

ORIGINAL

19-5020

IN THE SUPREME COURT OF THE UNITED STATES

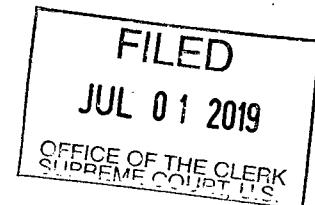
KHALEEEFA LAMBERT,

Petitioner,

v.

DARREN SETTLES (Warden)

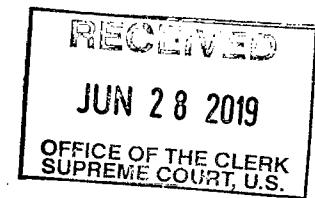
Respondent.



ON PETITION FOR WRIT OF CERTIORARI TO
THE SIXTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted by,
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QUESTIONS PRESENTED

- I. Did the Sixth Circuit err in denying Petitioner's claim that his trial counsel's performance was so deficient as to prejudice the outcome of the trial and violate petitioner's Sixth Amendment Constitutional right to effective assistance of counsel?
- II. Did the Sixth Circuit err in denying Petitioner's claim that the evidence presented at trial was insufficient to persuade a properly instructed, reasonable, jury that petitioner committed the crime of premeditated or felony murder?

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PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES SUPREME COURT

The Petitioner, Khaleefa Lambert, respectfully prays that a Writ of Certiorari be issued to review the judgement and opinion of the Sixth Circuit Court of Appeals, rendered in these proceedings on April 17, 2019.

OPINION BELOW

The Sixth Circuit Court of Appeals affirmed petitioner's conviction in its Case no. 19-5117. The opinion is unpublished, and is reprinted in the appendix to this petition at 1a, *infra*.

JURISDICTION

The original opinion of the Sixth Circuit Court of Appeals was entered April 17, 2019.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The following statutory and constitutional provisions are involved in this case.

U.S. CONST., AMEND. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST., AMEND. 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.

28 U.S.C. §2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court only on grounds that he is in custody

in violation of the Constitution or laws or treaties of the United States.

(3)(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgement of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF CASE

Khaleefa Lambert was convicted by a Montgomery County, Tennessee, Circuit Court jury of premeditated murder, first degree felony murder, especially aggravated kidnapping by the use of a weapon, and especially aggravated kidnapping by the infliction or serious bodily injury. State v. Khaleefa Lambert, No. M2011-01797-CCA-R3-CD, 2013 WL 791618, at *1 (Tenn.Crim.App. ,ar. 4, 2013), perm. app. denied (Tenn. Aug. 14, 2013). The trial court merged the murder convictions and sentenced the petitioner to life imprisonment with the possibility of parole. Id. The trial court also merged the especially aggravated kidnapping convictions and sentenced the petitioner to eighteen years, to be served consecutively to the murder conviction. Id. The petitioner appealed, and the Tennessee Court of Criminal Appeals affirmed on March 4, 2013. Id. Then Tennessee Supreme Court denied the petitioner's application for discretionary review on August 14, 2013. Id.

On June 23, 2014, the petitioner filed a petition for post-conviction relief. Khaleefa Lambert v. State, No. M2016-01059-CCA-R3.PC, 2017 WL 8255488, at *1 (tenn.Crim.App. Mar. 2, 2017), perm. app. denied (May 18, 2017). Following an evidentiary hearing, the post-conviction court denied the petition. Id. at *8. The petitioner filed a timely notice of appeal, and the Tennessee Court of Criminal Appeals affirmed the denial of post-conviction relief on March 2, 2017. Id. at *1.

The Tennessee Supreme Court denied the petitioner's application for discretionary review on May 18, 2017. Id.

On June 27, 2017, the petitioner filed the pro se petition for writ of habeas corpus. (Doc. no. 1). By order entered on July 25, 2017, the court directed the respondent to file an answer, plead or otherwise respond to the petition in conformance with habeas Rule 5. (Doc. No. 4). The respondent filed his response on August 31, 2017, conceding that the Petition is timely and urging the court to dismiss the petition. (Doc. No. 11). Then on January 9, 2019, the district court denied petitioner's federal habeas corpus.

Afterwards, petitioner filed a COA in the Sixth Circuit of Appeals, and Court denied it on April 17, 2019.

REASONS FOR GRANTING THE WRIT

Relevant Parts of the Record

A. Trial Proceedings

The Tennessee Court of Criminal Appeals summarized the proof adduced at the petitioner's jury trial as follows:

The grand jury returned a multi-count indictment against the appellant, charging him with the murder and kidnapping of his wife, eighteen-year-old Ashley Barnes. At trial, the proof revealed that the victim was in the Army and was stationed at Fort Campbell, Kentucky. On November 14, 2008, she married the appellant, and she was deployed to Jalalabad, Afghanistan, on December 18, 2008.

