No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2019

PHILLIP HARTSFIELD, REGISTER NO. R-46473, Petitioner,

-vs-

STEPHANIE DORETHY, WARDEN, Respondent.

On Petition For Writ Of Certiorari

To The U.S. Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether the lower court erred by holding that the prejudice standard applying to ineffective assistance of counsel claims under *Strickland v. Washington*, 466 U.S. 668 (1984) is applicable to Mr. Hartsfield's claim that his counsel usurped his exercise of his right to testify in his own defense and in condoning the purported state court requirement that a defendant make a contemporaneous, on the record assertion of his right to testify in the face of being silenced by his counsel?

2. Whether the lower court erred in declining to certify for appeal the issue of whether state court unreasonably applied clearly established federal law in denying Mr. Hartsfield's claim that trial counsel was ineffective for failing to call William "Billy" Thompson to testify on Hartsfield's behalf, where Thompson could have refuted testimony from the State's witness that Hartsfield's co-defendant had him dispose of the murder weapon and where Thompson's testimony to the co-defendant's jury led to the co-defendant's acquittal?

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To The U.S. Court of Appeal for the Seventh Circuit

The petitioner, Phillip Hartsfield, respectfully prays that a writ of certiorari issue to review the judgment of the U.S. Court of Appeals for the Seventh Circuit, entered in the above-entitled proceedings on February 3, 2020.

OPINION BELOW

Hartsfield v. Pfister, 949 F.3d 307 (7th Cir. 2020)

Hartsfield v. Pfister, N.D. Ill. Case No. 14-cv-05816 (Memorandum Opinion & Order, Entered March 6, 2018)

People v. Hartsfield, Appeal No. 1-05-2782 (March 18, 2007) (unpublished order under Illinois Supreme Court Rule 23)

People v. Hartsfield, App. No. 1-12-0155 (September 13, 2013) (unpublished order under Illinois Supreme Court Rule 23)

JURISDICTION

A. Subject Matter Jurisdiction.

The district court's subject matter jurisdiction was based on 28 U.S.C. §§ 2241 and 2254. *See King v. Gramley*, 1997 WL 177870 *1 (N.D. Ill.). Petitioner Phillip Hartsfield filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, with the Clerk of the United States District Court for the Northern District of Illinois on July 29, 2014; the Petition was filed in the Clerk's office the same day. This was Petitioner's first and only petition for habeas corpus relief filed in the federal courts.

B. Appellate Jurisdiction.

The Seventh Circuit's jurisdiction was based on 28 U.S.C. §§ 1291 and 2253. *See Sceifers v. Trigg*, 46 F.3d 701 (7th Cir. 1995). The district court entered its Memorandum Opinion and Order on March 6, 2018. Petitioner filed his Notice of Appeal on April 4, 2018.

The U.S. Court of Appeals denied relief on February 3, 2020. This petition for a writ of certiorari is being filed within 150 days of that dismissal (pursuant to this court's COVID-19 order extending the time to file petitions for writ of habeas corpus by 60 days). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

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 offence to be twice put in jeopardy of life or 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 defence.

AMENDMENT XIV

Section 1. 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

Phillip Hartsfield is an Illinois prisoner. He is serving consecutive sentences of 45 years in prison for first degree murder and six years in prison for home invasion. On direct appeal, the Appellate Court of Illinois affirmed Hartsfield's convictions and sentences in *People v. Hartsfield,* Appeal No. 1-05-2782 (March 18, 2007) (unpublished order under Illinois Supreme Court Rule 23). Hartsfield's Petition for Leave to appeal to the Supreme Court of Illinois was denied.

Hartsfield filed a state post-conviction petition, collaterally challenging his convictions and sentence. The circuit court denied Hartsfield's state post-conviction relief without an evidentiary hearing, and the Appellate Court of Illinois affirmed in *People v. Hartsfield*, App. No. 1-12-0155 (September 13, 2013) (unpublished order under Illinois Supreme Court Rule 23). Hartsfield's Petition for Leave to appeal to the Supreme Court of Illinois was denied.

Hartsfield then filed a petition for a writ of *habeas corpus* in the U.S. District Court for the Northern District of Illinois. The district court denied Hartsfield's petition in its entirety. The Court of Appeals affirmed. *Hartsfield v. Pfister*, 949 F.3d 307 (7th Cir. 2020)

A. District Court Proceedings & Appeal from the Denial of Habeas Relief

Hartsfield filed his Petition for Writ of Habeas Corpus in the District Court for the Northern District of Illinois on July 29, 2014, raising seven claims. U.S. Dist Ct. Docket "DKT" #1. The district courted denied habeas corpus relief and denied a COA on March 6, 2018. The Court of Appeals granted a COA on December 7, 2018.

B. State Court Proceedings

Alejandro "Alex" Martinez was shot and killed on the morning of January 4, 2004. *People v. Phillip Hartsfield*, No. 1-05-2782, at 2, 7 (1st Dist. Mar. 28, 2007) (Rule 23 order) (*Hartsfield I*).[1] There were no eyewitnesses. *Hartsfield I*, at 5-6.

The State charged 19-year-olds Phillip Hartsfield and Mohammed Abukhdeir with several counts of first-degree murder and home invasion. *Id.* at 1; (Tr. C. 9-13, 87). The parties tried the case simultaneously to separate juries. *Hartsfield I*, at 1.

Claudia Garcia, Candy Richmond, and Kristina Kasper testified they went to a party at Martinez's house in the early morning hours of January 4, 2004. *Id.* at 2. Steven Howard was at the Martinez party, with friends Raul Flores and Hector Canternin. *Hartsfield I*, at 2. The group drank. (Tr. R. 179, 207, 320-321).

Kasper and Richmond ultimately argued with other party-goers, which began after one of the men asked Kasper why she was dating "a black guy." *Id.* at 2-4. Howard hit both Kasper and Richmond. Id. The girls drove away sometime between 4:30 and 5:00 a.m. *Id.* at 2.

Garcia testified that Richmond and Kasper made some phone calls as she drove them home; Richmond gave the Kolin address to the person on the other line. *Id.* Garcia said Richmond talked about having someone killed in that house. (Tr. R. 59, 64). Raul called Richmond's cell phone, and Garcia testified that Richmond said,

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[1]Where possible, factual citations are to the Appellate Court of Illinois' decision on direct appeal. Otherwise, citations to the trial record appear as (Tr. C.) and (Tr. R.), and to the state post-conviction proceedings as (PC. C.) and (PC. R.). Other citations to the State Court Record are to Exhibit Numbers as enumerated Respondent's district court filing, under DKT#14.

"Don't worry about it. I got you motherfuckers." *Hartsfield I*, at 2. Richmond denied making that statement. *Id.* at 3. Garcia dropped Richmond and Kasper off at their respective homes in Berwyn. *Id.* at 2.

Meanwhile, according to Katherine Chrzan, Hartsfield picked her in her car in Naperville at around 4:30 a.m. Id. at 4-5. Mohammed was with Hartsfield. *Id.* at 5. In the car, Hartsfield received multiple short phone calls; during one, Chrzan heard a raised female voice on the other end. *Id.* Hartsfield said he would be there in 20 minutes. *Id.* Chrzan & Hartsfield went inside Hartsfield's home, and he retrieved a shotgun. *Id.* Hartsfield left at 6:30 or 7:00 a.m.; Chrzan remained. *Id.* Hartsfield returned at 9:00 or 9:30. (Tr. R. 100). *Hartsfield I*, at 5. There was nothing unusual about his clothing, and Chrzan did not see any blood either on Hartsfield or in the car. (Tr. R. 125-126).

Much later, Hartsfield drove Chrzan home, and she noted that her gas tank was nearly empty. *Id.* Hartsfield told Chrzan that he was in Chicago, and that, "if I told you, you probably wouldn't want to come around any more." *Id.* He later told her that "if he ever went to jail for murder, he would kill himself." *Id.*

Richmond and Kasper said Hartsfield and Abukhdeir picked them up at around 7:00 a.m. on January 4. *Hartsfield I*, at 3-4. Both girls were still drunk. (Tr. R. 225, 228, 357). They went to 5530 South Kolin at 7:30 or 8:00 a.m. *Hartsfield I*, at 3; (Tr. R. 194, 230). Hartsfield got out and rang the front doorbell. *Hartsfield I*, at 3-4. There was no answer, and Hartsfield returned to the car and popped the trunk. *Id.* Richmond claimed she saw a silver automatic handgun in his hand. *Id.* at 3.

Hartsfield and Abukhdeir went down one of the gangways along the side of the house. *Id.* at 3-4.

After about five minutes, Hartsfield and Abukhdeir returned and got in the car. *Id.* The men were laughing, and Abukhdeir had blood on his knuckles. *Id.*; (Tr. R. 199). Abukhdeir said he had blood all over him.[2] *Hartsfield I*, at 3; (Tr. R. 199). Hartsfield told him to shut up, and Abukhdeir responded, "If it wasn't for me, you wouldn't have gotten through the back door," and later, "I hope you did it right." *Hartsfield I*, at 3.

Richmond testified Hartsfield pulled over, and Mohammed handed him the gun, which Hartsfield held with his sleeve and put in the trunk. *Hartsfield I*, at 3. They went to a house, popped the trunk, and Mohammed ran inside the house and came back. Id. Kasper's testimony does not mention either stop. *Id.* at 4; (Tr. R. 337-339). Hartsfield drove the girls home. *Hartsfield I*, at 3-4. Richmond testified Hartsfield said, "Candy, you're my girl, but I'll kill you." *Id.* She asked why, what did they do, and he responded, "Nothing, I didn't do anything." *Id.* at 4.

Richmond and Kasper both acknowledged drinking between 10 and 14 beers on

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[2]In is Memorandum Opinion and Order denying relief, the district erroneously stated that when Petitioner and his co-defendant returned from the alley near the deceased's house, that the co-defendant remarked that "Petitioner (Hartsfield) had blood all over him." A1, at p. 14. In fact, testimony in the record never indicated that Hartsfield had any blood at all on him. When a prosecution witness testified that the co-defendant said "he had blood all over him," the record shows that the co-defendant was referring to himself. (Tr. R. 199). That same witness, when asked, said she saw blood on the co-defendant. (Tr. R. 199). And it was the co-defendant whose blood-soaked pants (perhaps his own blood) were recovered. *Hartsfield I*, at 7. No blood was ever seen or recovered from Hartsfield.

the morning in question, including in the car with Hartsfield and Abukhdeir. (Tr. R. 207, 225, 341-342, 344-345). Richmond acknowledged that she did not hear any gunshots and did not see a silencer. (Tr. R. 238).

Laura Vega, Martinez's aunt, lived in the basement apartment of Martinez's house, which shared the back door of the house with the upstairs. *Hartsfield I*, at 5. (Tr. R. 409, 429-430). She returned home from a party at 4:00 a.m., and heard women's voices upstairs. *Hartsfield I*, at 5; (Tr. R. 414, 431-432). She went to bed. *Hartsfield I*, at 5. She woke at 9:00 a.m., used the bathroom, went back to bed, and slept until noon. *Id.* She went upstairs; Alberto told her Alex was still sleeping. *Id.* Vega did not notice any damage to any doors. Id. She did not hear any pounding, kicking, or gunshots at any point. *Id.* at 5-6.

Alberto Martinez arrived home at around 11:30 a.m. *Id.* at 6; (Tr. R. 454). He peeked into Alex's room, saw him under the covers, and assumed he was sleeping. (Tr. R. 461-462). Alberto watched TV, left to go shopping, and returned home in the evening. (Tr. R. 462-463). Alberto tried to wake Alex. (Tr. R. 464). When he pulled the covers off, Alex was stiff and cold and had bullet wounds in his face and neck. (R. 464-465).

Police responding to the home recovered two .40-caliber shell casings inside Martinez's bedroom. *Hartsfield I*, at 7. Martinez had suffered four gunshot wounds. Id. The medical examiner recovered one bullet. *Id.*; (Tr. R. 608). The back door to the Martinez had a crack along the narrow side or edge of the door. *Hartsfield I*, at 6; (Tr. R. 592).

John Waszak testified that on the evening of January 6, he was at Billy Thompson's house along with Abukhdeir. *Id.* at 6. Thompson owed Abukhdeir a fairly large amount of money. (Tr. R. 648). Abukhdeir gave Thompson a knotted sock, and said if he got rid of it for him, Thompson's debt would be considered "clean," or satisfied (Tr. R. 656). Waszak testified that he looked inside the sock, and saw a gray gun barrel, spent casings, and shells, though his statement to police and prosecutors contained no mention of looking at the sock's contents. *Hartsfield I*, at 6; (Tr. R. 725-726). He said recognized the gun barrel as one belonging to a gun he sold to Abukhdeir in 2002. *Hartsfield I*, at 6. Waszak dropped the sock into the Des Plaines River. *Id.* Police never recovered the sock. (Tr. R. 794).

Waszak acknowledged several prior convictions, and denied receiving any consideration for a pending case in exchange for his testimony. *Hartsfield I*, at 6; (Tr. R. 710-712).

Police interrogated Richmond, Kasper, and Garcia. (Tr. R. 473, 774). Police later searched Chrzan's car, in which they found Abukhdeir's wallet. *Hartsfield I*, at 6. A search of the Abukhdeir home revealed, in one bedroom, a black .40-caliber CalTec pistol and several .40-caliber Speer brand rounds. *Id.* at 7. From another bedroom, officers recovered jeans with apparent bloodstains; that blood was later found to be Abukhdeir's own. *Id.*; (Tr. R. 570).

The gun legally belonged to Abukhdeir's brother. *Hartsfield I*, at 7. A ballistics expert testified she performed testing and could not eliminate the gun as having fired the cartridges recovered from Martinez's bedroom. *Id.* However, the

ammunition recovered from Amjad was all silver-cased, while casings recovered from the scene were brass. *Id.* at 8.

The parties stipulated to telephone records showing calls between Richmond's cell phone number and Hartsfield's cell phone number on the morning of January 4. (Tr. R. 844-846).

