

No. 20-5544

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 07, 2020
DEBORAH S. HUNT, Clerk

DEMARCUS COLE,

Petitioner-Appellant,

v.

KEVIN MYERS, Warden,

Respondent-Appellee.

ORDER

Before: WHITE, Circuit Judge.

Demarcus Cole, a Tennessee prisoner, appeals the district court's judgment denying his 28 U.S.C. § 2254 habeas corpus petition. Cole moves for a certificate of appealability (COA). *See* Fed. R. App. P. 22(b)(2).

In 2013, a jury found Cole guilty of first-degree felony murder and especially aggravated robbery. *State v. Cole*, No. W201302850CCAR3CD, 2014 WL 7269813, at *1 (Tenn. Crim. App. Dec. 22, 2014). Cole planned to rob Demetris Cole, and, during the robbery, another individual involved in the plan shot Demetris five times, resulting in his death two days later. Cole was sentenced to consecutive terms of life and twenty years in prison, to be served consecutively to a six-year prison term for a previous conviction. *Id.* at *1.

On appeal, Cole raised the sole issue of whether the evidence was sufficient to support his convictions. *Id.* at *5. The state appellate court concluded that it was. *Id.* at *6. The Tennessee Supreme Court denied leave to appeal. *Id.* Cole filed a petition for post-conviction relief, claiming that his counsel rendered ineffective assistance. After a hearing on the post-conviction motion, the trial court denied it, the state appellate court affirmed, and the state supreme court denied

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permission to appeal. *Cole v. State*, No. W2015-01901-CCA-R3-PC, 2016 WL 2859196, at *11 (Tenn. Crim. App. May 11, 2016).

In his § 2254 habeas petition, Cole claimed that his trial counsel rendered ineffective assistance when he failed to: 1) file a motion to suppress photos that investigating officers retrieved from his cell phone without his consent, 2) object to improper comments by the prosecutor during closing argument, and 3) explain to him the theory of criminal responsibility for another's acts under Tennessee law. Cole also argued that his Fourth Amendment protection against illegal search and seizure was violated when the investigators confiscated and examined his cell phone, and that his Fifth Amendment right against self-incrimination was violated by the prosecutor's reference to his decision not to testify at trial. The district court denied the petition and denied a COA.

In his COA motion, Cole argues that: 1) the state appellate court's analysis of his claim about trial counsel's failure to move to suppress the cell phone photos was unreasonable because the court failed to consider the "devastating impact" that the photos had on his case; 2) the prosecutor's comments regarding Cole's decision not to testify amounted to a "sufficiently grave" constitutional violation of his Fifth Amendment rights to excuse his procedural default of this claim; and 3) the procedural default of his claim that trial counsel was ineffective for failing to explain Tennessee's criminal-responsibility law should be excused because post-conviction counsel also failed to explain it to him. Cole has abandoned the remaining claims presented in his petition because his COA application does not address them. *See Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000).

To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, a petitioner must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Habeas corpus relief may be granted on claims that were adjudicated on the merits in state court only if

the state-court adjudication was “contrary to, or involved an unreasonable application of, clearly established federal law” or the state-court adjudication “was based on an unreasonable determination of the facts.” 28 U.S.C. § 2254(d). When the district court denies a habeas petition on a procedural ground without reaching the underlying constitutional claims, a COA should issue when the petitioner demonstrates “that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Ineffective Assistance of Trial Counsel

Cole argues that trial counsel was ineffective for failing to move to suppress evidence from his cell phone, including pictures of firearms in his home. To succeed on an ineffective-assistance claim, a petitioner must show both that counsel’s performance fell below an objective standard of reasonableness and that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984). In habeas proceedings, the district court must apply a doubly deferential standard of review: “[T]he question [under § 2254(d)] 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 v. Richter*, 562 U.S. 86, 105 (2011).

Shortly after the shooting, Cole voluntarily came into the police station at a police officer’s request and permitted an investigator to examine his cell phone. *Cole*, 2016 WL 2859196, at *4, *6. Investigators then obtained records from Cole’s service provider, AT&T, which the prosecutor presented as evidence of Cole’s whereabouts during and after the incident. *Id.* at *5, *7, *9. A few weeks after the incident, Cole was taken into custody on unrelated charges, and an investigator, Sergeant Chestnut, took his cell phone without his consent and performed a forensic evaluation, finding the photos of firearms. *Id.* at *4, *10. These photos were used as evidence that Cole was involved in planning the robbery and the resulting murder, because one of the firearms in the photos matched the .32 caliber type used in the murder. This evidence was also used to impeach

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Cole at trial, because he had stated to an investigator in an initial interview that he owned no firearms. Moreover, the pictures on the Cole's phone were taken as recently as six weeks before the shooting.

