom of $10, 000, to pay him $10, 000, or Mr. Nash, his grandmother, would suffer the consequences. And you're going to hear this when he gives his statement, he will explain it. You'll hear him refer to it as 10 stacks, $10,000. And for this reason, Mr. Nash engaged in behavior that, that you wouldn't expect.

What you're going to hear is that regardless of what anybody else thinks about what Mr. Nash heard about these allegations, there's something that he took serious and he felt that he needed to do something to try and get the money. So in an effort to get the money, he went into the store.

Tr. Tr. pg. 25 Lns 3-25.

Despite this opening, and even recognizing that Mr. Nash's pretrial statement reflects this, trial counsel failed to present witnesses to testify to this fact, failed to request an instruction on the defense and/or failed to make argument to the jury supportive thereof.

Mr. Nash's petition here represents a long settled principle of law, being that the *Strickland v. Washington,* 466 U.S. 668 (1984) standard is an objective standard of reasonableness of which operates on prevailing professional norms. These norms require counsel to conduct an independent investigation of law and fact and raise appropriate issues of which are outcome determinative to his or her client's case. It does not require that a petitioner

know or investigate law and fact or on his/her own try to figure out what facts may somehow support an issue of which counsel should raise.

Mr. Nash additionally, positions that Supreme Court Justices are jurists of reason, hence the positions offered by Justice Breyer and Sotomayor, respecting the denial of certiorari in *Elrick J. Gallow, Petitioner, v. Lynn Cooper, Warden, Respondent*, 133 S.Ct. 2730 (2013), should be enough debatability as to have warranted the grant of a COA on the claim where his post-conviction attorney failed to present substantiating evidence during the post-conviction proceeding in the lower trial court on some of his substantial ineffective assistance of trial counsel claims.

Where post-conviction counsel does not introduce such proof in the lower court, it makes any further post-conviction appeal of an issue futile. The Sixth Circuit, as did the district court, focused on no right to ineffective assistance of counsel during the post-conviction appeal as not providing cause, however, did not address the obvious issue relative the outcome of the post-conviction hearing itself based upon the ineffective assistance of post-conviction counsel.

Finally, where this Court has made clear the COA standard, in denying Mr. Nash a COA, the Sixth Circuit has applied and required a level of proof at the COA stage to one even higher than the burden of proof that was required for a trial and/or a colorable and substantial ineffective assistance of counsel claim.

STATEMENT OF THE CASE

Mr. Nash was convicted of first-degree murder based upon a murder committed in the perpetration of a felony. He was given a life sentence where he has the consideration of parole eligibility for release after service of a minimum of 51 to 60 years in prison. He was further convicted of especially aggravated robbery and given another 25 years.

The case reflects that on one late Saturday evening, college student and employed teenager, Petitioner Charles Nash, in desperation to save the life of his grandmother-from what he feared as her impending threatened Monday morning death, by a drug dealer who had been robbed by someone he thought was Nash-committed two robberies to pay a ten-thousand dollar forced debt that was placed upon him.

The first robbery was caught on video, however, showed the armed Petitioner as having never committed any violence. The second robbery moments later resulted in the unfortunate death of the storeowner.

In having spoken to his father, who had coordinated Mr. Nash's voluntary surrender to a detective cousin, Kenneth Freeman[1], then nineteen-year-old Mr. Nash was arrested and driven by the cousin to the Police Service Center where he could there be formally questioned. Absent *Miranda* warnings, while traveling to the Service Center, Mr. Freeman manipulated a detailed yet unmirandized narrative from Mr. Nash as to what happened.

Once they arrived at the service center, Mr. Nash was then formally *Mirandized* and the following colloquy took place between himself and the police prior to his giving the formal incriminating statement against himself:

[DET. FREEMAN]: ....Here's the rights waiver form showing you, just read over that like I just read it and if you want to talk to me just initial every place right there and then sign and date it right there.