Hartsfield was found guilty of first-degree murder and home invasion. *Hartsfield I*, at 8; (Tr. C. 84-85). He was sentenced to 45 years on the murder, and six on the home invasion, to run consecutively. *Hartsfield I*, at 8; (Tr. C. 121).

Direct Appeal

On direct appeal, Hartsfield made several challenges to his convictions; the Illinois Appellate Court affirmed. *Id.* at 8-19. Hartsfield's PLA was denied.

Post-Conviction Petition & Appeal

Hartsfield filed a pro se post-conviction petition, alleging, among other things, that trial counsel usurped his right to testify on his own behalf and that trial counsel was ineffective for failing to call favorable witnesses Billy Thompson to contradict testimony of State witness John Waszak. (PC C. 34-52).

Affidavits from Hartsfield and his mother were attached, attesting that Hartsfield he wanted to testify and repeatedly told his attorney so. Billy Thompson's affidavit was also attached. (PC C. 46-52).

Appointed counsel filed an amended post-conviction petition, also relying on Thompson's original affidavit and detailed affidavits from Hartsfield and his mom. (PC C. 54-110). The State moved to dismiss the petition, and the trial judge granted

the State's motion. (PC C. 156-191; PC R. Z27).

Hartsfield appealed. *People v. Hartsfield*, 2013 IL App (1st) 120155, ¶1 (*Hartsfield II*). The Illinois Appellate Court affirmed. *Hartsfield II*, at ¶50. Hartsfield's PLA was denied.

REASONS FOR GRANTING CERTIORARI

I This court should grant certiorari to decide whether the lower court erred by holding that the prejudice standard applying to ineffective assistance of counsel claims under *Strickland v. Washington*, 466 U.S. 668 (1984) is applicable to Mr. Hartsfield's claim that his counsel usurped his exercise of his right to testify in his own defense and in condoning the purported state court requirement that a defendant make a contemporaneous, on the record assertion of his right to testify in the face of being silenced by his counsel.

Despite the absence on the record of a knowing and intelligent waiver of his right to testify in his own defense and the affirmative declarations of Phillip Hartsfield and another witness regarding Hartsfield's assertion to his counsel that he would exercise his right to testify, the state court denied Hartsfield's claim that he was denied his right to counsel. The district court and the Court of Appeals failed to remedy this error in a holding that centered around Hartsfield's failure to interrupt court proceedings with a contemporaneous, verbal assertion of his right to testify after his lawyer had already silenced his efforts to speak up to the judge on this point. This court should grant certiorari to clarify (1) that no showing of Strickland prejudice is necessary where the defendant's counsel has denied him his right to

testify and (2) that when a defendant's counsel has silenced him where he sought to exercise his right to testify, the defendant need not verbally interrupt court proceedings to establish a violation of his right.

The Fourteenth Amendment's due process guarantee, the Sixth Amendment's Compulsory Process Clause, and the Fifth Amendment's Privilege Against Self-Incrimination all guarantee a citizen accused of a crime the right to testify in his own defense. *Rock v. Arkansas*, 483 U.S. 44, 51-53 (1987). This is true, as the right to testify in one's own defense is encompassed in all three rights, including (1) the right of a litigant to be heard, (2) the right of a criminal defendant to summon witnesses on his behalf, and (3) the almost sacrosanct choice of whether to exercise or waive the right against self-incrimination. *Id.* The right to testify in one's own defense is fundamental right, and may be given up only personally by the defendant and only after a knowing and intelligent waiver by the defendant. *Jones v. Barnes*, 463 U.S. 745, 753 (1983) (right to testify in one's own defense is fundamental and can only be waived by the defendant and not his counsel); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (defendant's waiver of rights must be knowing and intelligent); *Ward v. Sternes*, 334 F.3d 696, 705 (7th Cir. 2003) (same).

In *Rock v. Arkansas*, this court held that the Arkansas court had deprived that defendant of her right to testify by barring portions of her potential testimony relating to memories that came to her only after being "hypnotically refreshed." 463 U.S. at 46-48, 62. The Court reversed and remanded to the state supreme court. *Id.* at. 62. The *Rock* Court so held even though that defendant's testimony was not

barred in its entirety; only the hypnotically refreshed memories were barred as testimony, and the defendant, in fact, testified in her own defense. *Id.* at 46-48.

In this case, Hartsfield claimed in state court post-conviction proceedings that his attorney had usurped his right to testify and his right to make the decision of whether to testify by refusing to call him to the stand. (PC. C. 47, 56-59, 99, 101, 107, 109). Hartsfield consistently told his attorney that he wanted to testify, including after the State rested, but counsel told Hartsfield he did not want him to testify and, at times, "shushed" Hartsfield. (PC. C. 47, 49, 107, 109). When Hartsfield persisted, counsel told him he would "get [his] chance" when the judge admonished him about testifying, but the judge never admonished Hartsfield concerning his right to testify. (PC. C. 47, 107). The affidavit of Hartsfield's mother also stated that she witnessed at least some of these conversations, and Hartsfield had repeatedly told his lawyer he wanted to testify. (PC C. 46-52) Notably, Hartsfield's factual assertions were not rebutted in the state court.

On federal habeas review and in state court, Hartsfield argued that the crux of this claim – the denial of Hartsfield's right to testify – itself is a claim that requires the examining court to proceed to the question of harmlessness, without assessing whether the petitioner has proven ineffective assistance or prejudice under *Strickland v. Washington*, 466 U.S. 668, 694 (1984), Instead, Hartsfield argued, once the habeas court finds "error" in this context, it must apply the *Brecht v. Abrahamson* standard of harmlessness to determine whether a federal habeas petitioner's claim or error requires reversal. 507 U.S. 619 (1993). That standard says

that the writ should issue when the petitioner can establish that the error "has a substantial an injurious effect or influence in determining the jury's verdict. *Id.* at 637. In other words, the petitioner must establish actual prejudice. *Id.* This standard looks to the record as a whole and considers whether the State's evidence was overwhelming in nature. *Id.* at 639.

Nevertheless, both the district court and the Court of Appeals wrongly concluded that the Illinois court was correct in addressing Hartsfield's claim relative to the denial of his right to testify solely as an ineffective assistance of counsel claim under *Strickland*, requiring a showing of prejudice on Hartsfield's part *Hartsfield v. Dorethy*, 949 F.3d 307, 312-13 (7th Cir. 2020). In so holding, the lower court relied on, among other cases, two recent U.S. Supreme Court cases, *McCoy v. Louisiana*, 138 S. Ct 1500 (2018) and *Garza v. Idaho*, 139 S. Ct. 738 (2019), claiming that they establish a framework for deciding whether a state prisoner's claim he was deprived of his right to make a fundamental trial decision should be analyzed (1) under *Strickland* requiring a showing of prejudice or (2) as a claim about the denial of his underlying right, without regard to prejudice.[3] *Hartsfield*, 949 F.3d at 314-15. The Court of Appeals implied that it is only in cases where the defendant makes a personal, on-the-record assertion of the right and is overruled by the judge that the defendant is relieved of showing *Strickland* prejudice, since in those cases the court becomes

[3]The exhaustive list of fundamental trial decisions over which the accused has the ultimate authority is this: whether to plead guilty, whether to waive a jury, whether to testify in his or her own defense, and whether to appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

involved in the interference with a decision within the defendant's sole autonomy. *Id.* In cases in which the defendant has failed to make a personal, on-the-record assertion of his right, however, the Court of Appeals said that the claim that counsel overrode the defendant's wishes is analyzed under *Strickland*, with the requisite *Strickland* showing of prejudice. *Id.*

The Court of Appeals misinterprets this court's opinions in *McCoy* and *Garza*. In *McCoy*, over the defendant's vociferous objection, defense counsel conceded the defendant's guilt at the guilt-innocence phase of defendant's death penalty trial. 138 S. Ct. at 1505. Counsel did so after pretrial consultation with the defendant revealing counsel's intention to concede guilt and focus on the defendant's serious mental and emotional disturbance. *Id.* at 1507-07. At multiple pretrial consultations the defendant instructed counsel not to concede guilt. *Id.* at 1506. Defendant brought the matter to the trial court's attention and sought to discharge counsel. *Id.* The court refused to discharge counsel and told counsel that the matter or whether or not to concede guilt was a matter of trial strategy for counsel to decide. *Id.* at 1506. Defendant again complained to the judge after counsel's opening statement that counsel was "selling him out" by conceding his guilt, but the judge indicated that he would not tolerate the defendant's outbursts. *Id.* at 1507. The jury found the defendant guilty and sentenced him to death. *Id.*

Represented by new counsel, the defendant filed a motion for a new trial claiming that the trial court violated his constitutional rights by allowing counsel to make the concession over the defendant's objection. The trial court denied the

motion, and the state supreme court affirmed. *Id.* at 1507.

This court granted certiorari and, after consideration, reversed. *Id.* at 1512. This court reasoned that, while trial management was the lawyer's province, some other decisions are wholly within the autonomy of the client, including whether to (1) plead guilty, (2) waive the right to a jury trial, (3) testify in one's own behalf, and (4) forego an appeal. *Id.* at 1508, citing *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Conduct which overrides the defendants decision or violates the defendant's autonomy in these areas, this court said, violates the defendant's constitutional rights and must be reversed regardless of prejudice. *McCoy*, 138 S. Ct. at 1508-09, 1512.

Claims establishing a violation of the defendant's autonomy in this regard need not make a showing of prejudice under *Strickland*. *Id.* at 1510-11. To quote this court, "Because a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence." *Id.* at 15-10-11. In other words, the court does not require a showing of prejudice. The court, thus, held that the *McCoy* defendant must be afforded a new trial without any need of first showing *Strickland* prejudice. *Id.* at 1511.

In *Garza v. Idaho*, this court also rejected the argument that the defendant needed to show prejudice to obtain relief on his claim that his trial counsel was ineffective for refusing the defendant's instructions to file a notice of appeal for the defendant's direct appeal. 139 S. Ct. 738 (2019). In the trial court, the defendant pleaded guilty to multiple cases pursuant to negotiated pleas, the terms of which were

that the defendant waived his right to appeal. *Id.* at 742. Despite the pleas, the defendant repeatedly instructed counsel to file notices of appeal. *Id.* at 743. Counsel did not do so, but, instead, advised the defendant that he had waived his right to appeal. *Id.*

The *Garza* defendant filed a state post-conviction petition indicating that his lawyer was ineffective for failing to file the notices of appeal. *Id.* at 743. The state trial and appellate courts denied relief. *Id.* The state supreme court affirmed, indicating that although a showing of prejudice is normally not necessary when counsel fails to file a notice of appeal after being instructed to do so, given the appeal waivers that were a part of Garza's negotiated pleas, Garza needed to show prejudice to prevail on his claim of ineffective assistance for failure to file the notices of appeal. *Id.* at 743.

This court reversed, holding that *Strickland* prejudice was presumed where counsel failed to file notices of appeal despite the defendant's explicit instructions to do so. *Id.* at 750. Like the *McCoy* court, the *Garza* court reasoned that whether or not to appeal is a decision squarely within the autonomy of the defendant, and not his lawyer. *Id.* at 746, 748. The court so held even though the record of the proceedings in the trial court prior to state post-conviction contained no indication that the defendant instructed counsel to file a notice of appeal. Instead, the record prior to state post-conviction was silent on this matter.

As a reading of *McCoy* and *Garza* reveals, this court did not hold that the elimination of the need to show *Strickland* prejudice hinged on whether or not the

defendant's objections were brought to the trial court's attention prior to state post-conviction. In both *McCoy* and *Garza*, when declining to require a showing of prejudice, this court simply focused on whether counsel made a decision against the defendant's wishes on a matter which was solely within the defendant's personal autonomy. The dichotomy this court emphasized in negating the need to show prejudice was that between (1) decisions which are the province of counsel and (2) decisions which are in the sole discretion or autonomy of the defendant, himself. The Court of Appeals erred in holding otherwise and this court should grant certiorari to reject the lower court's conclusion that in order to do away with the *Strickland* prejudice requirement, the defendant must have made an on-the-record, personal assertion of his rights in the trial or plea proceedings.

II. This court should grant certiorari to decide whether the lower court erred in declining to certify for appeal the issue of whether the state court unreasonably applied clearly established federal law in denying Mr. Hartsfield's claim that trial counsel was ineffective for failing to call William "Billy" Thompson to testify on Hartsfield's behalf, where Thompson could have refuted testimony from the State's witness that Hartsfield's co-defendant had him dispose of the murder weapon and where Thompson's testimony to the co-defendant's jury led to the co-defendant's acquittal.

A habeas corpus petitioner seeking a Certificate of Appealability "COA" must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003). The petitioner is not required "to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus." *Id*. at 338. "Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338. A COA should issue when the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El*, 537 U.S. at 336; *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). Under this standard, "a petitioner must show that reasonable jurists could debate whether the

petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El,* 537 U.S. at 336.

The U.S. Constitution guarantees a citizen accused of a crime the right to effective assistance of counsel. U.S. Const. Amends. VI, XIV. *Strickland v. Washington*, 466 U.S. 668, 687-89 (1984). The constitutional right requires effective assistance because the right to counsel is a fundamental right that ensures the fairness and, thus, the legitimacy of our adversarial process. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

In this case, Phillip Hartsfield requested a COA on the claim that his trial counsel provided ineffective assistance of counsel by failing to call William "Billy" Thompson as a witness at trial. Both the district court and the Court of Appeals denied his request as to that claim.

Hartsfield made a substantial showing that reasonable jurists would debate that calling Thompson in Hartsfield's case would have led to acquittal. Thomspon was ready, willing, and able to testify on Hartsfield's behalf, and Thompson's testimony presented at co-defendant Mohammed Abukhdeir's trial (conducted simultaneously with Hartsfield's), led to acquittal. Thompson's testimony directly contradicted key State witness John Waszak, whose testimony linked Hartsfield and Abukhdeir to a gun matching the caliber of the murder weapon; Abukhdeir was acquitted. The failure of Hartsfield's counsel to present an available and willing witness to provide testimony contradicting a key State witness and supporting the theory of defense – that Hartsfield did not do it – was patently unreasonable, and the resulting prejudice is apparent in

Abukhdeir's acquittal. At the very least, reasonable jurists would debate that point.