In its decision affirming the trial court's denial of Cole's post-conviction motion, the state appellate court rejected Cole's claim that his counsel was ineffective for failing to move for suppression of the cell phone evidence. *Id.*, at *10. The state court determined that, even assuming that counsel's performance was deficient, there was no reasonable probability that the outcome of the trial "would have been different had a motion [to suppress] been filed and granted" in light of the "bulk of the incriminating evidence against the petitioner." *Id.* at *10. The inculpatory evidence included testimony from individuals who had either been asked to participate in the robbery during Cole's planning stage, were present at the murder and heard the entire incident leading up to the shooting, or heard Cole's confession to the plan for robbing Demetrius and the resulting homicide. *Id.*

The district court concluded that the state court's prejudice determination was not unreasonable. *See Harrington*, 562 U.S. at 101. Reasonable jurists would not find that conclusion debatable, because of the abundance of incriminating evidence presented at trial. Cole's girlfriend, Kyneshia Williams, testified that Cole had asked her to "set up" the victim so that he could rob him for drugs and money, but she refused. *Cole*, 2015 WL 7269813, at *5. Cole told Williams that if she did not want to participate, he would "make other plans." *Id.* According to Williams, Cole had shown her a .40 caliber gun and a .32 caliber gun in his bedroom closet and had admitted to her that the victim had been shot five times with a .32 caliber weapon. *Cole*, 2015 WL 7269813, at *5. Cole's prison cellmate testified that Cole confessed to him that he had set the victim up for robbery and that the murder was not planned. *Id.* Ebony Jenkins, another witness, testified that she was present at the time of the shooting and that before the robbery and subsequent murder, Cole had brought two men into the apartment where the incident took place. *Id.*, at *2. In light of this inculpatory evidence, jurists of reason would agree that it was not unreasonable for the state court to conclude that admission of the photos of the weapons did not prejudice Cole's case

because, without them, there is no reasonable probability that the results of the proceeding would have been different.

Prosecutorial Misconduct/Ineffective Assistance of Counsel

In his habeas petition, Cole challenged the following portion of the prosecutor's closing argument as a violation of his Fifth Amendment right against self-incrimination:

You can't do bad in this world and get by. You can't lie. You can't lie. You can't do those things and get by. Now, the Defendant, either he never had anybody tell him, or if they told him that, he didn't listen, didn't listen. He can get up here and he can suggest that Mr. Sparks [Cole's trial counsel] can tell you he's not a party to this and maybe he's sorry for this, I don't know, but sorry is no consolation to the family of Demetris Cole.

Cole conceded that he procedurally defaulted this prosecutorial misconduct claim by failing to raise it on direct appeal and that he also defaulted his claim that his counsel was ineffective for failing to object to the prosecutor's remarks. In his COA motion, Cole confirms his default. Cole argues that the default should be excused because of the gravity of the alleged violation of his Fifth Amendment right not to incriminate himself.

Cole relies on a statement in Justice Stevens's concurring opinion in *Wainwright v. Sykes*, 433 U.S. 72, 95(1977): "[I]f the constitutional issue is sufficiently grave, even an express waiver by the defendant himself may sometimes be excused." But the Supreme Court has never recognized a "sufficient gravity" exception to the requirement that a petitioner establish cause for a procedural default and resulting prejudice before the default will be excused. See *Murray v. Carrier*, 477 U.S. 478, 496 (1986) (recognizing a single exception to the cause-and-prejudice requirement: "an extraordinary case[] where a constitutional violation has probably resulted in the conviction of one who is actually innocent"); *Nelloms v. Jackson*, 129 F. App'x 933, 936 (6th Cir. 2005). Reasonable jurists would not debate the district court's procedural ruling on these claims. See *Slack*, 529 U.S. at 484.

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Cole's Criminal Responsibility under Tennessee Law

Cole argued in his habeas petition that his trial counsel was ineffective for failing to explain his criminal responsibility for another's actions under Tennessee law. Cole conceded in his COA motion that he procedurally defaulted the claim by failing to raise it in his post-conviction motion, and he blames the ineffective assistance of his post-conviction counsel for the default.

The district court determined that the claimed ineffective assistance of post-conviction counsel could not excuse the procedural default because the underlying ineffective-assistance-of-trial-counsel claim was not substantial. The court examined the record and concluded that Cole had demonstrated familiarity with the relevant Tennessee statute and its applicability to his circumstances. Reasonable jurists could not debate the district court's determination that the underlying claim was not substantial, because, even if Cole did not fully understand the legal theory underlying his convictions, he has not shown how, but for counsel's failure to explain it, the proceedings might have resulted in a different outcome. *See Strickland*, 466 U.S. at 694.