(silence)

[DET. FREEMAN]: *I explained to you also* that we were gonna fingerprint you and take your pictures and stuff like that, right? Okay. And you stated that you would like to do that first? Or do you want to continue with this right now?

[DET. SHAW]: Hey, I want to go to the john first.

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[1] **Detective Freeman was later fired by the Police Department for an assault against an elderly gentleman at a Walmart Store and other prior misconduct.**

[DET. FREEMAN]: Okay. Hold on just a second, let me see if he's gonna sign that Rights Waiver Form.

[DEFENDANT]: Is it ... uh ... it ain't possible that I could have a lawyer?

[DET. FREEMAN]: Yeah, That's ... and if you want to answer some questions now you can always get a lawyer then or now, whatever, just like what it's saying here but if you want to start talking and then if you decided if you want to stop that's fine too.

[DEFENDANT]: I just want to get on tape that I ain't kill that lady.

[DET. FREEMAN]: Okay. Well, I would like for you to initial and ... and then sign first.

[DEFENDANT]: Uh ...

[DET. SHAW]: The way ... the way this law works, it's called the Miranda Law, okay.

[DEFENDANT]: Uh-hum (yes).

[DET. SHAW]: This guy that got arrested ... he confessed to a crime and then when it came time for court he said well I didn't know I didn't have to say anything so that's why they make us read this to you now.

[DEFENDANT]: Yeah.

[DET. SHAW]: Just so you understand that basically you don't have to answer every question that we ask you. You can answer some of them and not others. You don't have to answer any question if you don't want but if you want to answer some of them and not others or if you want to tell your side of the story and not answer any questions you can do that too. But before we can listen to you or anything else you have to sign saying you understand what your rights are and you're willing to speak about it even if it's just to tell your side of the story and not to answer questions that's your ... prerogative.

State v. Nash, 2009 WL 2461178, at *2 (Tenn.Crim.App. Aug. 12, 2009).

In line with this particular aspect of the questioning, Mr. Nash's pretrial counsel filed a motion to suppress the incriminating statement that followed on the basis that Mr. Nash had unequivocally invoked his right to counsel and hence questioning should have ceased. The TCCA disagreed finding the same as not an unequivocal request for an attorney. *State of Tennessee v. Charles Nash*, 2009 WL 2461178 (Tenn.Crim.App. August 12, 2009) Application for Permission to Appeal Denied by Supreme Court March 1, 2010. **Appx G.**

Mr. Nash subsequently filed for post-conviction relief raising ten claims involving ineffective assistance of counsel, and the prosecution's suppression of exculpatory evidence. The petition was summarily dismissed, only to be later reversed and remanded, for appointment of counsel and a hearing, by the TCCA. *Charles Nash v. State of Tennessee*, 2011 WL 2410325 * 2-3 (Tenn.Crim.App. 2011). **Appx F.**

The TCCA's opinion recognized Mr. Nash as having included a very impressive memorandum of law and supporting facts in support of his post-conviction petition, however, on remand, Mr. Nash was appointed counsel who failed to fully and properly substantiate many of his substantial claims with evidence and/or argument during the state court evidentiary hearing.

Post-conviction counsel did pursue claims related to pre-trial counsel's failure to have moved to suppress the Petitioner's pretrial statement on grounds of Detective Freeman's improper use of a talk first interrogation tactic-through the interrogation in the cruiser on the way to the service center- under *Missouri v. Seibert.*

Nash argued that, despite his having informed trial counsel of such discussion, and the clear inference in the testimony, argument, and evidence of which came out during the motion to suppress that counsel did file, counsel did not make the more obvious and substantial *Seibert* challenge.

The state court in turn shifted the burden to Mr. Nash to have informed his counsel that he was questioned upon arrest, while in transport to the Police service center, and hence that a talk first interrogation issue existed.