In an affidavit attached to Hartsfield's state post-conviction petition, Thompson attested, as he had testified in Abukhdeir's trial, that John Waszak was not at his house on January 6, 2004, nor was he there on any other day around January 6, because Waszak "is a drug addict and thief and is not welcome." (C. 60, 103). Thompson's testimony would have directly contradicted Waszak, who testified that he was at Thompson's house on January 6, with Thompson and Abukhdeir. *Hartsfield I*, at 6. According to Waszak, Abukhdeir gave Waszak a knotted sock and asked him to get rid of it. *Hartsfield I*, at 6. Waszak testified that he looked inside and saw a gray gun barrel, spent casings, and shells; he recognized the barrel as belonging to a .40-caliber gun he had sold Abukhdeir some years earlier. *Id.* Thus, Waszak's testimony provided a critical link between a .40-caliber gun – the caliber of the murder weapon – and Abukhdeir and Hartsfield. *Id.* at 6, 10. Given that counsel's apparent strategy was to draw the jury's attention to weaknesses in the State's case, and particularly the impeachment or attempted impeachment of the State's witnesses, Hartsfield claims that counsel's failure to present Thompson's testimony to directly contradict Waszak would be debated by reasonable jurists.

Reasonable jurists could debate that Hartsfield was prejudiced under *Strickland*. The State's evidence in this case was far from overwhelming in nature. The State failed to produce a shred of direct evidence against Hartsfield. There was no physical evidence linking Hartsfield to the crime. No fingerprints, no blood evidence, no gunshot residue, no ballistic evidence, and no eyewitnesses.

The State based its case on Hartsfield's opportunity, means, and motive to commit the offenses. But these things, opportunity, means, and motive, were not unique to Hartsfield. A

party was held at the victim's house the night before which lasted into the early morning hours; so, there were numerous people in the house who had access to the victim for a period of several (14) hours before the deceased was found dead. *Hartsfield I*, at 2.

There were no eyewitnesses to the shooting, and the testimony from the State's witnesses came from people who claimed they sat in a car as Hartsfield and his co-defendant went toward the decedent's house. *Hartsfield I*, at 3-4. Neither of them saw or heard anyone enter the premises or heard any gunshots during the time that the defendant was out of their sight. *Id.* What's more, those witnesses were attempting to deflect responsibility from themselves.

As stated, the decedent was unattended for 14 hours, from approximately 4:00 a.m. to 6:00 p.m., and the time of death could not be determined. *Hartsfield I*, at 5-7. A witness who lived in the basement just below the victim's room did not hear anyone break into the back door during the time that the defendant was in the area, nor did she hear any gunshots during that time. *Id.* at 5-6.

The testimony of the State's principal witnesses, Richmond, Kasper, Chrzan, is subject to attack as well. Both were extremely drunk at the time. (Tr. R. 207, 225, 341-42, 344-45). Their testimony was inconsistent with one another's. Some testimony claimed that Hartsfield semi-bragged about the killing and threatened them not to tell. *Hartsfield I*, at 3-4. Another, who was in the same car when this allegedly happened heard none of that. (Tr. R. 366-67).

The State attempted to corroborate their testimony with the testimony of John Waszak. He testified that a couple of days after the shooting the co-defendant gave him parts of a gun and shell casings to get rid of. (Tr. R. 656, 725-26, 794). He was severely impeached on a variety of topics, and his testimony was never corroborated by the recovery of the weapon in question.

Hartsfield I, at 6.

In summary, reasonable jurists could debate whether calling Thompson as a defense witness could have made a difference in the outcome of Hartsfield's trial. The Court of Appeals, thus, erred in declining to grant a COA on this claim. This court should grant certiorari so that Hartsfield's claim can be fully raised and decided in the Court of Appeals.

CONCLUSION

For the foregoing reasons, petitioner, Phillip Hartsfield, respectfully prays that a writ of certiorari issue to review the judgment of the U.S. Court of Appeals.

Respectfully submitted,

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APPENDIX A

Hartsfield v. Pfister, N.D. Ill. Case No. 14-cv-05816 (Memorandum Opinion & Order, Entered March 6, 2018).

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PHILLIP HARTSFIELD (R46473), Petitioner, v. RANDY PFISTER, Warden, Pontiac Correctional Center, Respondent.	Case No. 14-cv-5816 Judge John Robert Blakey

MEMORANDUM OPINION AND ORDER

Petitioner Phillip Hartsfield brings a Petition for Writ of Habeas Corpus ("Petition") pursuant to 28 U.S.C. § 2254, challenging his state court convictions for murder and home invasion. Petitioner is currently serving a 45-year prison term on the murder conviction and a consecutive 6-year prison term on the home invasion charge. An IDOC inmate search shows that he is currently being held at Pinckneyville Correctional Center. For the reasons explained below, this Court denies the petition, and declines to issue a certificate of appealability.

I. Legal Standard

Federal review of state court decisions under § 2254 is limited. With respect to a state court's determination of an issue on the merits, habeas relief can be granted only if the decision "was contrary to, or involved an unreasonable application of, clearly established Federal law," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court

proceeding." 28 U.S.C. § 2254(d)(1)-(2); *Harrington v. Richter*, 562 U.S. 86, 100 (2011). This Court presumes that the state court's account of the facts is correct, and Petitioner bears "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see Coleman v. Hardy*, 690 F.3d 811, 815 (7th Cir. 2012).

State prisoners must give the state courts "one full opportunity" to resolve any constitutional issues by "invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). If a petitioner asserts a claim for relief that he did not present in the first instance to the state courts, the claim is procedurally defaulted and "federal courts may not address those claims unless the petitioner demonstrates cause and prejudice or a fundamental miscarriage of justice if the claims are ignored." *Byers v. Basinger*, 610 F.3d 980, 985 (7th Cir. 2010).

II. Background and Procedural History

This Court begins by summarizing the facts and procedural posture from the state court record [14] (attaching Exhibits A to X), including the Illinois Appellate Court's opinions on direct appeal, *Illinois v. Hartsfield*, No. 1-05-2782 (Ill. App. Ct. March 28, 2007) ([14] Ex. A), and post-conviction review, *Illinois v. Hartsfield*, No. 1-12-0155 (Ill. App. Ct. Sept. 13, 2013) ([14], Ex. J). This Court presumes that the state court's factual determinations are correct for the purposes of habeas review, as Petitioner does not point to any clear and convincing contrary evidence. 28 U.S.C. § 2254(e)(1); *Brumfield v. Cain*, 135 S. Ct. 2269, 2282 n.8 (2015) (citing 28 U.S.C.

2254(e)(1)). Indeed, here Petitioner does not contest the state appellate court's factual findings. [1] at 6-11.

This case arises out of the January 4, 2004 murder of Alejandro Martinez. Petitioner and his co-defendant, Mohammed Abukhdeir, were simultaneously tried before separate juries for first-degree murder and home invasion in connection with Martinez' death. [14] Ex. J at 2. The evidence at trial established that, in the wee hours of the morning on January 4, Martinez was partying with several friends at his home at 5530 South Kolin in Chicago. [14] Ex. J at 2. Claudia Garcia testified at trial that she was at a party up north with some friends when her boyfriend, Steven Howard, called her and asked her to come to Martinez' house. [14] Ex. A at 2. Garcia arrived at the party at approximately 3 a.m. with her friends, Candy Richmond and Kristina Kasper. *Id.* Martinez, Howard, and two of Martinez' friends, Raul Flores and Hector Canternin, were at the party when the women arrived. [14] Ex. A at 2.

After a while, Garcia and Howard went into the bathroom. *Id.* Kasper used Richmond's cell phone to call Petitioner, with whom Kasper was having a sexual relationship. *Id.* While on the call, Kasper heard Petitioner with another woman and became angry. *Id.* at 1-2. After the call, Kasper told Richmond about the conversation in front of Flores and Canternin. *Id.* at 2. They then asked Kasper why she was dating "a black guy" (Petitioner is African-American), and an argument ensued between Kasper, Flores, and Canternin. [14] Ex. J at 2. After about 15 minutes, Richmond knocked on the bathroom door and told Garcia that

she wanted to leave. *Id.* Garcia came out of the bathroom and saw Kasper fighting with Flores. [14] Ex. A at 2. Richmond was also yelling at Flores and Canternin, calling them derogatory terms for Mexicans. *Id.* As the three women were leaving, Richmond and Kasper continued to yell at them. [14] Ex. J at 2-3. Howard followed the women to the car and "smacked" both Kasper and Richmond. *Id.* at 2; [14] Ex. A at 3. The women left in Garcia's car at approximately 4:30 or 5:00 am. [14] Ex. A at 2; [14] Ex. J at 3.

While in the car, Richmond and Kasper made several phone calls. [14] Ex. J at 3. Garcia testified that Richmond called someone, gave them the victim's address, and encouraged the person on the other end of the line to take retaliatory action against the men at the party. *Id.*; [14] Ex. A at 2. Garcia also testified that someone from the party called Richmond and Richmond said, "Don't worry about it. I got you motherfuckers." [14] Ex. A at 2. The person that called was Raul Flores. *Hartsfield*, order at 2. Kasper testified that either she or Richmond called Petitioner and gave him the Martinez' address. [14] Ex. J at 3; [14] Ex. A at 4. At trial, the parties stipulated to telephone records showing calls between Richmond's cellphone number and Petitioner's cellphone number on the morning of January 4. [14] Ex. T at 844-846.

Candy Richmond also testified at trial; she denied that she encouraged Petitioner to kill anyone or that she threatened to have anyone killed. She also denied that she told Flores "I got you" after leaving the party. [14] Ex. A at 3. Richmond testified that, after she arrived home at 5:30 or 6:00 a.m., she received

calls from Petitioner, Garcia, and Kasper. *Id.* She testified that Petitioner picked her up at around 7:00 a.m. in a silver four-door car. *Id.* Abukhdeir was also in the car. *Id.* They picked up Kasper and proceeded to Martinez' house, arriving around 7:30 a.m. *Id.* Richmond testified that, when they arrived, Petitioner exited the car and rang the front doorbell. *Id.* No one answered and Petitioner returned to the car and opened the trunk. *Id.*; [14] Ex. J at 3. Richmond testified that Petitioner then retrieved a silver gun from the trunk. [14] Ex. A at 3; [14] Ex. J at 3. Richmond testified Petitioner and Abukhdeir proceeded down a gangway adjacent to Martinez' house and returned to the car five minutes later. [14] Ex. A at 3.

Richmond testified that Petitioner and Abukhdeir were laughing as they got into the car. *Id.*; [14] Ex. J at 3. She thought she saw blood on Abukhdeir's knuckles. [14] Ex. J at 3. Richmond heard Abukhdeir say "he has blood all over him." *Id.* Petitioner told Abukhdeir to "shut the fuck up" and Abukhdeir said, "If it wasn't for me, you wouldn't have gotten through the back door." *Id.* Richmond also heard Abukhdeir say, "I hope you did it right." *Id.* Kasper testified that she did not hear this conversation but did observe a gun in Abukhdeir's lap. [14] Ex. J at 3; [14] Ex. A at 3-4.

Richmond also testified that, at one point, petitioner stopped the car, took the gun from Abukhdeir, and put the gun in the trunk. [14] Ex. J at 3-4. They drove to another house, which Richmond believed to be Abukhdeir's. [14] Ex. A at 3. Petitioner opened the trunk and Abukhdeir went into the house then came back to the car. *Id.* Kasper's testimony did not mention either stop. *Hartsfield*, order at 4;

[14] Ex. P at 337-339. Petitioner and Abukhdeir then dropped off Kasper and Richmond. *Id.* Richmond further testified that as Petitioner was dropping her off, Petitioner told Richmond: "You're my girl but I'll kill you." [14] Ex. A at 3-4; [14] Ex. J at 4. When Richmond asked Petitioner what he had done, he said "Nothing." [14] Ex. A at 4; [14] Ex. J at 4. Both Richmond and Kasper had been drinking that night. [14] Ex. J at 3. Richmond acknowledged that she did not hear any gunshots and did not see a silencer. [14] Ex. O at 238.

Katherine Chrzan testified that, at the time of the murder, she was pregnant with Petitioner's child and drove a silver four-door Chevrolet in 2004. [14] Ex. J at 4; [14] Ex. A at 4. Around 4:30 a.m. on January 4, 2004, Petitioner picked up Chrzan from a friend's house in her car. [14] Ex. A at 4-5; [14] Ex. J at 4. Abukhdeir was in the back seat. [14] Ex. A at 5. Chrzan testified that Petitioner then received a phone call, and that Chrzan could hear a female voice coming through the line. *Id.* Petitioner told the caller he would be there in twenty minutes. *Id.* Petitioner drove to his house; Chrzan and Petitioner went to Petitioner's bedroom while Abukhdeir stayed in the car. *Id.* In his bedroom, Petitioner retrieved a shotgun from under his bed. *Id.* He left Chrzan at his house around 6:30 or 7:00 a.m. and returned at 9:00 or 9:30 a.m. *Id.* Petitioner and Chrzan then slept until 6:00 p.m. *Id.*

On cross-examination, Chrzan testified that when Petitioner returned home, there was nothing unusual about his clothing and she did not see any blood either on Petitioner or in her car. [14] Ex. O at 125-127.

That evening, Chrzan noticed that her car's gas tank was almost empty. *Id.* She asked Petitioner where he had driven the night before. [14] Ex. A at 5. Petitioner said he went to Chicago, but that if he told her what happened, she "wouldn't want to come around anymore," and that "if he ever went to jail for murder, he would kill himself." *Id.* Chrzan further testified that the same night, she overheard Petitioner on the phone ask if "Sally" was registered. *Id.* Chrzan understood that "Sally" was a gun. *Id.* On January 6, 2004, Chrzan and Petitioner were approached by police officers outside the Maywood courthouse. *Id.* Chrzan consented to a search of her car. *Id.*

John Waszak, a friend of Petitioner and Abukhdeir, also testified at trial. He testified that, on the evening of January 6, he was at Billy Thompson's house along with Abukhdeir. [14] Ex. A at 6. Waszak testified that, while at Thompson's house, Abukhdeir gave him a sock tied up with a knot at the top; the sock contained a gun barrel and shell casings. [14] Ex. A at 6; Ex. R at 649. Waszak testified that his girlfriend drove him to the Ogden Bridge over the Des Plains River in Lyons and he threw the sock in the river. *Id.* Before he disposed of the sock, Waszak looked inside and saw a .40 caliber gun barrel, spent casings, and live shells. [14] Ex. A at 6; Ex. R at 651. Waszak recognized the gun; he identified it as the gun called "Sally" that he previously sold to Abukhdeir. [14] Ex. A at 6; Ex. R at 652. Waszak admitted that he had prior convictions for residential burglary, possession of a controlled substance, forgery, and domestic battery. Ex. A at 6.

