APPENDIX – A

No. 17-5498

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MAURICE EDWARD CARTER,)
)
Petitioner-Appellant,)
) ORDER
v.)
)
MIKE PARRIS,)
)
Respondent-Appellant.)

Maurice Edward Carter, a pro se Tennessee prisoner, applies for a certificate of appealability ("COA") in his appeal from a district court judgment dismissing his habeas corpus petition filed under 28 U.S.C. § 2254. He also moves to proceed *in forma pauperis* on appeal.

In 2009, Carter pleaded guilty to one count of aggravated statutory rape and one count of criminal exposure to HIV and received an effective sentence of twenty years in prison. As a condition of his guilty plea, he reserved a certified question of law for appeal under Tennessee Rule of Criminal Procedure 37(b)(2)(A) "regarding the denial of his motions to suppress the stop and search of his automobile, and his subsequent statement to police and evidence obtained during the execution of search warrants." *State v. Carter*, No. M2010-00063-CCA-R3CD, 2011 WL 3303714, at *1 (Tenn. Crim. App. Aug. 2, 2011).

On appeal, Carter argued, among other things, that his permission to search his vehicle did not extend to a locked box in his backseat, rendering its search unlawful. However, the Tennessee Court of Criminal Appeals did not address this issue, concluding that it had not been "properly reserved in the certified question." *Id.* at *11. Further, the court concluded that "the certified question [was] not dispositive of the charges against" Carter and dismissed his appeal for lack of jurisdiction without deciding the merits of his claims. *Id.* at *1. The Tennessee Supreme Court denied Carter's application for permission to appeal.

Carter filed a petition for post-conviction relief, arguing that his attorneys were ineffective for failing to properly preserve his lock-box claim and that he would not have pled guilty if he had known that the Tennessee Court of Criminal Appeals would not rule on the merits of his certified question. After a hearing at which Carter's former attorneys testified, the trial court dismissed the petition on the merits. The Tennessee Court of Criminal Appeals affirmed and also declined to consider a new claim on appeal—that Carter's guilty plea was involuntary because his trial counsel was ineffective in advising him of the "ramifications and possible outcomes of his guilty plea"—finding that Carter had waived review of the issue by failing to raise it in his post-conviction petition. *Carter v. State*, No. M201400750CCAR3PC, 2015 WL 967255, at *11 (Tenn. Crim. App. Mar. 3, 2015). The Tennessee Supreme Court denied Carter's application for permission to appeal.

In 2015, Carter filed his § 2254 petition, arguing that his counsel was ineffective for: (1) improperly advising him that his certified question would be determined on the merits by the Tennessee Court of Criminal Appeals; (2) failing to properly present and preserve his lock-box claim; and (3) allowing him to enter an "unknowing, involuntary[,] and uninformed guilty plea." The district court denied Carter's first and second claims on the merits and his third claim as procedurally defaulted. The court dismissed the petition and declined to issue a COA. Carter now asks this Court to issue a COA.

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *accord Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). When the denial of relief is based on the merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When the district court denies a habeas petition on a procedural ground without reaching the underlying constitutional claims, a COA should issue when the petitioner demonstrates "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* "[A] COA does not require a showing that the appeal will succeed." *Miller-El*, 537

U.S. at 337. It is sufficient for a petitioner to demonstrate that "the issues presented are adequate to deserve encouragement to proceed further." *Savoca v. United States*, 567 F.3d 802, 803 (6th Cir. 2009).

First, Carter argued that his guilty plea was involuntary because his trial attorneys were ineffective when they told him that the Tennessee Court of Criminal Appeals would address the merits of his certified question. Had he known that his claims would not be heard on the merits, he insists that he would have gone to trial rather than plead guilty.

Ineffective assistance claims are reviewed under the two-part test of *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* requires a defendant to show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. *Id.* at 687. The standard is "highly deferential," *id.* at 689, and "'doubly' so" on federal habeas review, *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)). "To establish *Strickland* prejudice a defendant must 'show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Lafler v. Cooper*, 566 U.S. 156, 163 (2012) (quoting *Strickland*, 466 U.S. at 694). Where a defendant challenges the validity of his guilty plea based upon counsel's deficient performance, he "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

The Tennessee Court of Criminal Appeals concluded that Carter could not show prejudice because he was, in fact, aware that the court might not consider his certified question dispositive yet still persisted in pleading guilty. *Carter*, 2015 WL 967255, at *11. The court relied on testimony by Carter's trial attorneys that they warned Carter "before he entered his guilty pleas that the appellate court could determine the certified question was not dispositive of the charges against [him] and dismiss the appeal" and on a letter signed by Carter acknowledging that his issue might not be dispositive. *Id.*

The district court determined that this decision was not an unreasonable application of clearly established Supreme Court precedent under 28 U.S.C. § 2254(d)(1). Reasonable jurists

would not disagree because, since the state court's factual findings are presumed correct, Carter's claim is simply belied by the record. *See* 28 U.S.C. § 2254(e)(1).

Carter appears to acknowledge that he was aware that his claim could be considered non-dispositive but maintains that when he pleaded guilty he did not know that this meant that the court would not consider the merits of his issues. However, his subjective misunderstanding about the implications of an issue being found non-dispositive does not entitle him to relief on his claim.

Under Tennessee Rule of Criminal Procedure 37(b)(2)(A), a certified question must be dispositive. The word carries no special technical meaning—a certified question is dispositive if deciding the question would resolve the appeal. *See Carter v. State*, No. M2012–01843–CCA–R3–PC, 2013 WL 3023093, at *5 (Tenn. Crim. App. June 14, 2013). Accordingly, Tennessee courts do not reach the merits of certified questions unless they are dispositive. *See State v. Preston*, 759 S.W.2d 647, 650 (Tenn. 1988). This Court cannot rely on Carter's subjective failure to understand that a non-dispositive question precludes a merits review because the meaning of "dispositive" here is unambiguous. *See McAdoo v. Elo*, 365 F.3d 487, 496–97 (6th Cir. 2004). Thus, because he offers no other argument in support of his claim, he has failed to show that he would not have otherwise pleaded guilty. Accordingly, this claim does not deserve encouragement to proceed further.