In filing for federal habeas corpus relief, among other points, Mr. Nash continued to argue the ineffectiveness of his attorney in having failed to make the talk first-interrogation argument. He further made significant argument that cause in the form of the ineffective

assistance of post-conviction counsel existed to excuse the procedural default of his remaining substantial ineffective assistance of trial counsel claims being those on which his post-conviction attorney failed to submit any proof in support thereof.

Mr. Nash further argued the ineffective assistance of trial counsel where, despite promises to the jury in opening argument, counsel failed to call witnesses and/or submit available evidence in support of his only defense of duress/necessity and/or request proper instruction from the Court on this promised defense.

Mr. Nash argued other claims, however, those are not necessarily pertinent to the questions raised herein this Certiorari Petition.

Despite, the pretrial suppression hearing evidence, transcript, testimony of witnesses, and trial counsel's own statements to the local news paper, inclusive of the opening argument promise to the jury of which established this point, as did the state court, the Federal Courts denied relief on the instruction/duress/necessity issues on the basis that the proof did not fairly raise the issue.

As it relates to counsel's failure to raise a *Missouri v. Seibert* challenge, the Sixth Circuit upheld the finding that the Petitioner never told counsel that such questioning had occurred.

In upholding procedural default of Mr. Nash's other substantial ineffective assistance of trial counsel claims, despite the argument being post-conviction counsel's failure to submit evidence in support of the claim in the lower court, the Sixth Circuit found ineffective assistance of post-conviction counsel on appeal cannot support cause under this Court's precedents.

REASONS FOR GRANTING THE PETITION

I. This Court has not squarely addressed the issue, however, a concurrence denying certiorari in *Gallow v. Cooper* has essentially found *Martinez* and *Trevino* applicable when a post-conviction attorney fails to submit proof in support of a substantial ineffective assistance of trial counsel claim-hence warranting a need for this Court to make it clear that even such a concurrence may be utilized to meet the debatable standard for granting a COA.

Mr. Nash argued as cause the ineffective assistance of his post-conviction attorney for that attorney's failure to have introduced substantial evidence and argument to substantiate certain of his ineffective assistance of trial counsel claims during the state court post-conviction proceeding in the post-conviction court, thus procedurally defaulting said ineffective claims.

Mr. Nash argued nothing about the ineffective assistance of post-conviction counsel relative the post-conviction appeal, but simply noted how the lack of proof at the evidentiary hearing prevented relief in the lower court and further would have rendered an appeal therefrom on such claims futile.

It is for the most part clear that the ineffective assistance of post-conviction counsel may support a showing of cause relative the denial of a substantial claim of the ineffective assistance of trial counsel, and that the same applies to Tennessee's procedural framework. *Martinez v. Ryan*, 132 S.Ct. 1309 (2012); *Trevino v. Thaler*, 132 S.Ct. 1744 (2012); and *Sutton v. Carpenter*, 745 F.3d 787 (6th Cir. 2014).

As those cases reflect, the ineffective assistance of post-conviction counsel on appeal cannot form cause to excuse the procedural default of an ineffective assistance of trial counsel claim not raised during post-conviction appeal to any court higher than the post-conviction court.

In *Elrick J. Gallow, Petitioner, v. Lynn Cooper, Warden*, 133 S.Ct. 2730 (June 27, 2013), however, the Honorable Justice Breyer, joined by the Honorable Justice Sotomayor, stated their view that circumstances where post-conviction counsel does not present evidence in support of ineffective assistance of counsel claims are no different than circumstances where post-conviction counsel fails to raise a claim at all for *Trevino* and *Martinez* purposes.