Clarksville attorney Adrian Bohnenberger testified that shortly before the victim was deployed, she contacted him about obtaining an uncontested divorce from the appellant. A few weeks before the victim returned from overseas, the appellant called Bohnenberger and said he would not sign the divorce papers without being paid "a rather absurd" amount of money as compensation for the loss of support he was receiving from the Army. Bohnenberger informed the appellant that the victim was trying to have the appellant's military support payments discontinued, and the appellant became agitated. The appellant never indicated that he did not want to divorce the victim; he was merely concerned about the money he would receive. After the appellant's refusal to sign papers for an uncontested divorce, the victim told Bohnenberger she wanted to pursue a contested divorce.

The victim's mother, Michelle Bosarge, testified that on February 28, 2009, the victim flew to Nashville and that Bosarge met her there. They spent a few days together at Bosarge's home in Mobile, Alabama, and the victim left for Clarksville, Tennessee, on March 5, 2009, to pursue her divorce from the appellant.

Katelyn Rondeau and her boyfriend, Lavell Traylor, testified that on the night of Friday, March 6, 2009, the victim stayed at a Microtel Inn in Clarksville. Rondeau, Traylor, Benita Gold, and a man named Nathaniel came to the victim's room, and they watched television and drank alcohol. Rondeau and Traylor said that the victim never gave any indication that she might be having an extramarital affair. However, she did express her desire to divorce the appellant. While in the motel room, the victim received calls from the appellant on her cellular telephone. The victim used the speakerphone feature, and Rondeau and Traylor heard the appellant beg the victim to not leave him. Everyone in the motel room was intoxicated and laughed during the call.

Rondeau and Traylor estimated that they, Gold, and Nathaniel left the motel room sometime around 3:00 a.m. or 4:00 a.m. The victim was planning to go to bed when they left.

Tiffany Almeyda, a friend of the appellant who lived in his apartment complex, testified that on the night of March 6, 2009, the appellant called and asked her to pick him up at a gas station in Clarksville. Brittany Randolph Gribble and Brittany Lester testified that they accompanied Almeyda. The appellant was in a good mood. When they arrived at the apartment complex around 1:00 or 2:00 a.m., the appellant asked if he could borrow Almeyda's white 2007 Mercury Mariner to visit his son, and Almeyda agreed. No knives or other weapons were in the vehicle at that time.

Jonathan Haynes, a front desk clerk at the Microtel Inn, testified that around 3:30 or 4:00 a.m., the appellant came into the lobby and asked for the victim's room number, saying that she was his wife and that he was trying to surprise her for their anniversary. Haynes refused, and the appellant offered Haynes twenty dollars to reveal the information. Haynes offered to call the victim's room to verify that the appellant was supposed to be there, but the appellant asked him to not do that because it would ruin the surprise. The appellant tried to look over the counter to see the registry or the computer. After his attempts to discover the victim's room number proved fruitless, he whispered, "[D]amn." The appellant paced in the lobby for about fifteen to thirty minutes, Haynes asked him to leave, and he left.

Army Lieutenant Shanda Garth, who acted as a liaison between deployed servicemen and servicewomen and their family members, testified that the appellant called her around 6:00 a.m. on March 7. The appellant had contacted Lieutenant Garth on previous occasions about support payments from the Army and to complain that the victim wanted to divorce him. Lieutenant Garth helped the appellant with financial matters but advised him that she could not help with personal matters. On the morning of March 7, the appellant told Lieutenant Garth that the victim was in a hotel with another man. Lieutenant Garth once again advised the appellant that she could not assist him with relationship matters. After a "pregnant pause," the appellant said, "[A]ll right, ma'am," and hung up. Lieutenant Garth denied she advised the appellant that he needed photographic proof of the victim's adultery.

Doris Henson testified that she arrived at the Microtel Inn around 5:30 or 6:00 a.m. on March 7, 2009, to relieve Haynes at the front desk. At 9:18 a.m., the victim, who was alone, checked out of the motel. Henson noticed that the victim had long, black hair that was "done up real pretty" and that she was talking on a cellular telephone. Henson did not see anyone running in the hallway of the motel that morning.

Brenda Stacey testified that around 9:00 a.m., she and her husband were driving by the Microtel Inn. Stacey saw a white sport utility vehicle (SUV) and the victim's car in the parking lot. A man ran in front of the SUV, grabbed a woman who was trying to get into her car, and shook her. The man was black, taller than the woman,

thin, and had "close braids." The woman was shorter than the man and had shoulder-length dark hair. Stacey told her husband to go to the motel because the man was hurting the woman, but her husband refused, saying there was nothing they could do. Stacey promised her husband that if she found out something had happened at that motel, she would not forgive him for refusing to go back.