Next, Carter argues that if his attorneys had properly litigated his lock-box issue, the evidence found in his locked box would ultimately have been suppressed, as well as all later evidence discovered as a result.

In resolving this claim, the Tennessee Court of Criminal Appeals and the district court applied the same legal analysis from Carter's first claim, concluding that he could not demonstrate *Strickland* prejudice because he did not prove that he would not have otherwise pleaded guilty. *See Carter*, 2015 WL 967255, at *11. However, reasonable jurists could debate the district court's decision because this claim does not attack the validity of Carter's plea; rather, it attacks counsel's performance in litigating the claim. *See Smith v. Robbins*, 528 U.S. 259, 285 (2000) (noting that in evaluating whether prejudice resulted from appellate counsel's

deficient performance, the question is whether there is a reasonable probability that the defendant would have prevailed but for counsel's deficient performance).

Finally, Carter argues that his counsel was ineffective for allowing him to enter an "unknowing, involuntary[,] and uninformed guilty plea" because he was never informed of the elements or the nature of his crimes. Carter does not challenge the district court's determination that this claim was procedurally defaulted but argues that he demonstrated cause and prejudice to excuse the default.

The district court rejected Carter's argument that, under *Martinez v. Ryan*, 566 U.S. 1 (2012), the ineffective assistance of his counsel during his post-conviction proceedings constituted cause to excuse the procedural default of his claim. The Court concluded that counsel was not ineffective because the underlying claim would not have succeeded on appeal since the record showed that his plea was knowing and voluntary. *See McFarland v. Yukins*, 356 F.3d 688, 699 (6th Cir. 2004) ("Counsel's failure to raise an issue on appeal could only be ineffective assistance if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal."). Reasonable jurists would not disagree.

For a guilty plea to be voluntary, knowing, and intelligent, a defendant must be informed of the nature and elements of the crimes to which he is pleading guilty. *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005). As the district court noted, the record establishes that Carter's plea was voluntary, knowing, and intelligent. *See Henderson v. Morgan*, 426 U.S. 637, 647 (1976). At his plea hearing, Carter admitted that he was guilty of his charges. Further, Carter signed a request for acceptance of plea of guilty, stating that "I understand the nature of the charge(s) against me and any defenses that could be raised on my behalf." And in this same document, he acknowledged that he had received and discussed with his counsel a copy of the indictment, which specified the elements of each of his charges. Absent contrary evidence, this Court presumes that counsel adequately explained the nature of the offenses to Carter. *See Williams v. Wolfenbarger*, 513 F. App'x 466, 470 (6th Cir. 2013). Therefore, this claim does not deserve encouragement to proceed further.

Accordingly, this Court **GRANTS** Carter's application for a COA on his claim that his counsel was ineffective for failing to adequately litigate his lock-box argument. It also **GRANTS** his request to proceed *in forma pauperis* on appeal. The court **DENIES** a COA as to all other claims. The clerk's office is directed to issue a briefing schedule on the certified issue and to appoint counsel to represent Carter. *See* 18 U.S.C. § 3006A(a)(2)(B).

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 18a0264p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MAURICE EDWARD CARTER,

Petitioner-Appellant,

v.

MIKE PARRIS, Warden,

Respondent-Appellee.

No. 17-5498

Appeal from the United States District Court
for the Middle District of Tennessee at Cookeville.
No. 2:15-cv-00057—Kevin H. Sharp, District Judge.

Argued: November 27, 2018

Decided and Filed: December 10, 2018

Before: THAPAR, BUSH, and NALBANDIAN, Circuit Judges.

COUNSEL

ARGUED: Andrew Kim, GOODWIN PROCTER LLP, Washington, D.C., for Appellant. Nicholas S. Bolduc, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, for Appellee. **ON BRIEF:** Andrew Kim, William M. Jay, GOODWIN PROCTER LLP, Washington, D.C., for Appellant. Nicholas S. Bolduc, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, for Appellee.

OPINION

THAPAR, Circuit Judge. Maurice Carter pled guilty to a variety of sex crimes and received a twenty-year prison sentence. He now petitions for habeas relief. Carter alleges his attorneys were constitutionally ineffective for failing to make the best arguments for suppression

of key evidence. Yet even if Carter's counsel had made different arguments, the end result in his case would have remained the same—the evidence against Carter would have come in. Therefore, we affirm the district court and deny Carter's habeas petition.

I.

Near midnight on June 2, 2007, some residents of Smith County, Tennessee, called the sheriff's office complaining about a disturbance created by people gathered on county property at an old abandoned ferry landing. Although the road leading to the landing was closed, sheriff's deputies found a group of cars there and people near a campfire. Deputy Steve Babcock approached the car in which Maurice Carter was sitting with a minor, C.C. Babcock peered into the car window with his flashlight and saw "a bag containing green leafy substance next to . . . Carter's leg." R. 55-5, Pg. ID 1954. He also saw "a pack of rolling papers . . . spilled next" to Carter. *Id.* at 1955. Since he believed the bag contained marijuana, Babcock asked C.C. and Carter to get out of the car. Learning that C.C. was just thirteen and not old enough to drive, Babcock spoke with Carter, confirmed the car was his, and asked for consent to search the car. Carter said yes. And shortly thereafter, Babcock "found another bag of marijuana in the driver's side door." But he had to suspend searching further because Carter needed medical attention for what appeared to be an anxiety attack.

After an ambulance took a panting and sweating Carter to a hospital, Babcock resumed searching the car with two other deputies. The deputy searching the backseat saw what looked to be a "new English dictionary." *Id.* at 1965–66. But when he picked it up, he "shook it" and realized it was not a dictionary at all—it actually was a disguised lockbox. *Id.* at 1985. He took out his knife and broke the lock. Inside the lockbox, the deputy found sexually explicit photographs of C.C. and some DVDs. Law enforcement subsequently arrested Carter after his release from the hospital. He immediately consented to additional searches of his apartment and his computer, where more images of C.C. were found. Carter admitted to taking pictures of C.C. and knowingly exposing him to HIV. When C.C. began having girlfriends, Carter would use the pictures he took as blackmail to continue to force C.C. into sexual acts. Tennessee charged Carter with various counts of child rape, criminal exposure to HIV, sexual exploitation of a minor, and possession of marijuana.