In some federal court considerations, this fact seems to be the accepted extension of *Trevino* and *Martinez*, *See Haight v. White*, No. 3:02-CV-P206-S, 2013 WL 5146200, at 8* (W.D.Ky. Sept. 12, 2013) ("*Martinez* is clear that errors by post-conviction counsel may be sufficient to establish cause for a procedural default of an ineffective assistance of trial counsel claim. That is so whether the post-conviction attorney entirely failed to raise the claim or raised the claim, but did so in a manner that was insufficient to meet prevailing professional standards."); *and Horonzy v. Smith*, No. 1:11-cv-00235-EJL, 2013 WL 3776372, at *2 (D.Idaho July 16, 2013) (noting that, if "initial post-conviction counsel ...failed to adequately develop the facts and seek an evidentiary hearing," this failure "would be within the *Martinez* exception"). This point was pending in the Sixth Circuit as noted in *Smith v. Carpenter*, No. 3:99-cv-0731, 2015 WL 4545736 *4 (M.D.Tenn July 28, 2015), however, it has been rejected by the Sixth Circuit and some others.

At a rapid rate, disagreement and/or the *Gallow* concurrence seems to be ignored in the consideration of *Smith* and many other cases as well. *Smith v. Carpenter*, 2018 WL 317429 *4-7 (M.D. Tenn. January 8, 2018) (relying upon *Moore v. Mitchell*, 708 F.3d 760 (6th Cir. 2013); *Escamilla v. Stephens*, 749 F.3d 380 (5th Cir. 2014); *Rhines v. Young*, 2016 WL 614665, at 8 (D.S.D. Feb. 16, 2016); *Henderson v. Carpenter*, 21 F.Supp. 927, 933 (W.D. Tenn. 2014).

As set forth by Mr. Nash, in Tennessee, as with many other states, a failure to present evidence and/or argument to support a claim in a lower court prevents relief on said claim. Thus, there being no use of filing an appeal relative the same to a higher court. *Randy Maray Cheairs, Jr. v. State of Tennessee*, No. W2011-01293-CCA-R3-PC, 2012 WL 6030569 * 7 (Tenn. Crim. App. 2012) ("In addition, for purposes of proving an ineffective assistance of counsel claim, proof of deficient representation by omission requires more that a speculative showing of a lost of a potential benefit. ... The post-conviction court determined that the Petitioner "failed to establish the factual allegations contained in his petition by clear and convincing evidence." The record supports this determination, and the Petitioner is not entitled to relief on this issue).

Mr. Nash's argument for cause did not encompass any argument relative cause due to the ineffective assistance of post-conviction counsel on his post-conviction appeal, however, the Sixth Circuit's analysis limited the same thereto and did not consider, on inference because of its own precedent, Mr. Nash's actual argument relative cause.

Mr. Nash submits, however, that post-conviction attorneys who simply raise substantial ineffective assistance of counsel claims, and yet fail to argue them and/or present substantial evidence in support thereof, should clearly suffice as cause under *Martinez and Trevino* in context where applicable.

At the very least, the Sixth Circuit should have recognized the Breyer/Sotomayor concurrence as constituting reasonable jurist, thus making the issue debatable and have warranted the grant of a COA to Mr. Nash.

For the above reasons, and due to the circuit splits/Breyer/Sotomayor concurrence, this Honorable Court is respectfully asked to grant the writ and decide the important questions herein.

II. In denying a COA in this case the Sixth Circuit has continued a pattern of using the COA process for merit based determinations of claims absent full briefing in contravention of this Court's precedents, hence effectively depriving petitioners like Mr. Nash of review of significant and substantial constitutional claims.

Very recently this Honorable Court reaffirmed the standard required for a COA in *Buck v. Davis*, 137 S.Ct. 759 (2017).

A COA can only issue "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c) (2). To meet this standard, a petitioner must demonstrate "that jurists could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Buck v. Davis*, 137 S.Ct. 759 (February 22, 2107); *Slack v. McDaniel*, 120 S.Ct. 1595 (2000); *Gonzalez v. Thaler*, 132 S.Ct. 641 (2012); *Miller-EL v. Cockrell*, 537 U.S. 322, 327 (2003). The stage is simply not one for a full merits based determination.

