

18-7377

IN THE
SUPREME COURT OF THE UNITED STATES

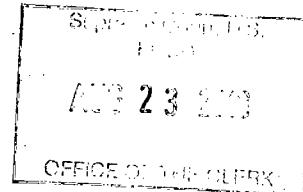
ORIGINAL

JARVIS HARRIS,
Petitioner,

vs.

JOE EASTERLING, Warden, "et al."
Respondent.

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ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES SUPREME COURT FROM THE SIXTH CIRCUIT
COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

JARVIS HARRIS #400198

HARDEMAN COUNTY CORRECTIONAL FACILITY

2520 UNION SPRINGS ROAD

WHITEVILLE, TN. 38075

731-254-6000

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

The Petitioner is Jarvis Harris, a prisoner at Hardeman County Correctional Facility, 2520 Union Springs Road, Whiteville, TN. 38075.

The Respondent's are Michael Donahue and Grady Perry, Warden's for said facility.

QUESTIONS PRESENTED

- I. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND DISTRICT COURT FOR THE WESTERN DISTRICT HAS ENTERED A DECISION IN CONFLICT WITH THE DECISION OF THIS COURT ON THE SAME IMPORTANT MATTER, HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH A DECISION BY ANOTHER UNITED STATES² COURT OF APPEALS**
- II. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND DISTRICT COURT FOR THE WESTERN DISTRICT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, OR HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT?**

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The Order of United States Court of Appeals for the Sixth Circuit appears at Appendix A to the petition.

The Opinion of District Court for the Western District of Tennessee appears at Appendix B to the petition.

The Opinion from Tennessee Court of Criminal Appeals appears at Appendix C to the petition.

The Opinion from Tennessee State Supreme Court appears at Appendix D to the petition.

The Opinion from Tennessee Court of Criminal Appeals appears at Appendix E to the petition.

The Opinion from Tennessee State Supreme Court appears at Appendix F to the petition.

JURISDICTION

For cases from State courts

The date on which the United States Court of Appeals for the Sixth Circuit denied the case was
June 29, 2018.

No petition for rehear was filed.

The jurisdiction of this Court is invoked under **28 U.S.C. § 1257.**

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth and Fourteenth amendment to the United States Constitution, which provides as follows:

AMENDMENT IV

The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation.

AMENDMENT VI

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.

AMENDMENT XIV

Section I.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In 2005, Petitioner was convicted by a Tennessee jury of one count of first degree murder and one count of attempted first degree murder. The trial court sentenced Petitioner to life imprisonment. The Tennessee court of criminal Appeals affirmed Petitioners conviction, *State v. Harris, No. W2006-02234-CCA-R3-CD, 2007 WL 2409676 (Tenn. Crim. App. Aug. 24, 2007)*, and the Tennessee Supreme Court denied permission to appeal further.

In 2009, Petitioner filed a state post-conviction petition, which was denied by the trial court. The Tennessee Court of Criminal Appeals affirmed this decision, *Harris v. State, No. W2010-01848-CCA-R3-PC, 2011 WL 3629230 (Tenn. Crim. App. Aug. 18, 2011)*, and the Tennessee Supreme court denied further review.

In 2012, Petitioner filed his § 2254 petition in the district court, alleging several violations of his constitutional rights. The district court initially dismissed two of Petitioner's claims as not providing a cognizable basis for § 2254 relief and a third claim as clearly without merit. However, the court allowed a fourth claim, alleging the ineffective assistance of trial and appellate counsel in handling a **Fourth Amendment** claim, to proceed. *Harris v. Perry, No. 2:12-CV-02668-STA-dkv, 2015 WL 5707078 (W. D. Tenn. Sept. 28, 2015)*. The court subsequently concluded that the issue was also meritless and dismissed the petition. *Harris v. Perry, No. 2:12-CV-02668-STA-dkv, 2016 WL 5396701 (W. D. Tenn. Sept. 27, 2016)*. Petitioner appealed the district court's decision but the Sixth Circuit Court of Appeals dismissed the appeal as untimely. *Harris v. Perry, No. 16-6822, 2017 WL 6546959 (6th Cir. July 13, 2017) (order)*. Petitioner then filed a third motion for relief from judgment, and the district court denied this motion. Additionally, the district court denied petitioner a COA to appeal its decision. Petitioner then sought a COA in order to challenge the denial of his third motion for relief from judgment.

Under 28 U.S.C. § 2253 (c)(1)(A), this court will grant a COA for an issue raised in as § 2254 petition only if the petitioner has made a substantial showing of the denial of a federal constitutional right. A COA is necessary to appeal the denial of a **Rule 60(b)** motion in a § 2254 case, *Johnson v. Bell*, 605 F. 3d 333, 336 (6th Cir. 2010), and, in order to obtain a COA, Petitioner must demonstrate that jurist of reason “could debate whether . . . the [motion] should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U. S. 473, 484 (2000) (citation and internal quotation marks omitted).