Accordingly, this court **DENIES** Cole's request for a COA.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

Cole v. Myers

United States District Court, W.D. Tennessee, Eastern Division. | April 27, 2020 | Slip Copy | 2020 WL 1988256 (Approx. 11 pages)

2020 WL 1988256

Only the Westlaw citation is currently available.

United States District Court, W.D. Tennessee, Eastern Division.

Demarcus COLE, Petitioner,

v.

Kevin MYERS, Respondent.

No. 1:17-cv-01075-STA-jay

Signed 04/27/2020

Attorneys and Law Firms

David W. Camp, Law Offices of David Camp, PLLC, Jackson, TN, for Petitioner.

Meredith W. Bowen, Office of the Attorney General, Nashville, TN, for Respondent.

**ORDER DIRECTING CLERK TO MODIFY DOCKET, DENYING § 2254 PETITION,
DENYING CERTIFICATE OF APPEALABILITY, AND DENYING LEAVE TO APPEAL IN
FORMA PAUPERIS**

S. THOMAS ANDERSON, CHIEF UNITED STATES DISTRICT JUDGE

*1 Petitioner Demarcus Cole has filed, through counsel, a habeas corpus petition (the "Petition"), pursuant to 28 U.S.C. § 2254. (ECF No. 1.) For the following reasons, the Petition is **DENIED**.

BACKGROUND**I. State Proceedings**

In January 2013, a Madison County, Tennessee, grand jury returned an indictment charging Cole with first-degree murder, felony murder, and especially aggravated robbery. (ECF No. 16-1 at 5-8.) The State subsequently dismissed the first-degree murder charge and proceeded to trial on the remaining counts. (*Id.* at 64.)

At the jury trial, the defendant's girlfriend, Kyneshia Williams, testified that, in the early hours of October 29, 2011, the defendant called her and requested that she call the victim, Demetrius Cole, to set-up a meeting to purchase cocaine in order to rob him. *State v. Cole*, No. W2013-02850-CCA-R3-CD, 2014 WL 7269813, at *5 (Tenn. Crim. App. Dec. 22, 2014), *perm. appeal denied* (Tenn. May 18, 2015). When Williams refused to participate in the scheme, the defendant told her that he would make other plans. *Id.* "The following Sunday, the defendant showed up at her house" and "told her that the victim had been shot five times with a hollow point .32 caliber weapon—twice in the head, once in the arm, once in the chest, and once somewhere else—and that he was dead." *Id.* Williams further testified that the defendant stored two firearms at his house, one of which was a .32 caliber pistol. *Id.*

Ebony Jenkins testified that she "spent the evening of October 28–29 at the defendant's apartment and was present when the victim was shot." *Id.* at *1. She said "[t]he victim arrived at [the apartment at] about 10:00 p.m., and the three of them drank beer and smoked marijuana together." *Id.* She explained that, in the early morning hours, two men, whom she had seen outside with the defendant, came into the apartment. *Id.* Soon after, one of the men said " 'This is a f*cking robbery' as he pulled a gun on the victim." *Id.* "One of the men ordered [Jenkins] to put blankets over her head, and she complied." *Id.* While "her head [was] covered, she heard 'a commotion' and one of the two men yelling to the victim, 'Give me everything in your pockets. I want your money, your cellphone, your wallet, anything that you have in your pockets.' " *Id.* After hearing "the defendant and the second man ... leave," she heard "the sounds of further struggle between" the remaining individual and the victim. *Id.* She then heard "two gunshots, followed by three more gunshots." *Id.* When the perpetrator left the apartment, "she removed the blankets from her head to find the victim lying on the floor covered in blood." *Id.* She then called 9-1-1. *Id.*

The medical examiner testified that he "performed the autopsy of the victim's body," and determined that the "cause of death was multiple gunshot wounds." *Id.* at *2. Special Agent

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Alex Brodhag testified that the victim was shot with a .32 caliber pistol. (ECF No. 16-4 at 130.)

Sergeant Chestnut, an officer from the Jackson Police Department, testified that, on the morning of the shooting, the defendant agreed to meet with him at the police station. *Cole*, 2014 WL 7269813, at *3. While there, Cole gave a statement in which he insisted "that he was a robbery victim and had been forced at gunpoint to drive the perpetrators from the scene." *Id.* The witness further related that "[t]he defendant ... had his cell phone ... in his pocket[.]" and agreed to allow the officer to look at the device. *Id.* at *4. Chestnut discovered that "[a]ll incoming and outgoing calls, as well as any text messages, had been deleted from the defendant's phone[.]" *Id.* The defendant gave the officer several explanations for the deletions, including "that the perpetrators must have done it." *Id.*