In a whole, the Sixth Circuit's denial of a COA relative this claim can be summarized in two paragraphs:

> In his fourth ground for relief, Nash asserted ineffective assistance of trial counsel because counsel failed "to present a defense of duress" and to request a jury instruction regarding that defense. He argued that "clear evidence" established that he committed that crimes under duress because a drug dealer had threatened to kill his grandmother if he did not repay a debt that he owed to that drug dealer.
>
> The district court concluded that Nash was not entitled to relief on this ineffective assistance of counsel claim. The district court reviewed the Tennessee defense of duress and the testimony that Nash presented at the post-conviction hearing in support of the defense, and concluded that the record contained no evidence "that the threatened harm on which this claim was based was present, imminent, impending, or continuous as required to establish the duress defense under Tennessee law." Because the record did not support a duress defense, the district court concluded that counsel was not ineffective for failing to pursue such a defense at trial. Counsel is not ineffective for failing to pursue a defense that is not supported by the evidence. *Cf. Kelly v. Lazaroff*, 846 F.3d 819, 830-31 (6th Cir. 2017). Reasonable Jurists would not debate the district court's rejection of Nash's fourth ground for relief. *See Miller-El*, 537 U.S. at 327.

Charles Nash v. Shawn Phillips, No. 17-6105 * 5 (6th Cir. April 5, 2018).

Mr. Nash's whole point here was that his grandmother's life was threatened with certain death if he did not come up with ten thousand dollars to pay a drug dealer who had essentially forced an unwarranted debt upon him. Committing a robbery to come up with the money to pay the drug dealer whom had been robbed, and lied to that the robbery was done by Mr. Nash, was a lot less then the harm of having his grandmother killed in which he sought to prevent. Mr. Nash in no way put himself in this situation, however, because of the serious nature of the same, he could not go to law enforcement and hence felt helpless to do anything except commit the underlying robbery in order to come up with the money.

Eliminating the underlying robbery offense through the defense of duress and/or necessity, however, would eliminate any felony murder conviction. Where the prosecution had already conceded its proof as recognizing no premeditated murder, Mr. Nash would only have had a second degree murder, voluntary manslaughter or negligent homicide conviction at the most.

Tennessee law recognizes that:

The defenses of duress and necessity were formerly available at common law. "With the enactment of the 1989 Criminal Code, all common law defenses were abolished, and replaced by statutory defenses." *State v. Culp*, 900 S.W.2d 707, 710 (Tenn. Crim.App. 1994), *see* Tenn. Code. Ann. § 39-11-203(e)(2).

Duress and necessity are not affirmative defenses that must be proven by a defendant. Culp, 900 S.W.2d at 710. *Both defenses provide a general defense which must only be fairly raised by the proof being considered by the trier of fact and any reasonable doubt on the issue requires an acquittal.* Tenn. Code Ann. § 39-11-203(c), (d). "It is well-established in Tennessee that the trial court has the duty of giving a correct and complete charge of the law applicable to the facts of the case and that the defendant has the right to have every issue of fact raised by the evidence and material to the defense submitted to the jury upon proper instructions by the trial court." *State v. Green*, 995 S.W.2d 591, 604-05 (Tenn.Crim.App. 1998) (*citing State v. Teel*, 793 S.W.2d 236, 249 (Tenn. 1990), cert. denied, 498 U.S. 1007 (1990); *State v. Bryant*, 654 S.W.2d 389, 390 (Tenn.1983); and *State v. Thompson*, 519 S.W.2d 789, 792 (Tenn.1975)).

Marquis D. Hendricks v. State of Tennessee, No. E2016-02123-CCA-R3-PC, 2017 WL 3174074 (Tenn. Crim.App. July 26, 2017).

Duress is a defense to prosecution where the person or a third person is threatened with harm that is present, imminent, impending and of such a nature to induce a well-grounded apprehension of death or serious bodily injury if the act is not done. Tenn. Code Ann. § 39-11-504 (a).

Mr. Nash submits that duress and/or necessity are not defenses that he is required to prove and only needed to be fairly raised by the proof to have been a jury question. If Mr. Nash believed this in his mind, as counsel's opening argument to the jury stated, then the defense would have been established.