Laura Vega, the victim's aunt, also testified at trial. She testified that she lived in the basement apartment of the victim's house. [14] Ex. A at 5. She testified that she returned home from a night of dancing at 4:00 a.m. on January 4, 2004, saw the lights on upstairs, and heard men and women talking. *Id.* She did not hear Martinez's voice. *Id.*; Ex. Q at 414, 431-432. At that time, she did not notice anything unusual about the back door. *Id.* Vega went to bed soon afterward, awoke briefly at 9:00 a.m., and eventually got up at noon. *Id.* She walked upstairs to ask Alberto Martinez, the victim's brother who also lived in the house, if he wanted to share a pizza. *Id.* He declined and said the victim was still sleeping. *Id.* Vega testified that she did not hear any gunshots or pounding on the door that morning. *Id.*

Alberto Martinez, the victim's brother, testified that he returned home at 11:30 a.m. on January 4, 2004 after spending the night out. [14] Ex. A at 6. He testified that, at some point, he yelled to the victim, and, when the victim failed to respond, Martinez thought he was sleeping. *Id.* Alberto Martinez testified that, at about 6:00 p.m. that day, he attempted to wake the victim and found him dead in his bed. *Id.*

Detective Jim O'Brien, one of the police detectives who investigated the murder, testified that he arrived at the victim's house at 6:00 p.m. on January 4, 2004. *Id.* The condition of the victim's body and the scene indicated that the victim had not been moved after he was killed. *Id.* Detective O'Brien testified that the back door was split and appeared to have been kicked or forced open. *Id.* A forensic

scientist examined the backdoor to the victim's house but found no blood or other biological materials on the door. [14] Ex. A at 7; Ex. R at 593-594.

Detective Daniel McNally, another investigator, testified that he searched Chrzan's car after obtaining her consent, where he found Abukhdeir's identification card. [14] Ex. A at 6. After securing a search warrant for Abukhdeir's house, the detective found a.40 caliber Cal Tech pistol loaded with eight live rounds and a box of .40-caliber Speer brand bullets in a basement bedroom. *Id.* at 6-7. Abukhdeir's brother provided a receipt for the gun and a Firearm Owner's Identification (FOID) card in his name for the gun. *Id.* at 7. In another basement bedroom, the detective found Abukhdeir's identification and a pair of bloodstained Jeans. *Id.*

The assistant medical examiner (ME) testified that the victim's body was autopsied at 8:15 a.m. on January 5, 2004. [14] Ex. A at 7. The ME determined that the victim sustained four gunshot wounds: one close-range shot to the left cheek, which exited the back of his head; one close-range shot to his left neck, which lodged in the victim's right shoulder muscle; one shot to his left forearm, which fractured his ulna; and one shot to his left thumb. *Id.*; Ex. R at 608. The ME testified that the only bullet recovered from the victim's body was the one lodged in his shoulder muscle. The ME could not be certain of the exact time of death, but testified to a degree of medical certainty that the cause of death was the victim's gunshot wounds. *Id.*

Forensic scientist Julie Steele testified that one .40 caliber bullet was recovered from the victim's body and two fired .40 caliber Speer brand bullet

casings were recovered from the scene for testing. *Id.* Steele testified that she could not identify or eliminate the Cal Tech pistol found in Abukhdeir's house as the gun that fired the bullet recovered from the victim's body. [14] Ex. A at 7-8; [14] Ex. J at 6. Additionally, the bullets recovered from Abukhdeir's house had silver casings while those found at the scene of the murder had brass casings. Ex. A at 7-8.

The jury convicted Petitioner on both counts. The trial judge sentenced him to 45 years on the murder charge and 6 years on the home invasion charge, with the sentences to run consecutively.

Petitioner appealed, arguing that: (1) he was not proven guilty of the charges beyond a reasonable doubt; (2) the trial court erred in admitting Detective O'Brien's testimony as to what Richmond, Kasper, Waszak, Howard, Flores and Canternin said when he questioned them, because such statements were inadmissible hearsay; (3) the trial court erred in admitting the gun and ammunition found at co-Defendant's house, as well as evidence of the ballistics tests performed on that gun; (4) the trial court erred in admitting Chrzan's testimony that Petitioner was arrested outside of the Maywood courthouse because the statement amounts to impermissible other crimes evidence; and (5) certain comments made by the prosecutor in closing arguments were improper. *See* [14] Exs. A, B. The Appellate Court rejected these challenges and affirmed Petitioner's conviction. [14] Ex. A. Petitioner then filed a petition for leave to appeal (PLA), raising all of these same arguments, and the Illinois Supreme Court denied the PLA. See [14] Exs. E, F.

Petitioner filed a *pro se* post-conviction petition claiming that his trial counsel was ineffective because he usurped Petitioner's right to testify and failed to call Billy Thompson, Amjud Abukhdeir, and Maria Vega as witnesses. With the assistance of counsel, Petitioner filed an amended post-conviction petition, claiming that trial counsel was ineffective for usurping Petitioner's right to testify and for failing to call Billy Thompson to testify, and that trial and appellate counsel were ineffective for failing to challenge the admission of Candy Richmond's hearsay testimony about Abukhdeir's inculpatory statements. [14] Ex. J at 6-7. The trial court dismissed the petition, finding that the claims lacked merit. *Id.* at 7.

Petitioner appealed that dismissal, represented by the State Appellate Defender's Office, raising the same claims he raised in his amended post-conviction petition and also arguing that his post-conviction counsel was ineffective when he abandoned the claim made in Petitioner's *pro se* post-conviction petition that trial counsel was ineffective for failing to present testimony from Amjad Abukhdeir, who owned the gun introduced at trial. [14] Ex. G at 2, 32-34. The Appellate Court affirmed the dismissal of the petition. [14] Ex. J. Petitioner then filed a PLA with the Illinois Supreme Court, and the Supreme Court denied the PLA on January 29, 2014. [14] Exs. K, L.

Petitioner then filed this habeas corpus petition [1] on July 29, 2014.

III. Analysis of Petitioner's Claims

In the habeas corpus petition he filed with this Court, Petitioner asserts seven claims. In claim one, Petitioner asserts that the State failed to prove him

guilty of the offenses of home invasion and first degree murder beyond a reasonable doubt. In claim two, he claims that the trial court erred in allowing the introduction of hearsay statements of six of the State's witnesses. In claim three, Petitioner claims that the trial court erred in allowing the State to introduce evidence of a handgun and ammunition recovered from the home of co-Defendant, as well as evidence of ballistics examinations conducted on the gun. In claim four, he asserts that the trial court erred in allowing the State to introduce evidence that Petitioner was arrested for the instant offenses as he was exiting the Maywood Courthouse. In claim five, he claims that the State's closing and rebuttal closing arguments were improper and constitute reversible error. Finally, in claims six and seven, he claims that his trial counsel was ineffective when he usurped his right to testify in his own behalf and failed to call Billy Thompson to the stand to testify on Petitioner's behalf to undermine the trial testimony of John Waszak.

Petitioner is currently serving 45 years for first degree murder, with a consecutive six years for home invasion. He filed Writ of Habeas Corpus which includes seven claims and states that he is being improperly imprisoned. The Court considers each claim below.

A. Claim One

Petitioner first argues that he was not proven guilty beyond a reasonable doubt of the offenses of home invasion and first degree murder. Respondent correctly argues that this claim is meritless. On appeal, the Appellate Court reasonably concluded that any rational jury could have convicted petitioner of the

murder and home invasion of Martinez. A reviewing court must uphold a conviction as constitutional if, when viewing the evidence in the light most favorable to the state, *"any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Moreover, a reviewing court "faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *McDaniel v. Brown*, 558 U.S. 120, 133 (2010) (quoting *Jackson*, 443 U.S. at 326).

Federal habeas review of a sufficiency-of-the-evidence claim adds "an additional layer of deference onto this inquiry." *Monroe v. Davis*, 712 F.3d 1106, 1119 (7th Cir. 2013). A state court decision rejecting a sufficiency challenge may not be overturned "unless the decision was objectively unreasonable." *Parker v. Matthews*, 132 S. Ct. 2148, 2152 (2012) (internal quotation marks and citation omitted); *see also Williams v. Thurmer*, 561 F.3d 740, 743 (7th Cir. 2009) (state court's decision on section 2254 review need only be "minimally consistent with the facts and circumstances of the case"); *Hardaway v. Young*, 302 F.3d 757, 762 (7th Cir. 2002) (holding that a state court decision must be more than incorrect from the point of view of the federal court; AEDPA requires that it be "unreasonable," "lying well outside the boundaries of permissible differences of opinion").

Under Illinois law, first degree murder occurs when an individual kills another without lawful justification and either intends to kill or do great bodily

harm to that person, or knows that his actions will cause death. 720 ILCS § 5/9-1(a)(1). Home invasion occurs when an individual enters an occupied dwelling without authority and intentionally causes injury to the occupant. 720 ILCS § 5/12-11(a)(2).

Here, there was overwhelming evidence presented at trial showing petitioner's guilt. This evidence included: (1) several inculpatory statements by both Petitioner and co-defendant; (2) evidence of a forced entry into the victim's home; (3) eyewitness testimony that Petitioner and Abukhdeir approached the victim's home with a gun; and (4) a gun recovered from Abukhdeir's home that could not be eliminated as the gun used to kill the victim. The evidence at trial also showed that Richmond, Kasper, and Garcia fought with men at Martinez' party and, after leaving the party, Richmond called Petitioner, gave him the victim's address and urged him to retaliate. [14] Ex. A 2-4, Ex. J at 3. After Garcia dropped off Richmond and Kasper, Petitioner and Abukhdeir picked them up and drove to the victim's house. [14] Ex. A at 2. Chrzan, who was with Petitioner when Richmond called, testified that she observed Petitioner take a shotgun from under the bed as he left her house, and Kasper testified that she saw Petitioner retrieve a gun from the trunk when they arrived at the victim's home. *Id.* at 3, 5. Richmond testified that Petitioner and Abukhdeir, with the gun, then walked down a gangway that lead to the rear of the victim's house. *Id.* Richmond testified that when the men returned, Abukhdeir said that Petitioner "ha[d] blood all over him"; that "if it wasn't for [Abukhdeir]," Petitioner "wouldn't have gotten through the back door";

and that he hoped Petitioner "did it right." *Id.* at 3; [14] Ex. J at 3. Richmond testified that as Petitioner was dropping her off, he threatened: "You're my girl but I'll kill you." [14] Ex. A at 3-4. Later that day, Petitioner told Chrzan that he had driven her car to Chicago, that she "wouldn't want to come around anymore" if he told her what had happened, and that "if he ever went to jail for murder, he would kill himself." *Id.* at 5. Police recovered .40 caliber bullets from the victim's body and from the scene, as well as a .40 caliber gun from Abukhdeir's house. *Id.* at 7. Waszak testified that, two days after the murder, Abukhdeir gave him a tied sock containing a .40 caliber gun barrel, spent casings, and live shells, which he then threw into the river to repay the debt he owed to Abukhdeir. Additionally, the back door of the victim's house was split open, suggesting that a forced entry had occurred. [14] Ex. A at 6.

Petitioner argues that none of the State's witnesses heard or saw anyone enter the premise, nor had they heard any gunshots during the time that defendant was out of their sight. He also emphasizes that detectives found no fingerprints, blood evidence, or gunshot residue and no other physical evidence linking Petitioner to Martinez' murder; nor, he argues, was there any ballistic evidence or eye witness testimony tying him to the murder. On cross examination, the assistant medical examiner admitted that she could not determine the exact time of death. The deceased was unnoticed from approximately 4:00 a.m. until approximately 6:00 p.m. on the day of his death. During this time, many other individuals might have had access to the scene. The witness who lived in the basement below did not hear

anyone break into the hour or kick in the door during that time petitioner was in the area; nor did she hear any gunshots. Additionally, the testimony of Richmond and Kasper was allegedly suspect because both women admitted to being drunk at the time. And the testimony of John Waszak was purportedly impeached on a variety of topics, and his testimony was not corroborated by the recovery of the contents of the sock. Petitioner argues that Chrzan's testimony about her conversation with Petitioner (where he told her that she "probably wouldn't want to come around anymore" if she knew what happened, and that "if he ever went to jail for murder, he would kill himself") and his question about "Sally" being registered was vague and inconclusive.

Initially, the lack of physical evidence directing linking Petitioner to the crimes is not dispositive, because circumstantial evidence remains sufficient to support a conviction. *See Clayton v. Gilmore*, No. 94-2167, 1997 WL 267850, at *5 (7th Cir. May 15, 1997) (rejecting sufficiency of the evidence claim on habeas review where "circumstantial evidence was sufficient for a reasonable jury to find [petitioner] guilty"); *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) ("[W]e have never questioned the sufficiency of circumstantial evidence in support of a criminal conviction."); *United States ex rel. Green v. Greer*, 667 F.2d 585, 587 n.3 (7th Cir. 1981) (citing *Jackson*, 443 U.S. at 324-25) ("The *Jackson* Court recognized that circumstantial evidence could support a guilty verdict."); *see generally Holland v. United States*, 348 U.S. 121, 140 (1954) (observing that, in criminal cases, circumstantial evidence is "intrinsically no different from testimonial evidence").