Carter's defense attorneys focused their efforts on suppressing the evidence acquired in the vehicle search. The attorneys argued that the Tennessee deputies performed an unconstitutional search of Carter's vehicle and the lockbox. Since two Tennessee counties charged Carter with crimes, a joint hearing was held by two county judges. And both judges believed the vehicle search was constitutional and denied Carter's motion.

Carter pled guilty but reserved the right to appeal the search to the Tennessee Court of Criminal Appeals.[1] After sentencing, his attorneys appealed. The Tennessee Court of Criminal Appeals addressed some of Carter's search claims but decided not to reach others. As relevant here, the criminal appeals court declined to consider whether Carter had consented to the search of the lockbox because it was "beyond the scope of the [appeal] question."

Carter now petitions for habeas relief, arguing that he received ineffective assistance of counsel both at the trial court and at the criminal appeals court. He contends that his attorneys should have made different arguments to suppress the lockbox evidence. The district court denied relief, and we granted a certificate of appealability.

II.

The Supreme Court has held that the Sixth Amendment guarantees criminal defendants the right to receive effective assistance of counsel. But proving ineffective assistance of counsel "is *never* an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010) (emphasis added). To show he was denied his right to effective assistance, Carter must demonstrate two things: (1) his counsel's performance was deficient, and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Carter argues that we should review his claim de novo rather than under the "highly deferential" habeas standard. *Harrington v. Richter*, 562 U.S. 86, 105 (2011); *see also* 28 U.S.C. § 2254(d). But we need not decide the proper standard of review because Carter cannot demonstrate prejudice under either standard.

Trial counsel. As Carter's ineffective-assistance-of-trial-counsel claim is based on a motion to suppress, our prejudice analysis "turn[s] on the viability" of that motion. *Arvelo v.*

[1]Tennessee allows criminal defendants who plead guilty to reserve certified issues for a limited appeal. *See* Tenn. R. Crim. P. 37(b)(2)(A); *State v. Preston*, 759 S.W.2d 647, 650 (Tenn. 1988).

Sec'y, Fla. Dep't of Corr., 788 F.3d 1345, 1348 (11th Cir. 2015); *accord Grumbley v. Burt*, 591 F. App'x 488, 500–01 (6th Cir. 2015). He cannot show prejudice if the motion to suppress would have been denied regardless of his attorneys' arguments. *See Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986) ("Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious . . . ."). Carter argues that his attorneys would have successfully suppressed the lockbox evidence had they made two arguments. First, he says that his attorneys should have argued that Carter gave consent to search only the car but not the lockbox. Thus, the deputies' search went beyond his consent. And second, Carter claims that his attorneys should have argued that the inventory exception to the Fourth Amendment's warrant requirement did not apply to the lockbox. The inventory exception allows police to use "standardized criteria" and inventory the contents of an impounded vehicle after its owner's arrest. *Florida v. Wells*, 495 U.S. 1, 4–5 (1990). Carter says it is "obvious" that the inventory exception did not apply to the lockbox because the police discovered it before his arrest. He argues that had his attorneys made *these* arguments, then the lockbox photos would have been suppressed, and all the subsequent findings would have been inadmissible as "fruit[s] of the poisonous tree." *United States v. Pearce*, 531 F.3d 374, 381 (6th Cir. 2008) (quoting *Wong Sun v. United States*, 371 U.S. 471, 484–85 (1963)).

But neither of Carter's preferred arguments would have made any difference. Even if Carter did not consent to the search of his lockbox, *and* even if the inventory exception would not have applied to the evidence, the lockbox photos were still admissible. Although the Fourth Amendment generally requires police to obtain a warrant before performing a search, law enforcement may "search a vehicle without a warrant if they have probable cause to believe that the vehicle contains evidence of a crime." *United States v. Galaviz*, 645 F.3d 347, 355 (6th Cir. 2011) (internal quotation marks omitted). *But see Morgan v. Fairfield Cty.*, 903 F.3d 553, 567–68 (6th Cir. 2018) (Thapar, J., concurring in part and dissenting in part) (suggesting an approach to the Fourth Amendment grounded in the Amendment's original meaning). Here, Carter does not dispute that Deputy Babcock had probable cause to search Carter's vehicle as soon as he saw the bag of marijuana and rolling papers. Seeing a small bag of marijuana (an illegal controlled substance in Tennessee) is enough to give officers probable cause to search a vehicle. *See*

United States v. Burnett, 791 F.2d 64, 67 (6th Cir. 1986) ("Once the contraband was found, [the officer] had every right to search the passenger area of the car, the trunk, and any and all containers which might conceal contraband."); *see also United States v. Elkins*, 300 F.3d 638, 659 (6th Cir. 2002) (stating that the odor of marijuana alone is sufficient for probable cause).

The fact that the lockbox was a locked container inside the car also makes no difference. The Supreme Court long ago dispensed with any categorical distinction between cars and the containers within cars. *See California v. Acevedo*, 500 U.S. 565, 570–72 (1991); *United States v. Ross*, 456 U.S. 798, 823 (1982). So long as "probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of *every part* of the vehicle and its contents that may conceal the object of the search." *Ross*, 456 U.S. at 825 (emphasis added). Moreover, this is not a case where the probable cause to search the car failed to extend to the container in the car, i.e., the lockbox. For instance, if the deputies were looking for a stolen barrel of Pappy Van Winkle bourbon, they would not have had probable cause to search in a place that could clearly not fit a barrel, like a car's small glovebox.[2] But, in this case, the deputies were not looking for a bourbon barrel in the glovebox, nor were they searching for a surfboard in the center console. The deputies were searching for additional quantities of drugs or drug paraphernalia. There is no dispute that the deputies had probable cause to believe such items could have been in the lockbox, especially once the deputies realized it was a container that "could conceal the object of the search." *Id.*; *see also Wyoming v. Houghton*, 526 U.S. 295, 307 (1999).