Shawntika Majors, the mother of the appellant's son, testified that around 5:30 or 6:00 a.m. on the morning of March 7, 2009, she called the appellant and asked about babysitting while she went to work. During the call, the appellant sounded upset and said that he was going to speak with the victim at a motel. Majors advised the appellant to "let it go," and the call ended.

Thereafter, Majors, who was supposed to be at work around 8:00 a.m., repeatedly attempted to call the appellant. At approximately 8:45 or 9:00 a.m., the appellant returned her calls and told her to tell their son that the appellant loved him. Majors asked what had happened, and the appellant, who was crying, said that he "hurt her." Majors assumed the appellant was referring to the victim. Majors "heard something in the background like someone trying to catch their breath." Majors advised the appellant to go to the hospital, but he stated that "he was going to drive until he ran out of gas."

The appellant's sister, Shanesha L. Jackson, testified that a little after 9:00 a.m., the appellant called her. He was crying, told her that he loved her, and asked her to tell the rest of his family that he loved them. When Jackson asked what was wrong, the appellant responded that "he done messed up" and that he thought he had hurt the victim because he "cut her." Jackson inquired as to the victim's condition and whereabouts. The appellant said that the victim was "in the back," that he was talking to her, and that he was going to take her to the hospital. Jackson encouraged the appellant to take the victim to the hospital quickly and assured him that she would meet him at the hospital. When the appellant's cellular telephone started failing, he asked Jackson to call 911 to tell them he was in a white truck and that he was on his way to the hospital. Jackson's call with the appellant lasted approximately ten minutes.

Tennessee Highway Patrol Trooper Krystal Mathis testified that around 10:00 a.m., she was stationed on the westbound side of Interstate 24 near the 1.5 mile marker when she saw in her rearview mirror a white SUV swerve behind her police cruiser then pull back into traffic. Trooper Mathis activated her emergency equipment, and the SUV immediately pulled in front of the cruiser and parked. Trooper Mathis approached the SUV on the passenger side. At Trooper Mathis' instruction, the appellant, who was driving the vehicle, unlocked the passenger door. Trooper Mathis opened the door and saw the appellant's hand wrapped in a bloody towel or tissue. The appellant was crying. When Trooper Mathis asked why he was crying, the appellant said that he did not mean to "hurt her." Trooper Mathis asked to whom he was referring, and the appellant looked over his shoulder toward the rear of the vehicle. Trooper Mathis then saw the body of a female in the back floorboard. The

victim's head and upper body were behind the driver's seat, which "was pushed all the way back." Trooper Mathis asked the appellant what he had done to the victim. The appellant replied that the victim was cheating on him but that he did not mean to hurt her. Trooper Mathis tapped the victim's leg and spoke to her, but the victim was unresponsive. The appellant said that the victim was not dead and was only sleeping. Trooper Mathis obtained the appellant's identification and asked him to step out of the vehicle. She handcuffed the appellant and placed him in the back of the cruiser. Trooper Mathis did not see a weapon in the SUV.

While the appellant was in the back of the police car, he told Trooper Mathis that he saw the victim at a motel "all hugged up with a man." The appellant said that when he approached them, the man ran away. The appellant grabbed the victim and put her in the SUV. The appellant said that he had called the victim's lieutenant around 8:00 a.m. to report the victim was cheating on him and that the lieutenant advised him to obtain photographic proof of the affair.

Clarksville Police Sergeant Joe Difiore testified that he went to the Microtel Inn on March 7 to assist at the crime scene unit. Sergeant Difiore saw some dark red spots on the black pavement, which he believed were blood stains. Detective Tim Finley testified that he swabbed the stains for testing.

Clarksville Police Detective Alan Charvis testified that in the morning hours of March 7, he was informed of the incident on the interstate and that he went into the office of the Major Crimes Unit to begin gathering information. He learned that the appellant was in custody and had been transported to the hospital for treatment of his injuries. Detective Charvis obtained information about the victim and contacted her mother.

Detective Charvis had the SUV the appellant was driving, with the victim's body still inside, towed to a bay at the Major Crimes Unit's office. He learned that the appellant had borrowed the vehicle from Almeyda. Detective Charvis did not believe the victim was familiar with the vehicle.

Detective Charvis said that the victim's body was in the back floorboard of the vehicle, with her upper body behind the driver's seat. He noticed that the driver's seat "was pushed back and the seat back was laid back" over the victim's body. A knife blade was sticking out of the victim's neck; the broken handle from the knife was found near the seatbelts in the backseat.

