Post-Conviction Court's Order Denying The Petitioner's Motion to Reopen his Post-Conviction. Filed July 14, 2014.

e.g., "Appendix A."

IN THE CRIMINAL COURT OF SHELBY COUNTY, TENNESSEE
30TH JUDICIAL DISTRICT AT MEMPHIS
DIVISION VIII

LOUIS MAYES, PETITIONER	)	
VS.	)	06-04104
STATE OF TENNESSEE, RESPONDENT	)	

FILED 7-14-14
KEVIN P. KEY, CLERK
BY _____ D.C.

ORDER DENYING MOTION TO REOPEN PETITION FOR POST-CONVICTION RELIEF

This cause came on to be heard July 14, 2014, on the Motion to Reopen Petition for Post-conviction Relief filed by the petitioner and the record as a whole,

FROM ALL OF WHICH THE COURT FINDS that the petitioner, a juvenile, was convicted of Murder First Degree and was ultimately sentenced to life mprisonment. His conviction and sentence were affirmed in *State v. Louis Mayes*, No. W2007-02483-CCA-R3-CD, 2009 Tenn. Crim. App. LEXIS 336, 2009 WL 1312629 (Tenn. Crim. App. May, 11, 2009), *perm. app. denied*, (Tenn. Oct. 19, 2009); *see also Louis Mayes v. State*, No. W2013-00614-CCA-MR3-CO, 2013 Tenn. Crim. App. LEXIS 1013, 2013 WL 6164467 (Tenn. Crim. App. Nov. 21, 2013). In 2010, the petitioner filed a timely petition for post-conviction relief, and after a full hearing on the merits, the petition was denied. The denial was affirmed in *Louis Mayes v. State*, 2013 Tenn. Crim. App. LEXIS 1120, No. W2012-01470- CCA-R3-PC (Tenn. Crim. App. December 18, 2013), *perm. app. denied*, (Tenn. April 11, 2014).

The petitioner seeks to reopen his prior petition pursuant to Tenn. Code Ann. § 40-30-117(a)(1), stating that *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), holding that an automatic sentence of life without parole upon conviction is unconstitutional as to juveniles, should be applied retroactively to his life sentence in Tennessee. However, in order to grant relief, the statute mandates in section (a)(4) that it must appear that "the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced." This court finds

that the holding of our Court of Criminal Appeals in *Darden v. State*, 2014 Tenn. Crim. App. LEXIS 230 (Tenn. Crim. App. Mar. 13, 2014) controls, as follows:

> Unlike the Arkansas and Alabama statutes discussed in *Miller* that only allowed for sentences of death or life imprisonment without parole for first degree murder, Tennessee defendants convicted of first degree murder may be sentenced to death, life imprisonment without the possibility of parole, or life imprisonment. T.C.A. § 39-13-202(c) (2010). A defendant transferred from juvenile court before being convicted may not be sentenced to death. T.C.A. § 37-1-134(a)(1) (Supp. 2013). Life imprisonment in Tennessee does not condemn a juvenile offender to die in prison as the life-without-parole sentences contemplated by *Miller*. In Tennessee, a defendant sentenced to life imprisonment must serve 85% of sixty years, or fifty-one years, before becoming eligible for release. T.C.A. § 40-35-501(i)(1) (2010); *see also Vaughn v. State*, 202 S.W.3d 106 (Tenn. 2006); Tenn. Op. Att'y Gen., No. 97-098, 1997 Tenn. AG LEXIS 105 (1997). *Miller* addressed the need for discretion in imposing a sentence of life without the possibility of parole. *Miller*, 567 U.S. ___, 132 S. Ct. at 2460. Because the Petitioner received a life sentence with release eligibility after fifty-one years' imprisonment, we conclude that the Petitioner is not entitled to post-conviction relief.

As this court likewise finds that the holding in *Miller* does not apply to Tennessee's sentencing scheme, the motion to reopen should be denied.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the above-styled Motion to Reopen Petition for Post-conviction Relief is hereby denied.

ENTERED this 14th day of July, 2014.

CHRIS CRAFT
Criminal Court, Div. VIII
30th Judicial District at Memphis

Court of Criminal Appeals Order Affirming the Post-Conviction Court's Order Denying the Petitioner's Motion to Reopen For Post-Conviction Relief. Filed September 26, 2014.

e.g., "Appendix B."

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

LOUIS MAYES v. STATE OF TENNESSEE

Criminal Court for Shelby County
No. 0604104

No. W2014-01472-CCA-R28-PC

ORDER

This matter is before the Court upon the Petitioner Louis Mayes' application for permission to appeal the post-conviction court's denial of his motion to reopen post-conviction proceedings. The State has responded in opposition to the motion, stating that the Petitioner has no claim for relief and that the post-conviction court did not abuse its discretion in denying the motion.

In 2006, the Petitioner, Louis Mayes, was convicted of first degree premeditated murder and was sentenced to life in prison. The Petitioner was a juvenile at the time of the offense. This Court affirmed the conviction on direct appeal. See State v. Louis Mayes, No. W2007-02483-CCA-R3-CD, 2009 WL 1312629, at *1 (Tenn. Crim. App., at Jackson, May 11, 2009), perm. app. denied (Tenn. Oct. 19, 2009).

The Petitioner subsequently sought post-conviction relief alleging ineffective assistance of counsel during the juvenile transfer hearing, at trial, and on appeal. The post-conviction court denied the petition, and this Court affirmed the post-conviction court's judgment on appeal. See Louis Mayes v. State, No. W2012-01470-CCA-R3-PC, 2013 WL 6730105, at *1 (Tenn. Crim. App., at Jackson, Dec. 18, 2013), perm. app. denied (Tenn. Apr. 11, 2014).

The Petitioner filed a motion to reopen post-conviction proceedings in which he alleged that the United States Supreme Court's decision in Miller v. Alabama, 132 S.Ct. 2455 (2012), established a new constitutional right that was not recognized at the time of his trial. On July 7, 2014, the post-conviction court entered an order dismissing the petition.

Tennessee Code Annotated section 40-30-117(a) authorizes the reopening of post-conviction proceedings only under the following circumstances:

> (1) The claim in the motion is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. The motion must be filed within one (1) year of the ruling of the highest state appellate court of the United States supreme court establishing a constitutional right that was not recognized as existing at the time of trial; or
>
> (2) The claim in the motion is based upon new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or
>
> (3) The claim asserted in the motion seeks relief from a sentence that was enhanced because of a previous conviction and the conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid, in which case the motion must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid; and
>
> (4) It appears that the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced.

T.C.A. § 40-30-117(a).

In Miller, the United States Supreme Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" Miller, 132 S.Ct. at 2460. The Court did not prohibit a sentence of life without parole for all juveniles convicted of murder. Id. at 2469. Rather, the sentencer must consider "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id. A judge or jury must have the opportunity to consider mitigating circumstances before sentencing a juvenile to life without parole. Id. at 2475.

This Court recently held that the holding in Miller is a new rule of constitutional criminal law that should be applied retroactively. Charles Damien Darden v. State, No. M2013-01328-CCA-R3-PC, 2014 WL 992097, at *10 (Tenn. Crim. App., at Nashville, Mar. 13, 2014), perm. app. pending. Regardless of the retroactivity of the rule announced in Miller, Tennessee statutes do not mandate a sentence of life without parole when a defendant is convicted of first degree murder for acts committed as a juvenile. Rather, the juvenile may

be sentenced to either life or life without parole. T.C.A. §§ 39-13-202(b), -207. A juvenile is not eligible for the death penalty. T.C.A. § 37-1-134(a)(1). If the State seeks a sentence of life without parole, a separate sentencing proceeding must be held during which a jury must determine whether to impose a sentence of life or life without parole. T.C.A. § 39-13-207(a). The jury "shall weigh and consider the statutory aggravating circumstance or circumstances proven by the state beyond a reasonable doubt and any mitigating circumstance or circumstances." Id. at (d). Mitigating circumstances include the defendant's youth at the time of the offense. T.C.A. § 39-13-204(j)(7).

Tennessee's sentencing scheme for juveniles convicted of first degree murder does not run afoul of Miller. See Charles Damien Darden, 2014 WL 992097, at *11. The Petitioner has failed to satisfy any of the grounds for reopening a post-conviction petition. Accordingly, the post-conviction court did not abuse its discretion in denying the motion to reopen. See T.C.A. § 40-30-117(a), (c).

IT IS HEREBY ORDERED that the Petitioner's application for permission to appeal is DENIED. Because it appears that the Petitioner is indigent, costs are taxed to the State.

Roger A. Page

ROGER A. PAGE, JUDGE

CONCUR:

John Everett Williams

JOHN EVERETT WILLIAMS, JUDGE

Alan Glenn

ALAN E. GLENN, JUDGE

The Tennessee State Supreme Court's Order Denying the Petitioner's Appeal. Filed January 16, 2015.

e.g., "Appendix C."

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

LOUIS MAYES v. STATE OF TENNESSEE

Shelby County Criminal Court
0604104

No. W2014-01472-SC-R11-PC

Date Printed: 01/16/2015 **Notice / Filed Date: 01/16/2015**

NOTICE - Case Dispositional Decision - TRAP 11 Denied

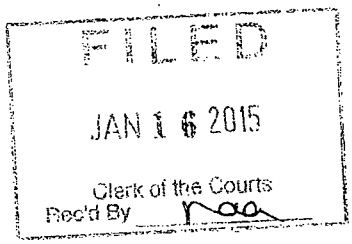
The Appellate Court Clerk's Office has entered the above action.

James M. Hivner
Clerk of the Appellate Courts

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

LOUIS MAYES v. STATE OF TENNESSEE

Criminal Court for Shelby County
No. 0604104



No. W2014-01472-SC-R11-PC

ORDER

Upon consideration of the application for permission to appeal of Louis Mayes and the record before us, the application is denied.

PER CURIAM

The Order From the United States District Court For the Western District of Tennessee Denying the Petitioner's Federal Habeas Petition. Filed March 4, 2019.

e.g., "Appendix D."

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

LOUIS MAYES, Petitioner, v. JONATHAN LEBO, Respondent.	)	No. 2:14-cv-02470-SHM-tmp

ORDER TO UPDATE THE DOCKET WITH CURRENT RESPONDENT
ORDER OF DISMISSAL
ORDER DENYING CERTIFICATE OF APPEALABILITY
ORDER CERTIFYING APPEAL NOT TAKEN IN GOOD FAITH
AND
ORDER DENYING LEAVE TO PROCEED *IN FORMA PAUPERIS* ON APPEAL

On June 17, 2014, Petitioner Louis Mayes, Tennessee Department of Correction ("TDOC") prisoner number 428483, who is confined at the West Tennessee State Penitentiary ("WTSP") in Henning, Tennessee, filed a petition pursuant to 28 U.S.C. § 2254. (Petition ("Pet."), ECF No. 1.) The Clerk is directed to update the docket to reflect that the current Respondent to the petition is WTSP Warden Jonathan Lebo. On June 19, 2014, the Court entered an order staying the case due to ongoing state post-conviction proceedings. (Order, ECF No. 5.) On March 17, 2015, Petitioner Mayes filed a motion to reopen the case and an amendment to the petition. (Motion ("Mot."), ECF No. 7, Amendment, ECF No. 8-1.) On June 6, 2016, Respondent filed the state court record. (Record ("R."), ECF No. 19.) On June 27, 2016, Respondent filed an answer to the petition. (Answer, ECF No. 28.) On September 6, 2016, Mayes filed a reply to Respondent's answer. (Reply, ECF No. 35.)

As more fully discussed below, the issues Petitioner raises in the habeas petition fall into two categories: 1) whether the state court identified and applied the correct federal legal

principles and 2) whether the claim is procedurally defaulted. For the reasons discussed below, the petition is **DISMISSED**.

I. STATE COURT PROCEDURAL HISTORY

On August 9, 2005, Petitioner Louis Mayes, who was seventeen years old, was arrested by Memphis Police officers and booked into the Shelby County Jail. (R., Amended ("Am.") Mot. to Suppress, ECF No. 19-1 at PageID 179.) On August 11, 2005, after a probable cause hearing, Juvenile Court of Memphis and Shelby County Referee Claudia Haltom ordered that Mayes be detained at the Shelby County Juvenile Detention Center. (R., Order, ECF No. 19-14 at PageID 1023.) On August 24, 2005, during a transfer hearing, Juvenile Court Judge Herbert Lane determined that Mayes should be tried as an adult and transferred him back into the custody of the Shelby County Sheriff's Department. (R., Order, ECF No. 19-14 at PageID 1022.) On May 4, 2006, a Shelby County grand jury returned an indictment against Mayes for one count of first-degree murder. (R., Indictment, ECF No. 19-1 at PageID 131.) On August 16, 2007, a Shelby County Criminal Court jury convicted Louis Mayes of first-degree murder as charged. (R., Minutes ("Mins."), ECF No. 19-1 at Page ID 189.) The trial court sentenced Mayes to life in prison. (R., Judgment, ECF No. 19-1 at PageID 190.) Mayes appealed. (R., Notice of Appeal, ECF No. 19-1 at PageID 195.) The Tennessee Court of Criminal Appeals ("TCCA") affirmed. *State v. Mayes*, No. W2007-02483-CCA-R3-CD, 2009 WL 1312629 (Tenn. Crim. App. Sept. 9, 2008), *perm. app. denied* (Tenn. Oct. 19, 2009).