REASONS FOR GRANTING THE WRIT

I. THE STATE COURT, DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE AND THE SIXTH CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, AND HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISION OF THIS COURT.

First Provision

The Petitioner will make a substantial showing of the denial of his **Fourth, Fifth, Sixth and Fourteenth Amendment** Constitutional rights by the following set of facts and particulars. Also, the Petitioner will demonstrate that reasonable jurist could debate whether the petition should have been resolved in a different manner, and that the issues presented were adequate to deserve encouragement to proceed further.

Section 2254(d) establishes that standard for addressing claims that have been adjudicated in the state courts on the merits:

"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 United States Supreme Court; 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.

A state court's decision is "contrary" to federal law when it "arrives at a conclusion opposite to that reached" by the Supreme Court on a question of law or "decides a case differently than" the Supreme has "on a set of materially indistinguishable facts." *Williams v. Taylor*, 120 S. Ct. 1495 (2000). An "unreasonable application" of federal law occurs when the state court "identifies the correct legal principle from" the Supreme Court's decisions "but unreasonably applies that principle to the facts of the petitioner's case." *Id. at 120 S. Ct. 1523*. The state court's application clearly established federal law must be "objectively unreasonable."

A. WHETHER THE PETITIONER WAS DENIED OF [SIC] EFFECTIVE ASSISTANCE OF COUNSEL DURING THE SUBSEQUENT TRIAL AND APPELLATE PROCEEDINGS AGAINST HIM.

This issue is debatable among jurists as held in *Miller -El v. Cockrell*, 123 S. Ct. 1029 (U.S. 2003), where the blatant denial of the Petitioner's constitutional rights were attributable to the State Court's deprivation of Petitioner's **Fourth, Fifth, and Sixth Amendment** Constitutional rights of equal protection and due process of law.

As support for this issue, the Petitioner contends that he was denied effective assistance of counsel during the subsequent trial and appellate proceedings:

Petition presented the following issues:

The Court issued an order on September 28, 2015, that, *inter alia*, dismissed Claims 1 through

3. (Order, ECF No. 26). The Order noted that "Petitioner has potentially viable ineffective assistance of trial counsel and ineffective assistance of appellate counsel claims that have not been squarely addressed by the state courts." (*Id.* at 35). Specifically, the Court noted that Petitioner had a potentially meritorious claim that he was arrested in violation of the Fourth Amendment but that trial counsel and post-conviction counsel had not raised the issue despite Petitioner's persistent attempts to bring the issue to counsel's attention. (*Id.* at 35-40). The Order observed that "[i]t is unclear ... whether Petitioner properly exhausted an ineffective assistance of trial counsel claim based on counsel's failure to litigate the **Fourth Amendment** issue.

It is also unclear whether that failure can be excused on the basis of the Supreme Court's decisions in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013)." (*Id.* at 40-41). The Order concluded that "it is in the interest of justice to appoint counsel in this matter to represent Petitioner with respect to that portion of **Claim 4** that addresses the handling by trial and appellate counsel of the **Fourth Amendment** issue arising from Petitioner's arrest." (*Id.* at 41). The matter was referred to Chief United States Magistrate Judge Diane K. Vescovo to determine whether Petitioner qualified for appointed counsel. (*Id.*). Petitioner was directed to file *in forma pauperis* affidavit and a copy of his inmate trust fund account statement. (*Id.*).

On October 20, 2015, Petitioner filed the required documents. (**Appl. to Proceed in District Court Without Prepaying Fees or Costs (Short Form)**, ECF No. 27). On October 29, 2015, Magistrate Judge Vescovo found that Petitioner qualified for appointed counsel and directed that counsel be appointed from the Criminal Justice Act panel. (**Order**, ECF No. 28). On November 4, 2015, Marty B. McAfee was appointed to represent Petitioner. (**Appointment of and Authority to Pay Court Appointed Counsel**, ECF No. 29).

The Court issued an order on December 10, 2015, directing that, "within twenty-eight (28) days of the date of entry of this order, Petitioner, through counsel, file any amendment to his § 2254 Petition

that may be necessary pertaining to the ineffective-assistance claim and a legal memorandum." (**Order at 2, ECF NO. 30**). The Warden was invited to "file a supplemental answer addressing this issue twenty-eight (28) days after the filing of Petitioner's amendment and memorandum." (*Id. at 2-3*). Petitioner's through his appointed Attorney failed to comply with, or otherwise respond to, this Order.

In an order issued on January 14, 2016, Petitioner, through his appointed attorney, was instructed to advised the Court within three business days whether he intended to file a supplemental memorandum and to explain why he was unable to follow the deadline that was set. (**Order at 1, ECF No. 31**). Petitioner was cautioned that a "[f]ailure to timely respond to this order may constitute a waiver of the right to file a supplemental memorandum." (*Id.*). McAfee did not respond to that Order and, therefore, has waived Petitioner's right to file an amendment and supplemental memorandum.