Steve Scott with the Tennessee Bureau of Investigation (TBI) firearms and tool mark identification unit testified that he examined the knife blade and determined that the blade was four inches long, was serrated on one edge, and was smooth on the other edge.

Detective Charvis testified that the victim's Chevrolet Cobalt was brought to a bay at the Major Crimes Unit's office. When it arrived, Detective Charvis discovered that the left rear tire of the vehicle was flat and that the tire had been punctured. Scott testified that he examined the puncture and determined that the tire was cut by a blade similar to the one found in the victim's neck. However, he was unable to find sufficient individual characteristics to definitively link that knife to the cut tire.

Detective Charvis testified that he interviewed the appellant around 4:00 p.m. on March 7 and that he recorded the interview. During the interview, the appellant said that he and the victim met on the Internet site, Myspace. They were together approximately seven months before her death. He said that on March 6, the victim came to his house, and they talked. The next morning, he went to the motel after speaking with Lieutenant Garth. The appellant maintained that he had repeatedly complained about the victim having an affair and that Lieutenant Garth had advised him that he needed proof of adultery, such as photographs or an audio recording. The appellant said that he went to the motel but denied flattening the victim's tire. The appellant saw the victim and a black man "hugged up" in a hallway leading out of the motel. The appellant said that he was 6'3", the victim was 5'5", and the man was approximately 5'9" with a "low haircut." The appellant advanced on the victim, and the man ran. The appellant grabbed the victim and put her in the SUV. He stabbed her with a kitchen knife he found in the SUV and thought he must have cut his hand on the knife. The appellant could not recall if he stabbed the victim in the parking lot or inside the SUV. He drove away from the motel and got on the interstate headed toward Kentucky. He talked to the victim while he drove. Outside of Fort Campbell, he called 911 to report that he was on the way to the hospital with the victim. However, the battery of his cellular telephone died, and he was unable to convey the information. When he saw Trooper Mathis, he pulled over in front of her and told her, "I hurt my wife." The appellant said that he thought he stabbed the victim but that he could not completely remember. He said that "it was like a blank in and blank out." The appellant confirmed that he called his sister and that he asked the motel clerk to disclose the victim's room number. The appellant stated that he might have "just snapped ."

Army Sergeant Toney McClelland, who was stationed in Afghanistan with the victim, testified that he never saw any indication that the victim was engaging in an extramarital affair. Additionally, the victim's stepfather, Howard Bosarge, testified that he was in Afghanistan at the same time as the victim, that he saw her on a daily basis, and that he never saw evidence of an affair.

Forensic pathologist Dr. Thomas Deering testified that he performed an autopsy on the victim's body and discerned that the victim's death was caused by multiple sharp force injuries consisting of stab wounds, incised wounds, and "flick marks." The victim had an incised wound to the top right of the head that fractured the outer surface of the skull and another incised wound to the right index finger. There were stab wounds behind, below, and in front of the ear; to the left side of the neck above

the collarbone; and near the right wrist. There were two additional sharp force injuries to the right side of the neck and "flick marks" to the abdomen. These wounds would have been painful but not fatal. However, two wounds were potentially fatal. One of the potentially fatal wounds was a 4" deep stab wound to the abdomen that cut the loop of the small bowel, went through the mesentery of the bowel, and cut the inferior vena cava. The wound would have been fatal within days if not treated. Additionally, a knife blade was embedded 4 1/4" to 4 1/2" in the right side of the neck. The wound incised the right internal carotid artery, went behind the trachea and esophagus, and came out in front of the left vertebral artery. The wound was fatal, causing heavy bleeding that would have led to death in minutes. Dr. Deering could not specifically say how long the victim had lived but estimated that it could have been between five and twenty-five minutes but not as long as an hour. He also did not know if the location of the wound would have rendered the victim speechless. He said that the victim would have been conscious and capable of movement until blood loss eventually rendered her unconscious.

TBI Special Agent Jennifer Shipman with the serology/DNA laboratory testified that she tested three of four swabs taken from the motel parking lot. All of the swabs were consistent with the appellant's blood. Agent Shipman also tested the victim's underwear and found spermatozoa that matched the appellant's DNA, which she explained was consistent with the victim and the appellant having sexual intercourse within seventy-two hours prior to the victim's death.

State v. Lambert, 2013 WL 791618, at **1-5.

B. Post-Conviction Proceedings

The Tennessee Court of Criminal Appeals summarized the proof adduced at the petitioner's post-conviction evidentiary hearing as follows:

The Petitioner filed a timely petition for post-conviction relief, arguing that lead trial counsel's performance was deficient and that he was prejudiced by lead trial counsel's deficient performance. At the post-conviction hearing, the Petitioner agreed that the main issues at his trial were whether the victim was having an affair and whether the killing was voluntary manslaughter or first degree premeditated murder. He stated that lead trial counsel began to represent him after his case was bound over to the Montgomery County Circuit Court. The Petitioner testified that he met with lead trial counsel many times, and he also met with a private investigator. He also stated that the State was initially seeking the death penalty and that co-counsel was assigned to his case, but the State later dropped that request. The Petitioner testified that he met with co-counsel several times and that he had no complaints about co-counsel's performance specifically.