Significantly, neither argument that Carter contends his attorneys should have made would have changed the result. First, the scope of Carter's consent—either broad or narrow—makes no difference. Deputy Babcock had probable cause to search the car with or without Carter's consent, and the fact that he asked for consent is of no moment. Deputies may have many reasons to ask for consent. *Cf. Kentucky v. King*, 563 U.S. 452, 466–67 (2011) ("[T]he police may want to ask an occupant of the premises for consent to search because doing so is simpler, faster, and less burdensome . . . ."). For instance, asking for consent may allow officers

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[2]Pappy Van Winkle is an extremely rare bourbon, hard to find and hard to afford. And while much bourbon is understandably lost to the Angel's Share, Pappy seems to be often lost in robberies and heists—or what one may call the Thief's Share. *See* Mike Esterl, *Bourbon Heist: Who Stole the Pappy Van Winkle?*, Wall St. J. (Oct. 17, 2013).

to assure themselves that a subsequent search is constitutional—even if the consent is unnecessary. *See United States v. Hudson*, 405 F.3d 425, 441 (6th Cir. 2005) ("An officer with consent needs neither a warrant nor probable cause to conduct a constitutional search."); *cf. King*, 563 U.S. at 467 ("Faulting the police for failing to apply for a search warrant at the earliest possible time after obtaining probable cause imposes a duty that is nowhere to be found in the Constitution."). But asking for consent does not somehow forfeit the probable cause that had already developed for a search.

Second, the inventory argument that Carter suggests his attorneys should have made is similarly inapposite. *Cf. Burnett*, 791 F.2d at 67–68. Inventory searches occur after an arrest, but the deputies here lawfully searched Carter's vehicle *before* his arrest. So, as Carter himself points out, "it was obvious that" the inventory exception did not apply. Appellant Br. 2. But more to the point, whether the sheriff's deputies could have found the lockbox evidence later during an inventory search is unnecessary to consider, since the deputies lawfully found the lockbox before making any arrest. Therefore, even if Carter's attorneys had argued that the inventory exception did not apply, the result of the motion to suppress would not have changed. The vehicle exception applies regardless.

Carter makes one last argument in his reply brief. He suggests that this court should not rest its prejudice decision on a "fact-intensive alternative ground" upon which the Tennessee courts did not rely. *United States v. Duran-Salazar*, 307 F. App'x 209, 212 (10th Cir. 2009). But the facts of this case are not in dispute, and more facts are not needed. *See Kimmelman*, 477 U.S. at 390–91 (remanding for an evidentiary hearing when there was insufficient evidence to establish if an officer's search "came within one of the exceptions . . . to the Fourth Amendment's prohibition against warrantless searches"). Plus, the vehicle exception is not an alternative ground as Carter suggests: the Tennessee courts *did* rely on the vehicle exception to the Fourth Amendment's warrant requirement. True, the county judges at Carter's motion-to-suppress hearing suggested that a number of reasons justified the warrantless search of the lockbox. For instance, after the state's case-in-chief seeking to justify the search, the county judges opined that the search was justified by the consent and inventory exceptions. But after the judges made those statements, Carter's counsel put on witnesses, including Carter himself,

and again the lockbox was at issue. At the end of this part of the hearing, one Tennessee county attorney again argued the lockbox search was constitutional. He stated that "you can search in items that are located in the car . . . if you have reason to believe that it could contain what you were searching for, in this case, drugs," and the lockbox was "an item that was sufficient for that." R. 55-5, Pg. ID 2023. It was in direct response to this vehicle exception argument that the county judges made their final ruling. As one county judge stated, "I think the law is pretty clear in searching a vehicle when something is in plain sight[,]" and opening the lockbox was "incident to this search." *Id.* at 2024. The other county judge added, "We would find likewise." *Id.* Therefore, the Tennessee courts found the lockbox evidence to fall within the vehicle exception.

Since the Tennessee sheriff's deputies had probable cause to search Carter's vehicle and found the lockbox evidence as part of that search, the evidence used against Carter was admissible—regardless of the arguments Carter now suggests his attorneys should have made. Thus, Carter cannot show prejudice from his trial counsel's allegedly deficient representation. *See Kimmelman*, 477 U.S. at 375.

Appellate counsel. Carter also contends that his attorneys were constitutionally ineffective at the Tennessee Court of Criminal Appeals. As part of his plea agreement, Carter preserved the search issue for appeal, and so his attorneys filed a certified question with the criminal appeals court. Carter alleges that their certified question failed to allow the court to consider fully the vehicle search and the lockbox evidence. Again, we turn to whether his attorneys' actions prejudiced him, which means "we assess the strength of the claim [that] appellate counsel failed to raise." *Wilson v. Parker*, 515 F.3d 682, 707 (6th Cir. 2008). If there is no "reasonable probability that inclusion of the issue would have changed the result of the appeal," then habeas relief will not be granted. *McFarland v. Yukins*, 356 F.3d 688, 699 (6th Cir. 2004). And here, regardless of whether Carter's attorneys had more carefully crafted the certified question, the ultimate result of the appeal challenging the lockbox evidence would have been the same. As discussed, the deputies had probable cause to search the vehicle, which extended to the lockbox. No certified question would have changed that *even if* Carter's attorneys could have provided different, yet still unsuccessful, arguments on appeal. *Burton v.*

Renico, 391 F.3d 764, 774 (6th Cir. 2004) ("Even if the unasserted claims are not frivolous, the requisite prejudice cannot be shown if the claims are found to lack merit.").