In an order issued on February 10, 2016, the Court held that, by failing to respond to the previous orders, Petitioner had waived his right to file an amendment and supplemental memorandum. (**Order at 5, ECF No. 32**). The Order dismissed **Claim 4**, holding that virtually every sub-claim was barred by procedural default and that the state-court decision on the one sub-claim that had been properly exhausted was not contrary to or and unreasonable application of *Strickland v. Washington*, 466 U. S. 668 (1984), and was not based on an objectively unreasonable factual determination. (*Id. at 5-20*). The Order also denied a certificate of appealability. (*Id. at 21*). Judgment was entered on February 10, 2016. (**J. in a Civil Case, ECF No. 33**).

On February 11, 2016, Petitioner, through counsel, filed his **First Motion for Relief from Judgment**, which sought relief under **Rules 60(b)(1) and (6) of the Federal Rules of Civil Procedure**. (**1st Mot. for Relief from J., ECF No. 34**). That motion asked the Court to "strike its judgment" and extend Petitioner's time to file a supplemental memorandum and amendment. (*Id. at Pg. ID 1422*). McAfee explained that the ECF notices of the Court's previous Orders had been delivered to his inbox but that his assistant erroneously assumed they had been sent in error and did not

bring them to his attention. (*Id.*). Respondent filed a response in opposition to the motion on February 12, 2016. (**Resp. in Opp'n to 1st Mot. for Relief from J., ECF No. 35**).

In an Order issued on February 29, 2016, the Court denied relief under **Rule 60**, reasoning that McAfee's **failures to respond to the Court's orders did not constitute "excusable neglect"** under **Rule 60(b)(1)**. (**Order at 3-4, ECF No. 36**). The Order also stated as follows:

However, Petitioner may be entitled to relief under **Federal Rule of Civil Procedure 59(e)** which provides for motions to alter or amend judgment.

Relief under **Rule 59(e)** is available to correct a clear error of law, on the basis of newly discovered evidence or an intervening change in the law, or to prevent manifest injustice. Despite the absence of excusable neglect in this matter, there are other, more compelling concerns that the Court believes may justify relieving Petitioner from the consequences of his counsel's inaction. This case involves a **§ 2254** Petition and, thus, Petitioner's liberty. Additionally, the Court previously determined that Petitioner should be given the opportunity, through counsel, to further expound on and clarify the circumstances surrounding **Claim 4** as set for[th] in the pro se Petition. While the Court believes that it has fully adjudicated and addressed Claim 4 on the merits in its Order, (**ECF No. 32**), it is possible that Petitioner may be able to convince the Court otherwise.

Counsel shall have fifteen (15) days from the entry of this order in which to file a Memorandum of Law and any supporting documentation that counsel believes would contradict or justify reconsideration of the Judgment that has already been entered. The Respondent shall not be required to respond unless ordered to do so by the Court. After reviewing the memorandum, the Court will determine whether Petitioner's motion for relief from judgment should be granted to prevent a manifest injustice.

(*Id.* at 45 (internal quotation marks and footnote omitted).)

On March 14, 2016, Petitioner filed his Second Motion for Relief from Judgment, supported by a legal memorandum. (**2nd Mot. for Relief from J., ECF No. 37; Memo. of Law in Supp. of 2nd Mot. for Relief from J., ECF No. 37-1**).

Petitioner avers that the proof is clear and obvious that McAfee's failure to follow the Court's Order to file a amendment to Petitioner's **§ 2254** Petition was a blatant denial of a Court Order to perform a specific act and was also a blatant denial to demonstrate to the Court that there was

accessible evidence to support Petitioner's **Fourth Amendment** claim pertaining to (ineffective assistance of counsel).

LEGAL STANDARD

"To grant a motion filed pursuant to **Rule 59(e)** of the **Federal Rules of Civil Procedure**, there must be (1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice." *Betts v. Costco Wholesale Corp.*, 558 F. 3d 461, 474 (6th Cir. 2009) (internal quotation marks omitted). The Sixth Circuit has repeatedly held that "**Rule 59(e)** motions cannot be used to present new arguments that could have been raised prior to judgment. **Rule 59(e)** allows for reconsideration; it does not permit parties to effectively re-argue a case." *Howard v. United States*, 533 F. 3d 472, 475 (6th Cir. 2008).

Here, according to the District Court's Order, Petitioner seeks relief on the basis of manifest injustice.

Although the "manifest injustice" grounds for a **Rule 59(e)** motion appears to be a catch-all provision, it is not meant to allow a disappointed litigant to attempt to persuade the Court to change its mind. Instead, whether manifest injustice would result from denying a **Rule 59(e)** motion is, by definition, a fact-specific analysis that falls squarely within the discretionary authority of the Court. In exercising this discretion, the Court should weigh the importance of bringing litigation to a firm conclusion and the need to render fair and just rulings,

Lonardo v. Travelers Indem. Co., 706 F. Supp. 2d 766, 809 (N.D. Ohio 2010)(citations omitted).