The Petitioner testified that lead trial counsel did not sufficiently investigate Army Lieutenant Shanda Garth. The Petitioner stated that lead trial counsel did not

interview Lieutenant Garth until many months after the offenses occurred, and he testified that if Lieutenant Garth had been interviewed more quickly her statement would have corroborated his statement. The Petitioner agreed that Lieutenant Garth's statement would not have affected the facts of the victim's death at trial. The Petitioner also testified that lead trial counsel failed to properly investigate relevant phone records. The Petitioner testified that, if lead trial counsel had investigated the phone records of his call to Lieutenant Garth, the records would have shown that the call lasted "at least a hard [thirty] minutes," which would have contradicted Lieutenant Garth's testimony at trial that she spoke to the Petitioner for two to three minutes before the Petitioner's phone cut off. Additionally, the Petitioner testified that the phone records would have shown that he was emotional during his call with Lieutenant Garth, which would have supported his argument that he was guilty of voluntary manslaughter, not premeditated murder. The Petitioner also asserted that, if lead trial counsel had researched case law, lead trial counsel would have found case law with facts similar to the Petitioner's case that could have been used to attack the State's premeditation argument. He stated that lead trial counsel did not object to statements made by the State during closing arguments, specifically the State's argument that that [sic] the jury should ignore the Petitioner's emotions and convict the Petitioner. The Petitioner stated that lead trial counsel did not request a change of venue and asserted that a change of venue was necessary because of media attention about his case. The Petitioner agreed that media attention about the case was addressed with potential jurors during voir dire.

The Petitioner testified that, after the offenses, the police did not perform a breathalyzer test or blood draw to determine if the Petitioner was under the influence of alcohol and that lead trial counsel should have filed a motion or argued to the jury that the police should have conducted a breathalyzer test or blood draw on the Petitioner after the offenses. The Petitioner stated that he and lead trial counsel discussed whether the Petitioner should testify that he had been drinking before the offenses; however, he stated that no one was around him during the offenses that could have corroborated that he was impaired from alcohol. The Petitioner agreed that lead trial counsel informed him that, if he testified, the State could cross-examine him about his prior criminal record. The Petitioner stated that it was lead trial counsel's decision for the Petitioner to not testify.

The Petitioner testified that the State misrepresented testimony and that lead trial counsel did not object to the misrepresentation during trial. Additionally, he stated that lead trial counsel did not file a motion to suppress his confessions. The Petitioner testified that, if lead trial counsel had successfully moved for the suppression of the two statements, then "the things that [he had] said [would not have been] twisted into being premeditated" The Petitioner could not remember if he was informed of his Miranda rights before or during his encounter with the trooper, but he stated that he was informed of his Miranda rights before he gave a formal statement to the police. If his statements to law enforcement had been suppressed, the Petitioner explained that he could have based his argument for voluntary manslaughter on his statements to lead trial counsel.

On cross-examination, the Petitioner testified that he was originally represented by another attorney. He and original trial counsel discussed the State's plea offer, and after original trial counsel informed the State that he had rejected the plea offer, the State filed a death penalty notice and lead trial counsel replaced original trial counsel because lead trial counsel was certified to try death penalty cases. Regarding a motion for change of venue, the Petitioner testified that one potential juror was excused because the juror had heard of the Petitioner's case. The Petitioner stated that he never discussed his mental health with lead trial counsel. The Petitioner was unsure whether he had ever been treated for a mental health problem and whether lead trial counsel would have found any information on the Petitioner's mental health if lead trial counsel had looked for such records.

The Petitioner testified that prior to trial and during the trial he informed lead trial counsel that he wanted to testify, but lead trial counsel advised against testifying. He stated that, after the State rested its case, he still wanted to testify, but lead trial counsel told his sister to convince him not to testify. The Petitioner agreed that his conversation with his sister regarding lead trial counsel's advice against testifying "affected [his] decision and [he] didn't make the [choice he] really wanted to make." He stated that suppression of his statement to the trooper and his formal confession to the police would have helped his case—even though evidence of his emotional state would have been suppressed—because he would have been convicted of something less than first degree murder.