Here, the jury heard testimony that Richmond and Kasper got into a fight at Martinez' house; that the argument implicated Petitioner and potentially his race and ended when Howard smacked the women and they left; that the women then called Petitioner and urged him to take action in retaliation; that Petitioner received those calls, then drove with Abukhdeir to pick up the women; that the group then drove to the victim's house, with a gun; that Petitioner and Abukhdeir then walked toward the back of the house, with the gun; that Petitioner returned to the car a short time later, then told his girlfriend that if she knew what had happened, she would not come around anymore; that police recovered a gun from Abukhdeir's house, which forensics could not eliminate as the gun used in the shooting; that Abukhdeir implicated Petitioner by saying that he was covered in blood and that Abukhdeir hoped Petitioner had "done it right"; and that two days after the murder, Abukhdeir asked a mutual friend of his and Petitioner's to get rid of a sock containing a gun barrel and shell casings.

Although Petitioner challenges Richmond's and Kasper's credibility and the weight to be given to Waszak's testimony, it is up to the jury to determine what weight to ascribe in-court testimony—Petitioner cannot subsequently challenge the jury's credibility determinations on habeas review. *See Marshall v. Lonberger,* 459 U.S. 422, 851 (1983) ("28 U.S.C. § 2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them."); *United States v. Bailey*, 510 F.3d 726, 733 (7th Cir. 2007) ("This Court construes all evidence in the light most favorable to the

government, defers to the jury in assessing credibility, and resolves all conflicts in the evidence in favor of the government."); *United States v. Hopson*, 184 F.3d 634, 636 (7th Cir. 1999) (jurors are "free to believe" whatever evidence is submitted to them, and their "credibility assessments and evidence-weighing" are entitled to deference).

In light of all of this evidence, the Court finds that the state court's rejection of Petitioner's sufficiency challenge was objectively reasonable. As a result, Petitioner's claim one fails.

B. Claims Two, Three, and Four

Petitioner next claims that the trial court erred in allowing the admission of: (1) prior consistent statements of six of the State's witnesses (claim 2); (2) a handgun recovered from co-defendant's home and evidence that Petitioner owned a shotgun (claim 3); and (3) evidence that Petitioner was arrested while exiting the Maywood Courthouse (claim 4). As Respondent correctly notes, these claims are procedurally defaulted because Petitioner failed to fairly present them as federal claims in state court.

Inherent "in the habeas petitioner's obligation to exhaust his state court remedies before seeking relief in habeas corpus is the duty to fairly present his federal claims to the state courts." *Lewis v. Sternes,* 390 F.3d 1019, 1025 (7th Cir. 2004) (internal citation omitted); *see also O'Sullivan v. Boerckel,* 526 U.S. 838, 845 (1999). The fair presentment doctrine requires a petitioner to alert the state court to the federal nature of his claim by identifying "the federal source of law on which

he relies," citing a "case deciding such a claim on federal grounds," or simply labeling the claim "federal." *Baldwin v. Reese,* 541 U.S. 27, 32 (2004). Additionally, it may be possible for Petitioner to frame his issue as federal by citing a lower court opinion that raises a similar federal issue. In order for a case citation to be sufficient to satisfy the fair presentment doctrine, Petitioner must assert, in his Petition, that the case being cited to conducts a federal constitutional analysis. *Id.* at 31. This must be clearly stated as the Court is not required to further read into these lower court opinions to determine the federal nature of the case at hand, as doing so would alter their ordinary review practices and impose a substantial burden upon them. *Id.* at 31.

Here, Petitioner failed to fairly present the federal nature of claims 2, 3, or 4 during his state court proceedings. Rather, he argued his claims within the context of State law only. With regard to claim 2, Petitioner argued that the trial court erred in allowing introduction of hearsay statements that were inadmissible under Illinois law. With regard to claim 3, Petitioner argued that the trial court erred in admitting gun and ballistics evidence because it was inadmissible under Illinois law. As to claim 4, Petitioner argued on direct appeal that the trial court erroneously admitted evidence that petitioner was arrested while exiting a courthouse, raising the inference that he had another criminal case pending at the time; Petitioner argued that this evidence was inadmissible under Illinois law. Petitioner never raised these issues in the context of any federal law or

constitutional provision. In short, Petitioner failed to present any of these issues as a claim for violation of any federal or constitutional right.

Petitioner argues that he fairly presented his claim by citing to cases below that included constitutional analysis. Not so. Petitioner must do more than simply cite a case that conducts a federal analysis. *Baldwin,* 541 U.S. at 31. It must be apparent to the reviewing court that a federal analysis is being raised and that Petitioner is using the case for that reason. *Id.* at 31. An appellate judge is not required to further read into lower court cases to determine the federal nature of the claim. *Id.* at 31. The claim must be clearly framed as having to do with a federal issue in the brief submitted to the court. Claims two, three, and four are thus procedurally defaulted.

C. **Claim Five**

Petitioner next claims that the State's closing and rebuttal arguments were improper and deprived him of a fair trial. Petitioner challenges several aspects of the prosecutor's arguments in this claim, and the Court will address each challenged set of statements in turn. But, at the outset, the Court notes that Petitioner asserted the same challenges on direct appeal, and the Illinois Appellate Court rejected them. As a result, the Court may not grant habeas relief unless the state court's decision on the merits was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or unless the state court decision was based upon an unreasonable determination of facts. 28 U.S.C. § 2254(d).

To prevail on a due process claim based on improper statements in closing arguments, a petitioner must demonstrate that the prosecutor's closing arguments were both improper and prejudicial. It is "not enough that the prosecutor's remarks were undesirable or even universally condemned." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). Rather, a petitioner must establish that the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* An analysis of prejudice turns upon the following factors: (1) whether the prosecutor misstated the evidence; (2) whether the remarks implicate specific rights of the accused; (3) whether the defense invited the response; (4) the trial court's instructions; (5) the weight of the evidence against the defendant; and (6) the defendant's opportunity to rebut. *Id.* at 181-82; *see also Ellison v. Acevedo*, 593 F.3d 625, 636 (7th Cir. 2010) (measuring whether state court's application of *Darden* was reasonable under § 2254(d)). The most important factor is the weight of evidence against the petitioner, as "strong evidence of guilt eliminates any lingering doubt that the prosecutor's remarks unfairly prejudiced the jury's deliberations." *United States v. Gonzalez*, 933 F.2d 417, 431–32 (7th Cir. 1991).

Petitioner argues that the State impermissibly shifted the burden of proof to the defense by asking during rebuttal "What did he just tell you for an hour and a half? What did he tell you? Who is the killer? Who is the killer?" [1] at 25; [14] Ex. T at 900. Petitioner argues that because this statement was made toward the beginning of the State's closing, it set the tone for the argument and destroyed Petitioner's presumption of innocence. Petitioner also argues that the prosecutor's

statement during rebuttal closing argument that the defense counsel was "snotty," which petitioner characterizes as a personal attack on defense counsel, was improper. [1] at 25-28. Petitioner further alleges that the prosecutor suggested to the jury that defense counsel was wasting the jury's time when defense counsel stated: "Why do you need to hear from anybody at the gas station? So you can be here until 10:00 o'clock tonight again?" [1] at 27; [14] Ex. T at 919. Petitioner asserts that these comments were intended to inflame the passions of the jury but, more importantly, were an attempt to shift the burden of proof from the State to the defense.

The Illinois Appellate Court found that, because defendant's objection to the first set of comments was sustained and because the court instructed the jury to disregard the comments, the comments did not prejudice Petitioner. [14] Ex. A at 18. With regard to the second set of comments, the court determined that Petitioner had failed to object to some of the comments and therefore waived any right to challenge them on appeal. *Id.* at 19. The court nevertheless found that the challenge lacked merit. *Id.* All of these findings were objectively reasonable.

After the first challenged statement, defense counsel objected and the objection was sustained. The judge then stated: "I will instruct the jury to disregard that comment." [14] Ex. T at 900. The jury was properly instructed that the burden of proof rested with the State, and the Court's instructions emphasized that Petitioner and his counsel did not have the burden of proving anything. *See United States v. Glover*, 479 F.3d 511, 520 (7th Cir. 2007) ("If the jury has been properly

instructed as to the burden of proof, a prosecutor may comment on a defendant's failure to present evidence contradicting the government's proof at trial."); *Smith v. Hunt*, 707 F.3d 803, 812 (7th Cir. 2013) ("There is a longstanding presumption that curative instructions to the jury mitigate harm that may otherwise result from improper comments during closing argument."). Additionally, immediately following the sustained objection and instructions to the jury to disregard the comment, the prosecutor clarified for the jury that "petitioner does not have to prove who is the killer." [14] Ex. T at 901.

More importantly, the evidence against Petitioner was overwhelming. The overall record of proceedings supports the conclusion that the challenged comments did not deprive petitioner of a fair trial. *See, e.g., Carter v. Ryker*, No. 10 C 3783, 2011 WL 589687, at *7 (N.D. Ill. Feb. 9, 2011) (prosecutor's closing argument remarks that allegedly shifted burden of proof did not prejudice petitioner where defense counsel invited remarks and judge instructed jury regarding defendant's presumption of innocence, State's burden of proof, and that closing arguments are not evidence); *see also Hough v. Anderson*, 272 F.3d at 903-04 (no due-process violation where judge instructed jury that closing arguments are not evidence and prosecutor's remarks did not misstate evidence or implicate a specific right, although defense counsel did not invite remarks and did not have opportunity to rebut); *United States v. Brisk*, 171 F.3d 514, 524-25 (7th Cir. 1999) (no due-process violation where majority of *Darden* factors weighed against finding of unfair trial,

including strong evidence of guilt and jury instruction that closing arguments are not evidence).

Petitioner next claims that the prosecutor made improper comments about Petitioner's motive to commit the crimes charged. At trial, the State suggested that Petitioner was motivated to commit the crimes charged by a desire to seek revenge over a perceived racial insult. Defense counsel objected to these comments, but the trial court overruled the objection. Petitioner argues that these comments lacked any foundation in the evidence. The Illinois Appellate Court considered this claim and determined that the prosecutor's comments were founded in a proper inference to be drawn from the record. [14] Ex. A at 18. This finding was objectively reasonable.

Prosecutors are permitted to argue "reasonable inferences from the evidence that the jury has seen and heard." *United States v. Klebig*, 600 F.3d 700, 718 (2009). Prosecutors may argue reasonable inferences from evidence the jury has heard but cannot "infuse their closing arguments with facts that the court has not admitted into evidence." *United States v. Cornelius*, 623 F.3d 486, 598 (7th Cir. 2010). At trial, the State presented evidence of an argument between Martinez' friends on one side and Petitioner's girlfriend and her friends on the other; the argument started when the men heard Kasper complaining about her boyfriend being with another woman. During this argument, one of the men asked Kasper why she was dating "a black guy," and the women called the men derogatory names referring to Hispanic men. As the women were leaving, one of Martinez' friends

smacked them. The women then called Petitioner and urged him to take action in retaliation. [14] Ex. A at 2-6. Taken together, this evidence supports a reasonable inference that the crimes may have been racially motivated. As a result, the Court cannot say that the prosecutor's comments were improper, and this Court rules that the state court's findings on the issue were reasonable.

Finally, Petitioner argues that the prosecutor's rebuttal comments about statements made by Abukhdeir to Waszak were not supported by the evidence. Specifically, petitioner challenges the following remarks: "What was the date that John Waszak told you he talked to the police? And what was the date that John Waszak told you that co-defendant Mohammed bragged about the bloody pants not being the right pants?" [14] Ex. T at 903. During trial, defense counsel objected to these statements and requested a sidebar. After admonishing the prosecutor at sidebar that her statements relating to evidence that had been admitted with respect to Abukhdeir only and not with respect to Petitioner, the trial court instructed the jury as follows: "What was allegedly said by Mohammed Abukhdeir to Waszak is not evidence before this jury; so I'll strike counsel's comments and instruct you to disregard it." *Id.* at 907. The court's instructions here effectively mitigated any potential harm stemming from the prosecutor's comments. *See Smith*, 707 F.3d at 812.

D. <u>Claims Six and Seven</u>

In claims six and seven, Petitioner argues that his trial counsel was constitutionally ineffective because counsel: (1) deprived Petitioner of his right to

testify (claim 6); and (2) failed to call William "Billy" Thompson to contradict testimony by State witness John Waszak. The trial court dismissed Petitioner's ineffective assistance of counsel claim on the merits, and the Illinois Appellate Court determined on post-conviction review that trial counsel's performance was not constitutionally deficient. [14] Ex. J at 10-16. Because the state courts adjudicated Petitioner's claims on the merits, this Court's review of the claims is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Under the AEDPA, the Court may not grant habeas relief unless the state court's decision on the merits was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or unless the state court decision was based upon an unreasonable determination of facts. 28 U.S.C. § 2254(d).

Claims of ineffective assistance of counsel are first analyzed under the two-part test set forth in *Strickland v. Washington,* 466 U.S. 668 (1984). Under *Strickland,* Petitioner must demonstrate that: (1) his trial counsel's performance was deficient; and (2) but for his counsel's alleged errors, there is a reasonable probability that the outcome of the trial would have been different, *i.e.,* prejudice. *Id. at* 687, 695. To demonstrate performance deficiency, Petitioner must establish that his counsel's performance fell below an objective standard of reasonableness and that he was prejudiced as a result. *Lee v. United States,* 137 S.Ct. 1958, 1964 (2017). Judicial scrutiny of a defense counsel's performance must be "highly deferential" and a reviewing court must indulge a "strong presumption that

counsel's conduct falls within the wide range of reasonable professional assistance." *Knowles v. Mirzayance*, 556 U.S. 111, 124 (2009) (internal quotation marks and citation omitted). Thus, a petitioner "must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689.

In terms of prejudice, a reasonable probability "is a probability sufficient to undermine the confidence in the outcome." *Strickland*, 466 U.S. at 694. If a case may be disposed of on the ground of lack of sufficient prejudice, the court need not consider the quality of the attorney's performance. *See id.* at 697 ("The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.").

Additionally, under the AEDPA, Petitioner must not only satisfy the *Strickland* standard *de novo*, but also establish that the state court's application of *Strickland* was unreasonable, "a 'doubly deferential' standard of review that gives both the state court *and* the defense attorney the benefit of the doubt." *Burt v. Titlow*, 134 S. Ct. 10, 13 (2013) (quoting *Cullen v. Pinholster*, 131 S. Ct. 1388, 1403 (2011)) (emphasis added).