Essentially, "a showing of manifest injustice requires that there exists a fundamental flaw in the court's decision that without correction would lead to a result that is both inequitable and not in line with applicable policy." *McDaniel v. American General Fin'l. Servs., Inc.*, 2007 WL 2084277, *2 (W.D. Tenn. 2007).

In re *Henning*, 420 B.R. 773, 785 (Bankr. W.D. Tenn. 2009). "As found in *Black's Law Dictionary*, a manifest injustice is define as '[a]n error in the trial court that is direct, obvious and observable such as a defendant's guilty plea that is involuntary..." *McDaniel v. Am. Gen. Fin. Servs.*,

Inc., No. 04-2667-B, 2007 WL 2084277, at *2 (W.D. Tenn. July 17, 2007) (additional internal quotation marks and citation omitted).

Petitioner contends that the District Court's analysis on whether Petitioner presented his **Fourth Amendment** claim at trial and on appeal is unsupported. In the **Opinion from the TCCA**, the Court ruled that "we agree with the post-conviction court and the state that issues relative to the trial court's denial of the petitioner's motion to suppress have been previously determined." "On direct appeal, this court's held that "the evidence supports the trial court's finding that the defendant knowingly, intelligently, and voluntarily waived" his constitutional rights prior to giving the statements to police."

Petitioner avers that he has fairly raised his **Fourth Amendment** claim to the trial court and again to the TCCA, which was denied by both courts. In Petitioner's § 2254 Petition, a **Fourth Amendment** claim was also raised that Petitioner was arrested without probable cause and the claim was denied for failure to properly exhaust the claim to the TCCA.

In evaluating counsel's argument, it is important to recall that a habeas petitioner properly exhausts a federal claim by presenting that claim to the state trial court and to the TCCA. (**See Order at 14, ECF No. 26**). The District Court asserts that the citations supplied by petitioner do not persuade the Court that Petitioner is entitled to relief from judgment. Petitioner avers that his original and amended post-conviction petitions have raised **Fourth Amendment** issues (see **Pet. for Post-conviction Relief at Pg. ID 935, *Harris v. State*, No. 03-00441 (Shelby Cnty. Crim. Ct.), ECF No. 15-15 at Pg. ID 935; Am. Post-conviction Pet. for Relief at Pg. ID 986, Id., ECF No. 15-15**), those allegations were not contained in an ineffective-assistance claim. These citations do not undermine the Court's conclusion (**Order at 6, ECF No. 32**) that Petitioner's post-conviction petition do not allege that trial counsel mishandled the **Fourth Amendment** issue by failing to argue that Petitioner had been arrested without probable cause. **See Anderson v. Harless, 459 U.S. 4, 6 (1982) (per curiam)**("It is not enough that all the facts necessary to support the federal claim were before the state courts,

or that a somewhat similar state-law claim was made.").

Petitioner avers that Petitioner fairly presented his **Fourth Amendment** claim to the post-conviction court that trial counsel failed to argue that he had been arrested without probable cause, Petitioner failed to include the issue in his pro se brief on the post-conviction appeal. Instead, as the February 10, 2016 Order found, "Petitioner argued in his brief to the TCCA that trial counsel failed to call Bass to testify at trial. . . ." (**Order at 7, ECF No. 32**). Counsel argues that Petitioner's pro se brief includes other aspects of the **Fourth Amendment** issue, although it was not styled as a sufficiency argument. (**See Memo. of Law in Supp. of 2nd Mot. for Relief from J. at Pg. ID 1437, ECF No. 37-1**). The statement cited by counsel appears in a section of the brief titled, "The Trial Court abused its discretion ruling the Evidence was sufficient to support the defendant's presumption of guilt convictions of First Degree Murder and First Degree Murder Beyond A Reasonable Doubt." (**Br. of Appellant at Pg. ID 1173, Harris v. State, W2010-02848-CCA-R3-PC (Tenn. Crim. App.), ECF No. 15-18**).

Petitioner avers that Court has taken the quotation out of context. The sentence at issue reads: "There is absolutely no testimony or evidence from anyone that could establish Probable Cause to arrest and have a grand jury return formal indictments **where Eric Cooper statements are arbitrarily unreasonable and relied upon as a criminal informant.**" (*Id. emphasis added*.) Finally, for the reasons previously stated, see *supra* pg. 8-9, raising a **Fourth Amendment** claim is not sufficient to exhaust a **Sixth Amendment** claim that counsel mishandled a **Fourth Amendment** issue. Therefore, Petitioner did not "fairly present" to the state courts his claim that his trial counsel failed to argue that he was arrested without probable cause in violation of the **Fourth Amendment**.

Petitioner contends that the **Fourth Amendment** claim was raised throughout his state court proceedings and on post-conviction. The case cite that the Court is referring to that was omitted should not allow the court to exclude the evidence that was presented to the court regarding a **Fourth**

Amendment claim.