The incident here occurred on a Saturday around four o'clock. Here there was clear evidence in Mr. Nash's pretrial statement that he believed that he had to come up with this 10,000 to pay a drug dealer whom someone else had allegedly robbed in order to keep his grandmother and subsequently himself from being killed. ***See* Nash's Pretrial Statement pp. 10-12, 23, 38, 44.**

Counsel's opening recognized Mr. Nash as going to college and working and hence operating under a circumstance reflective of duress, however, never introduced proof thereof to the jury nor requested an instruction when such proof entered in through Mr. Nash's statement. ***See* Ripper Opening Argument at Trial, pp. 25-28.**

Mr. Nash's post-conviction testimony further confirmed this fact of his having been operating under duress. ***See* Post-Conviction Testimony of Charles Nash, pp. 106-114, 126-127, 128, 137-141, 147-148.**

Despite having been available and interviewed by a defense investigator, Mr. Alex Freeman was also never called to testify relative his knowledge of the threats that in fact were out there-and weighing heavily on Mr. Nash's state of mind when in desperation he acted. ***See*** **Post-Conviction Testimony of Alex Freeman, pp. 150-158.**

The duress defense was actually the only substantial defense that Mr. Nash had and trial counsel offered no reasonable, strategic or tactical decision for having failed to properly present such. That is, no decision that did not contradict what his opening statement and promised defense was in which he effectively deprived Mr. Nash and the jury of evidence, argument and or a jury instruction relative thereto. ***See*** **Trial Counsel's Post-Conviction Testimony pp. 15-16 and 60-65.**

As to present, imminent, impending and of such a nature to induce a well-grounded apprehension of death or serious bodily injury if the act is not done that questions was to be left to a jury based upon what was set forth and or available to set forth relative Mr. Nash state of mind that certain to come Monday was the death of his grandmother and/or death and/or injury to self if he did not get this person's money.

Under governing precedent, the Sixth Circuit simply held Mr. Nash to much to high a standard for a COA as it essentially required a full detailed trial outcome determination and/or jury issue at this stage.

Respectfully, as here where a petitioner suffers such a loss of liberty, the test for relief relative the violation of constitutional rights bearing directly thereon, should not be permitted to be made more substantial than those required by precedent.

For the above reasons review is respectfully warranted by the United States Supreme Court.

III. This Court has made clear that the *Strickland v. Washington*, 466 U.S. 668 (1984) standard is an objective standard of reasonableness, and thus should grant review where the Sixth Circuit has permitted a burden shifting duty to the Petitioner to know the law and inform counsel of what supports, constitutes and/or substantiates an issue as opposed to counsel having conducted his/her own inquiry.

This claim represents trial counsel's failure to have made a *Missouri v. Seibert*, 542 U.S. 600 (2004) talk first interrogation suppression challenge relative Mr. Nash's confession.

There has been no finding that the talk first interrogation did not occur, but simply that Mr. Nash failed to tell his counsel of the occurrence. In short, the district court, as did the state court, placed the burden on Mr. Nash to inform counsel of something that he never would have known was relevant and of which the evidence actually shows, based upon the sequence of events in the case, counsel should have been well aware.

In reviewing federal habeas corpus claims, the Supreme Court followed by lower federal courts have set forth that where the state court plainly misapprehends or misstates the record in making their findings, and the misapprehension goes to a material factual issue that is central to a petitioner's claim, that misapprehension can fatally undermine the fact-finding process, rendering the factual finding unreasonable. *See e.g., Wiggins v. Smith*, 123 S.Ct. 2547, 2538-39 (2003); *Hall v. Director of Corrections*, 343 F.3d 976, 983 (9th Cir.2003). As the Supreme Court noted in *Miller-EL v. Cockrell*, 123 S.Ct. 1029 (2003), the state-court fact finding process is undermined where the state court has before it, yet apparently ignores, evidence that supports petitioner's claim. *Miller-El, supra,* at 1045; *Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir.2004); *Debra Jean Milke v. Charles L. Ryan*, ---F.3d----, 2013 WL 979127 (9th Cir. (Ariz) 2013).