Carter contends that we should not analyze this case based on actual prejudice but instead should presume prejudice. In some cases, courts do make such a presumption for ineffective-assistance-of-appellate-counsel claims. *See Roe v. Flores-Ortega*, 528 U.S. 470, 483–84 (2000). For example, prejudice may be presumed if an attorney fails to file a notice of appeal, *see id.* at 486, or if an attorney fails to file an appellate brief, *Hardaway v. Robinson*, 655 F.3d 445, 449 (6th Cir. 2011). The lodestar that guides courts to presume prejudice is whether the attorney's actions effectively "deprived [the defendant] of the appellate proceeding altogether." *Flores-Ortega*, 528 U.S. at 483. But that is not what happened in Carter's case. Carter's attorneys ensured that his plea deal allowed for an appeal to challenge the search. And then they crafted their appeal, which, in their words, was "specific" but not "too narrow." R. 55-25, Pg. ID 2654. The Tennessee Court of Criminal Appeals ultimately disagreed, but it did not disagree in such a way that rendered Carter's appeal "entirely nonexistent." *Flores-Ortega*, 528 U.S. at 484. Instead, the criminal appeals court reviewed the briefing and addressed many of Carter's arguments in a fourteen-page opinion. Just because the court summarily dismissed the arguments that Carter now thinks are winners does not mean his counsel's certified question "deprived [him] of the appellate proceeding altogether." *Id.* at 483. He had a proceeding. It just did not go his way.

Therefore, since the result of the appeal would not have been different, Carter cannot show prejudice from his appellate attorneys' representation.

* * *

As Carter cannot demonstrate prejudice at either the trial or appellate stages of his state proceedings, he is unable to prove he received ineffective assistance of counsel. We affirm.

APPENDIX – B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

MAURICE EDWARD CARTER **Petitioner,**	]]	
v.	]]	**No. 2:15-cv-0057** **Chief Judge Sharp**
MIKE PARRIS, Warden **Respondent.**	]]	

MEMORANDUM

The petitioner, proceeding *pro se*, is an inmate at the Northwest Correctional Complex in Tiptonville, Tennessee. He brings this action pursuant to 28 U.S.C. § 2254 against Mike Parris, Warden of the facility, seeking a writ of habeas corpus.[1]

I. Background

On December 7, 2009, the petitioner pled guilty in Smith County to aggravated statutory rape and criminal exposure to HIV. Doc. No. 55-10. For these crimes, he received an aggregate sentence of twenty (20) years in prison. Doc. No. 55-1 at pgs. 127 and 130.

As part of his plea agreement, the petitioner reserved a certified question of law for appeal. *Id.* at pgs. 122-123. The Tennessee Court of Criminal Appeals, however, rejected the appeal, finding that the petitioner's certified question of law was not dispositive. Doc. No. 55-15. The Tennessee

[1] When this action was originally filed, the petitioner was an inmate at the Morgan County Correctional Complex where Shawn Phillips is the Warden. He has since been transferred to his present place of confinement where his custodian is Warden Mike Parris. *see* Doc. No. 54, fn. 1.

Supreme Court later denied petitioner's request for additional review. Doc. No. 55-18.

In July, 2012, the petitioner filed a *pro se* petition for state post-conviction relief in the Criminal Court of Smith County. Doc. No. 55-19 at pgs. 4-33. The trial court summarily dismissed the petition, concluding that the petitioner's claims had previously been considered on direct appeal. *Id.* at pgs. 34-35. Upon review, the Tennessee Court of Criminal Appeals reversed this ruling and remanded the case back to the trial court for further proceedings. Doc. No. 55-23.

Counsel was appointed to represent the petitioner and an amendment of the *pro se* petition for post-conviction relief was filed. Following an evidentiary hearing, the trial court denied the petitioner's request for post-conviction relief. Doc. No. 55-27. The Tennessee Court of Criminal Appeals affirmed the denial of post-conviction relief. Doc. No. 55-31. For a second time, the Tennessee Supreme Court refused to grant petitioner's request for further review. Doc. No. 55-34.

II. Procedural History

On October 8, 2015, the petitioner initiated this action with the *pro se* filing of a petition (Doc. No. 1) for writ of habeas corpus. The petition consists of three claims for relief. These claims include :

1) trial counsel were ineffective due to misrepresentations made by them that the certified question of law would be considered on direct appeal (pg. 5);

2) trial counsel were ineffective for failing to properly preserve the certified question of law for appeal (pg. 6); and,

3) trial counsel were ineffective for allowing petitioner "to enter into an unknowing, involuntary, and uninformed plea as well as allowing a plea through use of fraud,

improper promises and/or misrepresentations" (pg. 8).[2]

Upon its receipt, the Court reviewed the petition and determined that the petitioner had stated a colorable claim for relief. Accordingly, the respondent was directed to file an answer, plead or otherwise respond to the petition. Doc. No. 7.

The respondent then filed a Motion to Dismiss (Doc. No. 18), arguing that the petitioner had failed to fully exhaust his state court remedies for all three of his claims. The petitioner conceded that he had not yet fully exhausted his claims and filed a Motion to Hold Action in Abeyance (Doc. No. 21), to allow him time to conclude the exhaustion of his remedies in the state courts.[3]

By an order (Doc. No. 22) entered January 7, 2016, the respondent's Motion to Dismiss was denied and the petitioner's Motion to Hold Action in Abeyance was granted. This case was administratively closed, subject to reopening upon motion of either party.

In August, 2016, the petitioner filed a Motion to Reopen Case (Doc. No. 30) and a Motion to Lift Stay (Doc. No. 32). These motions were granted, and the respondent was once again directed to file an answer, plead or otherwise respond to the petition. Doc. No. 33.

Presently before the Court is respondent's Answer (Doc. No. 54), to which the petitioner has offered no reply.

Having carefully considered the petition, respondent's Answer and the expanded record, it appears that an evidentiary hearing is not needed in this matter. *See* Schriro v. Landrigan, 550 U.S. 465, 474 (2007). Therefore, the Court shall dispose of the petition as the law and justice require.

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[2] The petitioner retained Jack Bellar and Jamie Winkler, members of the Smith County Bar, to represent him.

[3] The petitioner acknowledged that he had filed a petition for Writ of Error Coram Nobis in the state courts that was still pending. Doc. No. 21.

Rule 8(a), Rules - - - § 2254 Cases.

III. Analysis of the Claims

A.) Procedurally Defaulted Claim

A federal district court will not entertain a petition for writ of habeas corpus unless the petitioner has first exhausted all available state court remedies for each claim in his petition. 28 U.S.C. § 2254(b)(1).