Petitioner avers that "when federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington v. Richter*, 562 U.S. 86, 99 (2011). In *Cullen v. Pinholster*, 563 U.S. 170, 190, 131 S. Ct. 188 (2011), the Supreme Court found an ineffective-assistance claim to have been adjudicated "on the merits" where the claim had been included in both of the prisoner's state habeas petitions, each of which the California Supreme Court had denied "on the substantive ground that it is without merit." 563 U.S. 170, 187 (2011) (internal quotation marks omitted). The Supreme Court explained that § 2254(d) "applies even when there has been a summary denial.

In these circumstances, [a habeas petitioner] can satisfy the 'unreasonable application' prong of § 2254(d)(1) only showing that there was no reasonable basis for the {state court's} decision." ***Id* at 187-88** See also *Richter*, 562 U.S. at 98 ("Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief.").

Petitioner asserts that he is entitled to relief under *Martinez* and *Trevino* "even if Petitioner had not litigated this issue exhaustively", the argument is supported. The Court expresses that Petitioner cites no authority for the proposition that *Martinez* and *Trevino* apply where a claim was properly raised in a post-conviction petition but counsel chose not to present evidence at the evidentiary hearing. The typical fact pattern for a *Martinez* issue involves the complete failure to present an issue in a post-conviction petition.

However, the Court failed to recognize that to protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel, it is necessary to modify the unqualified statement in *Coleman v. Thompson*, 501 U. S. at 752-54, that an attorney's ignorance or inadvertence in a post-

conviction proceeding does not qualify as cause to excuse a procedural default. *Coleman* is now qualified by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial.

Where the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim. This is because the state habeas court looks to the merits of the claim of ineffective assistance, no other court has addressed the claim, and defendants pursuing first-tier review are generally ill equipped to represent themselves because they do not have a brief from counsel or an opinion of the court addressing their claim of error.

The rules for when a prisoner may establish cause to excuse a procedural default are elaborated in the exercise of a court's discretion. These rules reflect an equitable judgment that only where a prisoner is impeded or obstructed in complying with the State's established procedures will a federal habeas court excuse the prisoner from the usual sanction of default. Allowing a federal habeas court to hear a claim of ineffective assistance of trial counsel when an attorney's errors (or absence of an attorney) caused a procedural default in an initial-review collateral proceeding acknowledges, as an equitable matter, that the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim.

When a State requires a prisoner to raise an ineffective assistance of trial counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective assistance claim in two circumstances. The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was

ineffective under the standards of *Strickland*. To overcome the default, a prisoner must also demonstrate that the underlying ineffective assistance of trial counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.

Second Provision

Petitioner argues that his trial and appellate counsel rendered ineffective assistance, in violation of the **Sixth Amendment**. (**§ 2254 Pet. at Pg. ID 10, *Harris v. Perry*, No. 2:12-cv-02668-STA-dkv (W.D. Tenn.), ECF No. 1**). In the form § 2254 Petition, Petitioner alleges only that "Petitioner's trial counsel failed to investigate the Petitioner's case in relation to the law both factually and legally." (*Id.*) In his legal memorandum, Petitioner argues that his trial counsel (i) failed to mention during the argument on the motion to suppress that Petitioner had been arrested without probable cause "because the Petitioner was arrested and taken into custody without an arrest warrant in relation to the victim's death" (**Memo. in Supp. of § 2254 Pet. at 12, *Id.*, ECF No. 1-1**; (ii) failed to mention during the argument on the motion to suppress that "the officers' [sic] continu[ed] to question [him] after he invoked his right to have counsel present during the custodial interrogation on both April 14, 2002 and on April 16, 2002" (*Id. at 13*); (iii) failed to raise in the motion for a new trial that the trial court erred in denying the motion to suppress on the grounds that (a) "the Petitioner was handcuffed the entire time, although, he was treated as a witness, not as a suspect, during the interview" and (b) the police continued to question him after he had invoked his right to counsel (*Id. at 14*); and (iv) "fail[ed] to adequately prepare Petitioner for trial and adequately communicate with the Petitioner prior to the Petitioner's trial, because Petitioner trial counsel failed to confer with is client without delay and as often as necessary to elicit matters of defense, or to ascertain what potential defenses were or were not unavailable" (*Id.*). Petitioner further argues that (v) his appellate counsel rendered ineffective assistance by failing to raise on appeal the Fourth Amendment issues that trial counsel had neglected to

include in the motion for a new trial. (*Id. at 17*).

In his Answer, Respondent argues that the portion of Claim 4 addressing the performance of trial counsel is barred by procedural default. (**Answer 1t 22-23, *Harris v. Perry*, No. 2:12-cv-02668-STA-dkv (W.D. Tenn.), ECF No. 24**). The only ineffective assistance claim in the original post-conviction petition pertained to the performance of appellate counsel. (**See Pet. for Post-conviction Relief at Pg. ID 934-35, 963-66, *Harris v. State*, Nos. 03-00441, -00442 (Shelby County Crim. Ct.), ECF No. 15-15**). In his amended post-conviction petition, Petitioner argued that his attorney failed to investigate both factual and legal issues of merit (**Am. Post-conviction for Relief at Pg. ID 985, *Id.*, ECF No. 15-15**), but the factual basis for the issue did not mention trial counsel's performance (*Id. at Pg. ID 985-89*).