Lead trial counsel testified that he had worked as an attorney for almost twenty-six years and had tried at least three murder cases. Lead trial counsel stated that he began to represent the Petitioner after the State filed a death penalty notice and that a fact investigator and a mitigation investigator also worked on the Petitioner's case. Lead trial counsel met with the Petitioner twenty-four times over two years through jail visits or correspondence and at seventeen court appearances. Additionally, he stated that the Petitioner received a copy of each of the approximately fifty motions or notices that were filed in his case. Lead trial counsel testified that the Petitioner's position on his conversation with Lieutenant Garth was that "she told him to go get evidence of marital infidelity[.]" but that Lieutenant Garth testified that she did not advise the Petitioner to obtain evidence. Lead trial counsel stated that a motion to change venue in the Petitioner's case would not have been successful. He agreed that neither the Petitioner nor the victim had significant ties to the Clarksville community. Regarding media attention on the Petitioner's case, he stated that "[t]here [were] a few news articles in March of 2009, when the event occurred. And then there was another article or two in December of 2009, when the State filed its capital notice. And beyond that, there wasn't a whole lot of media play at all."

Lead trial counsel testified that he did not remember whether a potential juror was excused because the juror was familiar with the case or whether a juror stated that she knew lead trial counsel. He also stated that he researched case law regarding premeditation in murder cases; however, he noted that researching case law had

limited usefulness in a jury trial because an attorney cannot “quote case law to the jury.” Lead trial counsel testified that the main issue at trial was the Petitioner’s state of mind and that he played the Petitioner’s 9-1-1 calls during the opening statement and closing argument “because that was the best evidence available of his state of mind at the time.” Lead trial counsel testified that the Petitioner never indicated nor gave evidence that he was intoxicated during the commission of the offenses. He stated that none of the law enforcement officers that interacted with the Petitioner after the offenses stated that he was intoxicated. Lead trial counsel testified that the Petitioner never indicated a need for a mental evaluation, and the Petitioner did not request a mental health evaluation. Further, he stated that none of the other attorneys or investigators who assisted with the case ever saw a need for the Petitioner to undergo a mental health evaluation.

Lead trial counsel testified that portions of the State’s closing argument made him uncomfortable, but he stated that the closing argument was not “so far out of bounds that [it] required [an] objection on the [spot], particularly given the strength of the evidence that was in the case.” While he could not remember the Petitioner specifically indicated that he wanted to testify, his practice was to prepare any client who wanted to testify at their trial. He stated that he “d[id] not remember spending time with [the Petitioner] in preparation for his testimony[,]” which would indicate that the Petitioner did not want to testify. Lead trial counsel stated that the Petitioner’s testimony would not have benefitted his case and would have exposed him to cross-examination. He also explained that the Petitioner’s statements to police helped establish the Petitioner’s argument that the offenses were not premeditated. Lead trial counsel testified that he did not remember speaking to the Petitioner’s sister about whether the Petitioner should testify. He stated that “it is not [his] practice to have anybody else, outside of the defense team, talk to a client about their decision to testify or not testify.”

On cross-examination, lead trial counsel testified that he did not raise the issue of prosecutorial misconduct during closing arguments in the Petitioner’s motion for new trial or direct appeal. Lead trial counsel discussed trial strategies with the Petitioner, particularly whether the Petitioner should have accepted the State’s open plea offer to second degree murder as a Range II offender. He stated that, if he had successfully suppressed either the Petitioner’s statement to the trooper or his formal confession, then the Petitioner’s 9-1-1 call and his calls to his family members likely would have been admitted and could have been used to establish the Petitioner’s argument for voluntary manslaughter. However, he also stated that, if the statements were suppressed, then the Petitioner would have needed to testify to help establish this argument. Lead trial counsel stated that the Petitioner would have been able to testify with some preparation. Lead trial counsel agreed that the Petitioner’s sister visited him while he was in jail but stated that he did not speak to the Petitioner’s sister.

The post-conviction court denied relief to the Petitioner in a written order.

LEGAL ARGUMENT

GROUND ONE

Reasonable jurist could differ as to whether the Courts correctly denied petitioner's claim, that his attorney's performance was so deficient that it prejudiced the outcome of his trial, and violated his U.S. Constitutional 6th Amendment right to effective representation. Strickland v. Washington, 466 U.S. 668 (1984).

Standard of Review

This court should use the precedent set forth in Strickland v. Washington, 466 U.S. 668 (1984) to determine whether petitioner's trial counsel's performance was ineffective requiring Post-conviction relief.

Strickland, set forth the familiar two-prong test for evaluating a claim of ineffective assistance of counsel. To prevail the petitioner must establish both:

1. that defense counsel's performance was constitutionally deficient, and
2. that deficient performance prejudiced the defense sufficiently to undermine the reliability of the trial (id).