In claim 6, Petitioner argues that his trial counsel was ineffective for refusing to call Petitioner to testify and denying him his constitutional right to testify on his own behalf. [1] at 29. Petitioner claims that his attorney told him that he would "get his chance" when the judge admonished him about his right to testify, but that

this admonishment never occurred. *Id.* At 30. Petitioner further alleges that he again told his counsel after the State rested that he wished to testify, but that his counsel refused his request. *Id.*

A defendant's right to testify at trial is a fundamental constitutional right, as is his or her right to choose not to testify. *Thompson v. Battaglia,* 458 F.3d 614, 619 (7th Cir. 2006). The decision "not to place the defendant on the stand is a classic example" of a strategic trial decision, for purposes of a claim of ineffective assistance of counsel. *United States v. Stuart,* 773 F.3d 849, 853 (7th Cir. 2014). "Under Illinois Law, a criminal defendant's 'conviction cannot be reversed on the basis that he was prevented from exercising that right unless he contemporaneously asserted his right to testify by informing the trial court that he wished to do so.'" *U.S. ex rel. Owens v. Acevedo,* No. 08 C 7159, 2012 WL 1416432, at *14 (N.D. Ill. May 29, 2012) (quoting *People v. Smith,* 680 N.E.2d 291, 302 (Ill. 1997) and citing *Thompson v. Battaglia,* 458 F.3d 614, 619 (7th Cir. 2006) (recognizing Illinois as among the jurisdictions that require "a defendant to protest a lawyer's refusal to allow her to testify during trial to preserve the right")). When a defendant's post-conviction claim that his "trial counsel was ineffective for refusing to allow the defendant to testify is dismissed, the reviewing court must affirm the dismissal unless, during the defendant's trial, the defendant made a 'contemporaneous assertion of his right to testify.'" *People v. Youngblood,* 389 Ill. 2d 209, 217 (2009) (quoting *People v. Brown,* 54 Ill. 2d 21, 24 (1973)).

Although Petitioner's habeas petition does not detail what his testimony would have been, had he been permitted by his counsel to testify, an affidavit attached to his amended post-conviction petition does set forth his potential testimony regarding the night of January 4, 2004. [14] Ex. W at 107-09. According to this affidavit, Petitioner would have testified that he spent the night with Abukhdeir and Chrzan; that he received phone calls from Richmond and Kasper around 4:45 a.m., but did not pick them up; that he left Chrzan to go home and sleep in his bedroom in Oak Park; that he then drove towards downtown Chicago, but decided to turn around and return to his house; and that, from that point on, he was home alone and did not speak to anyone, other than receiving a call from Chrzan after 8:00 a.m. asking where he was. *Id.* at 107-108. Petitioner argues that if he had been able to testify to these facts, he would have been able to cast the circumstantial evidence presented by the state in a different light, which would have led to a different outcome in his case.

There is nothing in the record, however, to suggest that Petitioner ever asked to testify and was thereafter denied the opportunity to do so. In the absence of a contemporaneous assertion by petitioner of his right to testify, the trial court properly rejected this post-conviction claim. *E.g., Owens*, 2012 WL 1416432, at *14. Beyond his own self-serving affidavit, Petitioner failed to present "something more, such as an affidavit from the lawyer" establishing that counsel refused to let him testify. *Thompson*, 458 F.3d at 619; *see also Underwood v. Clark*, 939 F.2d 473, 476 (7th Cir. 1991) ("The defendant must produce something more than a bare,

unsubstantiated, thoroughly self-serving, and none too plausible statement that his lawyer (in violation of professional standards) forbade him to take the stand.").

Nor has Petitioner shown that there was a reasonable probability that his proposed testimony would have resulted in a different outcome. Had Petitioner been permitted to testify as his affidavit suggests, his testimony would have been one more piece in the puzzle, but the jury nonetheless heard testimony from numerous other witnesses flatly contradicting Petitioner's story. Richmond testified that she did speak with Petitioner by phone after the party, that Petitioner came and got her and Kasper, and that they drove to the victim's house. Chrzan testified that Petitioner did pick up his phone and phone records confirmed the calls between Petitioner and Richmond. Petitioner does not explain why the jury would have disregarded all of this evidence in favor of his testimony.

In claim 7, Petitioner argues that trial counsel was ineffective for failing to call William "Billy" Thompson to testify on Petitioner's behalf. [1] at 32-33. According to Petitioner, Thompson was prepared to testify that John Waszak was not at Thompson's house on January 6, 2004 because Waszak "is a drug addict and a thief and is not welcome there." *Id.* Petitioner claims that Thompson's testimony would have directly contradicted Waszak's testimony that he was at Thompson's house on January 6, 2004 when Abukhdeir purportedly gave him the knotted sock containing the .40 caliber handgun. *Id.* at 33.

The Constitution does not require counsel to present "each and every witness that is suggested to him." *United States v. Best*, 426 F.3d 937, 945 (7th Cir. 2005).

"If counsel has investigated witnesses and consciously decided not to call them, the decision is probably strategic." *United States v. Berg*, 714 F.3d 490, 499 (7th Cir. 2013). Thus, counsel's decision whether to call a witness is "generally not subject to review." *Id.*; *see Gentry v. Sevier*, 597 F.3d 838, 851 (7th Cir. 2010) ("Second-guessing strategic decisions in hindsight will generally not be a meritorious basis to find ineffective assistance of counsel."); *United States v. Weaver*, 882 F.2d 1128, 1139 (7th Cir. 1989) ("It would be a rare case where counsel's conscious decision not to call a witness would amount to constitutionally ineffective assistance."). To prove counsel was ineffective for failing to call a specific witness, a petitioner must overcome the presumption that the challenged conduct might be considered sound trial strategy under the circumstances. *United States ex rel. Par. v. Hodge,* 73 F. Supp. 3d 895, 903 (N.D. Ill. 2014).

Here, Petitioner asserts that Waszak's testimony provided a "critical link" between the .40 caliber gun and Petitioner and Abukhdeir. Petitioner argues that no sound trial strategy would have allowed this piece of evidence to be admitted without attacking it. Yet the record shows that defense counsel did attack it: specifically, counsel weakened the impact of Waszak's testimony by cross-examining Wazak concerning his extensive criminal history, including his forgery charge, and his recent drug use. Counsel also highlighted the inconsistencies between what Waszak told the jury at trial and what Waszak told the police at the time of the investigation. In short, counsel exposed Waszak as a drug use, a liar, and a criminal—without calling Thompson. As a result, Petitioner fails to show what

Thompson could have added to the defense or that Thompson's testimony would have done anything to change the outcome of the proceedings.

Petitioner emphasizes that Thompson did testify on behalf of Abukhdeir, and that Abukhdeir was acquitted, whereas Petitioner was convicted. On the record before the Court, however, it is not possible to draw a link between Thompson's testimony and the jury's verdict. Indeed, that was not the only difference in the evidence presented to the co-Defendants' respective juries.

IV. Certificate of Appealabilty

The Court declines to issue a certificate of appealability under Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts. Petitioner cannot make a substantial showing of the denial of a constitutional right, nor can he show that reasonable jurists would debate (much less disagree), with this Court's resolution of this case. *Resendez v. Knight*, 653 F.3d 445, 446-47 (7th Cir. 2011) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)).

Petitioner is advised that this is a final decision ending his case in this Court. If Petitioner wishes to appeal, he must file a notice of appeal with this Court within thirty days of the entry of judgment. *See* Fed. R. App. P. 4(a)(1). Petitioner need not bring a motion to reconsider this Court's ruling to preserve his appellate rights, but if he wishes to do so, he may file a motion under Federal Rule of Civil Procedure 59(e) or 60(b). Any Rule 59(e) motion must be filed within 28 days of the entry of this judgment. *See* Fed. R. Civ. P. 59(e). The time to file a motion pursuant to Rule

59(e) cannot be extended. *See* Fed. R. Civ. P. 6(b)(2). A timely Rule 59(e) motion suspends the deadline for filing an appeal until the Rule 59(e) motion is ruled upon. *See* Fed. R. App. P. 4(a)(4)(A)(iv). Any Rule 60(b) motion must be filed within a reasonable time and, if seeking relief under Rule 60(b)(1), (2), or (3), must be filed no more than one year after entry of the judgment or order. *See* Fed. R. Civ. P. 60(c)(1). The time to file a Rule 60(b) motion cannot be extended. *See* Fed. R. Civ. P. 6(b)(2). A Rule 60(b) motion suspends the deadline for filing an appeal until the Rule 60(b) motion is ruled upon, but only if the motion is filed within 28 days of the entry of judgment. *See* Fed. R. App. P. 4(a)(4)(A)(vi).

V. Conclusion

For the reasons explained above, Petitioner's habeas corpus petition [1] is denied, and the Court declines to issue a certificate of appealability. The Clerk is instructed to enter a judgment in favor of Respondent and against Petitioner. On the Court's own motion, Respondent Randy Pfister is terminated and Karen Jaimet, the Warden of Petitioner's current place of custody, Pinckneyville Correctional Center, is added as Respondent. The Clerk shall alter the case caption to *Hartsfield v. Jaimet*. Civil case terminated.

Dated: March 6, 2018

ENTERED:

John Robert Blakey
United States District Judge

APPENDIX B

Hartsfield v. Pfister, 949 F.3d 307 (7th Cir. 2020)

949 F.3d 307
United States Court of Appeals, Seventh Circuit.

Phillip HARTSFIELD, Petitioner-Appellant,
v.
Stephanie DORETHY, Respondent-Appellee.

No. 18-1736
|
Argued January 8, 2020
|
Decided February 3, 2020

Synopsis

Background: Following affirmance of his convictions for first-degree murder and home invasion, 371 Ill.App.3d 1202, state inmate filed petition for writ of habeas corpus. The United States District Court for the Northern District of Illinois, John Robert Blakey, J., 2018 WL 1174396, denied petition, and petitioner appealed.

Holdings: The Court of Appeals, Flaum, Circuit Judge, held that:

[1] state court's decision to apply *Strickland*'s prejudice standard in evaluating petitioner's claim that his counsel usurped his right to testify was not contrary to clearly established federal law, and

[2] determination that petitioner was not denied effective assistance as result of counsel's actions to prevent him from testifying was not unreasonable.

Affirmed.

West Headnotes (8)

[1] **Habeas Corpus** ⇐ Review de novo

Court of Appeals reviews district court's decision to deny habeas relief de novo. 28 U.S.C.A. § 2254.

1 Cases that cite this headnote

[2] **Criminal Law** ⇐ Defendant as witness

Ineffective assistance of counsel claim is appropriate vehicle in which to allege that counsel violated defendant's right to testify. U.S. Const. Amend. 6.

[3] **Witnesses** ⇐ Defendants in Criminal Prosecutions

It is primarily responsibility of defendant's counsel, not trial judge, to advise defendant on whether or not to testify and to explain tactical advantages and disadvantages of doing so. U.S. Const. Amend. 6.

1 Cases that cite this headnote

[4] **Criminal Law** ⇐ Witnesses

Chapman's harmless error standard applies when court—not counsel—denies defendant right to testify.

[5] **Habeas Corpus** ⇐ Evidence; procurement, presentation, and objection

State court's decision to apply *Strickland*'s prejudice standard, rather than *Chapman*'s harmless error standard, in evaluating petitioner's claim that his counsel usurped his right to testify was not contrary to clearly established federal law, and thus did not warrant federal habeas relief. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254.

1 Cases that cite this headnote

[6] **Habeas Corpus** ⇐ Evidence; procurement, presentation, and objection

State court's determination that petitioner was not denied effective assistance of counsel as result of trial counsel's actions to prevent him from testifying in his murder trial was not unreasonable application of clearly established federal law in *Strickland*, and thus did not warrant federal habeas relief, despite petitioner's contention that counsel assured him that he would get his chance to speak when trial judge

admonished him of his right to testify, but trial judge never so admonished him, and when he attempted to contemporaneously assert his right to testify on record and in open court, counsel "shushed" him, where petitioner did not contemporaneously assert his right to testify, and it was not reasonably probable that his proposed testimony would have affected jury's verdict. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254.

1 Cases that cite this headnote

[7] **Witnesses** ⇐ Defendants in Criminal Prosecutions

Illinois law requires defendant to protest lawyer's refusal to allow her to testify during trial to preserve that right.

[8] **Witnesses** ⇐ Defendants in Criminal Prosecutions

Even though judges are not required to question defendants regarding their desire to testify, that practice is preferred.

*308 Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 14-cv-05816 — **John Robert Blakey**, *Judge*.

Attorneys and Law Firms

Geneva Lynette Penson, Attorney, LAW OFFICE OF GENEVA L. PENSON, LLC, Aurora, IL, for Petitioner-Appellant.

Nicholas Moeller, Joshua M. Schneider, Attorneys, OFFICE OF THE ATTORNEY GENERAL, Chicago, IL, for Respondent-Appellee.

Before Flaum, Rovner, and Scudder, Circuit Judges.

Opinion

Flaum, Circuit Judge.

*309 Fifteen years ago, an Illinois jury convicted Phillip Hartsfield of first-degree murder and home invasion. Hartsfield unsuccessfully challenged his convictions on direct appeal and collateral attack in the Illinois courts. In 2014, Hartsfield petitioned a federal district court for a writ of habeas corpus alleging seven claims. The district court denied his petition and Hartsfield appealed. We certified one of the issues Hartsfield presented for review: whether the state court reasonably held that Hartsfield's counsel did not usurp his personal right to testify at trial. We now affirm the judgment of the district court.

I. Background [1]

On January 4, 2004, Alberto Martinez found his brother Alejandro shot dead in his bed. Police responding to the home recovered two .40-caliber shell casings inside Alejandro's bedroom. The medical examiner identified four gunshot wounds on Alejandro's body and recovered one bullet. Police also noticed that the back door to the Martinez home had a crack along its narrow edge, as if it had been kicked or punched open. Later, the People of the State of Illinois ("the State") charged Phillip Hartsfield and Mohammed Abukhdeir with first-degree murder and home invasion. The co-defendants simultaneously tried their cases before separate Cook County juries.