While exhaustion is not a jurisdictional requirement, it is a strictly enforced doctrine which promotes comity between the states and federal government by giving the state an initial opportunity to pass upon and correct alleged violations of its prisoners' federal rights. O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). Consequently, as a condition precedent to seeking federal habeas corpus relief, the petitioner is required to fairly present his claims to every available level of the state court system. Rose v. Lundy, 455 U.S. 509, 518-20 (1982); Lyons v. Stovall, 188 F.3d 327,331 (6th Cir.1999). The petitioner must offer the state courts both the factual and legal bases for his claims. Hicks v. Straub, 377 F.3d 538,552 (6th Cir.2004). In other words, the petitioner must present "the same claim under the same theory" to the state courts. *Id.*. It is not enough that all the facts necessary to support a federal claim were before the court or that the petitioner made a somewhat similar state law claim. Anderson v. Harless, 459 U.S. 4,6 (1982).

Once petitioner's federal claims have been raised in the highest state court available, the exhaustion requirement is satisfied, even if that court refused to consider the claims. Manning v. Alexander, 912 F.2d 878, 883 (6th Cir. 1990).[4]

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[4] In Tennessee, a petitioner need only take his claims to the Tennessee Court of Criminal Appeals in order to fully exhaust his available state court remedies. Rule 39, Tenn. Sup. Ct. Rules; *see also* Adams v. Holland, 324 F.3d 838 (6th Cir. 2003).

The petitioner alleges that his attorneys were ineffective because they allowed him "to enter into an unknowing, involuntary, and uninformed plea as well as allowing a plea through use of fraud, improper promises and/or misrepresentations." (Claim No. 3).

These allegations were never set forth as a claim for relief either during direct appeal (Doc. No. 55-12) or the post-conviction proceedings (Doc. No.55-28).[5] Unfortunately, at this late date, the petitioner is no longer able to raise this issue in the state courts for review. *See* Tenn. Code Ann. § 40-30-102(a) and (c). Therefore, by way of procedural default, the petitioner has technically met the exhaustion requirement with respect to this claim. Alley v. Bell, 307 F.3d 380, 385 (6th Cir. 2002)(if an unexhausted claim would be procedurally barred under state law, that claim is procedurally defaulted for purposes of federal habeas corpus review).[6]

The exhaustion of a claim *via* procedural default does not, however, automatically entitle a habeas petitioner to federal review of that claim. To prevent a federal habeas petitioner from circumventing the exhaustion requirement in such a manner, the Supreme Court has held that a petitioner who fails to comply with state rules of procedure governing the timely presentation of

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[5] On appeal from the denial of post-conviction relief, the petitioner did suggest that he pled guilty due to the ineffectiveness of counsel. However, this claim was framed as an error of the trial court rather than counsel ("for failing to assess whether trial counsel had taken the necessary measures to ensure that Mr. Carter had a full understanding of the implications of entering a guilty plea, as the plea related to the reservation of a certified question of law"). Doc. No. 55-28 at pg. 14.

[6] The Tennessee Court of Criminal Appeals ruled that this issue had been waived because it was neither raised in the petitioner's amended post-conviction petition nor argued at the post-conviction evidentiary hearing. Doc. No. 55-31 at pg. 16. When a state court rejects a habeas petitioner's claim pursuant to an independent and adequate procedural ground, that claim has been procedurally defaulted. Baze v. Parker, 371 F.3d 310, 320 (6th Cir.2004). Tennessee's waiver rule constitutes an adequate and independent state law rule precluding habeas corpus relief. Hutchinson v. Bell, 303 F.3d 720, 738 (6th Cir.2002).

federal constitutional issues forfeits the right to federal review of those issues, absent cause for the noncompliance and some showing of actual prejudice resulting from the alleged constitutional violations. Gray v. Netherland, 518 U.S. 152, 162 (1996).

A habeas petitioner, though, can not rely on conclusory assertions of cause and prejudice to overcome the adverse effects of a procedural default. Rather, he must present affirmative evidence or argument as to the precise cause and prejudice produced. Lundgren v. Mitchell, 440 F.3d 754, 764 (6th Cir.2006). To demonstrate cause, the petitioner must show that an objective factor external to the defense interfered with his ability to comply with the state procedural rule. Murray v. Carrier, 477 U.S. 478, 488 (1986). To establish prejudice, there must be a showing that the trial was infected with constitutional error. United States v. Frady, 456 U.S. 152, 170-72 (1982).

Anticipating that the Court would find that this issue had been procedurally defaulted, the petitioner has alleged that post-conviction counsel was ineffective for failing to present all available issues during the post-conviction appeal. Doc. No. 1 at pg. 5. Such an assertion may be used to establish cause for a procedural default. *See* Martinez v. Ryan, 566 U.S. 1, 9 (2012)(inadequate assistance of counsel at initial review proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial). It is noted, however, that the failure of counsel "to raise an issue on appeal could only be ineffective assistance if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal." McFarland v. Yukins, 356 F.3d 688, 699 (6th Cir. 2004); *see also* Jones v. Barnes, 463 U.S. 745 (1983)(counsel has no constitutional duty to raise every non-frivolous issue requested by the petitioner).

According to the transcript of the petitioner's guilty plea hearing, he understood the charges against him, the rights that he would be waiving, and the penalties that could be imposed upon him.

Doc. No. 55-10 at pgs. 7-9. The petitioner also acknowledged discussing the evidence against him with his attorneys. *Id.* at pg. 11. The petitioner admitted that he was guilty of the charges, *Id.* at pg. 19, and, when asked, told the court that he was "totally satisfied" with counsels' services. *Id.* at pg. 17. In short, post-conviction counsel was not ineffective for failing to pursue this claim through the state courts. The petitioner has made no such showing of cause with regard to the defaulted claim. Nor has the petitioner made a showing of prejudice. As a consequence, the petitioner has failed to demonstrate that the procedural default of this claim should be excused. Teague v. Lane, 489 U.S. 288, 297-98 (1989)(denial of a claim is appropriate when the federal claim was not raised in the state appellate court for review).