On April 27, 2010, Mayes filed a *pro se* petition in Shelby County Criminal Court pursuant to the Tennessee Post-Conviction Procedure Act, Tenn. Code Ann. §§ 40-30-101-122. (R., Pet. for Post-Conviction Relief, ECF No. 19-13 at PageID 871-939.) On January 23, 2012, appointed counsel filed an amended petition. (R., Am. Pet., ECF No. 19-13 at PageID 945-59.)

The post-conviction court conducted an evidentiary hearing and denied relief in an amended order entered on June 11, 2012. (R., Amended ("Am.") Order, ECF No. 19-13 at PageID 984-98.) Mayes appealed. (R., Notice of Appeal, ECF No. 19-13 at PageID 1000.) The TCCA affirmed. *Mayes v. State*, No. W2012-01470-CCA-R3-PC, 2013 WL 6730105 (Tenn. Crim. App. Dec. 18, 2013), *perm. app. denied* (Tenn. Dec. 18, 2013).

On direct appeal, the Tennessee Court of Criminal Appeals ("TCCA") summarized the evidence presented at trial:

> Cynthia Wallace, the victim's mother, testified that on August 7, 2005, at approximately 9:30 p.m., her son, Christopher Wallace, "sounded frantic on the phone" when he called her to come and pick him up. She told Wallace to call her back later if he still needed a ride because she was preparing his sisters for bed. She did not hear from her son again that night. The next day, she was called to a crime scene where she confirmed that the body lying face down on the ground was Christopher Wallace.
>
> Kittrel Robinson, an officer with the Memphis Police Department, testified that on the night of the offense he was the first officer to respond to a "man down call" located at 595 Alice. Upon arrival, he found a black male lying unresponsive in the front yard with "an open wound, like a gunshot wound, in his back" and a cordless telephone in his hand. Officer Robinson noticed a trail of "blood specks" on the ground which he followed eastward to a white house that he later secured as part of the crime scene.
>
> Willie Miles, a crime scene investigator with the Memphis Police Department, testified regarding various photographs and a cordless phone that was found at the scene, all of which were admitted into evidence. On cross-examination, Investigator Miles testified that there was no physical evidence found at the scene that linked Mayes to the crime.
>
> Auriel Elion, the victim's girlfriend, testified that on the night of the offense, she walked to a nearby neighborhood with the victim and Robert Beecham where they encountered Mayes, Lonzie Carter, and a third man named Pancho. Carter, also known as "Mookie," was Beecham's cousin. Elion testified that the victim "exchang[ed] status" with the three men with gang handshakes. Elion explained that "exchanging status" meant "let[ting] them know who's the highest" rank in the Traveling Vice Lords. Elion testified that after the group exchanged status, Pancho "asked [the victim] who gave him his rank and [the victim] told him and . . . [Pancho] was like, well, he can't give you any rank." An

argument ensued, and Elion repeatedly requested the victim to walk to the store with her. When the victim refused, Elion left him with the men and walked to the corner store. Elion returned from the store and saw the victim without his shirt on, "hollering some words" and "very upset." None of the men explained to her why they were arguing.

After Elion arrived home, she noticed that the victim had called her at 9:40 p.m. When she returned his call, the victim stated that he was "fixing to go down there and kill all them . . . because . . . they thought he was false flagging." Elion explained that "false flagging" was "representing something that you're not." Despite Elion's attempts to calm the victim, he repeated his prior threat but added, "especially that [Carter], because he was claiming [Gangster Disciples] in middle school." Elion testified that their conversation ended when the victim said, "[M]y [friends are] already on Lauderdale. They [are] on [their] way."

Elion testified that she spoke with Mayes in a later phone conversation that night. She said that Mayes wanted to know where the victim lived and also wanted her to tell the victim that "[they did not] want no trouble. [They] just want[ed] peace." Elion testified that after this conversation, she was outside when Carter, Pancho, and Mayes "pulled down" in a white Grand Am. One of them asked for Beecham and then asked whether the victim lived at her house. Elion told them that the victim did not stay with her. She observed Beecham get into the white Grand Am with the other men, and they drove away. Elion stated she went to bed.

Elion next explained that her father asked if she had heard two gunshots and that she said, "[N]o." She and her brother stepped outside and saw a white Grand Am speeding down the street. Elion testified that she and her brother walked down the street to check on the victim at his house. When they arrived, the victim was not at home, but the lights and radio were on and the door was open. Elion knew "something was wrong" because "[the victim] never goes anywhere without his cigarettes and they were on the back of the couch." As Elion and her brother were returning home, Beecham approached them and said, "[D]on't go back around there . . . . because they shot at [the victim] and [the victim] . . . ran behind one of them houses. . . ."

The next morning, Elion's father told her that someone was found dead in the yard around the corner. Elion went to the scene, recognized the victim's body, and later provided two statements to the police. She explained that everything in the first statement was true, but she left out things because she was afraid. She identified Mayes in court and from a photospread as one of the individuals who came to her house looking for the victim. Elion testified that there were "about eight minutes" between the time that the men left her house looking for the victim and when she was asked by her father if she had heard any gunshots.

On cross-examination, Elion confirmed that the victim was a member of the Traveling Vice Lords who, although she could not explain what it meant, held rank or status as a "three star MOL." Elion reaffirmed her direct testimony; however, when asked whether the victim said that "he was going to shoot [Carter] in his face," Elion said, "Yes, sir." Elion also admitted that at a prior hearing she testified that she never saw Mayes after their phone conversation that night.

Robert Beecham testified that the victim, Carter, and Mayes were involved in an argument concerning gang rank on the night of the offense. Later that evening, while at Elion's house, Beecham overheard a telephone conversation between Elion and the victim. During the conversation, the victim said that "[h]e [was] fixing to go get his-some of his friends and go back to the house and shoot the house up." Beecham telephoned Carter, who was also his cousin, and "told them to be careful and go in the house because [the victim] said he [was] going to come back around there and shoot the house up." Beecham confirmed that Carter, Mayes, Pancho, and Louis Blayde, the driver of the white Grand Am, came to Elion's house. Carter asked Beecham to get in the vehicle with them. Beecham testified that Pancho sat in the front passenger's seat while he sat in the back seat with Mayes and Carter. Beecham was on the driver's side, Mayes was on the passenger's side, and Carter sat between them. Beecham testified that all the men in the vehicle were members of a gang, the "Vice Lords," but he was not. The day of the offense was the first time that Beecham had met the other men in the vehicle.

Beecham testified that they drove down Alice Street and saw the victim standing on the sidewalk talking on the phone. Carter and Mayes jumped out of the vehicle. Beecham stated that Carter was armed with "a black sawed off [shotgun] wrapped in tape." Beecham could not recall what type of weapon Mayes had but knew it was a handgun. Beecham heard Mayes tell the victim not to run, but the victim began to run from the two men. Beecham testified that he heard two shots from Mayes' handgun. When asked about the shotgun, Beecham stated, "It didn't never go off." After the shooting, Beecham said the two men got back in the vehicle. Beecham walked back to Elion's house and did not see the other men again that night. He stated, "Really, I didn't know if [the victim] had been hit or not, you know. I told [Elion] and them, don't go around there. You know, a bullet don't have no name on it. . . ."

Beecham stated that he gave two statements to the police regarding the shooting. He admitted that he did not tell the truth the first time he gave a statement because he was "terrified. [He had] seen what the Vice Lords were capable of doing. So [he did not] want to end up the same way." After everyone involved was arrested, Beecham told the truth in a second statement to the police because he felt that he and his family were no longer in danger. However, Beecham identified Mayes and Carter from a photospread both times he was

interviewed by the police. Beecham confirmed that he circled a photo of Mayes from a photospread and wrote, "this is Knockout who shot two times."

On cross-examination, Beecham testified that he did not know that Mayes and Carter were armed with weapons "until [he] got in the car and . . . took off." Beecham stated that he was not a member of a gang and "didn't know exactly what was going on. [The men] didn't tell [him] what they was fixing to do." Beecham entered the vehicle because of his cousin, Carter. Beecham explained that Carter was carrying the shotgun that did not fire. He admitted that he did not mention to the police in his first statement that he was in the car with Mayes and Carter, that Mayes and Carter had weapons, or that Mayes shot at the victim. Beecham stated that he did not make any deals with the prosecution in exchange for his testimony against Mayes.

Louis Blayde, an ex-gang member, testified that he knew Mayes by his alias, "Knockout." Blayde stated that in August of 2005, he was a "foot soldier" for the Vice Lords with no rank. Blayde explained that Mayes held rank as a "Three Star Universal Elite" which, under gang rules, meant that Blayde had to do whatever Mayes said. Blayde also knew Pancho, another Vice Lord, who held rank as a "Five Star Branch Elite." Blayde explained that Mayes held a higher rank than Pancho. He stated that he met Beecham and Carter, known to him only as "Mookie," for the first time on the night of the offense and that Beecham was not a member of the Traveling Vice Lords.

Blayde stated that, on the night of the offense, Mayes and Pancho asked him to drive them around because they were about to put the victim in "V" or "violation." To put someone in "violation" was not clearly defined at trial; however, Blayde explained that he believed they were only going to give the victim a "beat down." Blayde confirmed that he drove a white Pontiac Grand Am. Blayde said that Mayes, Pancho, Carter and Beecham were in his vehicle with him on the night of the offense. Blayde stated that he did not see Mayes or Carter carrying any weapons until after Beecham had entered the vehicle. He observed Mayes with a handgun and Carter with a "gauge" or a shotgun. They drove to Alice Street and saw the victim on the sidewalk talking on the phone. Blayde stated that Mayes and Carter jumped out of the vehicle and told the victim not to run. The victim ran, and Blayde heard two gunshots. Blayde testified that after the shooting, Mayes and Carter returned to the car, and Mayes said, "I shot him." They drove off and separated. Blayde turned himself in to the police on August 18, 2005, after he learned that they were looking for him. While talking to detectives, he identified Mayes and Carter as being involved with the shooting.

On cross-examination, Blayde admitted that he did not tell the police or testify at a prior hearing that "they were going to put [the victim] in violation" because he was afraid. He did not have any "promises or deals" with the prosecution in exchange for his testimony against Mayes.

> Dr. Kenneth Snell, a forensic pathologist, testified that the victim died as a result of a distant gunshot wound to the right mid-back; however, the projectile exited the victim's body on the right front chest. He stated that his findings were consistent with the victim being "bent over and running at the time he was shot." Dr. Snell roughly estimated that the victim died around midnight.
>
> Vivian Massey, an officer with the Shelby County Sheriff's Department Gang Unit, testified that Mayes told her that he had been affiliated with the Traveling Vice Lords since the age of nine. In addition, Mayes told Officer Massey that he was known as "Monster" or "Knockout," he was a member of the "Unknown Vice Lords," and he held rank as a "Five Star Universal Elite."
>
> Mayes presented no proof at trial.

State v. Mayes, 2009 WL 1312629, at *1-*5.

The TCCA opinion on post-conviction appeal summarized the evidence presented at the post-conviction hearing and the decision of the post-conviction trial court:

> Transfer counsel testified that he had no independent recollection of the facts involving this case and that he also did not have any notes to reference during the hearing. However, he testified that, when he conducted the Petitioner's transfer hearing, he had been a public defender for twenty-two years and had been doing transfer hearings in juvenile court for approximately one year. Transfer counsel also testified that he normally informed the client that it was their decision whether to testify and that he would also explain the risks and benefits involved in that decision. According to transfer counsel, he would typically contact family members to inquire whether a client had any history of mental illness prior to a hearing, and he explained that he would have pursued such an avenue if he "knew that there was a problem."
>
> Transfer counsel testified that it was his common practice not to call any witnesses at transfer hearings due to time constraints and heavy caseloads, instead electing to focus on cross-examining the State's witnesses. Transfer counsel explained that he conducted several transfer hearings a day when working in the juvenile court, that he often only had a few days' notice before a scheduled hearing date, and that "normally it was either have the hearing or let it be bound over." Further, transfer counsel stated that he generally did not conduct any investigation or look into any issues involving arrest or custodial interrogation prior to transfer hearings because his focus was on keeping the Petitioner in juvenile court. He further testified that his amount of preparation depended largely on "whether there was enough evidence there for the referee to decide to keep [the client] in juvenile court[.]" In response to questions from the court,

transfer counsel testified that he believed it was likely, given that the Petitioner had over sixteen "contacts" with the juvenile court, that the Petitioner would have gotten transferred to criminal court. Transfer counsel explained that "contacts" with the juvenile court are not limited to delinquent acts and encompass issues such as truancy, runaways, and family-related conflicts. The Petitioner's juvenile record was presented, and the post-conviction court took notice of its contents.