Further, the deficient performance prong of the test is satisfied by showing that counsel's acts or omissions were so serious as to fall below objective standard of reasonableness under prevailing professional norms. Strickland, 466 at 668. The prejudice prong of the test is satisfied by showing a reasonable probability, i.e., "a probability sufficient to undermine confidence in the outcome" that "but for counsel's unprofessional errors the result of the proceedings would have been different." Strickland, 466 U.S. at 694.

"In order to determine whether counsel's representation falls within the range [of deficient performance], in Baxter, the Tennessee Supreme Court directed its attention to criteria and

standards set forth in U.S. v. DeCostar, 487 F.2d 1197 (D.C. Cir. 1973). The DeCostar court set forth pretrial standards that any generally effective attorney should follow:

"Counsel must conduct appropriate investigation both factual and legal... to determine what matter of defense can be developed... This means that in most cases a defense attorney, or his agent, should interview not only his own witnesses, but also those that the government intends to call, when they are accessible. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities, and of course, their duty to investigate also requires adequate legal research." State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999); quoting U.S. v. DeCostar, 487 F.2d 1197, 1203-04 (D.C. Cir. 1973).

Further, stated in Burns, "counsel must make all reasonable investigations relevant to the case." Id. Failure to conduct a reasonable investigation constitutes deficient performance." Id.

It is a violation of this standard for defense counsel to deprive a criminal defendant of a substantial defense by his own ineffectiveness or incompetence.

Thus, all of the below demonstrates that petitioner has met the two-prong, deficient performance and prejudice, of Strickland to require post-conviction relief.

SUB-CLAIMS

The petitioner argues that trial counsel rendered ineffective assistance based on trial counsel's failure to:

- A. investigate evidence and case law that would have contradicted the State's argument of premeditation,
- B. discuss jury selection with the petitioner, and
- C. discuss the decision to testify with the petitioner.

SYNOPSIS OF CHAIN OF EVENTS

"[Petitioner] maintained that he had repeatedly complained about the victim having an affair and that Lieutenant Garth had advised him that he needed proof of adultery, such as photographs or an audio recording. [Petitioner] said that he went to the motel... [Petitioner] saw the victim and a black man 'hugged up' in a hallway leading out of the motel...[Petitioner] grabbed the victim and put her in the SUV. He stabbed her with a kitchen knife he found in the SUV... [Petitioner] stated that he 'just snapped!' He left the motel with the victim in the SUV headed toward Kentucky. "Outside of Fort Campbell he called 911 to report that he was on his way to the hospital with the victim. However, the battery in his cellular telephone died, and he was unable to convey the information. When he saw Trooper Mathis, he pulled over in front of her and told her, 'I hurt my wife.'"

SUPPORTIVE FACTS

- A. Trial counsel rendered ineffective assistance of counsel, in that he failed to adequately investigate evidence and case law that would have contradicted the state's argument on premeditation. Specifically,
 - I. If trial counsel would have interviewed Army Lieutenant Shandra Garth more quickly, than he did, her statement would have corroborated his statement concerning his emotional state.
 - II. If trial counsel would have investigated relevant phone records pertaining to his call to Lieutenant Garth, the record would have shown that the call lasted "at least [thirty] minutes," which would have contradicted her testimony at trial.
 - III. Further, a transcript of the phone call between petitioner and Lt. Garth would have shown that petitioner was emotional during the call, which would have supported his argument that there was no premeditation.
 - IV. Trial counsel failed to object to statements made by the state during closing arguments, specifically the state's argument that the jury should ignore petitioner's emotions and convict petitioner.
 - V. Trial counsel failed to object to the state's misrepresentation of testimony during the trial.
 - VI. Trial counsel failed to file a "Motion to Suppress" two statements that petitioner had made, which the state twisted to try and support their premeditation argument.
 - VII. Trial counsel failed to investigate, locate or produce the

man that petitioner saw with his wife at the motel just prior to her death. This would have supported that this was a crime of passion, not premeditated.

VIII. Trial counsel failed to findout or investigate to see if petitioner had mental health issues prior to trial.

IX. Trial counsel failed to retrieve petitioner's cellphone or phone records to show that petitioner did call 911 to notify the hospital that he was bringing his injured wife in. This would demonstrate that he was seeking help for her, after he came to his senses.

X. Trial counsel failed to conduct adequate legal research on similar cases; if he had of, he would have found several cases like State v. West, 844 S.W.2d 144 (Tenn. 1992) that would have demonstrated that the state did not prove premeditation in this case.

All of the foregoing demonstrates that trial counsel rendered difficient performance, by not conducting adequate pretrial investigation of the facts or case law, which prejudiced the outcome of the trial by allowing the state to incorrectly prove premeditation.

B. Trial counsel was ineffective for not discussing jury selection with petitioner which denied him his right to participate in his own defense.