A. Trial

The State put Claudia Garcia, Candy Richmond, and Kristina Kasper on the stand. Together, the women's testimony established that they had attended a party at the Martinez home that lasted into the early morning hours on January 4. Alejandro Martinez and several other men were at the party. While there, Kasper called Hartsfield, with whom she was having a sexual relationship. Kasper got angry after she heard another woman on the phone with Hartsfield. After she hung up on Hartsfield, the men at the party asked Kasper why she was dating "a black guy," and an argument broke out between the women and the men. As the women left the house between 4:30 and 5:00 a.m., the argument continued, and one of the men struck Kasper and her friend Richmond as they got into their car.

Garcia drove Kasper and Richmond home. During the car ride, Kasper and Richmond made several phone calls. According to Garcia, Richmond gave someone Martinez's address over the phone and threatened to have someone killed. Richmond subsequently denied making such a threat. As

stated by Kasper, either she or Richmond called Hartsfield and gave him Martinez's address.

Another woman, Katherine Chrzan, testified at Hartsfield's trial. She claimed she was pregnant with Hartsfield's child in January 2004. Specifically, on January 4, Chrzan explained that Hartsfield was driving *310 with Abukhdeir in Chrzan's car and they picked her up from a friend's house around 4:30 a.m. While in the car, Hartsfield received a phone call, and Chrzan heard a woman raise her voice. Hartsfield told the woman that he would be there in 20 minutes. Hartsfield drove to his house and brought Chrzan up to his bedroom while Abukhdeir waited in the car. Before Hartsfield left the room, he retrieved a shotgun from underneath his bed. Hartsfield departed his house around 6:30 or 7:00 a.m. and returned at 9:00 or 9:30 a.m.

At approximately 7:00 a.m., Hartsfield and Abukhdeir picked up Richmond and Kasper in Chrzan's car. Hartsfield drove to Martinez's home, where he and Abukhdeir knocked on the front door. When no one answered, they returned to the car and opened the trunk. Richmond saw Hartsfield pick up a silver automatic handgun. Hartsfield and Abukhdeir then walked down the gangway beside Martinez's home, returning five minutes later.

Back at the car, Richmond heard Abukhdeir say that "he had blood all over him," and when she looked, Richmond saw blood on Abukhdeir's knuckles. Hartsfield told Abukhdeir to "shut the fuck up," to which Abukhdeir responded: "If it wasn't for me, you wouldn't have gotten through the back door."[2] Richmond also heard Abukhdeir say: "I hope you did it right." Kasper claimed she did not hear the men's conversation. After they left Martinez's home, Hartsfield stopped the car and put the gun in the trunk. He drove Kasper home first and Richmond second.

The next evening, Chrzan discovered her gas tank was almost empty and asked Hartsfield where he had driven her car earlier that morning. Hartsfield answered that he went to Chicago. He added that if he told her what had happened, she "wouldn't want to come around anymore," and that "if he ever went to jail for murder, he would kill himself." Shortly afterward, Chrzan overheard Hartsfield on the phone, asking if "Sally" was registered. Chrzan understood that "Sally" was a gun.

John Waszak, a friend of Hartsfield and Abukhdeir's, was an additional witness at their trials. He testified that on January 6, 2004, he was at the home of a man named Billy Thompson with Hartsfield and Abukhdeir. While there, Abukhdeir gave Waszak a knotted sock, which contained a .40 caliber gun barrel, spent casings, and live shells. Waszak recognized the gun as "Sally" because he had previously sold it to Abukhdeir. Waszak eventually threw the sock into the Des Plaines River. On cross-examination, defense counsel elicited testimony about inconsistencies between Waszak's testimony and his statements to police; Waszak's extensive criminal history; and the implausibility of Waszak dropping the sock off a bridge on a busy street.

After the State rested, Hartsfield did not put on a case. The jury convicted him of first-degree murder and home invasion. The judge sentenced him to consecutive terms of 45 and 6 years in prison.

B. Direct Appeal and Collateral Attack

Hartsfield directly appealed his convictions and sentence arguing that the State failed to prove him guilty beyond a reasonable doubt. The Illinois Appellate Court affirmed, holding that a rational jury could have found Hartsfield guilty, high-lighting that the circumstantial evidence against Hartsfield was strong. The Illinois Supreme Court denied Hartsfield's ensuing petition for leave to appeal.

*311 Next, Hartsfield collaterally attacked his convictions and sentence. He petitioned the state trial court pro se contending that his trial counsel ineffectively assisted him when counsel (1) usurped his right to testify and (2) declined to call Thompson as a witness to impeach Waszak. The court appointed counsel, who amended Hartsfield's petition reiterating those same claims. Hartsfield attached to his petition affidavits from himself, his mother, and Thompson.

In his first affidavit, Hartsfield insists that he told counsel "many times" that he wished to testify, to which counsel replied that he did not want Hartsfield to testify. Hartsfield further maintains that counsel asked his mother to "convince" him not to testify, and Hartsfield told her that counsel would not let him testify. At trial, counsel told Hartsfield that he would "get his chance" when the judge admonished him about his right to testify, but the judge never did that. When Hartsfield attempted to speak up, counsel "shushed" him. For her part, Hartsfield's mother stated that counsel asked her to convince Hartsfield not to testify and that Hartsfield informed her that counsel would not let him testify; indeed, that counsel "shushed" him.

In his second affidavit, Hartsfield described what his testimony would have been if counsel would have permitted him to testify in his own defense. Hartsfield asserted he spent the night before the murder with Abukhdeir and Chrzan. According to his account, he left Chrzan asleep in his bedroom and then drove to Chicago by himself. Around 7:00 a.m., he unsuccessfully attempted to reach another woman with whom he was having a sexual relationship. Chrzan called Hartsfield at 8:00 a.m. asking where he was. After driving downtown, Hartsfield turned around and arrived home around 8:30 a.m. Hartsfield fell asleep and did not wake up until 6:00 p.m.

The state trial court dismissed Hartsfield's postconviction petition. The appellate court affirmed that judgment, applying *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), to both ineffective assistance of counsel allegations. Important here, the appellate court held that defense counsel made "a tactical decision" in advising Hartsfield, who was aware that it was ultimately his decision not to testify. It found that the record did not support Hartsfield's complaint that counsel prevented him from speaking up.

Relatedly, it ruled that Hartsfield's failure to contemporaneously assert his right to testify barred his ineffective assistance claim. Even if counsel deficiently performed, the court reasoned, that did not prejudice Hartsfield because it was not reasonably likely that his proposed testimony that he was driving around at the time of the murder would have affected the jury's verdict, especially given the strong circumstantial evidence against him. The Illinois Supreme Court denied Hartsfield's petition for leave to appeal that followed.

C. Federal Habeas Petition

In 2014, Hartsfield petitioned a federal district court for a writ of habeas corpus under 28 U.S.C. § 2254, claiming that: (1) the State failed to prove him guilty beyond a reasonable doubt; (2) counsel usurped his right to testify; and (3) counsel was ineffective for failing to call Thompson as a witness. The district court denied the petition and declined to issue a certificate of appealability in 2018.

We, however, granted Hartsfield's application for a certificate, limited to the question presented regarding his right to testify. We directed the parties to analyze *312 whether the state appellate court unreasonably concluded that: (1) Hartsfield needed to contemporaneously assert his right to testify during his trial; and (2) *Strickland* applied to such a claim, rather than the harmless-beyond-a-reasonable-doubt standard from *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Furthermore, if the parties decided that *Strickland* did not apply, we asked the parties to address whether Hartsfield suffered actual prejudice sufficient to justify habeas relief under *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993).

II. Discussion

[1] We review the district court's decision to deny habeas relief de novo. *See Jones v. Zatecky*, 917 F.3d 578, 581 (7th Cir. 2019). The Antiterrorism and Effective Death Penalty Act (AEDPA), however, sets the standard we apply to Hartsfield's petition. The Act permits us to grant relief only if the decision of the Appellate Court of Illinois, the last state court to address Hartsfield's claim on its merits, was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d); *see also Sims v. Hyatte*, 914 F.3d 1078, 1086–87 (7th Cir. 2019).

Hartsfield argues that the state court decision is contrary to federal law because *Strickland* does not control these circumstances, and even if it did, the state appellate court unreasonably applied it in rejecting his claim that his counsel usurped his right to testify. "We give state courts broad latitude in applying [*Strickland*'s] general standard." *Weaver v. Nicholson*, 892 F.3d 878, 884 (7th Cir. 2018), *cert. denied*, —— U.S. ——, 139 S. Ct. 649, 202 L.Ed.2d 499 (2018) (citation omitted); *see also Knowles v. Mirzayance*, 556 U.S. 111, 123, 129 S.Ct. 1411, 173 L.Ed.2d 251 (2009) (describing the standard of review on *Strickland* claims evaluated under § 2254 as "doubly deferential"). In other words, " '[t]he bar for establishing that the state court's application of the *Strickland* ineffective assistance of counsel standard was 'unreasonable,' is a high one." *Felton v. Bartow*, 926 F.3d 451, 464 (7th Cir. 2019) (quoting *Taylor v. Bradley*, 448 F.3d 942, 948 (7th Cir. 2006)).

A. *Strickland* and the Right to Testify

We begin with the question of how best to frame Hartsfield's claim that his counsel usurped his right to testify. Hartsfield contends that he need not show prejudice when the case involves the right to testify, but that is contrary to our precedent and the unanimous weight of authority. *See Barrow*

v. Uchtman, 398 F.3d 597, 603 n.4 (7th Cir. 2005) (holding that "*Strickland* is the appropriate governing precedent" in circumstances such as these); *see also* Alexander v. United States, 219 F. App'x 520, 523 (7th Cir. 2007) ("We analyze Alexander's claim of ineffective assistance of counsel under the familiar two-prong test laid out in *Strickland*[,] which requires proof that counsel's performance fell below minimum professional standards and that this deficient performance 'prejudiced' the defendant.") (citation omitted).

[2] Nonetheless, we take this opportunity to clarify what we believe is explicit—but certainly implicit—in our earlier rulings: An ineffective assistance of counsel claim is the appropriate vehicle in which to allege that counsel violated a defendant's right to testify. *See* United States v. Stuart, 773 F.3d 849, 853 (7th Cir. 2014) (applying the *Strickland* analytical framework to a claim that counsel violated the defendant's right to testify); ***313** Starkweather v. Smith, 574 F.3d 399, 403–04 (7th Cir. 2009), *as corrected on denial of reh'g* (Aug. 7, 2009) (same); Gross v. Knight, 560 F.3d 668, 672–73 (7th Cir. 2009) (same); United States v. Stark, 507 F.3d 512, 521 (7th Cir. 2007) (same); Canaan v. McBride, 395 F.3d 376, 384 (7th Cir. 2005) (same); Rodriguez v. United States, 286 F.3d 972, 983–84 (7th Cir. 2002), *as amended on denial of reh'g and reh'g en banc* (May 21, 2002) (same); Milone v. Camp, 22 F.3d 693, 705 (7th Cir. 1994) (same); Underwood v. Clark, 939 F.2d 473, 476 (7th Cir. 1991); United States v. Muehlbauer, 892 F.2d 664, 669 (7th Cir. 1990).

Our sister circuits, so far as we can tell, all agree that "the appropriate vehicle for claims that the defendant's right to testify was violated by defense counsel is a claim of ineffective assistance of counsel." Casiano-Jiménez v. United States, 817 F.3d 816, 819 (1st Cir. 2016) (citation and quotation marks omitted); *see also* Palmer v. Hendricks, 592 F.3d 386, 397–98 (3d Cir. 2010) (collecting cases); Matylinsky v. Budge, 577 F.3d 1083, 1097 (9th Cir. 2009); Hodge v. Haeberlin, 579 F.3d 627, 639 (6th Cir. 2009); Winfield v. Roper, 460 F.3d 1026, 1035 n.3 (8th Cir. 2006); Sexton v. French, 163 F.3d 874, 882 (4th Cir. 1998); Wimberly v. McKune, 141 F.3d 1187, 1998 WL 115953, *3 (10th Cir. 1998) (unpublished table decision); Brown v. Artuz, 124 F.3d 73, 79 (2d Cir. 1997); United States v. Teague, 953 F.2d 1525, 1534 (11th Cir. 1992). The *Strickland* standard applies to "any claim by the defendant that defense counsel has not discharged this responsibility—either by failing to inform the defendant of the right to testify or by overriding the defendant's desire to testify ...." *Artuz*, 124 F.3d at 79.

[3] The courts of appeals are united in reaching this conclusion for good reason: "It is primarily the responsibility of the defendant's counsel, not the trial judge, to advise the defendant on whether or not to testify and to explain the tactical advantages and disadvantages of doing so." United States v. Campione, 942 F.2d 429, 439 (7th Cir. 1991) (quoting United States v. Goodwin, 770 F.2d 631, 637 (7th Cir. 1985)); *see also* Teague, 953 F.2d at 1534. Not to put too fine a point on it, but we have described " '[t]he decision not to place the defendant on the stand [as] a classic example' of a strategic trial decision." Stuart, 773 F.3d at 853 (quoting United States v. Norwood, 798 F.2d 1094, 1100 (7th Cir. 1986)) (additional citations omitted); *see also* Stark, 507 F.3d at 516 (calling it a "sensitive aspect of trial strategy") (quoting United States v. Manjarrez, 258 F.3d 618, 624 (7th Cir. 2001)).

[4] Now, it is true that "[t]his [C]ourt has previously ruled that the *Chapman* standard [not *Strickland*] applies when a petitioner has been denied the right to testify." Ortega v. O'Leary, 843 F.2d 258, 262 (7th Cir. 1988) (citing Alicea v. Gagnon, 675 F.2d 913, 925 (7th Cir. 1982) (per curiam)). As an initial matter, *Alicea* preceded *Strickland* by two years. More importantly, we agree with Warden Dorethy that *Alicea* and its progeny stand for the proposition that *Chapman*'s harmless error standard applies when a court—*not counsel*—denies a defendant the right to testify, at least on direct review. *See* United States v. Books, 914 F.3d 574, 580 (7th Cir. 2019), *cert. denied*, —— U.S. ——, 139 S. Ct. 2682, 204 L.Ed.2d 1082 (2019) (citing *Ortega* and *Alicea* to support the assertion that harmless error analysis applies when "the district court's ruling constructively foreclosed [the defendant's] decision to take the stand").