Petitioner contends that he did argue that trial counsel failed to investigate his arrest and interrogation, concerning statements made speaking with a family member who was also a Memphis Police Officer, Eddie Bass. (*Id. at Pg. 990-94*). The post-conviction court denied relief, addressing only the claim that trial counsel rendered ineffective assistance by failing to call Bass as a witness at the suppression hearing and at trial. (**Order Denying Pet. for Post-conviction Relief at 6, ECF No. 15-15 at Pg. ID 1077**).

Petitioner avers that after the post-conviction court denied relief, Petitioner file a pro se brief to the Tennessee Court of Criminal Appeals ("TCCA"). (Br. of the Appellant of Tenn. [sis], ***Harris v. State, No. W2010-01848-CCA-R3-PC (Tenn. Crim. App.), ECF No. 15-18***). According to the TCCA, the ineffective assistance claims raised in the post-conviction appeal were "that trial counsel performed deficiently by failing to present Eddie Bass as a witness at the suppression hearing and at trial" and that "appellate counsel failed to raise meritorious issues on appeal ... regarding the deprivation of [Petitioner's] constitutional rights during the interrogation and deficiencies in the indictment." *Id.* That conclusion is supported by the appellate record. Respondent avers that the list of

issues in Petitioner's brief to the TCCA on the post-conviction appeal does not mention ineffective assistance of trial and appellate counsel. **See *Harris v. State*, W2010-01484-CCA-R3-PC, ECF No. 15-18 at Pg. ID 1136.** Ineffective assistance is mentioned only in connection with issue 1, that the "[t]rial [c]ourt abused its discretion denying all of Appellant's issues at post-conviction hearing." **Id. at Pg. ID 1151.** Petitioner argued in his brief to the TCCA that trial counsel failed to call Bass to testify at trial and Appellate Counsel failed to raise meritorious issues. (Id. at Pg. ID 1152). Therefore, the Courts finds that sub-claims finds (i), (ii), (iii) and (iv) were not exhausted in state-court and, because no further avenue exists in which to present those claims to the state court, they are barred by procedural default.

In Petitioner's Reply, Petitioner concedes that his attorney failed to exhaust certain of Petitioner's claims in state court but argues that "[c]ommon sense dictates a litigant cannot be held constructively responsible for the conduct on [sic] an attorney who is not operating as his agent in any meaningful sense of that word." **(Reply at 3, *Harris v. Perry*, No. 2:12-cv-02668-STA-dkv (W.D. Tenn.), ECF No. 25).** Petitioner asserted the language cited in the Supreme Court decision in ***Coleman v. Thompson*, 501 U. S. 722 (1991)**, but the Court failed to acknowledge the significance of that argument because Petitioner failed to cite the case by name.

Justice Alito, cited ***Coleman*, 501 U. S. at 752-54**, which applied principles of agency law to determine when an attorney's error can be attributed to his client. ***Coleman*** held that, because there is no constitutional right to counsel in state post-conviction proceedings, the ineffective assistance of post-conviction counsel does not provide cause to excuse a procedural default.

Petitioner avers that his argument should be construed as asserting that Petitioner's procedural default should be excused on the basis of the Supreme Court's decision's in ***Martinez v. Ryan*, 132 S. Ct. 1309 (2012)**, and ***Trevino v. Thaler*, 133 S. Ct. 1911 (2013)**. Petitioner contends that until recently, a habeas petitioner could not obtain relief when a claim was barred by procedural default due to

ineffective assistance of post-conviction counsel. In 2012, the Supreme Court issued its decision in *Martinez v. Ryan*, 132 S. Ct. at 1320, which recognized a narrow exception to the rule in *Coleman* "[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding ..." In such cases, "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial collateral proceeding, there were no counsel or counsel in that proceeding was ineffective."

The Supreme Court also emphasized that "[t]he rule of *Coleman* governs in all but the limited circumstances recognized here.... It does not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial, even though that initial review collateral proceeding may be deficient for other reasons." **Id.** The requirements that must be satisfied to excuse a procedural default under *Martinez* are as follows:

- (1) the claim of "ineffective assistance of trial counsel" was a substantial" claim;
- (2) the "cause" consisted of there being "no counsel" or only "ineffective" counsel during the state collateral review proceeding;
- (3) the state collateral review proceeding was the "initial" review proceeding in respect to the "ineffective-assistance-of-trial-counsel claim", and
- (4) state law requires that an "ineffective assistance of trial counsel [claim] .. be raised in an initial-review collateral proceeding."