B.) Fully Exhausted Claims

The remaining claims (Claim Nos. 1 and 2) essentially allege that counsel were ineffective because, on direct appeal, the state appellate court would not address the petitioner's certified question of law, finding it had no jurisdiction to consider the question because it was not dispositive in nature. These claims were fully exhausted in the state courts.

The availability of federal habeas corpus relief is limited with regard to claims that have been previously adjudicated on the merits in state court. Harrington v. Richter, 562 U.S. 86, 92 (2011). When a claim has been adjudicated on the merits in state court, the state court adjudication will not be disturbed unless (1) it resulted in a decision contrary to clearly established federal law or (2) involved an unreasonable application of federal law in light of the evidence. 28 U.S.C. § 2254(d); Nevers v. Killinger, 169 F.3d 352, 357 (6th Cir.1999).

In order for a state adjudication to run "contrary to" clearly established federal law, the state court must arrive at a conclusion opposite to that reached by the United States Supreme Court on

a question of law or decide a case differently than the United States Supreme Court on a set of materially indistinguishable facts. Williams v. Taylor, 529 U.S. 362, 405 (2000). To grant the writ for an "unreasonable application" of federal law, the petitioner must show that the state court identified the correct governing legal principle involved but unreasonably applied that principle to the facts of the case. *Id.* at 529 U.S. 413. In short, the petitioner "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington, *supra* at 562 U.S. 103.

Evidence against the petitioner included incriminating photographs and DVDs found in a locked box in his car. Petitioner attempted to suppress this evidence but was unsuccessful. He then agreed to plead guilty but reserved a certified question of law relating to the validity of the search and seizure for appeal.

On appeal, the Tennessee Court of Criminal Appeals would not consider the merits of petitioner's challenge because such a ruling would not be dispositive of his case. The petitioner now claims that his attorneys were ineffective because he was misled into thinking that his challenge would be heard on the merits. He asserts that he would not have pled guilty if he knew that the appellate court would not review the search and seizure of that material.

The Sixth Amendment provides that a criminal defendant is entitled to the effective assistance of counsel. Missouri v. Frye, 566 U.S. 133, 138 (2012). To establish a violation of this right, the petitioner bears the burden of pleading and proving that his attorney's performance was in some way deficient *and* that the defense was prejudiced as a result of the deficiency. Strickland v. Washington, 466 U.S. 668, 687 (1984). A deficiency occurs when counsel has acted in a way that

falls below an objective standard of reasonableness under prevailing professional norms. *Id.* at 466 U.S. 688. Within the context of a guilty plea, prejudice for an ineffective assistance analysis is established when it is shown that "there is a reasonable probability that, but for counsels' errors, petitioner would not have pleaded guilty and would have instead insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985).

Where the issue is one of ineffective assistance of counsel, review under the Anti-Terrorism and Effective Death Penalty Act is "doubly deferential", Cullen v. Pinholster, 563 U.S. 170, 190 (2011), because counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, *supra* at 466 U.S. 690.

The state appellate court found that the petitioner had failed to demonstrate the type of prejudice needed to sustain an ineffective assistance claim. Doc. No. 55-31 at pg. 16. At the post-conviction evidentiary hearing, both attorneys for the petitioner testified that the petitioner was informed before entering his plea that the appellate court might not find the certified question of law to be dispositive. They produced a letter signed by the petitioner stating as much. Doc. No. 55-26 at pgs. 2-3. Thus, the state courts were reasonable in finding that the petitioner had failed to show that he would not have pled guilty if he had been properly advised by his attorneys. These claims, therefore, have no merit.

IV. CONCLUSION

The petitioner's ineffective assistance claim as it relates to the entry of his guilty plea (Claim No. 3) has been procedurally defaulted. In the absence of a showing of cause and prejudice arising from the default, the default is unexcused, rendering this claim meritless.

The state courts determined that the petitioner's fully exhausted claims, i.e., the ineffectiveness of counsel as it relates to the preservation of the certified question of law (Claim Nos. 1 and 2), lacked merit. The record supports this finding. The petitioner has failed to rebut the presumption of correctness accorded to the findings of fact made by the state courts with clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Nor has he shown in what way the legal conclusions made by the state courts with respect to his exhausted claims are either contrary to or an unreasonable application of federal law. Accordingly, this action has no merit and will be dismissed.

An appropriate order will be entered.

Kevin H. Sharp
Chief District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

MAURICE EDWARD CARTER **Petitioner,**	]]	
v.	]]	**No. 2:15-cv-0057** **Chief Judge Sharp**
MIKE PARRIS, Warden **Respondent.**	]]	

ORDER

In accordance with the Memorandum contemporaneously entered, the Court finds no merit in petitioner's habeas corpus petition (Doc. No. 1). Therefore, the petition is DENIED and this action is hereby DISMISSED. Rule 8(a), Rules - - § 2254 Cases.

Should the petitioner file a timely Notice of Appeal, such Notice shall be treated as an application for a Certificate of Appealability, 28 U.S.C. § 2253(c), which will NOT issue because the petitioner has failed to make a substantial showing of the denial of a constitutional right.

It is so ORDERED.

Kevin H. Sharp
Chief District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

MAURICE EDWARD CARTER **Petitioner,**	]	
v.	]	**No. 2:15-cv-0057** **Chief Judge Sharp**
MIKE PARRIS, Warden **Respondent.**	]	

ORDER

By an order (Doc. No. 64) entered March 22, 2017, the instant *pro se* § 2254 habeas corpus action was dismissed.

The following day, the Court received petitioner's Reply (Doc. No. 66) in opposition to the respondent's Answer (Doc. No. 54). Because this action has been dismissed, the Court shall treat the petitioner's Reply as a motion to reconsider the dismissal of this action.

The petitioner raised three claims for relief. Each of these claims is based upon the alleged ineffective assistance of counsel. The first claim asserts that counsel had been ineffective for misrepresenting to him that the state appellate court would consider his certified question of law on its merits. The second claim is that counsel were ineffective for failing to properly preserve his certified question of law for appellate review. The final claim is that counsel were ineffective for allowing the petitioner to enter a guilty plea that was neither knowingly nor willingly given.