The Petitioner testified that he did not feel that he was properly represented in juvenile court. The Petitioner further testified that he only met with transfer counsel for approximately three minutes prior to his transfer hearing and that he was not informed of any right to appeal the juvenile court's decision. The Petitioner also testified that he was not informed of any right to, nor did transfer counsel seek, a continuance to give them a chance to prepare for the transfer hearing. He explained that he had no opportunity to do any investigation or discuss any legal issues involving his case prior to the hearing, that he was unaware of any right to discovery materials, and that he had no opportunity to develop a strategy to utilize at the transfer hearing. The Petitioner admitted on cross-examination that his interaction with the juvenile court included approximately thirty family complaints, that sixteen of those "contacts" with the juvenile court involved him specifically, that the sixteen involved delinquent acts such disorderly conduct, and that he had previously been sent to a juvenile detention facility.

After taking the matter under advisement, the post-conviction court denied relief and issued the following findings, as relevant to this appeal:

> Petitioner fails to demonstrate with clear and convincing evidence that transfer counsel failed to effectively represent the Petitioner. Transfer hearings are numerous; transfer counsel normally do not put on any proof and rarely have more than a day or two to prepare for each client's hearing. Transfer Counsel testified he lacked a file from this case; but that he always informs his client of their right to take the witness stand.
>
> Because there is no evidence transfer counsel failed to inform Petitioner of this right, that claim is meritless. Also, because the record demonstrates that first degree murder charges are always transferred to adult court—except where exceptional circumstances exist like the individual is rather young—and because there is no evidence that transfer counsel should have obtained a mental evaluation, Petitioner fails to meet the clear and convincing burden and this claim is without merit.
>
> ....

> Petitioner argues that Trial Counsel rendered ineffective assistance for failing to object to the testimony of Vivian Massey who testified in detail as to Petitioner's gang affiliation and rank. Petitioner argues that Trial Counsel's failure to object to the State's introduction of this evidence, after the State already closed its case-in-chief, prejudiced Petitioner. This claim is without merit, however, because Petitioner fails to meet the first *Strickland* prong: a failure that renders this issue moot.
>
> Trial Counsel testified that he did, in fact, object to the State's introduction of Vivian Massey's testimony, but that the trial court overruled the objection. Further, Trial Counsel testified he raised this issue in the motion for new trial and subsequently did not bring it up on appeal because, . . . [he] felt that that was not a viable appeal issue." Because, Trial Counsel's "tactical and strategic choices" will not be second guessed by the court, *see Campbell* [*v. State*,] 904 S.W.2d [594,] 596[(Tenn. 1995)], and because Trial Counsel did, indeed, object to the lay witness testimony; the issue is without merit.

Mayes v. State, 2013 WL 6730105, at *1-*2.

II. LEGAL STANDARDS

Federal courts have authority to issue habeas corpus relief for persons in state custody under 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). A federal court may grant habeas relief to a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

A. Exhaustion and Procedural Default

A federal court may not grant a writ of habeas corpus on behalf of a state prisoner unless, with certain exceptions, the prisoner has exhausted available state remedies by presenting the same claim sought to be redressed in a federal habeas court to the state courts pursuant to 28 U.S.C. § 2254(b) and (c). *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). The petitioner must

"fairly present"[1] each claim to all levels of state court review, up to and including the state's highest court on discretionary review, *Baldwin v. Reese*, 541 U.S. 27, 29 (2004), except where the state has explicitly disavowed state supreme court review as an available state remedy, *O'Sullivan v. Boerckel*, 526 U.S. 838, 847-48 (1999). Tennessee Supreme Court Rule 39 eliminated the need to seek review in the Tennessee Supreme Court to "be deemed to have exhausted all available state remedies." *Adams v. Holland*, 330 F.3d 398, 402 (6th Cir. 2003); *see Smith v. Morgan*, 371 F. App'x 575, 579 (6th Cir. 2010).

The procedural default doctrine is ancillary to the exhaustion requirement. *See Edwards v. Carpenter*, 529 U.S. 446, 452-53 (2000) (noting the interplay between the exhaustion rule and the procedural default doctrine). If the state court decides a claim on an independent and adequate state ground, such as a procedural rule prohibiting the state court from reaching the merits of the constitutional claim, the procedural default doctrine ordinarily bars a petitioner from seeking federal habeas review. *Wainwright v. Sykes*, 433 U.S. 72, 81-82 (1977); *see Walker v. Martin*, 562 U.S. 307, 315 (2011) ("A federal habeas court will not review a claim rejected by a state court if the decision of the state court rests on a state law ground that is independent of the federal question and adequate to support the judgment") (internal quotation marks and citation omitted)).[2] In general, a federal court "may only treat a state court order as

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[1]For a claim to be exhausted, "[i]t is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made." *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam) (internal citation omitted). Nor is it enough to make a general appeal to a broad constitutional guarantee. *Gray v. Netherland*, 518 U.S. 152, 163 (1996).

[2]The state-law ground may be a substantive rule dispositive of the case, or a procedural barrier to adjudication of the claim on the merits. *Walker*, 562 U.S. at 315. A state rule is an "adequate" procedural ground if it is "firmly established and regularly followed." *Id.* at 316 (quoting *Beard v. Kindler*, 558 U.S. at 60-61 (2009)). "A discretionary state procedural rule . . . can serve as an adequate ground to bar federal habeas review . . . even if the appropriate exercise

enforcing the procedural default rule when it unambiguously relied on that rule." *Peoples v. Lafler*, 734 F.3d 503, 512 (6th Cir. 2013).

If a petitioner's claim has been procedurally defaulted at the state level, the petitioner must show cause to excuse his failure to present the claim and actual prejudice stemming from the constitutional violation or that a failure to review the claim will result in a fundamental miscarriage of justice. *Schlup v. Delo*, 513 U.S. 298, 320-21 (1995); *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). The latter showing requires a petitioner to establish that a constitutional error has probably resulted in the conviction of a person who is actually innocent of the crime. *Schlup*, 513 U.S. at 321; *see also House v. Bell*, 547 U.S. 518, 536-539 (2006) (restating the ways to overcome procedural default and further explaining the actual innocence exception).

B. Merits Review

Pursuant to Section 2254(d), where a claim has been adjudicated in state courts on the merits, a habeas petition should only be granted if the resolution 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.

28 U.S.C. § 2254(d)(1)-(2). Petitioner carries the burden of proof on this "difficult to meet" and "highly deferential [AEDPA] standard," which "demands that state-court decisions be given the benefit of the doubt." *Cullen*, 563 U.S. at 181 (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011), and *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam)).

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of discretion may permit consideration of a federal claim in some cases but not others." *Id.* (quoting *Kindler*, 558 U.S. at 54.) (internal quotation marks and citations omitted).

Review under § 2254(d)(1) is limited to the record before the state court that adjudicated the claim on the merits. *Cullen*, 563 U.S. at 182. A state court's decision is "contrary" to federal law when it "arrives at a conclusion opposite to that reached" by the Supreme Court on a question of law or "decides a case differently than" the Supreme Court has "on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). An "unreasonable application" of federal law occurs when the state court "identifies the correct governing legal principle from" the Supreme Court's decisions "but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 412-13. The state court's application of clearly established federal law must be "objectively unreasonable" for the writ to issue. *Id.* at 409. The writ may not issue merely because the habeas court, "in its independent judgment," determines that the "state court decision applied clearly established federal law erroneously or incorrectly." *Renico v. Lett*, 559 U.S. 766, 773 (2010) (citing *Williams*, 529 U.S. at 411).

There is minimal case law addressing whether, under § 2254(d)(2), a decision was based on "an unreasonable determination of the facts." In *Wood v. Allen*, 558 U.S. 290, 301 (2010), the Supreme Court stated that a state-court factual determination is not "unreasonable" merely because the federal habeas court would have reached a different conclusion.[3] In *Rice v. Collins*, 546 U.S. 333 (2006), the Court explained that "[r]easonable minds reviewing the record might

[3]In *Wood*, the Supreme Court granted certiorari to resolve whether, to satisfy § 2254(d)(2), "a petitioner must establish only that the state-court factual determination on which the decision was based was 'unreasonable,' or whether § 2254(e)(1) additionally requires a petitioner to rebut a presumption that the determination was correct with clear and convincing evidence." *Wood*, 558 U.S. at 299. The Court found it unnecessary to reach that issue, and left it open "for another day". *Id.* at 300- 01, 303 (citing *Rice v. Collins*, 546 U.S. 333, 339 (2006), in which the Court recognized that it is unsettled whether there are some factual disputes to which § 2254(e)(1) is inapplicable).

disagree" about the factual finding in question, "but on habeas review that does not suffice to supersede the trial court's . . . determination." *Rice*, 546 U.S. at 341-42.

The Sixth Circuit has described the § 2254(d)(2) standard as "demanding but not insatiable" and has emphasized that, pursuant to § 2254(e)(1), the state court factual determination is presumed to be correct absent clear and convincing evidence to the contrary. *Ayers v. Hudson*, 623 F.3d 301, 308 (6th Cir. 2010). A state court adjudication will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented during the state court proceeding. *Id.*; *see also Hudson v. Lafler*, 421 F. App'x 619, 624 (6th Cir. 2011) (same).

C. Ineffective Assistance

A claim that ineffective assistance of counsel has deprived a defendant of his Sixth Amendment right to counsel is controlled by the standards stated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To succeed on this claim, a movant must demonstrate two elements: 1) that counsel's performance was deficient, and 2) "that the deficient performance prejudiced the defense." *Id.* "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

To establish deficient performance, a person challenging a conviction "must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. A court considering a claim of ineffective assistance must apply a "strong presumption" that counsel's representation was within the "wide range of reasonable professional assistance." *Id.* at 689. The challenger's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687.

To demonstrate prejudice, a petitioner must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.[4] "A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 694. It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.' [*Strickland*,] at 693. Counsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' *Id.*, at 687." *Harrington*, 562 U.S. at 104 (citing *Strickland*); *see also Wong v. Belmontes*, 558 U.S. 15, 27 (2009) (per curiam) ("But *Strickland* does not require the State to 'rule out'" a more favorable outcome to prevail. "Rather, *Strickland* places the burden on the defendant, not the State, to show a 'reasonable probability' that the result would have been different.").

The deference accorded a state-court decision under 28 U.S.C. § 2254(d) is magnified when reviewing an ineffective assistance claim:

> Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both "highly deferential," *id.*, at 689; *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7 (1997), and when the two apply in tandem, review is "doubly" so, *Knowles* [*v. Mirzayance*], 556 U.S., at 123, 129 S. Ct. at 1420 [(2009)]. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. 556 U.S., at 123, 129 S. Ct. at 1420. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.

Harrington, 562 U.S. at 105.

A criminal defendant is entitled to the effective assistance of counsel on direct appeal. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). The failure to raise a nonfrivolous issue on appeal

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[4]If a reviewing court finds a lack of prejudice, it need not determine whether, in fact, counsel's performance was deficient. *Strickland*, 466 U.S. at 697.

does not constitute *per se* ineffective assistance of counsel, as "[t]his process of winnowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536 (1986) (internal quotation marks and citation omitted). Claims of ineffective assistance of appellate counsel are evaluated using the *Strickland* standards. *Smith v. Robbins*, 528 U.S. 259, 285-86 (2000) (applying *Strickland* to claim that appellate counsel rendered ineffective assistance by failing to file a merits brief); *Smith v. Murray*, 477 U.S. at 535-36 (failure to raise issue on appeal). To establish that appellate counsel was ineffective, a prisoner

> must first show that his counsel was objectively unreasonable in failing to find arguable issues to appeal - that is, that counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them. If [the prisoner] succeeds in such a showing, he then has the burden of demonstrating prejudice. That is, he must show a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief, he would have prevailed on his appeal.

Smith v. Robbins, 528 U.S. at 285 (citation omitted).[5]

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[5]The Sixth Circuit has identified a nonexclusive list of factors to consider when assessing claims of ineffective assistance of appellate counsel:

1. Were the omitted issues "significant and obvious?"
2. Was there arguably contrary authority on the omitted issues?
3. Were the omitted issues clearly stronger than those presented?
4. Were the omitted issues objected to at trial?
5. Were the trial court's rulings subject to deference on appeal?
6. Did appellate counsel testify in a collateral proceeding as to his appeal strategy and, if so, were the justifications reasonable?
7. What was the appellate counsel's level of experience and expertise?
8. Did the petitioner and appellate counsel meet and go over possible issues?
9. Is there evidence that counsel reviewed all the facts?
10. Were the omitted issues dealt with in other assignments of error?
11. Was the decision to omit an issue an unreasonable one which only an incompetent attorney would adopt?

Franklin v. Anderson, 434 F.3d 412, 429 (6th Cir. 2006) (citation omitted).

An appellate counsel's ability to choose those arguments that are more likely to succeed is "the hallmark of effective appellate advocacy." *Matthews v. Parker*, 651 F.3d 489, 523 (6th Cir. 2011) (quoting *Caver v. Straub*, 349 F.3d 340, 348 (6th Cir. 2003)). It is difficult to show that appellate counsel was deficient for raising one issue, rather than another, on appeal. *See id.* "In such cases, the petitioner must demonstrate that the issue not presented was clearly stronger than issues that counsel did present." *Id.* Defendant must show that "there is a reasonable probability that inclusion of the issue would have changed the result of the appeal." *McFarland v. Yukins*, 356 F.3d 688, 699 (6th Cir. 2004).

"There is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." *Coleman*, 501 U.S. at 752 (internal citations omitted). Attorney error cannot constitute "cause" for a procedural default "because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must bear the risk of attorney error." *Id.* at 753 (internal quotation marks omitted). Where the State has no constitutional obligation to ensure that a prisoner is represented by competent counsel, the petitioner bears the risk of attorney error. *Id.* at 754.

In 2012, the Supreme Court decided *Martinez v. Ryan*, 566 U.S. 1 (2012), which recognized a narrow exception to the rule in *Coleman*, "[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding . . . ." *Martinez*, 566 U.S. at 17. In such cases, "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance [of counsel] at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Id.* The Supreme Court also emphasized that "[t]he rule of *Coleman* governs in all

but the limited circumstances recognized here. . . . It does not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial, even though that initial-review collateral proceeding may be deficient for other reasons." *Id.* The requirements that must be satisfied to excuse a procedural default under *Martinez* are:

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

Trevino v. Thaler, 569 U.S. 413, 423 (2013) (emphasis and alterations in original).

Martinez considered an Arizona law that did not permit ineffective assistance claims to be raised on direct appeal. *Martinez*, 566 U.S. at 4. In the Supreme Court's subsequent decision in *Trevino*, 569 U.S. at 429, the Court extended its holding in *Martinez* to states in which a "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal . . . ." *Trevino* modified the fourth *Martinez* requirement for overcoming a procedural default. *Martinez* and *Trevino* apply to Tennessee prisoners. *Sutton v. Carpenter*, 745 F.3d 787, 790 (6th Cir. 2014).

III. PETITIONER'S FEDERAL HABEAS CLAIMS

In the § 2254 petition, Mayes raises the following issues:

1. Whether the evidence was sufficient to support Petitioner's conviction for first-degree premeditated murder (Pet., ECF No. 1 at PageID 5);

2. Whether transfer counsel was deficient during the transfer stage between juvenile court and criminal court (*id.* at PageID 24);

3. Whether trial counsel was deficient for declining to subpoena a co-defendant to testify (*id.* at PageID 35);

4. Whether trial counsel performed deficiently by failing to request a complete jury instruction on circumstantial evidence and the lesser included offense of second-degree murder (*id.* at PageID 47);

5. Whether trial counsel performed deficiently by failing to request a jury instruction regarding accomplice testimony (*id.* at PageID 50);

6. Whether trial counsel performed deficiently by failing to object to Vivian Massey's testimony (*id.* at PageID 64);

7. Whether trial counsel performed deficiently by failing to have Vivian Massey testify to the definition of a violation in the Vice Lords (*id.* at PageID 73); and

8. Whether Petitioner's life sentence violates *Miller v. Alabama*, 567 U.S. 460 (2012). (Amendment to Pet, ECF No. 8-1 at PageID 104-118.)

Issue 1 was presented to the TCCA on direct appeal. (R., Brief ("Br." of Appellant, ECF No. 19-10 at PageID 821.) Issue 2 was presented to the TCCA in the post-conviction appeal. (R., Br. of the Appellant, ECF No. 19-18 at PageID 1331.) Issues 3-7 have never been reviewed by the TCCA, although they were reviewed and denied by the post-conviction trial court. (R., Am. Order, ECF No. 19-13 at PageID 986-87.) Petitioner contends that Issue 8 has been reviewed by the Tennessee courts.[6]

IV. ANALYSIS OF PETITIONER'S CLAIMS

A. Exhausted Issues

[6]Respondent has failed to provide the state court record of Petitioner's motion to reopen his post-conviction proceedings and subsequent decision of the Tennessee courts. Respondent has chosen to address the merits of this claim and waived any defense of procedural default.

1. The evidence was not sufficient to support Petitioner's conviction for first-degree premeditated murder. (Pet., ECF No. 1 at PageID 5.)

Petitioner Mayes contends the TCCA's determination that the evidence was sufficient to support his conviction for felony murder was an unreasonable determination of the facts. (Second Am. Pet., ECF No. 1 at PageID 5.) Specifically, Mayes contends that the corroborating witnesses Beecham and Blayde were accomplices as a matter of law because both were in the vehicle with Mayes before the crime was committed and assisted him by driving away from the scene or initially concealing the crime from the police. (*Id.* at PageID 11.) Respondent replies that the TCCA applied the correct federal rule and that its decision was based on a reasonable determination of the facts. (Answer, ECF No. 28 at PageID 1492.)

After reviewing the evidence presented at trial, the TCCA considered Mayes' argument and opined:

> Mayes argues that witnesses Blayde and Beecham "should . . . have been named as accomplices by the trial court" and that there was insufficient evidence to corroborate their testimony. The State argues that the witnesses were not accomplices and even if they were, independent corroborating evidence supported their testimony.
>
> The standard of review regarding challenges to the sufficiency of convicting evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, 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, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979); *see also* Tenn. R.App. P. 13(e) ("Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support a finding by the trier of fact of guilt beyond a reasonable doubt."). This standard is applicable to convictions predicated upon direct, circumstantial, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999). On appeal, this court will not reweigh or reevaluate the evidence. *State v. Grills*, 114 S.W.3d 548, 551 (Tenn. Crim. App. 2001). The trier of fact, not the appellate court, resolves issues regarding the credibility of witnesses and the weight and value given to the evidence. *State v. Sutton*, 166 S.W.3d 686, 689-90 (Tenn. 2005). Moreover, the State is entitled to the strongest

legitimate view of the evidence and all legitimate or reasonable inferences which may be drawn from that evidence. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). The Tennessee Supreme Court has stated that "[a] guilty verdict by the jury, approved by the trial court, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the prosecution's theory." *Id.* In addition, a guilty verdict "removes the presumption of innocence and replaces it with a presumption of guilt, and on appeal the defendant has the burden of illustrating why the evidence is insufficient to support the verdict rendered by the jury." *State v. Holton*, 126 S.W.3d 845, 858 (Tenn. 2004).

After the State rested its case, defense counsel asked the court if it had taken a position on whether Beecham and Blayde were accomplices because counsel was prepared to file a motion requesting that the jury be instructed they were accomplices as a matter of law. The trial court stated, "From the testimony, I can't find as a matter of law that they agreed with him as the accomplice statute says, united with the offender in committing the act. I think that would be a jury question. . . ." We note that the record does not contain a motion requesting that Beecham and Blayde be submitted to the jury as accomplices, and nothing more on the issue exists absent the motion for new trial. The trial court instructed the jury consistently with the standard accomplice jury charge leaving the question of Blayde's and Beecham's witness status for the jury to decide. *See* T.P.I.-Crim. 42.09.

In Tennessee, it is well established that a conviction may not be based solely upon the uncorroborated testimony of an accomplice. *State v. Shaw*, 37 S.W.3d 900, 903 (Tenn. 2001) (citation omitted). An accomplice is a person who "knowingly, voluntarily, and with common intent participates with the principal offender in the commission of the crime alleged in the charging instrument." *State v. Griffis*, 964 S.W.2d 577, 588 (Tenn. Crim. App. 1997). The question of who determines whether a witness is an accomplice depends upon the evidence introduced during the course of the trial. *Bethany v. State*, 565 S.W.2d 900, 903 (Tenn. Crim. App. 1978). When the facts are undisputed regarding a witness's participation in a crime, it is a question of law for the trial court. *See State v. Robinson*, 239 S.W.3d 211, 225 (Tenn. Crim. App. 2006). On the other hand,

> [w]here . . . the witness denies all criminal connection with the crime committed, whether he be an accomplice or not is a question of fact, to be submitted to the jury along with other issues of fact, under proper instructions from the court; the burden being upon the party invoking the rule to prove by a preponderance of the evidence the guilty connection of the witness with the crime. If the jury find[s] the witness to be an accomplice, they will apply the rule requiring corroboration; but, if the jury fail[s] to so find, his evidence will be given the same weight as that of other witnesses.

Hicks v. State, 126 Tenn. 359, 149 S.W. 1055, 1056 (Tenn. 1912).

> The Tennessee Supreme Court has previously described corroboration as some fact testified to, entirely independent of the accomplice's testimony, which, taken by itself, leads to the inference, not only that a crime has been committed, but also that the defendant is implicated in it; and this independent corroborative testimony must also include some fact establishing the defendant's identity. This corroborative evidence may be direct or entirely circumstantial, and it need not be adequate, in and of itself, to support a conviction; it is sufficient to meet the requirements of the rule if it fairly and legitimately tends to connect the defendant with the commission of the crime charged. It is not necessary that the corroboration extend to every part of the accomplice's evidence.

State v. Bigbee, 885 S.W.2d 797, 803 (Tenn. 1994). It is up to the jury to determine whether sufficient corroboration exists. *Id.*

In this case, Mayes stresses that both witnesses were accomplices as a matter of law primarily because they were in the vehicle with him before the crime was committed and assisted him by either driving away from the crime scene or initially concealing the crime from the police. We agree that Blayde's witness status is a very close question. However, as previously stated, an accomplice as a matter of law must knowingly, voluntarily, and with common intent participate with the principal offender in the commission of the crime alleged in the charging instrument. *Griffis*, 964 S.W.2d at 588. In this case, Mayes, the principal offender, was charged with first degree premeditated murder. Therefore, in order to be considered an accomplice as a matter of law, the record must show that Blayde knowingly, voluntarily, and with common intent participated in the commission of first-degree premeditated murder.

Significantly, the record shows that Blayde was not present during the initial confrontation between Mayes and the victim. Blayde also testified that even though he drove the other men in his vehicle to find the victim, he was initially unaware that they were armed with weapons. Although Blayde admitted that he knew the other men were about to put the victim in "V" or "violation", this term was not defined at trial. In his experience, Blayde explained that a "violation" only involved giving the victim a "beat down." Defense counsel specifically questioned Blayde on this issue by asking, "You've never heard of a violation where somebody got killed?" Blayde responded, "No." The record shows defense counsel attempted to further develop what was meant by a "violation" through Blayde again, by asking, "So for five years [as a gang member] you're saying you [have] never heard of a violation where somebody might be killed?" Blayde responded, "No." While it is troubling that Blayde

> knew the other men intended to harm the victim in some way, the proof does not establish that Blayde knowingly, voluntarily, and with common intent participated in the commission of first-degree premeditated murder. Therefore, we conclude that the trial court properly submitted the question of Blayde's status as a witness to the jury. *See Jimmy Dale Smith v. State*, No. 01C01-9205-CC-00152, 1995 WL 84021, at *19 (Tenn. Crim. App., at Nashville, Mar. 2, 1995) (concluding that the status of an unindicted witness who testified that he thought he was assisting the defendant in committing a burglary but unwittingly assisted him in a kidnaping was a question for the jury). Moreover, given our later discussion and conclusion regarding Beecham's witness status, we conclude that even if there was error, it was harmless. Tenn. R. Crim. P. 52(a) ("No judgment of conviction shall be reversed on appeal except for errors which affirmatively appear to have affected the result of the trial on the merits.").
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> In regard to Beecham's status as a witness, the record shows that Beecham did not know Mayes' or Carter's intentions when he entered the vehicle on the night of the offense. Beecham was not a member of the Traveling Vice Lords and did not know any of the men prior to entering the vehicle except his cousin, Carter. Beecham also testified that he did not know that Mayes or Carter were armed with weapons until after he had entered the vehicle and "took off." In our view, the evidence regarding Beecham's participation in the commission of the charged offense was susceptible to different inferences. *See, e.g., State v. Robert Wayne Marler*, No. E2003-02179-CCA-R3-CD, 2004 WL 1562529, at *5 (Tenn. Crim. App., at Knoxville, July 12, 2004) (concluding that the status of unindicted witness who was with the defendant before, during, and after the commission of the crime was a question for the jury). The trial court did not err by submitting the question of Beecham's status as a witness to the jury with the proper instructions. We must presume that the jury followed the instructions given to them by the court. *Henley v. State*, 960 S.W.2d 572, 581 (Tenn. 1997). Upon reviewing this record, we conclude that a reasonable juror could have determined that neither Blayde nor Beecham were accomplices. As such, no corroboration was necessary. We likewise conclude that a reasonable juror could have determined that Blayde was an accomplice and used Beecham's testimony as corroboration. Therefore, viewed in the light most favorable to the State, the evidence is sufficient to support Mayes' conviction for first degree premeditated murder.

State v. Mayes, 2009 WL 1312629, at *5-*7.

In *Jackson v. Virginia*, 443 U.S. at 324, the Supreme Court held that, "in a challenge to a state criminal conviction brought under 28 U.S.C. § 2254 - if the settled procedural prerequisites for such a claim have otherwise been satisfied - the applicant is entitled to habeas corpus relief if

it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof beyond a reasonable doubt." This standard requires a federal district court to examine the evidence in the light most favorable to the State. *Id.* at 326 ("a federal habeas corpus court faced with a record of conflicting 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").

Mayes repeats the argument considered and rejected by the TCCA. (Pet., ECF No. 1 at PageID 11-18.) Mayes' legal conclusions do not satisfy his burden of demonstrating that the state court's resolution of this issue was based on an unreasonable determination of the facts. Mayes' argument establishes, at most, that the jury was required to determine whether either or both Beecham and Blade were accomplices and, if one was an accomplice, whether the other's testimony was sufficient to corroborate the testimony of the accomplice. The jury concluded that the testimonies of Beecham and Blayde were sufficient to convict Mayes of first-degree premeditated murder.

The TCCA applied the correct legal rule and cited both *Jackson v. Virginia* and state cases applying the *Jackson* standard. *State v. Mayes*, 2009 WL 1312629, at *5. The TCCA determined "that a reasonable juror could have determined that neither Blayde nor Beecham were accomplices" *id.*, at *7, and "a reasonable juror could have determined that Blayde was an accomplice and used Beecham's testimony as corroboration." *Id.* Based on this Court's review of the transcript of Mayes' trial (R., Trial Transcript ("Tr."), ECF Nos. 19-6, 19-7, and 19-8), the TCCA correctly concluded that the testimony and evidence were more than sufficient to permit the jury to find that Mayes was guilty of first-degree premeditated murder. Issue 1 is without merit and is **DENIED**.

2. Transfer counsel was deficient during the transfer stage between juvenile court and criminal court. (Pet., ECF No. 1 at PageID 24)

Petitioner contends that the TCCA "misinterpreted the facts in light of the evidence actually presented in the post-conviction proceeding. This in turn allowed the post-conviction court to reach a decision that was both off point and contrary to clearly established federal law, namely *Strickland*." (*Id.* at PageID 28.) Respondent replies that, to the extent this issue is subsumed within Mayes' claim that trial counsel failed to present a cognizable defense, the issue was addressed and rejected by the TCCA and the determination was not an unreasonable determination of the facts. (Answer, ECF No. 28 at PageID 1493.)

The issue presented on post-conviction appeal was that "[t]ransfer counsel failed to fully investigate Petitioner's alleged involvement in the indicted crime and the nature of the arrest, and custodial interrogation, extent and weight of the evidence against him as purported by the State of Tennessee through the District Attorney's Office." (R., Br. of the Appellant, ECF No. 19-18 at PageID 1356-57.) The TCCA reviewed the determination of the post-conviction court and determined:

> The Petitioner contends that transfer counsel was ineffective for (1) failing to file appropriate motions, thereby precluding the Petitioner from several possible defenses; and (2) failing to sufficiently investigate and analyze the nature of Petitioner's arrest, custodial interrogation, and investigative witness statements possessed by the State regarding the Petitioner's first-degree murder charge. The Petitioner asserts that these failures "essentially left [him] with no viable option other than to 'be indicted and transferred to criminal court.' "The State responds that the Petitioner has failed to show that any deficiency by transfer counsel resulted in prejudice to the Petitioner. We agree with the State.
>
> The juvenile court has original jurisdiction over children who are alleged to be delinquent. *Howell v. State*, 185 S.W.3d 319, 326 (Tenn. 2006); *State v. Hale*, 833 S.W.2d 65, 66 (Tenn. 1992); *see* Tenn. Code Ann. § 37–1–134(a) (2003). Section 37–1–134(a)(1)–(4) provides the circumstances in which a juvenile court "shall" transfer a juvenile accused of conduct that constitutes a

criminal offense to the criminal court to be tried as an adult. *Howell*, 185 S.W.3d at 329. The juvenile must be at least sixteen years old at the time of the offense or, if under sixteen, be charged with certain enumerated offenses, as relevant here first-degree murder, and be provided with notice and a hearing. Tenn. Code Ann. § 37–1–134(a)(1)–(3). During the hearing, the juvenile court must find "reasonable grounds to believe" that the juvenile committed the delinquent act as alleged, that the juvenile "is not committable to an institution for the mentally retarded or mentally ill," and that the community's interests require legal restraint or discipline of the juvenile. *Id.* at (a)(4)(A)-(C). Thus, a transfer hearing involves three inquiries: (1) whether probable cause exists; (2) whether the juvenile is mentally disturbed; and (3) whether the juvenile is amenable to juvenile discipline. *See id.* Unless these grounds are found by the juvenile court, transfer from juvenile court to criminal court is subject to the juvenile court's discretion. *Id.*; *Howell*, 185 S.W.3d at 329. In making its determination, the juvenile court must consider, but is not limited to, the following:

> (1) The extent and nature of the child's prior delinquency records;
>
> (2) The nature of past treatment efforts and the nature of the child's response thereto;
>
> (3) Whether the offense was against person or property, with greater weight in favor of transfer given to offenses against the person;
>
> (4) Whether the offense was committed in an aggressive and premeditated manner;
>
> (5) The possible rehabilitation of the child by use of procedures, services and facilities currently available to the court in this state; and
>
> (6) Whether the child's conduct would be a criminal gang offense, as defined in § 40–35–121, if committed by an adult.

Tenn. Code Ann. § 37–1–134(b).

At the post-conviction hearing, transfer counsel readily admitted that he had no time to investigate cases assigned to him prior to the transfer hearing. Rather, he focused on cross-examining the State's witnesses to accomplish his stated goal of keeping his client in juvenile court. According to the post-conviction court, such is "the nature of the beast" regarding transfer hearings in the Shelby County Juvenile Court. However, it is well-settled that "counsel has a duty to make reasonable investigations or to make a reasonable decision that [render]s particular investigations unnecessary." *Strickland*, 466 U.S. 691.

Transfer counsel had no independent recollection of the facts involving this case and did not have any notes he could reference to shed any light on why he failed to conduct any investigation in this particular case. Our review of the record reveals that transfer counsel's lack of investigation was not the result of a professionally reasonable decision but, rather, a product of the procedures and common practices in the Shelby County juvenile court. As such, we conclude that transfer counsel's representation fell below the reasonable standard of competence and was, therefore, deficient. Transfer counsel's assertion that it was his common practice not to call any witnesses at transfer hearings due to time constraints and heavy caseloads does not alleviate his duties under *Strickland.* Taking time to properly investigate and prepare a case is the foundation of effective legal representation, and we are unaware of a "heavy docket" exception to the right to counsel.

Despite our conclusion that transfer counsel's representation fell below an objective standard of reasonableness, the Petitioner cannot prevail because he has failed to demonstrate that this deficient performance prejudiced him.[7] *See Strickland*, 466 U.S. at 687; *Cooper*, 849 S.W.2d at 747. Transfer counsel testified that almost all first-degree murder cases were transferred to the criminal court, save a few exceptional cases where the defendant was very young or exhibited an extreme mental disturbance. The Petitioner does not contend that he has any mental illness nor does he present any circumstance that might be considered "exceptional" that could have persuaded the juvenile court to retain jurisdiction over his case.[8] Regarding the Petitioner's allegation that transfer counsel was deficient for failing to "file any motions that would have presented Petitioner with reasonable options in light of the immediate implications of the first degree murder charge[,]" the Petitioner has failed to identify what motions he believed should have been filed and has presented no evidence that filing any such motion would have prevented his case from being transferred to the criminal court.

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[7]Because transfer counsel did cross-examine the State's witnesses, his representation did not rise to the level of deficiency in which prejudice is presumed. *See State v. Cronic*, 466 U.S. 648, 659, n. 25, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (Tenn. 1984) (concluding that "a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." Further, the court notes that the United States Supreme "Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding.").

[8]The Petitioner did allege in his petition for post-conviction relief that transfer counsel was deficient for failing to request a mental evaluation on the Petitioner's behalf. However, this issue appears to be abandoned on appeal and, to the extent that it is not, has nevertheless been waived for failure to present an expert witness attesting to the Petitioner having some mental incapacity. *See Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990).

> The record reflects that the Petitioner had over sixteen "contacts" with the juvenile court prior to the instant case; that this case involved an aggressive, premeditated offense against a person; and that the offense was gang-related. We, therefore, conclude that the juvenile court properly considered the factors enumerated in Tennessee Code Annotated section 37–1–134, finding that the Petitioner met the requirements for transfer to criminal court, and that it was reasonable for the juvenile court to believe that the Petitioner committed the crimes for which he was charged and that the interests of the community required that the child be put under legal restraint or discipline. Because the Petitioner met the criteria set out in Tennessee Code Annotated section 37–1–134(a), the juvenile court was required to transfer his case to the criminal court. *See* Tenn. Code Ann. § 37–1–134(a) (stating that the disposition of the child shall be as if the child were an adult if the statutory requirements listed therein are met). The Petitioner has failed to show how any investigation, additional preparation, or other action by transfer counsel would have resulted in the juvenile court's retaining jurisdiction over his case. Therefore, he has failed to demonstrate prejudice and is not entitled to relief on this issue.

Mayes v. State, 2013 WL 6730105, at *4-*6.

The TCCA determined that transfer counsel's performance was deficient but concluded that Petitioner had failed to demonstrate prejudice because transfer counsel had no viable argument to prevent Mayes' transfer to criminal court to be tried as an adult. It logically follows that Petitioner would not have prevailed had the transfer been appealed. Deference to the state court decision on this issue is appropriate. Issue 2 is **DENIED**.

8. Petitioner's life sentence violates *Miller v. Alabama*, 567 U.S. 460 (2012). (Amendment to Pet, ECF No. 8-1 at PageID 104-118.)

Mayes contends that he is entitled to relief from his life sentence based on the Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012). In *Miller*, the Supreme Court determined that the Eighth Amendment prohibits the imposition of mandatory sentences of life imprisonment without parole for individuals who were under the age of eighteen when they committed their crimes. The decision in *Miller* has been made retroactively applicable to cases

on collateral review. *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). The State has responded that Mayes' reliance on *Miller* is misplaced and the claim should be denied. (Answer, ECF No. 28 at PageID 1500.)

Mayes alleges that the post-conviction court's determination that, unlike the sentence considered in *Miller*, a life sentence in Tennessee does not condemn a juvenile to die in prison was an unreasonable determination of the facts.[9] (Amendment, ECF No. 8-1 at PageID 106-08.) Mayes contends that requiring him to serve 51 years in prison before he is eligible for parole is the equivalent to life without parole and that he will die in prison. (*Id.* at PageID 115.) Petitioner argues that the state court's decision is contrary to *Miller*. (Id.)

The gravamen of Mayes' argument is that the TCCA declined to extend the holding in *Miller* to cases that are factually distinct from the circumstances in *Miller*. There may be sound policy reasons for the Supreme Court or the Tennessee General Assembly to modify the sentences available to juveniles convicted of first-degree murder. That is not the issue before this Court. The issue is whether the TCCA's conclusion that *Miller*, by its terms, applies only to mandatory sentences of life without the possibility of parole "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103 (emphasis added). Mayes has advanced no argument that that standard has been satisfied here.

Mayes challenges the TCCA's factual finding that he is not serving a mandatory sentence of life imprisonment without the possibility of parole. Mayes cites Tenn. Code Ann. § 39-13-

[9] Petitioner states that he filed an application for permission to appeal to the TCCA but does not relate the result. (*Id.* at PageID 107.)

204, § 39-13-208 and § 40-35-501(i). (Amendment, ECF No. 8-1 at PageID 110.) Tenn. Code § 40-35-501(i) provides that

> [t]here shall be no release eligibility for a person committing an offense, on or after July 1, 1995, that is enumerated in subdivision (i)(2). The person shall serve one hundred percent (100%) of the sentence imposed by the court less sentence credits earned and retained. However, no sentence reduction credits authorized by § 41-21-236 or any other provision of law, shall operate to reduce the sentence imposed by the court by more than fifteen percent (15%).

Id. This provision applies to persons convicted of first-degree murder. *See id.* § 40-35-501(i)(2).

The cited statutes do not assist Mayes for several interrelated reasons. First, the Supreme Court's decision in *Miller* is factually distinguishable from the Tennessee sentencing scheme that applied in Mayes' case. In *Miller*, the juveniles were sentenced to mandatory terms of life imprisonment without the possibility of parole. The Supreme Court emphasized that "[s]tate law mandated that each juvenile die in prison even if the judge or jury would have thought that his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence (for example, life with the possibility of parole) more appropriate." *Miller*, 567 U.S. at 465. In Tennessee, by contrast, the available sentences for a juvenile convicted of first-degree murder are life imprisonment without the possibility of parole and life imprisonment. Tenn. Code Ann. § 39-13-204(a).[10] Here, the State did not seek a sentence of life imprisonment without the possibility of parole. Whether Tennessee law mandates the release of first-degree murderers after they have served fifty-one years or whether they merely become eligible for release[11] is not

[10]The death penalty is not available where, as here, a case was transferred from juvenile court. Tenn. Code Ann. § 37-1-134(a)(1).

[11]A life sentence is presumed to be 60 years. Tenn. Code Ann. § 40-35-501(h)(1). Eighty-five percent of 60 years is 51 years.

germane for purposes of Mayes' *Miller* claim because the state-court judgment did not impose a mandatory sentence of life imprisonment with no possibility of release.

Second, Tennessee courts have made clear that inmates sentenced to life imprisonment are eligible for release after fifty-one years. *See, e.g., Vaughn v. State*, 202 S.W.3d 106, 118-19 (Tenn. 2006) ("[S]ubsection (i) operates . . . to raise the floor from 60% of sixty years . . . to 100% of sixty years, reduced by not more than 15% of eligible credits.") (quoting Tenn. Op. Att'y Gen., No. 97-098 (1997)); *Darden v. State*, No. M2013-01328-CCA-R3-PC, 2014 WL 992097, at *11 (Tenn. Crim. App. Mar. 13, 2014) ("Life imprisonment in Tennessee does not condemn a juvenile offender to die in prison as the life-without parole sentences contemplated by *Miller*. In Tennessee, a defendant sentenced to life imprisonment must serve 85% of sixty years, or fifty-one years, before becoming eligible for release."), *appeal denied* (Tenn. Mar. 13, 2014); *see also State v. Collins*, No. W2016-01819-CCA-R3-CD, 2018 WL 1876333, at *20 (Tenn. Crim. App. Apr. 18, 2018) ("[T]his court has consistently rejected the claim that a juvenile's mandatory life sentence, which requires service of fifty-one years before release, constitutes an effective sentence of life without parole in violation of *Miller*.") (collecting cases).

Third, in *Starks v. Easterling*, 659 F. App'x 277, 280-81 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 819 (2017), the Sixth Court of Appeals held that a state-court decision rejecting a prisoner's challenge to his sentence, which precluded him from being considered for parole until he served a term in excess of his life expectancy, was not contrary to or an unreasonable application of *Miller*.[12] Mayes' sentence is similar to the sentence that was challenged in *Starks*. Therefore, relief on Mayes' *Miller* claim would be inappropriate. Issue 8 is **DENIED**.

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[12]The prisoner in Starks had been sentenced to life imprisonment plus 11 years. *Id.* at 278.

B. Issues Barred by Procedural Default:

3. Trial counsel was deficient for declining to subpoena a co-defendant to testify (Pet., ECF No. 1 at PageID 35);

4. Trial counsel performed deficiently by failing to request a complete jury instruction on circumstantial evidence and the lesser included offense of second-degree murder (*id.* at PageID 47);

5. Trial counsel performed deficiently by failing to request a jury instruction regarding accomplice testimony (*id.* at PageID 50);

6. Trial counsel performed deficiently by failing to object to Vivian Massey's testimony (*id.* at PageID 64); and

7. Trial counsel performed deficiently by failing to have Vivian Massey testify to the definition of a violation in the Vice Lords. (*Id.* at PageID 73.)

Petitioner Mayes contends that trial counsel performed deficiently by declining to subpoena his codefendant to testify at trial, by failing to request a complete jury instruction on circumstantial evidence and the lesser included offense of second-degree murder, by failing to request a jury instruction regarding accomplice testimony, by failing to object to Vivian Massey's testimony, and by failing to have Vivian Massey testify to the definition of a gang violation. (*Id.* at PageID 28-83.) Respondent replies that these claims are barred by procedural default because they were not raised during the post-conviction appeal. (Answer, ECF No. 28 at PageID 1496-99.)

Trial counsel testified at the post-conviction hearing that Mayes' codefendant, Lonzie Carter, provided an affidavit taking responsibility for the victim's death and denying that Mayes was involved, but that Carter's attorney would not allow Carter to be interviewed, the State had

Carter under subpoena as a rebuttal witness, and trial counsel was unwilling to take a chance that Carter would implicate Mayes. (R., Post-conviction Hearing ("Hr'g.") Transcript ("Tr."), ECF No. 19-15 at PageID 1155-58.) Trial counsel testified that, had the State called Carter as a witness, he would have used the affidavit to impeach Carter. (*Id.* at PageID 1158.)

Lonzie Carter testified at the post-conviction hearing that, when his shotgun didn't fire at the victim, he told Mayes to give him the handgun. (*Id.*, ECF No. 10-16 at PageID 1183.) He stated that Mayes gave him the handgun, and he shot the victim. (*Id.*) Carter testified that he intended to give that exact testimony at Mayes' trial. (*Id.* at PageID 1186.) Carter denied that he was going to be a witness for the State. (*Id.* at PageID 1188.) Carter admitted that he told the police that Mayes was the shooter, but contended that he lied because of what the detective told him. (*Id.* at PageID 1202.)

Petitioner testified that he wanted counsel to subpoena Carter as a trial witness although counsel had not been able to speak to Carter and they didn't know what Carter would say. (*Id.* at PageID 1237.) Carter's trial counsel testified that he did not permit Mayes' attorney to speak with Carter because they did not have a congruent defense. (*Id.*, ECF No. 19-17 at PageID 1285.) Counsel testified that, when he told Mayes' prosecutor that Carter would be willing to help the State, the prosecutor made him aware of the affidavit. (*Id.*) Carter's counsel testified that he would not have approached the prosecutor with Carter's offer of help without first talking it over with his client. (*Id.* at PageID 1289.)

The post-conviction court determined that Carter's attorney's testimony was unequivocal and credible. (*Id.* at PageID 1321.) The post-conviction court found Carter's testimony unbelievable and almost nonsensical. (*Id.* at PageID 1321-22.) The post-conviction court determined that Mayes' trial counsel's tactical decision was a legitimate trial strategy. (R.,

Order, ECF No. 1913 at PageID 993.) The claim was not raised during the post-conviction appeal.

The post-conviction court determined that Mayes failed to present evidence or testimony establishing that counsel's failure to request a complete jury instruction on both circumstantial evidence and the lesser-included offense of second-degree murder was deficient or prejudiced Petitioner's right to a fair trial. (*Id.* at PageID 993.) The claim was abandoned on post-conviction appeal.

Trial counsel testified that he filed a motion for a special jury instruction asking for an instruction declaring Beecham and Blayde to be accomplices as a matter of law. (R., Post-conviction Hr'g. ("Tr."), ECF No. 19-15 at PageID 1142.) Trial counsel testified that the judge did not give the instruction and left the matter for the jury to decide. (*Id.*) Petitioner Mayes testified that trial counsel spoke of filing a motion for that instruction but did not file the motion. (*Id.*, ECF No. 19-16 at PageID 1241.) The post-conviction court determined the issue was without merit because trial counsel preserved the issue for appeal and the TCCA addressed it. (R., Order, ECF No. 19-13 at PageID 994.) The claim was abandoned on post-conviction appeal.

Trial counsel testified that he objected when the State moved to reopen the proof to call Vivian Massey to the stand. (R., Post-conviction Hr'g. Tr.), ECF No. 19-15 at PageID 1169.) The judge overruled the objection. (*Id.*) Counsel testified that he incorporated the objection into the motion for a new trial. (*Id.*) Counsel testified that, after further research, he did not believe it was a viable issue for appeal. (*Id.*) Trial counsel was not asked why he did not have Massey explain what the gang terminology "violation" meant in the Traveling Vice Lords. Mayes testified that he did not remember trial counsel objecting to Massey's testimony. (*Id.*, ECF No.

19-16 at PageID 1253.) Mayes admitted that trial counsel cross-examined Massey. (*Id.* at PageID 1253.) Mayes testified that trial counsel did not ask the questions that Mayes wanted asked and did not ask enough questions. (*Id.* at PageID 1253-54.) Mayes did not testify that he wanted counsel to have Massey define the gang terminology for a "violation". The post-conviction court determined that the claim was without merit because counsel did object to the reopening of the proof. (R., Order, ECF No. 19-13 at PageID 996.) These issues were not raised during the post-conviction appeal.

Ineffective assistance of state post-conviction counsel can establish cause to excuse a Tennessee prisoner's procedural default of a substantial federal habeas claim that his trial counsel was constitutionally ineffective. *Sutton*, 745 F.3d at 787. To qualify as "substantial" under *Martinez*, a claim must have "some merit" based on the controlling standard for ineffective assistance of counsel. *Martinez*, 566 U.S. at 14.

Martinez and *Trevino* cannot excuse Petitioner's default of these claims of ineffective assistance. *Martinez* does not encompass claims that post-conviction appellate counsel was ineffective. *See Martinez*, 566 U.S. at 15 ("*Coleman* held that an attorney's negligence in a postconviction proceeding does not establish cause, and this remains true except as to initial-review collateral proceedings for claims of ineffective assistance of counsel at trial.") The procedural default of these claims of ineffective assistance occurred when post-conviction counsel exercised his discretion to limit the brief to the TCCA to the strongest arguments. Appellate counsel has no duty to raise frivolous issues and may exercise his discretion to limit a brief to the TCCA to the strongest arguments. Issues 3-7 are barred by procedural default and are **DENIED**.

The issues raised in this petition are without merit and barred by procedural default. The petition is **DISMISSED WITH PREJUDICE**. Judgment shall be entered for Respondent.

V. APPELLATE ISSUES

There is no absolute entitlement to appeal a district court's denial of a § 2254 petition. *Miller-El v. Cockrell*, 537 U.S. 322, 335 (2003). The Court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to a § 2254 petitioner. Rule 11, Rules Governing Section 2254 Cases in the United States District Courts. A petitioner may not take an appeal unless a circuit or district judge issues a COA. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22(b)(1). A COA may issue only if the petitioner has made a substantial showing of the denial of a constitutional right, and the COA must indicate the specific issue or issues that satisfy the required showing. 28 U.S.C. §§ 2253(c)(2)-(3). A "substantial showing" is made when the petitioner demonstrates that "reasonable jurists could debate whether (or, for that matter, agree that) 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 (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)); *Henley v. Bell*, 308 F. App'x 989, 990 (6th Cir. 2009) (per curiam) (holding a prisoner must demonstrate that reasonable jurists could disagree with the district court's resolution of his constitutional claims or that the issues presented warrant encouragement to proceed further).

A COA does not require a showing that the appeal will succeed. *Miller-El*, 537 U.S. at 337; *Caldwell v. Lewis*, 414 F. App'x 809, 814-15 (6th Cir. 2011) (same). Courts should not issue a COA as a matter of course. *Bradley v. Birkett*, 156 F. App'x 771, 773 (6th Cir. 2005) (quoting *Slack*, 537 U.S. at 337).

In this case, there can be no question that the claims in this petition are without merit and barred by procedural default. Because any appeal by Petitioner on the issues raised in this petition does not deserve attention, the Court **DENIES** a certificate of appealability.

In this case for the same reasons the Court denies a certificate of appealability, the Court determines that any appeal would not be taken in good faith. It is therefore **CERTIFIED**, pursuant to Fed. R. App. P. 24(a), that any appeal in this matter would not be taken in good faith, and leave to appeal *in forma pauperis* is **DENIED**.[13]

IT IS SO ORDERED, this 4th day of March 2019.

s/ Samuel H. Mays, Jr.
SAMUEL H. MAYS, JR.
UNITED STATES DISTRICT JUDGE

[13]If Petitioner files a notice of appeal, he must pay the full $505 appellate filing fee or file a motion to proceed *in forma pauperis* and supporting affidavit in the Sixth Circuit Court of Appeals within thirty (30) days of the date of entry of this order. *See* Fed. R. App. P. 24(a)(5).

The Order From the Sixth Circuit Court of Appeals Affirming the District Court's Judgment. Filed March 27, 2020.

e.g., "Appendix E."

NOT RECOMMENDED FOR PUBLICATION

No. 19-5435

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LOUIS MAYES, Petitioner-Appellant, v. JONATHAN LEBO, Warden, Respondent-Appellee.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

ORDER

Before: BATCHELDER, McKEAGUE, and READLER, Circuit Judges.

Louis Mayes, a Tennessee prisoner proceeding pro se, appeals the district court's judgment denying his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In 2005, officers with the Memphis Police Department arrested Mayes, then 17 years of age, for the murder of Christopher Wallace. At the transfer hearing, a juvenile court judge determined that Mayes should be tried as an adult. The Shelby County (Tennessee) Grand Jury subsequently indicted Mayes on one count of first-degree premeditated murder, in violation of Tennessee Code Annotated § 39-13-202. A jury convicted Mayes as charged and the trial court imposed a life sentence that renders Mayes eligible for release after at least 51 years' imprisonment. *See Brown v. Jordan*, 563 S.W.3d 196, 197, 200-02 (Tenn. 2018). The Tennessee Court of Criminal Appeals affirmed Mayes's conviction on direct appeal. *State v. Mayes*, No.

W2007-02483-CCA-R3-CD, 2009 WL 1312629, at *8 (Tenn. Crim. App. May 11, 2009), *perm. app. denied* (Tenn. Oct. 19, 2009).

Mayes thereafter filed a state petition for a writ of error coram nobis, in which he raised multiple claims, including his right to a hearing to present newly discovered evidence. The trial court summarily denied the petition as untimely, and the Tennessee Court of Criminal Appeals affirmed. *Mayes v. State*, No. W2013-00614-CCA-MR3-CO, 2013 WL 6164467, at *8 (Tenn. Crim. App. Nov. 21, 2013). Mayes also filed a petition for post-conviction relief, arguing that he received ineffective assistance of counsel during the juvenile transfer hearing, at trial, and on appeal. The trial court denied the petition and the Tennessee Court of Criminal Appeals affirmed. *Mayes v. State*, No. W2012-01470-CCA-R3-PC, 2013 WL 6730105, at *8 (Tenn. Crim. App. Dec. 18, 2013), *perm. app. denied* (Tenn. Apr. 11, 2014). Mayes subsequently moved to reopen his post-conviction proceedings, arguing that the United States Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012), established a new constitutional right that was not recognized at the time of his trial. The trial court dismissed Mayes's motion, and the Tennessee Court of Criminal Appeals denied his application for permission to appeal. *Mayes v. State*, No. W2014-01472-CCA-R28-PC (Tenn. Crim. App. Sept. 26, 2014).

In June 2014, Mayes filed a § 2254 habeas petition, which he later amended, advancing eight claims, including a claim that his life sentence is unconstitutional in light of *Miller*. The district court denied Mayes's habeas petition. This court issued Mayes a certificate of appealability solely with respect to his *Miller* claim. *Mayes v. Lebo*, No. 19-5435, slip op. at 3 (6th Cir. Aug. 23, 2019) (order). On appeal, Mayes argues that his life sentence "is a de facto mandatory life without parole sentence that exceeds the life expectancy of juvenile offenders," and therefore runs afoul of the Supreme Court's holding in *Miller*.

We review the district court's decision to deny Mayes's habeas petition de novo. *See Newman v. Metrish*, 543 F.3d 793, 795 (6th Cir. 2008). The Antiterrorism and Effective Death Penalty Act of 1996 "prohibits a federal habeas court from upending a state criminal judgment unless a state court's rejection of a constitutional claim was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court

of the United States.'" *Atkins v. Crowell*, 945 F.3d 476, 477 (6th Cir. 2019) (quoting 28 U.S.C. § 2254(d)(1)). This is a difficult standard to meet. *Metrish v. Lancaster*, 569 U.S. 351, 357-58 (2013). To warrant habeas relief, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

In *Miller*, the Supreme Court held that a sentence of "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" 567 U.S. at 465; *see also Montgomery v. Louisiana*, 136 S. Ct. 718, 732-36 (2016) (holding that *Miller* applies retroactively). In denying Mayes's application for permission to appeal the trial court's denial of his motion to reopen his post-conviction proceedings, the Tennessee Court of Criminal Appeals determined that "Tennessee's sentencing scheme for juveniles convicted of first[-]degree murder does not run afoul of *Miller*" because "Tennessee statutes do not mandate a sentence of life without parole when a defendant is convicted of first[-]degree murder for acts committed as a juvenile." Rather, a juvenile may be sentenced to either life or, if certain processes are followed, to life without parole.

The state appellate court's decision was neither "contrary to" nor an "unreasonable application" of *Miller*. *See* 28 U.S.C. § 2254(d)(1). We recently held that:

> [w]hether read broadly or narrowly, *Miller* creates a legal rule about life-without-parole sentences. And, whether one looks at [a Tennessee prisoner's life] sentence formally or functionally, he did *not* receive a life-without-parole sentence. He will be eligible for release after at least 51 years' imprisonment. *See Brown*, 563 S.W.3d at 197. *Miller*'s holding simply does not cover a lengthy term of imprisonment that falls short of life without parole.

Atkins, 945 F.3d at 478 (citing *Starks v. Easterling*, 659 F. App'x 277, 280-81 (6th Cir. 2016); *Bunch v. Smith*, 685 F.3d 546, 551 (6th Cir. 2012)). The fact that Mayes is eligible for release after 51 years' imprisonment materially distinguishes his case from *Miller*. *See id.* at 478-79 (citing *Lockyer v. Andrade*, 538 U.S. 63, 74 & n.1 (2003)). Moreover, by arguing that his life sentence "is a de facto mandatory life without parole sentence" that exceeds his life expectancy,

Mayes essentially asks us to expand *Miller*'s holding to cover life sentences that include a lengthy prison term before any potential release. But "[a] state decision cannot have unreasonably *applied* a Supreme Court precedent if a habeas petition needs a federal court 'to *extend* that precedent' to obtain relief." *Id.* at 479 (quoting *White v. Woodall*, 572 U.S. 415, 426 (2014)).

Accordingly, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Tennessee Supreme Court case Brown v. Jordan, that shows Tennessee Code Annotated Sections 40-35-211; 40-35-501; and 41-21-236, In great detail.

e.g.) "Appendix F."

WESTLAW

Brown v. Jordan
Supreme Court of Tennessee, AT NASHVILLE. December 6, 2018 563 S.W.3d 196 *(Approx. 9 pages)*

563 S.W.3d 196
Supreme Court of Tennessee,
AT NASHVILLE.

Cyntoia **BROWN**

v.

Carolyn **JORDAN**

No. M2018-01415-SC-R23-CO
Assigned on Briefs October 11, 2018
FILED 12/06/2018

Synopsis

Background: Following affirmance, 2014 WL 5780718, of denial of motion for post-conviction relief from state court sentence to life in prison after conviction for first-degree murder, felony murder, and aggravated robbery, petitioner sought federal writ of habeas corpus. The United States District Court for the Middle District of Tennessee, John T. Nixon, Senior District Judge, 2016 WL 8711705, denied petition. Petitioner appealed. The Sixth Circuit Court of Appeals, 2018 WL 3689660, certified question to Tennessee Supreme Court.

Holding: The Supreme Court, Roger A. Page, J., held that a defendant convicted of first-degree murder that occurred on or after date specified by release eligibility statute may be released after service of at least 51 years if the defendant earns the maximum allowable sentence reduction credits; abrogating *Vaughn v. State*, 202 **S.W.**3d 106.

Certified question answered.
Post-Conviction Review

West Headnotes (7)

Change View

1 **Statutes** Intent
A court's overarching purpose in construing statutes is to ascertain and effectuate legislative intent without expanding a statute beyond its intended scope.

2 **Statutes** Natural, obvious, or accepted meaning
Statutes Context
Words used in a statute must be given their natural and ordinary meaning in the context in which they appear and in light of the statute's general purpose.

3 **Statutes** Construing together; harmony
Statutes Conflict
Court endeavors to construe statutes in a reasonable manner that avoids statutory conflict and provides for harmonious operation of laws.

4 **Statutes** In general; factors considered
Where statutory language is ambiguous or a statutory conflict exists, court may consider and discern legislative intent from matters other than the statutory language, such as the broader statutory scheme, the history and purpose of the legislation, public policy, historical facts preceding or contemporaneous with the enactment of the statute, earlier versions of the statute, the caption of the act, and the legislative history of the statute.

5 **Statutes** Prior or existing law in general
Statutes Similar or related statutes

Court presumes that the General Assembly has knowledge of its prior enactments and knows the state of the law and the existence of other statutes relating to the same subject at the time it enacts new statutes.

6 **Sentencing and Punishment** Indeterminate Term
State does not have indeterminate sentences for criminal offenses. Tenn. Code Ann. § 40-35-211.

7 **Pardon and Parole** Minimum sentence, and computation of term in general
A defendant convicted of first-degree murder that occurred on or after date specified by release eligibility statute may be released after service of at least 51 years if the defendant earns the maximum allowable sentence reduction credits; abrogating *Vaughn v. State*, 202 **S.W.**3d 106. Tenn. Code Ann. §§ 40-35-501(h), 40-35-501(i).

***197 Rule 23 Certified Question of Law from the United States Court of Appeals for the Sixth Circuit, No. 16-6738 Julia Smith Gibbons, Judge**

Attorneys and Law Firms

Charles Mark Pickrell and Charles W. Bone, Nashville, Tennessee, for the appellant, Cyntoia **Brown**.

John H. Bledsoe, Nashville, Tennessee, for the appellee, Carolyn **Jordan**.

Roger A. Page, J., delivered the opinion of the Court, in which Jeffrey S. Bivins, C.J., and Cornelia A. Clark, Sharon G. Lee, and Holly Kirby JJ., joined.

OPINION

Roger A. Page, J.

We accepted certification of a question of law from the United States Court of Appeals for the Sixth Circuit that requires us to determine if a defendant convicted of first-degree murder committed on or after July 1, 1995, and sentenced to life in prison under Tennessee Code Annotated section 39-13-202(c)(3) will become eligible for release, and if so, after how many years. We conclude that a defendant so convicted and sentenced to life in prison under Tennessee Code Annotated section 39-13-202(c)(3) may be released, at the earliest, after fifty-one years of imprisonment.

I. Factual and Procedural Background

The certified question of law at issue in this appeal arises from a lawsuit Cyntoia **Brown** brought in the United States District Court for the Middle District of Tennessee ("District Court") pursuant to United States Code title 28, section 2254 against Vicki Freeman, Warden.[1] In February 2005, then-sixteen-year-old Cyntoia **Brown** was charged with criminal offenses involving the 2004 shooting death of Johnny Allen. *State v. **Brown***, No. M2007-00427-CCA-R3-CD, 2009 WL 1038275, at *3 (Tenn. Crim. App. Apr. 20, 2009), *perm. app. denied* (Tenn. Sept. 28, 2009). After a transfer hearing in juvenile court, Ms. **Brown** was transferred to criminal court, where her case was tried before a jury. *Id.* at n.3. The jury convicted her of premeditated first-degree murder, felony murder, and especially aggravated robbery. *Id.* at *12. The trial court merged the murder convictions and imposed a mandatory sentence of life imprisonment to run concurrently with a twenty-year sentence for especially aggravated robbery.[2] *Id.* at *12 n.6, *35. In its sentencing order, the trial court noted that Ms. **Brown** "must serve at ***198** least fifty-one (51) calendar years before she is eligible for release...."[3]

Ms. **Brown** filed a timely petition for post-conviction relief, in which she claimed her life sentence was unconstitutional under *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). The post-conviction court denied relief, and that decision was affirmed on appeal. ***Brown** v. State*, No. M2013-00825-CCA-R3-PC, 2014 WL 5780718 (Tenn. Crim. App. Nov. 6, 2014), *perm. app. denied* (Tenn. May 15, 2015).

Ms. **Brown** subsequently filed a petition for writ of habeas corpus under United States Code title 28, section 2254 in the District Court, in which she alleged, *inter alia*, that her mandatory minimum sentence of life imprisonment constitutes cruel and unusual punishment prohibited under *Miller v. Alabama*. The District Court denied relief, reasoning that *Miller* prohibits a mandatory sentence of life without the possibility of parole for juvenile offenders, and Ms. **Brown** received a life sentence, not a sentence of life without the possibility of parole. ***Brown*** *v. Freeman*, No. 3:15-cv-00712, 2016 WL 8711705, at *8 (M.D. Tenn. Oct. 28, 2016). Ms. **Brown**'s appeal from that decision is currently pending before the United States Court of Appeals for the Sixth Circuit, which certified the following question for this Court's consideration:

> Will a defendant convicted of first-degree murder committed on or after July 1, 1995, and sentenced to life in prison under Tennessee Code Annotated [section] 39-13-202(c)(3) become eligible for release and, if so, after how many years?

Brown *v.* ***Jordan***, No. M2018-01415-SC-R23-CO (Tenn. Oct. 11, 2018) (order accepting certification).

II. Standards of Review

Tennessee Supreme Court Rule 23, section 1 provides that

> [t]he Supreme Court may, at its discretion, answer questions of law certified to it by ... a Court of Appeals of the United States.... This rule may be invoked when the certifying court determines that, in a proceeding before it, there are questions of law of this state which will be determinative of the cause and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court of Tennessee.

1 2 3 4 5 Further, the answers to these questions of law depend upon the interpretation of statutes; therefore, we apply the familiar rules of statutory construction. *Shorts v. Bartholomew*, 278 **S.W.**3d 268, 274 (Tenn. 2009). A court's overarching purpose in construing statutes is to ascertain and effectuate legislative intent without expanding a statute beyond its intended scope. *Baker v. State*, 417 **S.W.**3d 428, 433 (Tenn. 2013). Words used in a statute "must be given their natural and ordinary meaning in the context in which they appear and in light of the statute's general purpose." *Mills v. Fulmarque, Inc.*, 360 **S.W.**3d 362, 368 (Tenn. 2012) (citations omitted). We endeavor to construe statutes in a reasonable manner that "avoids statutory conflict and provides for harmonious operation of the laws." *Baker*, 417 **S.W.**3d at 433 (internal quotations omitted). Where statutory language is ambiguous or a statutory conflict exists, we may consider and discern legislative intent from matters other than the statutory language, "such as the broader statutory scheme, the history and purpose of the legislation, public policy, historical facts preceding or contemporaneous ***199*** with the enactment of the statute, earlier versions of the statute, the caption of the act, and the legislative history of the statute." *Womack v. Corr. Corp. of Am.*, 448 **S.W.**3d 362, 366 (Tenn. 2014) (citing *Pickard v. Tenn. Water Quality Control Bd.*, 424 **S.W.**3d 511, 518 (Tenn. 2013)). We presume that the General Assembly has knowledge of its prior enactments and knows the state of the law and the existence of other statutes relating to the same subject at the time it enacts new statutes. *Shorts*, 278 **S.W.**3d at 277 (citing *Wilson v. Johnson Cnty.*, 879 **S.W.**2d 807, 810 (Tenn. 1994)).

III. Analysis

The certified question concerns the interpretation and application of the Tennessee sentencing statutes governing release eligibility of criminal defendants under Tennessee Code Annotated sections 40-35-501(h) and (i). Those sections currently provide:

> (h)(1) Release eligibility for each defendant receiving a sentence of imprisonment for life for first degree murder shall occur after service of sixty percent (60%) of sixty (60) years less sentence credits earned and retained by the defendant, but in no event shall a defendant sentenced to imprisonment for life be eligible for parole until the defendant has served a minimum of twenty-five (25) full calendar years of the sentence, notwithstanding the governor's power to reduce prison overcrowding pursuant to title 41, chapter 1, part 5, any sentence reduction credits authorized by § 41-21-236 or any other provision of law relating to sentence credits. A defendant receiving a sentence of imprisonment for life for

first degree murder shall be entitled to earn and retain sentence credits, but the credits shall not operate to make the defendant eligible for release prior to the service of twenty-five (25) full calendar years.

(2) There shall be no release eligibility for a defendant receiving a sentence of imprisonment for life without possibility of parole for first degree murder.

(i)(1) There shall be no release eligibility for a person committing an offense, on or after July 1, 1995, that is enumerated in subdivision (i)(2). The person shall serve one hundred percent (100%) of the sentence imposed by the court less sentence credits earned and retained. However, no sentence reduction credits authorized by § 41-21-236 or any other provision of law, shall operate to reduce the sentence imposed by the court by more than fifteen percent (15%).

(2) The offenses to which subdivision (i)(1) applies are:

(A) Murder in the first degree;

(B) Murder in the second degree;

(C) Especially aggravated kidnapping;

(D) Aggravated kidnapping;

(E) Especially aggravated robbery;

(F) Aggravated rape;

(G) Rape;

(H) Aggravated sexual battery;

(I) Rape of a child;

(J) Aggravated arson;

(K) Aggravated child abuse;

(L) Aggravated rape of a child;

(M) Sexual exploitation of a minor involving more than one hundred (100) images;

(N) Aggravated sexual exploitation of a minor involving more than twenty-five (25) images; or

***200** (O) Especially aggravated sexual exploitation of a minor.

Tenn. Code Ann. § 40-35-501(h), (i).[4]

At first blush, it may appear that sections (h) and (i) are in conflict. Such a conclusion is not unreasonable, given the lack of clarity within the statute that could cause the subsections in question to be read as contradictory to each other. Indeed, the Tennessee Attorney General opined as much in a 1997 opinion when responding to a question about how to calculate the term of confinement for a defendant convicted of a first-degree murder committed on or after July 1, 1995. *See* Tenn. Att'y Gen. Op. 97-098, 1997 WL 449672 (July 1, 1997). While the Attorney General correctly opined that a defendant sentenced to life imprisonment for a first-degree murder committed on or after July 1, 1995, is eligible for release, at the earliest, after service of fifty-one years, the Attorney General incorrectly concluded that a conflict exists between sections (h) and (i). Further, to the extent our opinion in *Vaughn v. State*, 202 **S.W.**3d 106 (Tenn. 2006), endorsed the Attorney General's opinion that a conflict exists between these two provisions, that part of the opinion is abrogated.

[6] Tennessee does not have indeterminate sentences for criminal offenses. Tennessee Code Annotated section 40-35-211 requires the imposition of a determinate sentence in all felony and misdemeanor cases.

> Specific sentences for a felony shall be for a term of years or months or life, if the defendant is sentenced to the department of correction ... There are no indeterminate sentences. Sentences for all felonies and misdemeanors are determinate in nature, and the defendant is responsible for the entire

> sentence undiminished by sentence credits of any sort, except for credits authorized by ... § 41-21-236.

Tenn. Code Ann. § 40-35-211(1). The determinate sentence for a life sentence is sixty years, as set forth in Tennessee Code Annotated section 40-35-501(h)(1). For a defendant convicted of a first-degree murder committed *before* July 1, 1995, the release eligibility occurs after service of sixty percent of sixty years less any sentence credits earned, but those sentence credits cannot operate to enable a defendant to become eligible for release until a minimum of twenty-five calendar years have been served. Tenn. Code Ann. § 40-35-501(h)(1).

When the General Assembly added subsection (i) in 1995, the minimum sentence a defendant must serve prior to becoming eligible for release was increased from sixty percent to one-hundred percent not only for those convicted of first-degree murder and given a life sentence but also for convictions of the other enumerated offenses listed in subsection (i)(2). The addition of subsection (i) to 40-35-501 did not alter the provision in section 40-35-501 setting forth the length of the determinate sentence. It merely altered the release eligibility for the sentence. Thus, first-degree murders committed either before or after July 1, 1995, carry the same determinate sentence length of sixty years. However, for first-degree murders committed *on or after* July 1, 1995, a defendant must serve one hundred percent of sixty years less any sentence credits received, but the sentence credits cannot operate to reduce the sentence imposed by more than fifteen percent. Tenn. Code Ann. § 40-35-501(i). Fifteen ***201** percent of sixty years is nine years, thus resulting in service of a minimum fifty-one-years. As such, a defendant who commits a first-degree murder on or after July 1, 1995, may be released, at the earliest, after service of fifty-one years. [6]

The Attorney General opined in 1997 that retention of subsection (h) created a conflict when subsection (i) was added because subsection (h) provides a twenty-five-year floor before a defendant sentenced to life for first-degree murder becomes eligible for release and subsection (i) raises that floor. Finding no way to reconcile the two provisions, the Attorney General opined that Tennessee Code Annotated section 40-35-501(h)(1) was repealed by implication by the enactment of Public Chapter 492, to the extent the two provisions conflict. As noted by the Attorney General, the legislative history indicates that the intent of subsection (i) was to increase the floor from sixty percent (as provided in subsection (h)) to one-hundred percent but to retain the sixty-year sentence for first-degree murder. *See* Tenn. Att'y Gen. Op. 97-098, 1997 WL 449672, at *2 (citing Special Report to the House Judiciary Comm., Tape # 1, May 3, 1995, at 672). The petitioner contends that the Attorney General's reasoning is flawed because under a proper statutory construction, the only possible way to read these two provisions together is to find that under the rule of specificity, subsection (h) controls as it applies to first-degree murder.

However, both interpretations are flawed. Subsection (h) was retained for two reasons. First, as noted in the Attorney General's opinion, subsection (h) sets forth the determinate sentence of sixty years for a life sentence, which was not changed by the addition of subsection (i). Second, because subsection (h) applies only to first-degree murders, for which there is no statute of limitation, the sentencing laws pertaining to release eligibility for a life sentence for a first-degree murder committed prior to July 1, 1995, by necessity, must remain in effect. Therefore, the release eligibility provisions of subsection (h) do not conflict with the release eligibility provisions of subsection (i)(1) but instead provide for a different release eligibility for first-degree murders (among other offenses) occurring on or after July 1, 1995. This interpretation gives effect to the legislative intent without broadening the statute beyond its intended scope and allows all provisions to be given fair import to their terms in a way that promotes justice and effectuates the objectives of the criminal code.

Indeed, we indicated as much in *Vaughn*. In that case, the Court considered whether defense counsel were ineffective for failing to object to erroneous jury instructions regarding their clients' change in release eligibility under Tennessee Code Annotated section 40-35-501(i). *Vaughn*, 202 **S.W.**3d at 116-20. The defendants in that case committed a first-degree murder on July 2, 1995, the day after the effective date of subsection (i). *Id.* at 110, 118. Counsel, unaware of the changes to release eligibility for first-degree murder, failed to challenge jury instructions that stated the defendants' release eligibility for a life sentence was twenty-five years pursuant to subsection (h) rather than fifty-one years pursuant to subsection (i). *Id.* at 110, 119. To reach the merits of the ineffective assistance ***202** of counsel claim, the Court discussed the underlying issue – that is, what was the release eligibility for a first-degree murder committed on or after July 1, 1995. *Id.* at 118. The Court

referenced the Attorney General's 1997 opinion and the potential conflict between subsections (h) and (i) and seemed to agree that a conflict existed between the two in that "it was not expressly stated that section (h) would no longer apply to a person committing an offense on or after July 1, 1995." *Id.* at 118-19. In resolving that conflict, the Court stated, "As for the conflict in the statutes, well-settled principles of statutory construction make it clear that the most recently enacted statute repeals by implication any irreconcilable provisions of the former act." *Id.* at 118 (citing *Tennessee-Carolina Transp., Inc. v. Pentecost*, 211 Tenn. 72, 362 **S.W.**2d 461, 463 (1962)). Relevant to the question at issue here, the Court observed that "[t]he passage of section 40-35-501(i) did not repeal section (h), as (h) still applies to a person committing an offense before July 1, 1995." *Vaughn*, 202 **S.W.**3d at 118.

To the extent *Vaughn* affirms the Attorney General's opinion that an irreconcilable conflict exists between subsections (h) and (i), that portion of the opinion is abrogated. As we have determined, no conflict exists between these statutory provisions. Both subsections remain in full effect and are not irreconcilable; therefore, no part of subsection (h) is repealed by implication. *Vaughn*, however, correctly held that a defendant convicted of first-degree murder committed on or after July 1, 1995, may be released after serving at least fifty-one years in confinement. *Vaughn*, 202 **S.W.**3d at 117.

IV. Conclusion

7 A defendant convicted of first-degree murder that occurred on or after July 1, 1995, may be released after service of at least fifty-one years if the defendant earns the maximum allowable sentence reduction credits. The Clerk shall transmit this opinion to the United States Court of Appeals for the Sixth Circuit and to the parties in accordance with Rule 23, section 8 of the Rules of the Tennessee Supreme Court. Costs in this Court are taxed to the respondent, Carolyn **Jordan**.

All Citations

563 S.W.3d 196

Footnotes

1 Ms. Freeman is no longer the warden of the prison where Ms. **Brown** is confined. Carolyn **Jordan** was substituted as the respondent in the federal court proceedings upon her appointment as Warden. *See, e.g.*, Tenn. R. App. P. 19(c).

2 The trial court initially sentenced the defendant to twenty years for especially aggravated robbery. Based on a discrepancy between the indictment and the judgment of conviction, the Court of Criminal Appeals modified the defendant's conviction to aggravated robbery and remanded the matter to the trial court for resentencing. On remand, the trial court sentenced the defendant to an eight-year sentence concurrent with the life sentence. ***Brown*** *v. State*, No. M2013-00825-CCA-R3-PC, 2014 WL 5780718, at *1 (Tenn. Crim. App. Nov. 6, 2014), *perm. app. denied* (Tenn. May 15, 2015).

3 We take judicial notice of the court records and actions in earlier proceedings in this case. *See Nunley v. State*, 552 **S.W.**3d 800, 806 n.3 (Tenn. 2018).

4 Section (i) was added in 1995 when the Tennessee General Assembly ratified 1995 Tenn. Pub. Acts, ch. 492, §§ 1,2.

5 It is important to note that a defendant convicted of a first-degree murder that occurred on or after July 1, 1995, will not necessarily become eligible for release after service of fifty-one years. A defendant's release will depend on the sentence credits a defendant receives under Tennessee Code Annotated section 41-21-236 or other applicable law governing sentence credits. Tenn. Code Ann. § 40-35-501(i).

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