*2 Sergeant Chestnut explained that he had another meeting with the defendant "on November 2 in the parking lot of the Family Dollar store in Henderson." *Id.* When the officer asked Cole "if he owned any firearms, ... the defendant 'was very adamant that he never owned or possessed any firearms.'" *Id.* "A couple of weeks later, however, the defendant informed Sergeant Chestnut that he had gone home ... and realized that he was missing two firearms from his apartment." *Id.* Cole "provided no explanation for why he had gone home to look for weapons that he allegedly had forgotten he owned." *Id.* Chestnut identified for the jury photographs of the defendant's apartment "that had been taken by the defendant's phone," showing "a small caliber weapon consistent with a .22, .25, or a .32, and a medium to large caliber semiautomatic firearm." *Id.* According to the officer, "during the investigation, he never released information about where the victim had been shot or what caliber weapon had been used." *Id.*

LeGraine Poston testified that he spoke with the defendant while the two were being held at the Madison County Jail. *Id.* at *5. "According to [the witness], the defendant said that he had set the victim up for a robbery because he wanted to 'get high,' that all that was supposed to happen was a robbery but that things had not gone according to plan, and that he did not want to take the blame for something that someone else had done." *Id.*

An analyst with the local planning department "testified that he had ... prepared a map of the city showing various cell phone calls with their times and the cell phone towers that had transmitted the calls." *Id.* An investigator from AT & T testified that he "us[ed] the [defendant's] cell phone records and the [analyst's] map" to determine that, in the hours after the shooting, "the defendant was moving from one location in the city to another during that time and that he never called 9-11 or law enforcement." *Id.*

"The defendant elected not to testify and rested his case without presenting any witnesses." *Id.* The jury convicted Cole of first-degree felony murder and especially aggravated robbery, and he was sentenced to "consecutive terms of life and twenty years[.]" *Id.* at *1. He took an unsuccessful direct appeal, in which he challenged the sufficiency of the evidence. *Id.* The Tennessee Supreme Court denied discretionary review. (ECF No. 16-12.)

Cole subsequently filed a state *pro se* post-conviction petition (ECF No. 16-13 at 3-8), as well as two amendments to the petition (*id.* at 28-29, 31-32). Petitioner's appointed counsel filed two additional amendments. (*Id.* at 41-46.) After an evidentiary hearing, the post-conviction trial judge denied relief from the bench and in a written order. (*Id.* at 50-52; ECF No. 16-15 at 69-79.) On appeal, the Tennessee Court of Criminal Appeals affirmed the lower court's decision and the Tennessee Supreme Court denied permission to appeal. *Cole v. State*, No. W2015-01901-CCA-R3-PC, 2016 WL 2859196, at *1 (Tenn. Crim. App. May 11, 2016), *perm. appeal denied* (Tenn. Sct. 26, 2016).

II. Federal Habeas Petition

Cole filed his Petition on April 19, 2017. (ECF No. 1.) He asserts in Claim 1 that trial counsel rendered ineffective assistance by failing to file a motion to suppress photos and information gathered from his cell phone (Claim 1A), "to object and request a mistrial due to improper references by the prosecutor during closing argument" (Claim 1B), and to explain to him the prosecution's "legal theory of 'Criminal Responsibility for the Actions of Another'" (Claim 1C). (ECF No. 1 at 6.) In Claim 2, Petitioner maintains that his right "to protection from warrantless searches by the government as provided in the Fourth Amendment to the United States Constitution" was violated when his cellular phone was examined by Jackson police officers. (*Id.* at 8.) He asserts in Claim 3 that his "right against self-incrimination as guaranteed by the Fifth Amendment to the United States Constitution was violated by the government's reference to [his] failure to testify." (*Id.* at 9.)

*3 Respondent Kevin Myers¹ filed the state-court record and a Response to the Petition. (ECF No. 16; ECF No. 17.) He argues that Claim 1A is without merit and the remaining claims are procedurally defaulted. Petitioner filed a reply, insisting that he is entitled to relief on all claims. (ECF No. 20.)

DISCUSSION

Upon review of the state court record and the parties' submissions, the Court determines that Respondent's arguments are well-taken.²

I. Legal Standards

A. Federal Habeas Review

The statutory authority for federal courts to issue habeas corpus relief for persons in state custody is provided by § 2254, as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). See 28 U.S.C. § 2254. Under § 2254, habeas relief is available only if the prisoner is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

The availability of federal habeas relief is further restricted where the petitioner's claim was "adjudicated on the merits" in the state courts. 28 U.S.C. § 2254(d). In that circumstance, the federal court may not grant relief unless the state-court decision " 'was contrary to' federal law then clearly established in the holdings of [the Supreme] Court; or ... 'involved an unreasonable application of' such law; or ... 'was based on an unreasonable determination of the facts' in light of the record before the state court." *Harrington v. Richter*, 562 U.S. 86, 100 (2011) (quoting 28 U.S.C. § 2254(d)(1)-(2)) (citations omitted).