In *Ortega*, as we have previously explained, "the defendant twice interrupted the proceedings and expressed his desire to testify. The trial judge ordered the defendant to remain silent ... The defendant protested, but the court treated the evidence ***314** as closed and allowed the case to proceed to closing arguments." United States v. Jones, 844 F.3d 636, 646 (7th Cir. 2016). Similarly, in *Alicea*, the trial court "excluded [the defendant's] alibi testimony simply because he failed to notify the prosecution that he intended to raise such a defense." 675 F.2d at 916.

The Supreme Court's recent precedents are not to the contrary; in fact, they too draw a distinction between a court's

denial of a defendant's constitutional right and counsel's denial of that same right. *See McCoy v. Louisiana*, —— U.S. ——, 138 S. Ct. 1500, 1511–12, 200 L.Ed.2d 821 (2018) (reasoning its ineffective-assistance-of-counsel jurisprudence did not apply in that case because "the violation of [the defendant's] protected autonomy right was complete *when the court allowed counsel to usurp control* of an issue within [the defendant's] sole prerogative." (emphasis added)).

This distinction is not arbitrary; it makes sense for reasons the Supreme Court originally articulated in *Strickland*, which we have since reiterated:

> In *Strickland*, for example, the Court discussed and distinguished various "Sixth Amendment contexts" in which prejudice to the defendant is legally presumed. The latter situations include cases of "state interference with counsel's assistance," and, most pertinently, cases involving "actual or constructive denial of the assistance of counsel altogether." Relying in part on the analysis in [*United States v.*]*Cronic*, [466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)], ... the Court in *Strickland* distinguished these latter circumstances on the grounds that prejudice to the defendant "is so likely that case by case inquiry into prejudice is not worth the cost," and that they "involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent." With respect to the kinds of errors by defense counsel that would normally form a basis for an ineffective assistance claim, on the other hand, the "government is not responsible for, and hence not able to prevent" them, they "come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial," and they cannot "be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid."[3]

Siverson v. O'Leary, 764 F.2d 1208, 1215–16 (7th Cir. 1985); *see also Smith v. Robbins*, 528 U.S. 259, 287, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000); *United States v. Hernandez*, 948 F.2d 316, 319–20 (7th Cir. 1991); *Lange v. Young*, 869 F.2d 1008, 1012–13 (7th Cir. 1989); *Solles v. Israel*, 868 F.2d 242, 246 (7th Cir. 1989); *Sanders v. Lane*, 861 F.2d 1033, 1038 & n.4 (7th Cir. 1988).

[5] The Warden, of course, defends actual prejudice under *Strickland* as the appropriate standard. Hartsfield, in his principal brief, first vies for *Brecht*'s harmless-error standard for habeas petitions. In his reply brief, however, Hartsfield decides to operate outside the trial error paradigm and call for the structural error standard to apply. In our view, the best reading of ***315** the Supreme Court's decisions in this realm is that *Strickland* controls because defense counsel allegedly interfered with Hartsfield's right to testify. Accordingly, the state appellate court's decision to apply *Strickland* was not contrary to clearly established federal law.[4]

B. Reasonableness of the State Court's Decision

[6] In applying *Strickland*, the state appellate court rejected Hartsfield's right-to-testify claim, concluding that Hartsfield did not satisfy either of the test's two prongs: (1) he has not established counsel deficiently performed because he did not contemporaneously assert his right to testify at trial; and (2) assuming his allegations are true and counsel forbade him from testifying, that decision did not ultimately prejudice Hartsfield's case. This was a reasonable application of *Strickland*.

[7] First, Illinois law requires a defendant to "protest a lawyer's refusal to allow her to testify during trial to preserve the right." *Thompson v. Battaglia*, 458 F.3d 614, 619 (7th Cir. 2006) (citing *People v. Smith*, 176 Ill.2d 217, 223 Ill.Dec. 558, 680 N.E.2d 291, 302–03 (1997)) (additional citations omitted); *see also People v. Medina*, 221 Ill.2d 394, 303 Ill.Dec. 795, 851 N.E.2d 1220, 1227 (2006). Hartsfield and his mother both allege that Hartsfield communicated his desire to testify to his counsel. According to them, counsel disagreed and said he would not put Hartsfield on the stand. Counsel assured Hartsfield, however, that he would get his chance to speak when the trial judge admonished him of his right to testify. But the trial judge never so admonished Hartsfield, and when Hartsfield attempted to contemporaneously assert his right to testify on the record and in open court, he claims his counsel "shushed" him. Therefore, the court was unaware of Hartsfield's wishes, and in the eyes of the appellate court, that added up to waiver.

[8] Only two of our decisions hold that a defendant did not properly preserve the right to testify. *See Stark*, 507 F.3d at 518–19 (illustrating and distinguishing *Ward v. Sternes* and *Ortega v. O'Leary* because of their unusual circumstances). It is thus worth reiterating our prior suggestion that "prudent counsel may choose to put such waivers on the record outside the presence of the jury, as is standard practice in some courts." *Thompson*, 458 F.3d at 619 (citing *Taylor v. United States*, 287 F.3d 658, 662 (7th Cir. 2002)). Even though "we

do not require judges to question defendants regarding their desire to testify," we certainly prefer it. *Id.* [5]

*316 Not all jurisdictions, however, follow Illinois's lead when it comes to requiring a defendant's contemporaneous assertion of the right to testify to preserve it for judicial review. That has consequence in the habeas context: "The variety in practice among the state courts and the various federal courts shows ... that there is no standard clearly established by the Supreme Court of the United States that is binding on all." *Thompson*, 458 F.3d at 619; *see also Arredondo*, 542 F.3d at 1165; *Jenkins v. Bergeron*, 824 F.3d 148, 153 (1st Cir. 2016) (agreeing with our analysis and stating that "the Supreme Court has never articulated the standard for assessing whether a criminal defendant has validly waived his right to testify or determined who has the burden of production and proof under particular circumstances.").

In ruling that Hartsfield did not contemporaneously assert his right to testify, the state court did not unreasonably apply clearly established Supreme Court precedent because there was no clearly established Supreme Court precedent to apply in the first place. *See Clark v. Lashbrook*, 906 F.3d 660, 664 (7th Cir. 2018) ("Where Supreme Court cases 'give no clear answer to the question presented, let alone one in the petitioner's favor,' it cannot be said that the state court unreasonably applied Supreme Court precedent and thus 'relief is unauthorized.' " (citation omitted)). [6]

Without the benefit of clearly established federal law, we cannot say the Illinois Appellate Court unreasonably decided that Hartsfield did not meet his burden of proving that his attorney in fact prohibited his testimony. Assuming we could independently find that Hartsfield met this burden, then that would of course constitute deficient performance. *See, e.g.*, *Galowski v. Murphy*, 891 F.2d 629, 636 (7th Cir. 1989) ("The attorney may not, as a tactical decision, forbid the defendant from testifying, but instead may only advise the defendant as to what the best approach would be.").

Second, and though we need not address it, Hartsfield cannot satisfy the prejudice prong under *Strickland* either. It is, in short, not reasonably probable that his proposed testimony would have affected the jury's verdict. As a preliminary matter, the circumstantial evidence against Hartsfield was strong. Two eyewitnesses placed him at the scene of the crime, armed with a weapon and a motive to use it. Hartsfield's own comments later that night further implicated him in the incident. More to the point, Hartsfield's uncorroborated story is that he was by himself and driving around during the time of the murder. We agree with the Warden that this amounts "to little more than a generic denial of guilt, which is insufficient to establish prejudice." In a nutshell, the state court reasonably applied *Strickland*.

*317 C. Scope of the Certificate of Appealability

For the sake of completeness, we note that Hartsfield brings two claims in addition to his ineffective assistance claim based on his right to testify. Hartsfield argues that the state appellate court unreasonably discounted his claims that the evidence at trial was insufficient for the jury to convict him on, and counsel was ineffective for failing to call a witness. We included neither of these issues in our order granting Hartsfield a certificate of appealability. The only issue we certified for appellate review was the right-to-testify issue.

Therefore, those other evidentiary issues are outside the scope of the certificate and we decline to review them. *See Peterson v. Douma*, 751 F.3d 524, 529 (7th Cir. 2014) ("[W]e have repeatedly said that an appeals panel will decide the merits of only those issues included in the certificate of appealability." (citation omitted)). We also decline Hartsfield's implicit request to amend the certificate this late in the game. *See Thompson v. United States*, 732 F.3d 826, 831–32 (7th Cir. 2013) (instructing counsel who wish to raise additional claims to not simply brief them but first request permission to do so).

III. Conclusion

The Appellate Court of Illinois reasonably held that defense counsel did not usurp Hartsfield's right to testify at trial. For that reason, we AFFIRM the judgment of the district court denying Hartsfield's habeas petition.

All Citations

949 F.3d 307

Footnotes

1 We take the facts from the Illinois Appellate Court's opinions because they are presumptively correct on habeas review and Hartsfield has not rebutted this presumption. *See* 28 U.S.C. § 2254(e)(1); *Perez-Gonzalez v. Lashbrook*, 904 F.3d 557, 562 (7th Cir. 2018).

2 Martinez's aunt, who lived in the basement apartment of the Martinez home, did not hear any loud noises or notice anything unusual about the back door that morning.

3 As a clarification, *Cronic* is an exception to *Strickland*'s prejudice prong for the most extreme displays of professional incompetence. We presume prejudice in those circumstances because "counsel was absent from the proceedings and unavailable to make any tactical judgments whatsoever. Thus, both *Strickland* and *Cronic* expressly treat cases involving the total lack of assistance of counsel as separate and distinct from cases involving ineffective assistance of counsel." *Siverson*, 764 F.2d at 1216.

4 To be sure, we have acknowledged that the call between an ineffective-assistance-of-counsel and an absence-of-counsel claim is a close one. *See Sanders*, 861 F.2d at 1037–38 & n.4. And in absence-of-counsel cases, we presume prejudice. *See Hernandez*, 948 F.2d at 320; *Lange*, 869 F.2d at 1013 (citations omitted). But even if this were an absence-of-counsel case—and it is not—the Supreme Court has never adopted, and thereby clearly established, a corresponding presumption of prejudice. *See Schmidt v. Foster*, 911 F.3d 469, 483 (7th Cir. 2018) (en banc) (noting "[t]here is no clearly established lesser standard for state-action denials."); *see also Arredondo v. Huibregtse*, 542 F.3d 1155, 1171 n.4 (7th Cir. 2008) (distinguishing *Ortega* because it "arose prior to Congress' enactment of [AEDPA] and, therefore, the court in *Ortega* was at liberty to apply a much more searching standard of review than the one to which AEDPA confines us."). Thus, the state court could not have contradicted clearly established Supreme Court precedent because there was never any clearly established precedent to begin with.

5 Indeed, we are troubled by the obligation that Illinois caselaw appears to impose upon a defendant to contemporaneously assert a right to testify in circumstances where defense counsel has just silenced the defendant. Perhaps the Illinois Supreme Court will find occasion to take another look at its approach when it considers *Knapp* later this term. *See People v. Knapp*, 2019 IL App (2d) 160162, ¶¶ 39–40, —— Ill.Dec. ——, —— N.E.3d ——, *appeal allowed*, 433 Ill.Dec. 445, 132 N.E.3d 283 (Ill. 2019).

6 Hartsfield contends *Rock*, *McCoy*, and *Garza v. Idaho*, —— U.S. ——, 139 S. Ct. 738, 203 L.Ed.2d 77 (2019) all clearly establish that a defendant need not point to an on-the-record assertion of his right to testify in the trial court. As to *Rock*, we have cautioned against reading it "too broadly in the habeas context" because it applies, if at all, at a very high level of generality. *Hanson v. Beth*, 738 F.3d 158, 164 (7th Cir. 2013) (citing *Arredondo*, 542 F.3d at 1170). Turning to *McCoy* and *Garza*, Hartsfield has not even begun to argue (let alone analyze) that those decisions apply retroactively on collateral review. *Cf. United States v. Khan*, 769 F. App'x 620, 623–24 (10th Cir. 2019), *petition for cert. filed*, No. 19-7223 (U.S. Jan. 2, 2020) ("Even assuming *McCoy* applies retroactively to this collateral proceeding, [the defendant] has not made a debatable showing that its holding applies under the facts of his case.").

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2019

PHILLIP HARTSFIELD, REGISTER NO. R-46473, Petitioner,

-vs-

STEPHANIE DORETHY, WARDEN, Respondent.

On Petition For Writ Of Certiorari

To The U.S. Court of Appeals for the Seventh Circuit

NOTICE AND PROOF OF SERVICE

TO : Kwame Raoul, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, Illinois 60601;

Please take notice that on July 2, 2020, we mailed first class postage prepaid, the original of the Petition for Writ of Certiorari and Motion for Leave to Proceed In Forma Pauperis to the Clerk of the above Court, three copies of which are hereby served on you.

Leopoldo Lastre
LEOPOLDO LASTRE

STATE OF ILLINOIS)
) SS
COUNTY OF KANE)

The undersigned, being first duly sworn on oath, deposes and says that she served three copies of the Petition for Writ of Certiorari and Motion for Leave to Proceed In Forma Pauperis on the Attorney General of Illinois by depositing the same in an envelope properly addressed, with postage pre-paid in a U.S. mail box at the U.S. Post Office at 525 N. Broadway, Aurora, Illinois on July 2, 2020.

GENEVA L. PENSON, *Of Counsel*

Subscribed and Sworn to before me on July 2, 2020.

NOTARY PUBLIC

OFFICIAL SEAL
AMPARO SILVA
NOTARY PUBLIC, STATE OF ILLINOIS
KANE COUNTY
MY COMMISSION EXPIRES 04/27/2024