***Trevino v. Thaler*, 133 S. Ct. at 1918.**

Petitioner contends that he has met each of the specific requirements that must be satisfied to excuse a procedural default under *Martinez*. However, each state-court and the District Court has failed to acknowledge Petitioner's arguments in regard to trial counsel failing to properly argue Petitioner's Fourth Amendment claim at trial and post-conviction counsel failing to properly argue the said claim at the post-conviction hearing or on appeal from post-conviction. Even more so, the District Court appointed an attorney to specifically argue a Fourth Amendment claim and that counsel also failed to properly argue Petitioner's Fourth Amendment claim after being warned by the Court that failure to do so would have Petitioner's claim being dismissed. Such ineffective assistance of counsel

at every initial stage of the state court proceedings and District Court proceedings has denied Petitioner of the opportunity to have a viable claim properly raise and presented to the courts.

Martinez arose under an Arizona law that did not permit ineffective assistance claims to be raised on direct appeal such as in Tennessee. In its subsequent decision *Trevino*, 133 S. Ct. at 1921, the Supreme Court extended its holdings in *Martinez* to states in which a "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal...." Thus, the decision in *Trevino*, modified the fourth requirement state by *Martinez* for overcoming a procedural default. The decision in *Martinez* and *Trevino* apply to Tennessee prisoners. *Sutton v. Carpenter*, 745 F. 3d 787, 789 (6th Cir. 2014).

Respondents avers that *Martinez* and *Thaler* are of no assistance to Petitioner because, *inter alia*, *Martinez* does not apply to claims that post-conviction appellate counsel failed to exhaust.

Wallace v. Sexton, 750 F. App'x 443, 453 (6th Cir. 2014) ("In the instant case, Wallace's claims were properly presented to the post-conviction trial court, which denied all of claims on the merits. Thus, the alleged ineffective assistance of Wallace's post-conviction appellate counsel is not cause to excuse the procedural default of his defense-theory claims, and we may not consider these claims on the merits.") *Martinez*, 132 S. Ct. at 1316 ("While counsel's errors in [other levels of post-conviction] proceedings preclude any further review of the prisoner's claim, the claim will have been addressed by one court, whether it be the trial court, the appellate court on direct review, or the trial court in an initial-review collateral proceeding."). Respondent further asserts that Petitioner also cannot complain about the failure to raise any claim during the post-conviction appeal because he was pro se.

Although Petitioner agree with the Respondent as to Petitioner filing his appeal from post-conviction pro se, the gist of Petitioner's argument is based on post-conviction counsel's failure to argue Petitioner's **Fourth Amendment** claim during the post-conviction proceeding. Such failure by

post-conviction counsel to not argue Petitioner's **Fourth Amendment** claim at Petitioner's post-conviction hearing falls well within the scope of requirements as set forth in *Martinez, Thaler and Carpenter. Id.*

The Petitioner avers that the petition for post-conviction relief was filed pro se and the **Fourth Amendment** claim was raised in the petition. Appointed counsel raised the **Fourth Amendment** issue in the amended petition which should have caused the State to file an Answer to the petition that admits or denies every claim raised in the petition and which raises affirmative and specific statutory defenses. **Tenn. S. Ct. Rule 28 § 2(B).** The State shall file a motion to dismiss which includes the facts relied upon to support the motion to raise as a defense that:

- (1) the petition is barred by the statute of limitations;
- (2) the claim has been waived or previously determined;
- (3) the petition is not filed in the court with jurisdiction;
- (4) the petition asserts a claim for relief from judgments entered in separate trials or proceedings;
- (5) a post-conviction petition or direct appeal regarding the same conviction is currently pending;

or

- (6) the facts alleged fail to show that petitioner is entitled to relief. **Tenn. S. Ct. Rule 28 § 2 (G)**

The Trial Court is required to address each issue raised in Petitioner's petition for post-conviction relief. **Tenn. S. Ct. Rule 28 § 6 (B) 3 (d)** states that:

In the event a colorable claim is stated, the judge shall enter a preliminary order which: the court orders that State to respond and , if appropriate, to file with the clerk certain transcripts, exhibit, or records from the prior trial or hearing.

Petitioner avers that trial counsel failed to raise Petitioner's **Fourth Amendment** claim and to present evidence to support such claim. Petitioner contends that his statement to police should have been suppressed because he was arrested without probable cause prior to giving the statement.

Respondent contends that Petitioner has failed to present any evidence in support of his claim that trial counsel should have argued that the police continued to question him after he invoked his **Fifth Amendment** rights is fully supported by the evidence. Petitioner contends that this claim was raised in Petitioner post-conviction petition, was again mentioned in post-conviction Counsel's Amended petition and the State addressed the claim in its Answer. No where in the record did the State request that this **Fourth Amendment** claim be dismissed for one of the enumerated requirements stated in **Tenn. S. Ct. Rule 28 § 2 (G)**.