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 when "the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at" an "opposite" result. *Williams v. Taylor*, 529 U.S. 362, 405 (2000). An unreasonable application of federal law occurs when the state court, having invoked the correct governing legal principle, "unreasonably applies the ... [principle] to the facts of a prisoner's case." *Id.* at 409.

For purposes of § 2254(d)(2), a state court's "factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010). The Sixth Circuit construes § 2254(d)(2) in tandem with § 2254(e)(1) to require a presumption that the state court's factual determination is correct in the absence of clear and convincing evidence to the contrary. *Ayers v. Hudson*, 623 F.3d 301, 308 (6th Cir. 2010) (citing *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)). A state court's factual findings are therefore "only unreasonable where they are 'rebutted by clear and convincing evidence and do not have support in the record.'" *Moritz v. Woods*, 692 F. App'x 249, 254 (6th Cir. 2017) (quoting *Pouncy v. Palmer*, 846 F.3d 144, 158 (6th Cir. 2017)) (internal quotation marks omitted).

*4 Before a federal court will review the merits of a claim brought under § 2254, the petitioner must have "exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). To be properly exhausted, a claim must be "fairly presented" through "one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 848 (1999).

The exhaustion requirement works in tandem with the procedural-default rule, which generally bars federal habeas review of claims that were procedurally defaulted in the state courts. *Id.* at 848. A petitioner procedurally defaults his claim where he fails to properly exhaust available remedies (that is, fails to fairly present the claim through one complete round of the state's appellate review process), and he can no longer exhaust because a state procedural rule or set of rules have closed-off any "remaining state court avenue" for review of the claim on the merits. *Harris v. Booker*, 251 F. App'x 319, 322 (6th Cir. 2007). Procedural default also occurs where the state court "actually ... relied on [a state] procedural bar as an independent basis for its disposition of the case." *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985). To cause a procedural default, the state court's ruling must "rest[] on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (citing *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Klinger v. Missouri*, 80 U.S. 257, 263 (1871)).

Only when the petitioner shows "cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will

result in a fundamental miscarriage of justice," will he be entitled to federal court review of the merits of a claim that was procedurally defaulted. *Id.* at 750. The ineffectiveness of post-conviction counsel may be cause to excuse the default of an ineffective-assistance-of-trial-counsel claim. *Trevino v. Thaler*, 569 U.S. 413, 423 (2013) (citing *Martinez v. Ryan*, 566 U.S. 1, 14, 16-17 (2012)). A fundamental miscarriage of justice involves "a prisoner[s] assert [ion of] a claim of actual innocence based upon new reliable evidence." *Bechtol v. Prelesnik*, 568 F. App'x 441, 448 (6th Cir. 2014).

B. Ineffective Assistance of Counsel

A claim that an attorney's ineffective assistance has deprived a criminal defendant of his Sixth Amendment right to counsel is controlled by the standards stated in *Strickland v. Washington*, 466 U.S. 688 (1984). To succeed on such a claim, a petitioner must demonstrate two elements: (1) "that counsel's performance was deficient"; and (2) "that the deficient performance prejudiced the defense." *Id.* at 687. "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 petitioner "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 the attorney's representation was "within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689 (internal quotation marks and citation omitted).

*5 An attorney's "strategic choices" are "virtually unchallengeable" if based on a "thorough investigation of law and facts relevant to plausible options...." *Strickland*, 466 U.S. at 690. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690-91.

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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.'" *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 693) (citations omitted). Instead, "[c]ounsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Id.* (quoting *Strickland*, 466 U.S. at 687).

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

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.

Id. at 105.

II. Motion to Suppress: Claims 1A and 2

Petitioner asserts in Claim 2 that the information taken from his cell phone, which included text and phone records and the photographs depicting firearms in his apartment, were improperly submitted to the jury because he did not consent to the search of the phone. (ECF No. 1 at 8; ECF No. 20 at 3.) He concedes that he agreed to a search of the phone the first time he spoke with Sergeant Chestnut, but he complains that he did not consent to a second search when the phone was taken from him during his detention on an unrelated crime. (ECF No. 20 at 3.) In Claim 1A, he maintains that trial counsel should have filed a motion to suppress the information gathered during the second search. (ECF No. 1 at 6.) Respondent argues that Claim 2 is procedurally defaulted and Claim 1A is without merit. (ECF No. 17 at 17-21, 23-24.) The Court agrees.

Cole did not argue prior to trial that the second search of his phone was done without his consent, and the time for raising that issue in the state courts has passed. See Tenn. Code Ann. § 40-30-106(g) ("A ground for relief is waived if the petitioner personally or through an

attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented[.]"). He asserts, however, that counsel's ineffective assistance in failing to file a motion to suppress the photographs is cause to excuse the procedural default. He insists that the TCCA's decision rejecting the ineffective assistance claim is unreasonable because, while the appellate court addressed his argument that counsel should have moved to suppress the text and call information retrieved from his phone, it did not address his additional contention that counsel rendered ineffective assistance by failing to seek suppression of the photographs. (ECF No. 20 at 5.) The argument is unfounded.

*6 In his post-conviction appellate brief, Cole argued that counsel was ineffective by failing to file a motion to suppress "pictures ... of weapons which were alleged to be the murder weapon[s] ... and call and text records [used] to create maps which were then entered into evidence and used to purportedly establish Mr. Cole's physical location in the hours and days following the robbery and homicide." (ECF No. 16-16 at 13 (first alteration in original).) In rejecting the argument, the TCCA identified *Strickland*'s standards and applied them to the evidence adduced at trial and the post-conviction hearing. *Cole*, 2016 WL 2859196, at *8-10. The court correctly summed-up Petitioner's argument as presenting a challenge to counsel's failure to seek suppression of the texts and call information, as well as suppression of the photographs:

The petitioner contends that the post-conviction court's ruling "misapprehends the evidence." He concedes that Sergeant Chestnut obtained his phone by consent on the first occasion but maintains that there was no consent on the second occasion, which occurred when he was in custody on unrelated charges several weeks later. According to the petitioner, his phone was removed from the property room and given to Sergeant Chestnut, who then performed a forensic evaluation of his phone. The petitioner maintained that Sergeant Chestnut recovered pictures of "weapons which were alleged to be the murder weapon[s]" and utilized call and text records to create maps to establish his location "in the hours and days following the robbery and homicide." The petitioner maintains that he did not consent to the second search of his phone.

Id. at *10.

The TCCA declined to decide whether counsel performed deficiently by failing to suppress the photographs and the phone records.³ *Id.* Instead, the court determined that Cole was not prejudiced by his attorney's conduct:

Regardless of whether counsel should have filed a motion to suppress the search of the petitioner's cell phone, we cannot conclude that there is any reasonable probability that the result of the proceeding would have been different had a motion to suppress been filed and granted. The bulk of the incriminating evidence against the petitioner came in the form of witness testimony from Kyneshia Williams, Ebony Jenkins, and LeGraine Poston, as well as the petitioner's evasiveness with the police. Moreover, as we will discuss in the section below, the call and text records that were used to create maps of the petitioner's location were recovered from the petitioner's cell phone service provider, not the phone, and were, thus, appropriate evidence. Any minimal information gleaned from the petitioner's phone was auxiliary.

Id.

Contrary to Petitioner's assertion, nothing in the TCCA's discussion suggests that its determination was based on its assessment of the prejudicial effect of the call and text information alone.⁴ Moreover, the fact that the court went on to also determine that the maps and locations of Petitioner's whereabouts were not derived from the call and text information taken from the phone does not suggest that the court overlooked the prejudicial effect of the photographs.

*7 Even if Petitioner meant to argue that the entirety of the TCCA's prejudice determination is unreasonable, the ineffective assistance claim would still be without merit. As the appellate court noted, the jury heard other, highly incriminating evidence of Petitioner's guilt besides the evidence obtained from the phone, including: the testimony of Cole's girlfriend that he attempted to involve her in a scheme to rob the victim and, when she refused to

participate, told her that he would make another plan; the testimony of a fellow jail detainee that Petitioner confessed to planning the robbery; and Ebony Jenkins's testimony regarding the events that unfolded in Petitioner's apartment which suggested that the defendant brought the two unidentified men to his home to rob the victim. Notably, too, the jury was presented with other evidence, besides the photographs, that the defendant owned firearms, including a .32 caliber pistol. See *Cole*, 2014 WL 726813, at *5. (Williams's testimony that Cole owned a .32 caliber pistol); (ECF No. 16-5 at 47-48) (Sergeant Chestnut's testimony that Petitioner admitted to him that he owned firearms and stored them in his apartment). Given this body of inculpatory evidence, the TCCA did not unreasonably conclude that counsel's failure to file a motion to suppress the contents of the phone did not prejudice Cole.

Because the TCCA's determination that counsel was not ineffective in failing to file a suppression motion was not unreasonable, Claim 1A is without merit and is **DENIED**. Claim 2 is **DISMISSED** as Petitioner has not established counsel's ineffectiveness as cause to excuse the procedural default of that claim.

III. Criminal Responsibility: Claim 1C

Petitioner asserts that trial counsel rendered ineffective assistance by failing to explain to him "the legal theory of 'Criminal Responsibility for the Actions of Another' that would be used against him." (ECF No. 1 at 6.) He alleges, specifically, that counsel did not tell him that he could be convicted of the crimes without the two other perpetrators having been charged. Respondent argues that the claim is procedurally defaulted. In his Reply, Petitioner concedes that he did not exhaust the claim, but he asserts that post-conviction counsel's failure to raise the issue is cause, pursuant to *Martinez*, to excuse the procedural default.⁵

To establish cause to excuse a default at the initial post-conviction stage, a petitioner must show that his post-conviction counsel "was ineffective under the standards of *Strickland*[]" *Martinez*, 566 U.S. at 14. He must therefore prove that post-conviction counsel performed deficiently and that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the [post-conviction] proceeding would have been different." *Strickland*, 466 U.S. at 694. A petitioner must also establish that the "underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that [he] must demonstrate that the claim has some merit." *Martinez*, 566 U.S. at 14.

Cole essentially argues that his testimony at the post-conviction hearing demonstrates that his claim is substantial. He posits that "it is apparent" from his testimony "that he critically lacked the necessary understanding of the legal theory of 'Criminal Responsibility for the Actions of Another,'" and suggests that his misapprehension of the law was the result of counsel's failure to properly advise him about the State's theory of criminal responsibility. (ECF No. 20 at 14.) The post-conviction testimony on which he relies consists of his explanation for his belief that he should not have been convicted on a theory of criminal responsibility without the State having also charged and convicted the principal offenders. Specifically, he testified at the post-conviction hearing that the Tennessee Supreme Court "held in *State versus Farren* that one can't be convicted pursuant to the theory of criminal responsibility if there's no other person guilty of the crime as the principal."⁶ (ECF No. 16-15 at 36.) He conceded on cross-examination that he was "familiar" with the statute, Tenn. Code Ann. § 39-11-407, which provides that "it is no defense that ... [t]he person for whose conduct the defendant is criminally responsible has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense or different type or class of offense, or is immune from prosecution." (*Id.* at 42-43.) He insisted, however, that "one can't be convicted ... if there's no other person." (*Id.* at 43.)

^{*8} The testimony does not suggest that the ineffective assistance claim is substantial. Specifically, Petitioner's remarks do not show that, at the time of trial, counsel failed to advise him about the applicable law regarding criminal responsibility, but only suggests that, having conducted legal research in preparation for his post-conviction proceedings, Petitioner misapprehended the import of the case law and the statute. Indeed, it may even be a mistake to perceive in his testimony a basic ignorance of the law. A review of his *pro se* post-conviction appellate brief reveals that his understanding of the legal landscape was somewhat sophisticated. Asserting that "every published opinion of the Tennessee ... Criminal Court and the Tennessee Supreme Court that addressed this defense ... involved cases in which there was a known principal offender," he posited that, consequently, the statute "presumes the existence of a party or parties other than a defendant convicted as being criminally responsible for the actions of another." (ECF No. 16-16 at 8-9 (*italics in original; bolding omitted*)). (*Id.* at 9.) He argued that he therefore could not be convicted

under the theory of criminal responsibility because the identities of the principal offenders were unknown. (*Id.*) That is the same argument he expressed during his post-conviction testimony.

Accordingly, because Petitioner's testimony does not show that the ineffective assistance claim is substantial, the procedural default is unexcused. Claim 1C is **DISMISSED**.

IV. Prosecutor's Statements: Claims 1B and 3

The Fifth Amendment's privilege against coerced self-incrimination forbids a prosecutor from commenting on a defendant's decision not to testify on his own behalf.⁷ *Griffin v. California*, 380 U.S. 609, 615 (1965). In Claim 3, Petitioner asserts that his "right against self[-] incrimination as guaranteed by the Fifth Amendment to the United States Constitution was violated by the government's reference to [his] failure to testify." (ECF No. 1 at 9.) He argues that the following statements made by the prosecutor during closing argument, as shown in italics, "suggested to the jury [that] Cole could have testified, even though the Prosecutor was aware that Cole had an absolute right not to testify":

You can't do bad in this world and get by. *You can't lie. You can't lie.* You can't do those things and get by. Now, the Defendant, either he never had anybody tell him, or if they told him that, he didn't listen, didn't listen. *He can get up here and he can suggest and Mr. Sparks can tell you he's not a party to this and maybe he's sorry for this, I don't know, but sorry is no consolation [.]*

(ECF No. 20 at 10 (emphasis supplied by Petitioner).)