In fact, in dissenting from the denial of certiorari in *Reeves v. Alabama*, 138 S.Ct. 22 (2017), Justices Sotomayor, Ginsburg and Kagan, recalled the Court's precedents wherein whole record review analysis was made to prove whether a Petitioner carried his/or her burden under *Strickland,* with or without testimony from counsel on the matter.

As the decisions recognize, the *Strickland* standard is based upon an objective standard of reasonableness and does not place a burden on the Petitioner to know the law or explain what constitutes valid claims. *Ayestas v. Davis*, 138 S.Ct. 1080, 1096 (2018); and *Reeves, Strickland, supra.*

In Mr. Nash's case, the district court, as did the state court, totally ignored, misrepresented and or completed misapprehended material facts, and the factual record, and thus accredited counsel as not having been made aware of Nash having been questioned and confessing prior to giving the more formal statement.

The record here shows that the prosecutor's suppression hearing examination and counsel's suppression examination of Detective Freeman **[SH pp. 12-14 and 24-29],** the prosecutor's trial examination and counsel's trial cross examination of Detective Freeman [**TT pp. 140-145 and 167**], trial counsel's post-conviction testimony **[PH pp. 19-22 and 26-34],** and the testimony of Mr. Nash, **[PH pp. 92-105 and 135]** establishes that counsel knew and/or had sufficient information to have been aware.

In addition, Mr. Nash's pretrial statement shows gives a clear inference that a pretrial discussion had been had where during such statement Detective Freeman mentions St Elmo, fingerprinting and/or other matters that were not on the recording and that he could have only gotten during *pre-Miranda* discussions. ***See* Statement pp. 3, 7 and 10.**

Finally, trial counsel's brief on direct appeal reflects counsel's awareness of a discussion in the vehicle before *Miranda* warnings and a later formal statement. **Petitioner's Direct Appeal Brief, pp. 2-3 and 17.**

Nash submitted and submits that the trial transcripts, suppression hearing transcripts and the recording of his confession themselves, however, all give a clear inference that he had been previously interviewed and had essentially confessed prior to any *Miranda* and a formal statement having been given. Furthermore, the record was clear that Detective Freeman was the person who picked the Petitioner up and in fact was the Petitioner's cousin who was trying to essentially be the hero that solved this major crime.

Despite this abundant clearness, and/or significant inferences already in existence, counsel, who was the lawyer and was aware of the above, should have known that it was his duty to take those inferences and request specifics from Mr. Nash as to whether certain other pertinent matters occurred that could substantiate the claim.

Under *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052 (1984) the Supreme Court has made clear that when judging a claim of ineffective counsel, courts must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id* at 2065. It has added that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id* at 2066. As the Supreme Court has further written, "[t]he benchmark for judging any claim of an ineffective counsel claim must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result"). *Strickland* at 2063-2064.

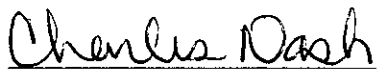
Mr. Nash submits that the record here shows that his pretrial confession is what built and substantiated the charges and conviction. Here also, counsel indeed had a means of more successfully being able to suppress this resulting proof, however, chose an avenue without real evidentiary support as a basis in futility within which to attempt suppression.

The Sixth Circuit's denial of a COA on a record that itself refutes the state and lower court decisions, and essentially shifts the burden to the petitioner to prove otherwise, should warrant the Supreme Court's consideration.

CONCLUSION

For the foregoing reasons, Mr. Nash respectfully requests that the petition for writ of certiorari is granted and that the appropriate relief is granted relative the important issues raised herein whether in the form of summary remand, GVR and/or a merits determination.

Respectfully Submitted,



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