The first two claims were fully exhausted in the state courts and were found to be without merit. This Court is bound by the state court rulings unless those rulings were either contrary to or an unreasonable application of federal law. 28 U.S.C. § 2254(d). Having reviewed those rulings in light of respondent's Answer, petitioner's motion to reconsider and the expanded record, the Court

finds that the disposition of those claims by the state courts did not offend federal law.

Petitioner's third and final claim is that counsel were ineffective for allowing him to enter a guilty plea that was neither knowingly nor willingly given. This claim was never raised in the state courts. Rather, the petitioner alleged in the state courts that the trial judge was in error "for failing to assess whether trial counsel had taken the necessary measures to ensure" that the petitioner had a full understanding of the implications of his plea. While this is similar to the claim alleged in the federal habeas petition, it is not the same claim. It is not enough that the petitioner had stated a somewhat similar claim. Anderson v. Harless, 459 U.S. 4, 6 (1982). Therefore, the petitioner procedurally defaulted the state court remedies for this claim.

To excuse a procedural default, the petitioner must show cause for the default coupled with actual prejudice arising from the alleged constitutional violation. Gray v. Netherland, 518 U.S. 152, 162 (1996). The petitioner put forth the alleged ineffective assistance of post-conviction counsel as cause for failing to raise the claim properly in the state courts. Martinez v. Ryan, 566 U.S. 1, 9 (2012). But even if post-conviction counsel was ineffective in that regard, the petitioner has offered nothing to constitute prejudice, other than his own self-serving statement that he would not have pled guilty. The record bears plenty of evidence showing that the guilty plea was knowingly and willingly given.

The Court has carefully reviewed the petitioner's motion to reconsider and finds that it lacks merit. Accordingly, said motion is hereby DENIED.

It is so ORDERED.

Kevin H. Sharp

Kevin H. Sharp
Chief District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

MAURICE EDWARD CARTER,	)	
	)	
Petitioner,	)	
	)	
v.	)	**NO. 2:15-cv-00057**
	)	**CHIEF JUDGE CRENSHAW**
MIKE PARRIS, Warden,	)	
	)	
Respondent.	)	

ORDER

On March 22, 2017, an Order (Doc. No. 64) was entered denying Petitioner's *pro se* habeas corpus Petition (Doc. No. 1) and dismissing the instant action. A Motion (Doc. No. 66) to reconsider the dismissal was found to be without merit and was denied. (Doc. No. 68.)

Presently before the Court are Petitioner's Rule 60 Motion for Relief from Judgment or, in the alternative, Rule 59 Motion to Alter or Amend Judgment (Doc. No. 72), and Respondent's Response (Doc. No. 73) in opposition to Petitioner's Motion.

The Petitioner is seeking relief from the dismissal of his habeas corpus Petition under Rule 60(b)(1) and (6) or Rule 59(a)(1)(2) and (d) of the Federal Rules of Civil Procedure. (Doc. No. 72 at 1.) Rule 60(b)(1) provides for relief from a judgment or order when the record indicates some type of "mistake, inadvertence, surprise or excusable neglect." Rule 60(b)(6) allows the Court to act "for any other reason that justifies relief." Rule 59(a)(1)(2) and (d) provide for the alteration or amendment of a judgment when the record indicates that there are grounds for a new trial.

Petitioner's reliance 59(a)(1)(2) and (d) is misplaced. Both rules deal with the granting of a new trial, which is inapplicable in a habeas proceeding. See Wood v. Russell, 2016 WL 3982517,

at *1 (S.D. Ohio July 22, 2016) (collecting cases for the proposition that "because petitioner's habeas petition was not adjudicated by a trial in the Court, Rule 59 is inapplicable). If Petitioner actually intended to rely on Rule 59(e) he has not shown "(1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in the law; or (4) a need to prevent manifest injustice." Intera Corp. v. Henderson, 428 F3d 605, 620 (6th Cir. 2005).

The Petitioner also seeks relief pursuant to Rule 60(b)(1) and (6). "Mr. Carter submits that mistake, inadvertence, surprise, excusable neglect, extraordinary circumstances, and/or other sufficient reasons clearly exist for setting aside and/or providing relief from this Court's judgment, where he had in fact mailed a timely reply to this Court of which, without fault of his own, failed to arrive before this Court issued its March 22, 2017 decision denying relief." (Doc. No. 72 at 4.)

The Petitioner refers to his Reply (Doc. No. 66) to the Respondent's Answer that was filed one day after the dismissal of the instant action. This pleading was, nevertheless, construed by the Court as a motion to reconsider the dismissal and was denied on the merits. (Doc. No. 68). Thus, the Petitioner has shown no mistake, inadvertence, surprise or excusable neglect arising from the late filing of this pleading. The Court has already ruled upon the allegations in Petitioner's Reply and found that it contains nothing from which the Court could imply that this action was dismissed in error. Nor has the Petitioner demonstrated any other reason, extraordinary or otherwise, that would justify Rule 60(b) relief. *See* Arrieta v. Battaglia, 461 F.3d 861, 865 (7th Cir. 2006) ("if the asserted ground for relief falls within one of the enumerated grounds .... of Rule 60(b), relief under .... Rule 60(b)(6) is not available.")

Accordingly, the Court finds no merit in the Petitioner's Motion for relief brought pursuant to Rules 59(a) and 60(b). The Motion is hereby **DENIED**. The Clerk shall forward a copy of this

Order to the Clerk of the Sixth Circuit Court of Appeals.

IT IS SO ORDERED.

WAVERLY D. CRENSHAW, JR.
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX – C

No. 17-5498

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Feb 04, 2019
DEBORAH S. HUNT, Clerk

MAURICE EDWARD CARTER,

Petitioner-Appellant,

v.

MIKE PARRIS, WARDEN,

Respondent-Appellee.

ORDER

BEFORE: THAPAR, BUSH, and NALBANDIAN, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk