Appendix A

No. 19-5874

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Apr 01, 2020
DEBORAH S. HUNT, Clerk

QUAMINE JONES,

Petitioner-Appellant,

v.

TONY MAYS, WARDEN,

Respondent-Appellee.

ORDER

Before: GRIFFIN, KETHLEDGE, and STRANCH, Circuit Judges.

Quamine Jones petitions for rehearing en banc of this court's order entered on January 8, 2020, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

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Filed: April 01, 2020

Mr. Quamine Jones
Riverbend Maximum Security Institution
7475 Cockrill Bend Boulevard
Nashville, TN 37243-0471

Re: Case No. 19-5874, *Quamine Jones v. Tony Mays*
Originating Case No.: 2:14-cv-02501

Dear Mr. Jones,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Mr. Thomas Austin Watkins

Enclosure

Appendix B

No. 19-5874

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

QUAMINE JONES,

Petitioner-Appellant,

v.

TONY MAYS, Warden,

Respondent-Appellee.

ORDER

Quamine Jones, a Tennessee prisoner proceeding *pro se*, appeals a district court order denying his motion for relief from judgment, which sought to challenge this Court's order dismissing his untimely appeal in his federal habeas proceeding, filed pursuant to 28 U.S.C. § 2254. Jones has filed an application for a certificate of appealability and a motion for leave to proceed *in forma pauperis*.

In December 2006, a jury convicted Jones of first-degree premeditated murder, in violation of Tennessee Code Annotated § 39-13-202. The trial court sentenced him to life in prison. The Tennessee Court of Criminal Appeals affirmed, and the Tennessee Supreme Court denied leave to appeal. *State v. Jones*, No. W2007-01111-CCA-R3-CD, 2008 WL 4963516 (Tenn. Crim. App. Nov. 21, 2008), *perm. app. denied* (Tenn. Apr. 27, 2009). In 2010, Jones filed a petition for post-conviction relief, which the trial court denied. The Tennessee Court of Criminal Appeals affirmed, and the Tennessee Supreme Court denied leave to appeal. *Jones v. State*, No. W2012-02108-CCA-R3-PC, 2013 WL 6175261, at *6 (Tenn. Crim. App. Nov. 22, 2013), *perm. app. denied* (Tenn. Apr. 9, 2014).

In June 2014, Jones filed a § 2254 habeas petition, arguing that trial and appellate counsel performed ineffectively, that the State failed to disclose exculpatory evidence, and that the police

engaged in misconduct. On September 22, 2017, the district court dismissed Jones's § 2254 petition, finding that his claims were either meritless or procedurally defaulted. Jones filed a notice of appeal on October 30, 2017. This Court dismissed the appeal for lack of jurisdiction because Jones's notice of appeal was untimely and he had not filed a motion to extend the time for filing an appeal. *Jones v. Lebo*, No. 17-6418, slip op. at 2 (6th Cir. Feb. 8, 2018) (order). Jones filed an amended notice of appeal on July 12, 2018, which this Court also dismissed for lack of jurisdiction. *Jones v. Hutchinson*, No. 18-5726, slip op. at 2 (6th Cir. July 26, 2018) (order).

On September 21, 2018, Jones filed a Federal Rule of Civil Procedure 60(b)(1) and (6) motion for relief from judgment, arguing that this Court erred in holding that his first notice of appeal was untimely under Federal Rules of Appellate Procedure 4(a)(1)(A), (c)(1), and 26(c). He asked the district court to enter an order vacating and reinstating its September 22, 2017, judgment dismissing his § 2254 petition to allow him an opportunity to file a timely notice of appeal. The district court denied Jones's Rule 60(b) motion, finding that it did "not have the authority to correct a mistake of law made by the Sixth Circuit." The district court declined to issue a certificate of appealability and denied leave to proceed *in forma pauperis* on appeal.

In his application for a certificate of appealability, Jones states that he submitted his notice of appeal to prison officials for mailing on October 17, 2017. He also argues the merits of his substantive grounds for relief.

A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner may meet this standard by showing that reasonable jurists could debate whether the petition should have been determined in a different manner or that the issues presented were "adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). If the petition was denied on procedural grounds, the petitioner must show "at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

If a notice of appeal was not filed in a timely manner "for reasons other than lack of notice," a party may file a Rule 60(b) motion asking the district court to vacate and re-enter its original judgment so that he can file a timely notice of appeal. *Tanner v. Yukins*, 776 F.3d 434, 441 (6th Cir. 2015). But reasonable jurists would agree that Jones was not entitled to such relief under Rule 60(b)(1), because he did not allege that the district court's September 22, 2017, judgment was a result of "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1).

Rule 60(b)(6), a residual clause, permits relief for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). Nevertheless, relief under this subsection is available "only in exceptional or extraordinary circumstances" and "only as a means to achieve substantial justice." *Tanner*, 776 F.3d at 443 (quoting *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990)). Reasonable jurists would agree that Jones's Rule 60(b) motion did not cite any such exceptional circumstances. That motion simply argued that this Court—not the district court—misapplied the Federal Rules of Appellate Procedure. Even assuming that such an argument, if meritorious, could be raised under Rule 60(b)(6), reasonable jurists would agree that relief is not warranted here. Jones states in his application for a certificate of appealability that he submitted his notice of appeal to prison officials for mailing on October 17, 2017, but the certificate of service on the notice of appeal is dated October 25, 2017, and the notice of appeal was stamped as "outgoing" from the prison mailroom on October 26, 2017. Jones could not have signed and dated the notice of appeal on October 25, 2017, if he had mailed it on October 17, 2017.

Jones also argued in his Rule 60(b) motion that this Court failed to apply Rule 26(c), which states, in relevant part, that "[w]hen a party may or must act within a specified time after being served, 3 days are added after the period would otherwise expire under Rule 26(a), unless the paper is delivered on the date of services stated in the proof of service." Fed. R. App. P. 26(c). But Rule 26(c) does not apply to notices of appeal. *See Jackson v. Chandler*, 463 F. App'x 511, 513 (6th Cir. 2012) (per curiam); *Ultimate Appliance CC v. Kirby Co.*, 601 F.3d 414, 416 (6th Cir. 2010).

Accordingly, Jones's application for a certificate of appealability is **DENIED**, and his motion for leave to proceed *in forma pauperis* is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Appendix C

No. 19-6084

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

QUAMINE JONES,

Petitioner-Appellant,

v.

TONY MAYS, Warden,

Respondent-Appellee.

ORDER

Before: SUHRHEINRICH, COOK, and READLER, Circuit Judges.

This matter is before the court upon initial consideration to determine whether this appeal was taken from an appealable order.

Quamine Jones filed a petition for a writ of habeas corpus on June 26, 2014, and the district court dismissed it on September 22, 2017. Jones appealed the September 22 decision, but this court dismissed the appeal for lack of jurisdiction because the notice of appeal was filed late. *See Jones v. Lebo*, No. 17-6418 (6th Cir. Feb. 8, 2018). Jones's amended notice of appeal was dismissed because it was filed late and duplicated his previous appeal. *See Jones v. Hutchinson*, No. 18-5726 (6th Cir. July 31, 2018). On September 21, 2018, Jones filed a motion for relief from judgment under Federal Rule of Civil Procedure 60(b). He argued that this court made a substantive mistake of law when it dismissed his appeal on the basis of a late notice of appeal. He asked the district court to vacate and reinstate the judgment previously entered in this case to allow him to file a timely appeal. On July 22, 2019, the district court denied the Rule 60(b) motion, stating that it lacked authority to correct a mistake of law made by this court and lacked jurisdiction to review this court's ruling. Jones appealed the July 22 ruling (appeal No. 19-5874). On September 12, 2019, the district court denied Jones a certificate of appealability. Jones appealed

the September 12, 2019, ruling, and that appeal was docketed in this court as appeal No. 19-6084, the current appeal.

This court lacks jurisdiction over appeal No. 19-6084. An order denying a motion for a certificate of appealability is not appealable. *Sims v. United States*, 244 F.3d 509, 509 (6th Cir. 2001). "The proper procedure when a district court denies a certificate of appealability is for the petitioner to file a motion for a certificate of appealability before the appellate court in the appeal from the judgment denying the motion to vacate." *Id.* (citing Fed. R. App. P. 22(b)(1)). This court will decide in appeal No. 19-5874 whether it will grant a certificate of appealability. *See* Fed. R. App. P. 22(b).

It is ordered that appeal No. 19-6084 is **DISMISSED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Appendix D

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

QUAMINE JONES, Petitioner, v. JAMES M. HOLLOWAY, Warden. Respondent.	No. 14-cv-02501-JPM-tmp

ORDER DENYING MOTION FOR RELIEF FROM JUDGMENT

Before the Court is the Petitioner's Motion for Relief from Judgment filed September 21, 2018. (ECF No. 44.) Petitioner requests that this Court vacate and set aside the judgment previously entered by the Court. (Id. at PageID 1129.) Petitioner contends that his appeal to the Sixth Circuit was timely filed and argues that the court of appeals made a mistake of law and failed to follow applicable substantive law of the Federal Rules of Appellate Procedure. (Id. at PageID 1131.) For the below reasons, the Motion for Relief from Judgment is DENIED.

I. Background

Petitioner is serving a life sentence for first-degree murder. (ECF No. 36, PageID 1071.) Petitioner filed a petition for a writ of habeas corpus on June 26, 2014, which the Court dismissed on September 22, 2017. (ECF No. 36.) The Clerk's Office received Petitioner's notice of appeal on October 30, 2017. (ECF No. 38.) The outgoing envelope was dated October 26, 2017 with a certificate of service dated October 25, 2017. (Id. at PageId 1113-14.) On February 8, 2018, the Sixth Circuit dismissed the appeal for lack of jurisdiction because the notice of appeal was not filed within the required thirty days. (ECF No. 40.) Petitioner's amended notice of appeal, ECF No. 41, was also dismissed for

the same reason on July 31, 2018. (ECF No. 43.) and his second application for a certificate of appealability was not considered (ECF No. 5.) On September 21, 2018, Petitioner filed a motion for relief from judgment under Federal Rule of Civil Procedure 60(b). (ECF No. 44.) Respondent filed a response on October 4, 2018. (ECF No. 46.) Petitioner filed a reply on October 26, 2019. (ECF No. 47.)

II. Discussion

Petitioner alleges that the Sixth Circuit made a substantive mistake of law when it denied his appeal for lack of jurisdiction. (ECF No. 44 at PageID 1131.) This Court does not have the authority to correct a mistake of law made by the Sixth Circuit. See 16 Charles Alan Wright, et al., *Federal Practice and Procedure* § 3938 (3d ed. Sept. 2018 update) (a request for relief going "direct[ly] to the correctness of the court of appeals ruling" cannot be decided by a district court). The District Court lacks jurisdiction to review the Sixth Circuit's ruling. Id. Accordingly, Petitioner's Motion for Relief is DENIED.

SO ORDERED, this 22nd day of July, 2019.

/s/ Jon P. McCalla
JON P. McCALLA
UNITED STATES DISTRICT JUDGE

Appendix E

Jones v. Hutchinson

United States Court of Appeals, Sixth Circuit.July 26, 2018Not Reported in Fed. Rptr.2018 WL 4998186 ***(Approx. 2 pages)***

Attorneys and Law Firms

ORDER

*1 This matter is before the court to determine whether we have jurisdiction over appeal No. 18-5726.

The habeas corpus petition was dismissed on September 22, 2017. Quamine Jones filed a notice of appeal with the district court on October 30, 2017. The appeal was docketed as appeal No. 17-6418 and was dismissed on February 8, 2018, because the notice of appeal was late. On July 12, 2018, Jones filed an "Amended Notice of Appeal" from the September 22, 2017 judgment. In the "Amended Notice of Appeal," Jones continues to explain why his October 30, 2017 notice of appeal was late. The appeal was docketed as appeal No. 18-5726, the current appeal.

The July 12, 2018 notice of appeal is late as applied to the September 22, 2017 judgment. *See* 28 U.S.C. § 2107(a). Jones's failure to timely file a notice of appeal deprives this court of jurisdiction. Compliance with the statutory deadline in § 2107(a) is a mandatory, jurisdictional prerequisite that this court may neither waive nor extend. *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 21 (2017); *Bowles v. Russell*, 551 U.S. 205, 214 (2007).

The notice of appeal docketed as appeal No. 18-5726 is also construed as a duplicate of appeal No. 17-6418. As stated previously, this court dismissed appeal No. 17-6418 on the basis of a late notice of appeal. Jones cannot file another direct appeal from the same district court judgment because he believes this court erred in its decision. A new notice of appeal seeking to have this court reconsider its prior decision is not appropriate.

It is ordered that appeal No. 18-5726 is **DISMISSED.**

Appendix F

No. 17-6418

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Feb 08, 2018
DEBORAH S. HUNT, Clerk

QUAMINE JONES,

Petitioner-Appellant,

v.

JONATHAN LEBO, Warden,

Respondent-Appellee.

ORDER

Before: BATCHELDER, GRIFFIN, and LARSEN, Circuit Judges.

This matter is before the court upon consideration of Quamine Jones's response to this court's order directing him to show cause why his appeal should not be dismissed on the basis of a late notice of appeal.

28 U.S.C § 2107(a) requires a notice of appeal to be filed in a civil case "within 30 days after entry of the judgment, order or decree." In this case, the district court entered its judgment on September 22, 2017. Any notice of appeal was due to be filed on or before October 23, 2017. The notice of appeal, with an October 25, 2017 certificate of service date, and stamped "OUTGOING OCT 26, 2017 WTSP MAILROOM," was filed in the district court on October 30, 2017. The notice of appeal is late. *See* 28 U.S.C § 2107(a); Fed. R. App. P. 4(a), 26(a).

In response to the show-cause order, Jones asks this court "to show some compassion and accept [his] notice of appeal" because he has been in segregation since October 6, 2017, "waiting to be transferred to another facility." He states that he received the district court's decision on September 27, 2017, five days after the decision. He appears to argue that the appeal period started upon receipt of the judgment. He indicates that he has no access to the prison law library and that his library form gets lost, thrown away, or does not make it to the library or legal aide

"due to the carelessness of some staff member in [the] segregated unit." He indicates that there is no notary in the segregation unit, that it takes a week to two weeks to receive legal material from the library or legal assistance, and that "[he has] no choice but to be patience [sic] and wait for the library staff, legal aide, notary, etc. . . . to respond to [his] request form." The time for filing a notice of appeal runs from entry of the judgment, not receipt of the judgment. *See* 28 U.S.C § 2107(a); Fed. R. App. P. 4(a)(1); *see also Gnesys, Inc. v. Greene*, 437 F.3d 482, 485 (6th Cir. 2005); *Reid v. White Motor Corp.*, 886 F.2d 1462, 1465 (6th Cir. 1989).

Compliance with the statutory requirement in § 2107(a) that the notice of appeal be filed within thirty days after the entry of a judgment is a mandatory, jurisdictional prerequisite that this court may neither waive nor extend. *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 20 (2017); *Bowles v. Russell*, 551 U.S. 205, 214 (2007). Section 2107(c) provides for the possibility of an extension of time to file a notice of appeal in two circumstances, but a party seeking such an extension must file a motion asking for more time. *See* § 2107(c); *Martin v. Sullivan*, 876 F.3d 235, 237 (6th Cir. 2017). Jones has not filed such a motion, and the court will not treat this notice of appeal as a motion for more time to file an appeal. *See Martin*, 876 F.3d at 237. This court does not have jurisdiction over this appeal.

It is ordered that the appeal is **DISMISSED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Appendix G

Jones v. Holloway

United States District Court, W.D. Tennessee, Western Division.September 22, 2017Not Reported in Fed. Supp.2017 WL 6811990 ***(Approx. 22 pages)***

Attorneys and Law Firms

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

JON PHIPPS MCCALLA, UNITED STATES DISTRICT JUDGE

*1 On June 26, 2014, Petitioner Quamine Jones, Tennessee Department of Correction ("TDOC") prisoner number 422514, an inmate 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.) On May 5, 2015, Respondent filed the state court record. (Record ("R."), ECF No. 20.) On May 6, 2015, Respondent filed an answer to the petition. (Answer, ECF No. 22.) On June 5, 2015, Jones filed a reply.[1] (Reply, ECF No. 25.) On June 25, 2015, Respondent supplemented the state court record. (Supplemental ("Supp.") R., ECF No. 27.) On June 26, 2015, Jones filed an amended reply.[2] (Amended ("Am.") Reply, ECF No. 28.)

As more fully discussed below, the issues Petitioner raises in the petition fall into two categories: 1) whether the state court identified and applied the correct federal legal principles or 2) whether the claim is procedurally defaulted. For the reasons discussed below, the petition is **DISMISSED.**

I. STATE COURT PROCEDURAL HISTORY

On December 14, 2006, a Shelby County Criminal Court jury convicted Quamine Jones of first degree murder. (R., Minutes ("Mins"), ECF No. 20-1 at Page ID 111.) The trial court sentenced Jones to life in prison. (R., Judgment, ECF No. 20-1 at PageID 112.) Jones appealed. (R., Notice of Appeal, ECF No. 20-1 at PageID 123.) The Tennessee Court of Criminal Appeals ("TCCA") affirmed. *State v. Jones*, No. W2007-01111-CCA-R3-CD, 2008 WL 4963516 (Tenn. Crim. App. Nov. 21, 2008), *perm. app. denied* (Apr. 27, 2009).

On April 2, 2010, Jones 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. 20-13 at PageID 721-41.) On May 10, 2010, counsel was appointed to represent him. (R., Order, ECF No. 20-13 at PageID 762.) On January 26, 2011, counsel filed an amended petition. (R., Am. Pet., ECF No. 20-13 at PageID 743-46.) Counsel filed three additional amended petitions. (R., Second Am. Pet., ECF No. 20-13 at PageID 747-50, Third Am. Pet., ECF No. 20-13 at PageID 751-54, Fourth Am. Pet., ECF No. 20-13 at PageID 755-59.) The post-conviction court conducted an evidentiary hearing and, on September 18, 2012, entered an order denying relief. (R., Order, ECF No. 20-13 at PageID 766-77.) The TCCA affirmed. *Jones v. State*, No. W2012-02108-CCA-R3-PC, 2013 WL 6175261 (Tenn. Crim. App. Nov. 22, 2013), *perm. app. denied* (Apr. 9, 2014).

On April 30, 2014, Jones filed a state habeas petition in the Shelby County Criminal Court. (Supp. R., Pet., ECF No. 27-1 at PageID 990-1010.) On December 4, 2014, the habeas court dismissed the petition for lack of any "factual or legal basis meriting Habeas Corpus relief". (Supp. R., Order, No. 27-1 at PageID 1038.)

The TCCA opinion on direct appeal summarized the evidence presented at trial:

*2 At trial, Ronald Crabtree, the brother-in-law of the victim, Terry Albertson, identified a photograph of the victim taken sometime during his life, and the State introduced this photograph into evidence.

Trial counsel recalled without specificity that [the victim's[3]] girlfriend testified at trial, identifying Petitioner as the shooter. Trial counsel did not recall if he questioned [the victim's] girlfriend about discussions she had with the State about getting a deal for her testimony. Trial counsel could not recall if [the victim's] girlfriend was dressed in prison clothing at trial.

Trial counsel did not recall if he objected to testimony by a detective about a cell phone found at the scene of the crime. Apparently, a cell phone was located near the victim's body. The phone contained an outgoing voice mail message indicating that it belonged to "Antwon" or "Twon." Trial counsel was able to make a preliminary objection to the inclusion of any hearsay statements during the detective's testimony. Additionally, trial counsel objected to the detective's testimony about Petitioner's nickname. The trial court overruled both objections.

Trial counsel testified that he prepared and filed a basic motion for new trial in order to preserve appellate review. He was relieved as counsel after the filing of the initial motion. However, trial counsel testified that had he represented Petitioner on appeal, he would have amended the motion to raise the indictment issue. Appellate counsel was hired by Petitioner and a second motion for new trial was filed raising additional issues.

Petitioner testified at the hearing. According to Petitioner, he was in Houston, Texas near the end of 2005 for his sister's funeral. He was arrested around January 2, 2006, after being pulled over for a traffic offense. When Petitioner was pulled over, a search of his name revealed that there was an outstanding fugitive warrant for murder. Petitioner remembered that he went to court several days after his arrest and learned that he was being extradited to Tennessee. Petitioner did not fight extradition; he was returned to Memphis.

*4 Petitioner was, according to his testimony, indicted on January 19, 2006. Petitioner testified that there was a preliminary hearing set but that the hearing never took place. Petitioner also acknowledged that trial counsel filed a motion to dismiss the indictment but insisted that trial counsel never argued the motion.

Petitioner confirmed that his middle name was Twon and acknowledged that trial counsel did object to the admission of testimony about his nickname but claimed counsel did not object to the hearsay testimony from the detective about what he heard on the cell phone recovered at the scene.

Petitioner recalled that [the victim's girlfriend] was a witness at trial. He thought that she was dressed in prison attire. Petitioner did not recall trial counsel asking her if she had worked out a deal with the State.

After the conviction, Petitioner stated that he sought leave of the court to remove trial counsel because counsel was not prepared. Appellate counsel represented Petitioner at the hearing on the motion for new trial and on appeal. Petitioner testified that his conviction was affirmed on appeal.

Jones v. State, 2013 WL 6175261, at *2-*3.

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"[4] 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 Fed.Appx. 575, 579 (6th Cir. 2010).

There is a procedural default doctrine 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

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.[7] "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, 466 U.S. at 687, 693); *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.*

*7 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 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

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, Jones raises the following issues[9]:

A. Trial counsel provided ineffective assistance by:

(1) failing to prepare adequately for trial (Pet., ECF No. 1 at 3);

(2) failing to obtain exculpatory evidence (*id.*);

(3) failing to investigate a state's witness (*id.*);

(4) failing to obtain DNA evidence (*id.*);

(5) failing to investigate police misconduct (*id.*);

(6) failing to object to hearsay testimony regarding the voice mail of a cell phone (*id.*);

(7) failing to investigate alibi witness (*id.*);

(8) failing to argue the motion to dismiss the indictment (*id.*);

*9 (9) failing to request to be relieved from representation (*id.*); and

(10) failing to impeach witness Jennifer Woods. (*Id.*)

B. Appellate counsel provided ineffective assistance by failing to appeal the following issues:

(1) police misconduct (*id.* at PageID 4);

(2) the trial court's failure to dismiss the indictment (*id.*);

(3) the trial court's admission of hearsay (*id.*); and

(4) the trial court's denial of the motion to replace trial counsel. (*Id.*)

C. The State failed to disclose deals made with Jennifer Woods in exchange for her testimony (*id.* at PageID 5);

D. The police engaged in misconduct involving Jennifer Woods (*id.* at PageID 6); and

E. The trial court erred by denying Jones' motion to replace trial counsel. (*Id.* at PageID 9.)

Three issues of ineffective assistance of trial counsel were presented to the TCCA in the post-conviction appeal: **A(6)** failure to object to hearsay testimony about the voice mail of a cell phone; **A(8)** failure to argue the motion to dismiss the indictment; and **A(10)** failure to impeach witness Jennifer Woods. (R., Br. of the Appellant, ECF No. 20-16 at PageID 853.) One issue of ineffective assistance of appellate counsel was presented to the TCCA in the post-conviction appeal: **B(2)** failure to appeal the claim that trial counsel should have filed a timely motion to dismiss the indictment. (*Id.*) **Issue C** was raised on direct appeal. (R., Br. of the Appellant, ECF No. 20-9 at PageID 608.) Respondent concedes that issues **A(6)**, **A(8)**, **A(10)**, **B(2)**, and **C** were exhausted in the post-conviction appeal. Issues **A(1)-(5)**, **A(7)**, **A(9)**, **B(1)**, and **B(3)**, **D**, and **E** have never been reviewed by the TCCA. Respondent contends that issues **A(1)-(5)**, **A(7)**, **A(9)**, **B(1)**, and **B(3)**, **D**, and **E** are barred by procedural default and that issues **D** and **E** fail to comply with Rule 2 of the Rules Governing Section 2254 Cases in the United States District Courts and fail to state a legally or factually cognizable constitutional claim. (Answer, ECF No. 22.)

IV. ANALYSIS OF PETITIONER'S CLAIMS

A. Ineffective Assistance of Counsel

*10 **1. Exhausted Claims:** Trial counsel failed: **A(6)** to object to hearsay testimony about the voice mail of a cell phone (Pet., ECF No. 1 at PageID 3.); **A(8)** to argue the motion for dismissal of the indictment (*id.*); and **A(10)** to impeach witness Jennifer Woods (*id.*). Appellate counsel failed: **B(2)** to appeal the trial court's failure to dismiss the indictment. (*Id.* at PageID 4.)

Before reviewing the testimony from the post-conviction hearing, the TCCA observed that Jones contended that trial counsel "was ineffective because counsel failed to properly argue and appeal whether the indictment should have been dismissed for failure to hold a preliminary hearing; that trial counsel failed to properly cross-examine [the victim's] girlfriend about the deal she reached with the State; and that trial counsel failed to object to a detective's testimony about what he heard when he dialed the voice mail of a cell phone that was found at the scene of the murder." *Jones v. State*, 2013 WL 6175261, at *4. The TCCA reviewed and summarized the post-conviction testimony. *Id.*, at *2-*3; *supra*

*11 (*Id.* at PageID 307.) The trial court advised counsel that he could object as the testimony developed. (*Id.*)
The prosecutor again asked Detective Merritt what steps he took in determining a suspect and Merritt responded:

The nights that I went out to the scene there were several witnesses that we spoke with. We interviewed them, we obtained information from them about what the witnesses observed there at the scene. During the investigation at the scene we also recovered a cellular telephone.

(*Id.* at PageID 308.) The prosecutor asked Merritt if he developed a name for the suspect and Merritt replied, "a first name or a nickname ... Antwon or Twon. And, we obtained that from a witness." Counsel approached the bench and objected to the testimony. (*Id.*) The trial court responded:

He said he got it from another source. I'm going to allow the testimony about the name. It's hearsay but it's acceptable because it's not solicited for the truth of the matter asserted, only that it was said, the name. I'm going to allow it.

(*Id.* at PageID 308-09.) Counsel continued to object to testimony that the officer "went in his police files" and the Court responded that the officer did not say that. (*Id.* at PageID 308.)
The prosecutor asked Detective Merritt how he obtained the cell phone. (*Id.*) Merritt responded:

When I went out to the scene of the shooting the night that it occurred there was a cell phone that was on the parking [sic] in the immediate area where Mr. Albertson was the victim of a shooting. We collected that cell phone. The following day I spoke with a Ms. Woods who was there when the shooting occurred and received information from Ms. Woods regarding a cellular telephone number that she received from Twon a day or so before the shooting.

(*Id.*) Merritt identified photographs of the cell phone at the scene and the cell phone in a sealed evidence bag. (*Id.* at PageID 310.)
Merritt testified that he was able to associate the telephone with Quamine Jones. (*Id.*) The prosecutor asked Merritt about information received from Jennifer Woods and trial counsel objected. (*Id.* at PageID 311.) The trial court responded that, he understood the nature of the objection, but the objection was overruled. (*Id.*) Merritt testified that he received information from Ms. Woods that the telephone number of Antwon was written on a slip of paper in the victim's car. (*Id.* at PageID 312.) Merritt searched the victim's car, checked the victim's wallet, and recovered a slip of

for a preliminary hearing, an indictment was returned by the Grand Jury of Shelby County, Tennessee charging the defendant with murder in the first degree. This indictment was returned on January 19, 2006." This obviously was not a correct statement of the facts, as the indictment was returned prior to the petitioner's being returned to Tennessee [on] February 3rd and having the arrest warrant served on him [on] February 6th, so he could not have set his case for a preliminary hearing prior to being returned to Tennessee. There is no showing in the record before this court when, or if, the petitioner was arraigned in General Sessions Court, and when, or if, the General Sessions arrest warrant was ultimately dismissed.

*13 While a preliminary hearing is not constitutional[ly] required, it is a critical stage of a criminal prosecution mandated by law. *Moore v. State*, 578 S.W.2d 78, 80 (Tenn. 1979); *State v. Whaley*, 51 S.W.3d 568, 570 (Tenn. Crim. App. 2000). In *Moore*, the Tennessee Supreme Court created an exception to the thirty-day limitation in the last sentence of Rule 5(e), holding that:

[T]he thirty-day limitation ... is applicable only when all parties—including the defendant, who must act promptly—have acted in good faith and in compliance with the statute. The failure of the court or the prosecution to exercise good faith and to abide the law operates to toll the statute and preclude its invocation.

Moore, 578 S.W.2d at 82. Thus, "[g]enerally, the State may seek an indictment by the grand jury subsequent to a dismissal of a warrant and prior to a preliminary hearing, and the indictment starts a new proceeding." *Whaley*, 51 S.W.3d at 570-71 (citing *Waugh v. State*, 564 S.W.2d 654, 660 (Tenn. 1978)). The State is however, precluded from pursuing a grand jury indictment when it " 'acting in bad faith, effectively denies the accused a preliminary hearing.' " *Id.* (quoting *State v. Golden*, 941 S.W.2d 905, 908 (Tenn. Crim. App. 1996)). In the petitioner's situation, he was arraigned in Criminal Court on February 15th and the motion to dismiss was filed in Criminal Court within thirty days of his arraignment on March 15th.

Tenn. R. Crim. P. 5(e)(1) states that any "defendant arrested or served with a criminal summons prior to indictment or presentment for a misdemeanor or felony, except small offenses, is entitled to a preliminary hearing," and Rule 5(e)(4) states that if "an indictment or presentment is returned against a defendant who has not waived his or her right to a preliminary hearing, the circuit or criminal court shall dismiss the indictment or presentment on motion of the defendant filed not more than thirty days from the arraignment on the indictment or presentment." This court finds that his attorney timely filed the motion on March 15th in Criminal Court within thirty days of arraignment. However, Rule 5(a) states as follows:

(a) In General.—

(1) Appearance Upon an Arrest.—Any person arrested—*except upon a capias pursuant to an indictment* or presentment—shall be taken without unnecessary delay before the nearest appropriate magistrate of:

(A) the county from which the arrest warrant issued; or

(B) the county in which the alleged offense occurred if the arrest was made without a warrant, ...

(emphasis supplied). This petitioner was arrested by officials in Texas after being pulled over for a traffic offense (presumably with the addition of another suspended license charge). They then discovered the warrant outstanding from Shelby County. While he was being held there for the issuance of a Governor's Warrant in Tennessee pursuant to the Texas Code of Criminal Procedure, Article 51.13 (the Texas codification of the Uniform Criminal Extradition Act, enacted by all 50 states), he was indicted. When he was extradited and arrived in Tennessee on February 3rd, the capias was served on him that same day, three days prior to the service of the other two General Sessions warrants. As he had been served with a capias pursuant to an indictment for first degree murder, this court finds that he did not even have to be taken before a General Sessions magistrate on that charge, pursuant to Rule 5(a)(1), much less be given a preliminary hearing. This court was presented with no proof that the State acted in bad faith in seeking the indictment prior to his extradition. The indictment was found prior to the petitioner's being returned to this state, and is not the kind of situation usually confronting Tennessee courts on such motions to dismiss in which a defendant, after demanding a preliminary hearing in General Sessions Court is subsequently indicted prior to the hearing, or the State fails to put any real proof on at the hearing, allowing dismissal of the charges and a later ensuing indictment. The defendant was initially arrested for other charges in Texas, and after being held for extradition in Tennessee, was brought to Tennessee on a Governor's Warrant pursuant to the Uniform Criminal Extradition Act. The failure of the

*15 The State's failure to disclose impeachment evidence was discovered when appellate counsel conducted discovery for the motion for new trial. Appellate counsel then raised the issue on direct appeal. The TCCA discussed the issue and ruled as follows:

At the hearing on the defendant's motion for new trial, Jennifer Woods testified that she had asked the district attorney's office whether the State would drop charges related to a "car incident" if she testified against the defendant. After Woods testified that she told the truth at the defendant's trial, the following colloquy took place between Woods and defense counsel:

[Defense Counsel]: And, they told you that if you did so that the car case would go away; is that correct?

[The Witness]: Not in those words, but something like that.

[Defense Counsel]: Something like that?

[The Witness]: Uh-huh. (Affirmative response.)

[Defense Counsel]: And—

[The Witness]: That they could see what they could do is pretty much what it was-the way it was put.

[Defense Counsel]: And, well, your understanding was that if you got up and testified against Mr. Jones that the charges against you would be dropped; is that correct?

[The Witness]: I was hoping.

[Defense Counsel]: That was your understanding?

[The Witness]: It was never said, yes, exactly it will be dropped, but they said they would see what they can do. I had confidence it would be, but they never said.

[Defense Counsel]: Is there any particular reason that you had confidence it would be?

[The Witness]: Yeah, because a lot of that had a lot to do with this.

On cross-examination, Woods acknowledged that the State did not make any promises to her in exchange for her testimony but that she was "hopeful that it would be worked out."

Although Woods's testimony at the motion for new trial hearing did not establish that the State reached an actual agreement with her in exchange for her testimony, it was sufficient to show that discussions on the issue took place. Furthermore, these discussions, which can reasonably be construed to have influenced her decision to testify on the State's behalf, would have been relevant to impeach her trial testimony. We conclude, therefore, that the State improperly suppressed evidence of the discussions that took place between the prosecutor and Woods regarding the disposition of the charges pending against her in exchange for testimony, the charges ultimately being dismissed. Nonetheless, given the overwhelming evidence against the defendant, the improperly suppressed evidence was not material in that there was not a reasonable probability that the result of the proceeding would have been different had it been disclosed to the defense. We conclude, therefore, that although the defendant has shown that he requested the information, that the State suppressed it, and that it would have been favorable to his defense, he has not shown that it was material and thus has not met his burden of establishing a *Brady* violation in the case.

State v. Jones, 2008 WL 4963516, at *7.

Trial counsel did not recall whether he asked Woods about any deals with the State on her pending charges, but agreed that it was important to know if deals existed. (R., Post-conviction Tr., ECF No. 20-14 at PageID 807-08.) Counsel recalled that Woods testified in prison clothes but did not know that her case was later dismissed. (*Id.* at PageID 813.)

*16 The post-conviction court reviewed this claim of ineffective assistance and held:

No proof has been offered that the State made any deals with Ms. Woods for her testimony. She testified in jail clothes at trial, and so obviously the jury knew that she was in some legal trouble. In the direct appeal of the petitioner's conviction, the Court of Criminal Appeals found that the State committed a Brady violation in not disclosing that Ms. Woods

evaluate the claim under the plain error doctrine. The State responds that the defendant has not shown that plain error analysis is warranted.

"When necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of an accused at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal." Tenn. R. Crim. P. 52(b). In *State v. Smith*, 24 S.W.3d 274 (Tenn. 2000), our supreme court adopted the test for plain error first announced by this court in *State v. Adkisson*, 899 S.W.2d 626 (Tenn. Crim. App. 1994). In order for us to find plain error, *Adkisson* requires that

(a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is "necessary to do substantial justice."

Smith, 24 S.W.3d at 282 (quoting *Adkisson*, 899 S.W.2d at 641-42).

A court's discretion to notice plain error is to be "sparingly exercised." *State v. Bledsoe*, 226 S.W.3d 349, 354 (Tenn. 2007). To justify reversal, the magnitude of the error must be so significant that it probably changed the outcome of the trial. *Id.* The accused has the burden of persuading an appellate court that the trial court committed plain error. *Id.* at 355. Consideration of all five factors is unnecessary when it is clear from the record that at least one of them cannot be satisfied. *Id.*

Any defendant arrested prior to indictment or presentment for a misdemeanor or felony is entitled to a preliminary hearing upon request. Tenn. R. Crim. P. 5(e). If the defendant is indicted while the preliminary hearing is being continued or at any time before he or she has been afforded a preliminary hearing on a warrant, the defendant may dismiss the indictment on motion. *Id.* No such motion to dismiss shall be granted after more than thirty days from the defendant's arrest. *Id.* The thirty-day limitation applies only when all parties have acted in good faith and in compliance with the rule. *Moore v. State*, 578 S.W.2d 78, 82 (Tenn. 1979).

*18 The State argues, and we agree, that plain error analysis of this claim is inappropriate because the record does not clearly establish what occurred in the trial court regarding this claim and the defendant has not shown that a clear and unequivocal rule of law has been breached. The record reveals that the defendant was indicted on January 19, 2006, and moved to dismiss the indictment on March 15, 2006. However, the record does not disclose when the defendant was arrested.[14] Thus, we are unable to determine whether the defendant moved to dismiss the indictment within thirty days of his arrest. If we assume that the defendant was arrested on or before January 19, 2006, then he has failed to comply with the thirty-day limitation for filing a motion to dismiss the indictment.[15] He has not alleged or shown that this limitation should be tolled because of bad faith on the part of the State. It is the duty of the appellant to prepare a fair, accurate, and complete record of what transpired in the trial court. Tenn. R. App. P. 24(b). Because the defendant has not established the existence of at least two of the factors for plain error review, we decline to consider the merits of this issue.[16]

State v. Jones, 2008 WL 4963516, at * 4.

Although Jones contends that appellate counsel did not "properly raise" this issue on direct appeal, he fails to explain or detail any other method that appellate counsel could have used to raise the issue and receive appellate review. Jones has not demonstrated any prejudice. Furthermore, Jones received appellate review of this issue during post-conviction proceedings. As discussed *supra* at pp. 18-23, the TCCA's decision in the post-conviction appeal comports with *Strickland*. Jones cannot demonstrate either ineffective assistance of counsel or prejudice. Deference to the state court decision on this issue is appropriate. Claim B(2) is **DENIED**

2. Procedurally Defaulted Claims: Petitioner raises the following additional claims of ineffective assistance: **A(1)** Failure to prepare adequately for trial (Pet., ECF No. 1 at 3), **A(2)** Failure to obtain exculpatory evidence (*id.*); **A(3)** Failure to investigate a state's witness (*id.*); **A(4)** Failure to obtain DNA evidence (*id.*); **A(5)** Failure to investigate police misconduct (*id.*); **A(7)** Failure to investigate alibi witness (*id.*); **A(9)** Failure to request to be relieved from representation (*id.*); **B(1)** Failure to appeal the issue of police misconduct (*id.* at PageID 4); **B(3)** Failure to appeal the issue of the trial court's admission of hearsay (*id.*); and **B(4)** Failure to appeal the issue of the trial court's denial of the motion to replace trial counsel (*id.*).

has failed to establish that those claims are substantial. Speculation and conclusory statements are insufficient to establish a substantial federal habeas claim.

Martinez and *Trevino* cannot excuse Petitioner's default of issues **A(1)-(5)**, **A(7)**, and **A(9)**. *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 issues **A(1)-(5)**, **A(7)**, and **A(9)** occurred when post-conviction counsel exercised his discretion to limit the brief to the TCCA to the strongest arguments. Counsel has no duty to raise frivolous issues and may exercise his discretion to limit a brief to the TCCA to the strongest arguments. Jones has not presented any evidence that requires review of issues **A(1)-(5)**, **A(7)**, and **A(9)** to prevent a fundamental miscarriage of justice. Murray v. Carrier, 477 U.S. 478, 495-96 (1986). Issues **A(1)-(5)**, **A(7)**, and **A(9)** are barred by procedural default and are **DENIED**.

*20 *Martinez* does not encompass claims that ineffective assistance of post-conviction appellate counsel can establish cause to excuse the procedural default of a claim of ineffective assistance of appellate counsel. *See* Hodges v. Colson, 727 F.3d 517, 531 (6th Cir. 2013), *reh'g and reh'g enbanc denied* (Feb. 14, 2014) ("Under *Martinez*'s unambiguous holding our previous understanding of *Coleman* in this regard is still the law—ineffective assistance of post-conviction counsel cannot supply cause for procedural default of a claim of ineffective assistance of appellate counsel."). This Court finds no reason to extend the limited holding in *Martinez* to claims other than ineffective assistance of trial counsel. Issues **B(1)**, **B(3)**, and **B(4)** are barred by procedural default and are **DENIED**.

B. State's Failure to Disclose Deals Made with Prosecution Witness Woods

Petitioner Jones alleges that the state failed to disclose any pleas, deals, or inducements made with State's witness Jennifer Woods in exchange for his testimony at trial. (Pet., ECF No. 1 at PageID 5.) Respondent contends that the state courts' rejection of this claim is not contrary to or an unreasonable application of clearly established federal law, nor is it based on an unreasonable determination of fact. (Answer, ECF No. 22 at PageID 952.)

On direct appeal, the TCCA reviewed Petitioner's claim and identified the correct legal rule:

The defendant next contends that the State failed to disclose to him that "the State's principal witness, Jennifer Woods, had obviously been offered a deal by the State since [C]lass 'C' theft charges against her were dropped after she testified at the [d]efendant's trial." He argues that this is impeachment evidence which the State had a duty to disclose. The State argues that it did not suppress impeachment evidence because the record does not show that it entered into an agreement with Woods to drop pending charges against her in exchange for her testimony.

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L.Ed. 2d 215 (1963). In order to establish a *Brady* violation, a defendant must show that he or she requested the information, the State suppressed the information, the information was favorable to his or her defense, and the information was material. State v. Edgin, 902 S.W.2d 387, 389 (Tenn. 1995). Evidence is "material" only if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense. United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L.Ed. 2d 481 (1985). Impeachment evidence, including evidence challenging the credibility of a key prosecution witness, falls within the *Brady* rule. Johnson v. State, 38 S.W.3d 52, 56-57 (Tenn. 2001).

State v. Jones, 2008 WL 4963516, at *6.

Woods' testimony at the hearing on the motion for new trial, *supra* at pp. 25-26, demonstrates that no actual agreement was made in exchange for her testimony, but discussions took place which, conceivably, influenced her decision to testify on the State's behalf. Those discussions should have been disclosed to Petitioner as impeachment evidence. The TCCA determined that Jones requested the information, that the State suppressed it, and that it would have been favorable to his defense. State v. Jones, 2008 WL 4963516, at *7. Ultimately, the TCCA held that Jones had not met his burden of establishing a *Brady* violation because he had failed to show that the evidence was material. *Id.*

*21 The legal standard pertaining to a *Brady* claim was accurately explained by the TCCA. The *Brady* standard is not met if Petitioner shows merely a reasonable possibility that the suppressed evidence might have produced a different

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 Fed.Appx. 989, 990 (6th Cir. 2009) (per curiam) (holding that 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 Fed.Appx. 809, 814-15 (6th Cir. 2011) (same). Courts should not issue a COA as a matter of course. *Bradley v. Birkett*, 156 Fed.Appx. 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 would be meritless, the Court **DENIES** a certificate of appealability.

In this case for the same reasons the Court denies a certificate of appealability, the Court finds 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**.[17]

*23 **IT IS SO ORDERED**, this 22nd day of September, 2017.

Additional material from this filing is available in the Clerk's Office.