Therefore, Petitioner contends that the **Fourth Amendment** claim was raised in Petitioner's post-conviction petition but was not argued by post-conviction counsel nor was it properly answered by the State. Even more so, the Trial Court failed to address the merits of the claim in the Court's findings of fact and conclusions of law.

Petitioner avers that post-conviction counsel failed to argue and support the **Fourth Amendment** claim at the post-conviction hearing which leaves this claim ripe for the holdings in *Martinez, Thaler and Sutton. Id.*

Petitioner avers that under the standard set forth in *Martinez, Thaler and Sutton*, Petitioner's post-conviction counsel failed to present the evidence to support the **Fourth Amendment** claim and therefore placed Petitioner in procedural default.

Petitioner contends that what is even more egregious than being denied ineffective assistance of counsel during the entire state-court proceedings is that Petitioner was also denied effective assistance of counsel on the Federal District Court proceeding as well. Counsel McAfee was given an Court Order to file an amendment to the § 2254 Petition "not once but twice." Counsel failed to follow the Order to present the **Fourth Amendment** claim to the District Court for review. McAfee then made a harmful attempt to correct the mistake he had made by not following the Order to file an amendment to the § 2254 Petition by filing a frivolous **Rule 60 B (1) and (6)**.

A federal claim for relief may be properly exhausted if the state court's decision does not explicitly address it; it is enough that the Petitioner's brief squarely presents the issue. *Smith v. Digmon*, 98 S. Ct. 597 (U.A. Ala. 1978). Also *Baldwin v. Reese*, 124 S. Ct. 1347 (U.S. 2004), specifies that a federal habeas corpus claim is fairly presented to a state appellate court only if that claim appears in Petitioner's brief. In the case at bar, Petitioner presented his **Fourth Amendment** claim to the post-conviction court for review and post-conviction counsel failed to properly raise in support the issue. Further, the constitutional principles in *Coleman* would mandate the aforementioned claim be heard and adjudicated on the merits in the interest of justice to prevent a gross miscarriage of justice. *Coleman v. Thompson*, 111 S. Ct. 25465 (1991).

Whenever an error, inadvertence, or omission results to deprive review of an exhausted claim, where Petitioner was represented by appointed counsel, such error cannot be charged to the Petitioner to further penalize the Petitioner as to not address the merits of said claims, clearly operate to deprive the Petitioner of his **Fifth and Fourteenth Amendment Constitutional** rights to acquire fundamental fairness and substantiate due process of the law.

"The following enumerated claim is so egregious and prejudicial that it results in a denial of fundamental fairness, it also violates due process and thus warrant habeas relief, certificate of appealability to issue and/or writ of certiorari. *Buge v. Mitchell*, 329 F. 3d 496, 512 (6th Cir. 2003); and also *Clemons v. Sowders*, 34 F. 3d 352, 356 (6th Cir. 1994)."

In *Harris v. Reed*, 109 S. Ct. 1038 (U. S. Ill. 1989), the Court determined "the mere fact that a federal claimant failed to abide by a state procedural rule does not, in itself, prevent this Court from reaching the federal claim: "[T]he state court must actually have relied on the procedural default as an independence for its disposition of the case." Conversely, a federal claimant's procedural default precludes federal habeas review, like direct review, only if the last state court rendering a judgment in the case rests its judgment on procedural default. See *Caldwell v. Mississippi*, 105 S. Ct.

2633, 2638 (U. S. Miss. 1985).

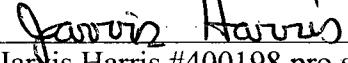
The state court and district court never adjudicated Petitioner's constitutional claim of ineffective assistance of counsel by disposition of procedural default as an independent basis to resolve the constitutional question. Therefore, the Respondent's position relative to this claim is "contrary to" clearly established Supreme Court precedent, and the writ of certiorari should be granted per this claim.

Petitioner contends that the State Courts, District Court for the Western District of Tennessee and the Sixth Circuit Court of Appeals has decided an important question of law that has not been, but should be settled by this court, and has decided an important federal question in a way that conflicts with relevant decisions of this court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

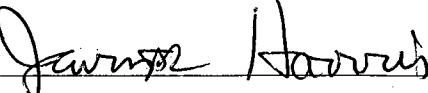


Jarvis Harris #400198 pro se
2520 Union Springs Road
HCCF P. O. Box 549
Whiteville, TN. 38075

CERTIFICATE OF SERVICE

I, Jarvis Harris #400198, hereby certify under the penalty of perjury that a true and exact copy of the foregoing "Petition for Writ of Certiorari" has been forwarded via First Class U. S. Mail, prepaid postage to Court Clerk, Scott E. Harris, 1 First St. NE, U.S. Supreme Court Bldg, Washington, DC. 20543; and Attorney General; Herbert H. Slatery III; 500 Charlotte Ave. P. O. Box 20207; Nashville, TN. 37202-0207.

On this 2 day of January, 2018
2019



Jarvis Harris #400198 pro se

APPENDIX A