Specifically, petitioner contends that during Voir Dire petitioner was not consulted regarding who to strike from the jury. A juror who knew trial counsel from a Republican Women's speech was left on the jury and petitioner would have preferred this juror not be on the panel.

C. Trial counsel was ineffective for not adequately discussing the decision to testify with petitioner.

The petitioner testified that prior to trial and during trial he informed lead trial counsel that he wanted to testify, but lead

trial counsel advised against it. Petitioner contends, that even after the state rested its case, he still wanted to testify, but lead trial counsel told his sister to convince him not to testify. This faulty advise and influence by trial counsel that led to petitioner not testifying denied him an opportunity to explain his mental state during the crime, and how he snapped. This explanation would have helped prove that this was a crime of passion and that their was no premeditation.

All of the above, both separately and cumulatively, demonstrate that trial counsel's performance was so deficient that it prejudiced the outcome of the trial. Hence, it's clear, the state court proceedings have resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254.

Thus, relief should granted, in the form of petitioner's conviction being vacated.

GROUND TWO

THE EVIDENCE WAS INSUFFICIENT TO PERSUADE A PROPERLY INSTRUCTED, REASONABLE JURY OF HIS GUILT BEYOND A REASONABLE DOUBT, WHICH VIOLATES PETITIONER'S RIGHT TO DUE PROCESS GUARANTEED TO HIM BY THE UNITED STATES CONSTITUTION. See Jackson v. Virginia, 443 U.S. 307 (1979).

STANDARD OF REVIEW

Whether petitioner's conviction was obtained as the result of evidence that is sufficient to persuade a properly instructed, reasonable jury, of his guilt beyond a reasonable doubt, in accordance to Jackson v. Virginia, 443 U.S. 307 (1979)

SUPPORTIVE FACTS

Petitioner challenges the sufficiency of the evidence sustaining his murder convictions.

1. First Degree Premeditated murder:

In order to obtain petitioner's conviction for 1st degree premeditated murder, the state was required to prove, beyond a reasonable doubt, that petitioner committed the "premeditated and intentional killing of [the victim]". Tenn. Code Ann. § 39-13-202 (A)

(1). Premeditation "is an act done after the exercise of reflection and judgment" and "means that the intent to kill must have been formed prior to the act itself." Id. at (d).

In this case, petitioner contends, that "this was a crime of passion" that was not committed "after the exercise of reflection and judgment."

Specifically, petitioner maintained that he had repeatedly complained about the victim having an affair and that Lieutenant Garth had advised him that he needed proof of the adultery, such as

photographs or an audio recording. [Hence, the petitioner] said that he went to the motel... [The Petitioner] saw the victim and a black man 'hugged up' in a hallway leading out of the motel. The [petitioner] said he was 6'3", the victim was 5'5", and the man [she was with] was approximately 5'9" with a low haircut. The [petitioner] advanced on the victim, and the man ran. The [petitioner] grabbed the victim and put her in the SUV. The [petitioner] stated that he might have 'just snapped! He said that it was like [he would] blank in and blank out. He stabbed her with a kitchen knife he found in the SUV...[He] headed toward Kentucky with the victim. "Outside of Fort Campbell, he called 911 to report that he was on the way to the hospital with the victim. However, the battery of his cellular telephone died, and he was unable to convey the information. When he saw Trooper Mathis, he pulled over in front of her and told her, 'I hurt my wife.'" Hence, it's clear, that petitioner's actions were not premeditated, this is a crime of passion. Afterwards, petitioner even sought help for the victim.

2. Petitioner's felony murder conviction:

Felony murder, as charged in the instant case, is defined as "[a] killing of another committed in the preparation of or attempt to perpetrate any...kidnapping." Tenn. Code Ann. § 39-13-202 (A)(2).

The petitioner contends that "[t]he state did not prove beyond a reasonable doubt that the killing and the felony [were] closely connected in time, place, causation, and continuity of action.

Specifically, there was no first degree murder because there was no premeditation; it's clear this was a crime of passion as described in #1-Synopsis of Chain of Events. Further, the crime took

place in a passionate violent instantaneous episode in the SUV, the victim was never restrained of her liberty so there was no especially aggravated kidnapping. There was no other felony besides voluntary manslaughter. This is evident from the fact that petitioner sought help for the victim by calling 911, attempted to drive her to the hospital and finally pursued a Police Officer for help.

All of which, demonstrates that there was insufficient evidence to convict petitioner of felony murder, and the state court proceedings have resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C. §2254.

Thus, relief should be GRANTED in the form of petitioner's conviction and sentence should be vacated.

CONCLUSION

For these reasons, a Writ of Certiorari should be issued to review the judgment and opinion of the Sixth Circuit Court of Appeals.

Respectfully submitted by,

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