Cole maintains in Claim 1B that counsel was ineffective by failing to object to the statements on the grounds that they violated his privilege against self-incrimination and deprived him of a fair trial because they constituted improper accusations that he had lied.⁸ (ECF No. 1 at 6.) Respondent argues that Petitioner procedurally defaulted both the Fifth Amendment claim and the ineffective assistance claim. (ECF No. 17 at 22-23, 24-25.) In his Reply, Petitioner concedes that he never objected to the prosecutor's comments at the time of trial or on direct appeal. (ECF No. 20 at 8.) He also admits that he litigated the ineffective-assistance issue in the post-conviction trial court but failed to present the claim to the TCCA. (*Id.* at 10.) He argues, however, that "the exhaustion rule need not apply" where the "constitutional issue is sufficiently grave[.]" (*Id.*) The argument is unavailing.

"[T]he exhaustion doctrine ... generally requires that a claim of ineffective assistance be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." *Murray v. Carrier*, 477 U.S. 478, 488-89 (1986). Where the independent claim "itself [has been] procedurally defaulted[.]" ... that procedural default may ... be excused if the prisoner can satisfy the cause-and-prejudice standard with respect to that claim." *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000) (emphasis in original).

^{*9} Petitioner's independent claim of attorney ineffective assistance, as set forth in Claim 1B, cannot be used as cause to excuse his procedural default of Claim 3. Cole did not present Claim 1B to the TCCA, and he has failed to show cause and prejudice to excuse the procedural default. To demonstrate cause, he would have to point to "some objective factor external to the defense" that prevented him from raising the issue on appeal from the denial of post-conviction relief. *Murray*, 477 U.S. at 488. He has offered no reason why he did not present the ineffective assistance claim to the TCCA.

What is more, the gravity of the alleged violations of Cole's privilege against self-incrimination and right to due process does not entitle him to a finding of prejudice. The Sixth Circuit has held that, "regardless of the nature of the underlying constitutional claim," a petitioner meets the prejudice prong of the cause-and-prejudice standard only by "show[ing] that he was *actually* prejudiced[.]" *Ambrose v. Booker*, 684 F.3d 638, 651 (6th Cir. 2012) (emphasis added). "The 'most important aspect to the [actual prejudice] inquiry is the strength of the case against the defendant' and whether a trial without errors would still have resulted in conviction." *Jones v. Bell*, 801 F.3d 556, 563 (6th Cir. 2015) (emphasis in original) (quoting *Ambrose*, 684 F.3d at 652). The evidence of Cole's guilt, as discussed *supra*, was substantial, such that a trial without the prosecutor's isolated comments or with counsel's objection would still have resulted in a conviction.

Because the procedural default of Claim 1B and, by extension, the default of Claim 3, are not excused, the claims are not properly before the Court. Claims 1B and 3 are **DISMISSED**.

For these reasons, the Petition is **DENIED**.

APPEAL ISSUES

A § 2254 petitioner may not proceed on appeal unless a district or circuit judge issues a certificate of appealability ("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. 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 v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). "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.'" *Dufresne v. Palmer*, 876 F.3d 248, 252-53 (6th Cir. 2017) (per curiam) (quoting *Slack*, 529 U.S. at 484).

In this case, reasonable jurists would not debate the correctness of the Court's decision to deny the Petition. Because any appeal by Petitioner does not deserve attention, the Court **DENIES** a certificate of appealability.

Pursuant to Federal Rule of Appellate Procedure 24(a), a party seeking pauper status on appeal must first file a motion in the district court, along with a supporting affidavit. Fed. R. App. P. 24(a). However, Rule 24(a) also provides that if the district court certifies that an appeal would not be taken in good faith, the prisoner must file his motion to proceed *in forma pauperis* in the appellate court. *Id.*

*10 In this case, for the same reason it denies a COA, the Court **CERTIFIES**, pursuant to Rule 24(a), that any appeal in this matter would not be taken in good faith. Leave to appeal *in forma pauperis* is therefore **DENIED**.⁹

IT IS SO ORDERED.

All Citations

Slip Copy, 2020 WL 1988256

Footnotes

- 1 The Clerk of Court is **DIRECTED** to substitute Kevin Myers for Kevin Genovese as Respondent. See Fed. R. Civ. P. 25(d).
- 2 Because the assertions of ineffective assistance in Claims 1A and 1B relate, respectively, to the trial errors alleged in Claims 2 and 3, the Court addresses the claims by subject matter, rather than in strict numerical order.
- 3 Pursuant to *Strickland*'s teachings, the TCCA did not "need [to] determine whether counsel's performance was deficient before [it] examin[ed] the prejudice suffered by the defendant as a result of the alleged deficiencies." *Strickland*, 466 U.S. at 697.
- 4 Petitioner does not argue that the TCCA's decision was contrary to clearly established Supreme Court law. A challenge on that ground would be without merit because the court identified and applied *Strickland*'s standards. See *Williams*, 529 U.S. at 406 ("A run-of-the-mill state-court decision applying the correct legal rule from [Supreme Court] cases to the facts of a prisoner's case would not fit comfortably within § 2254(d)(1)'s 'contrary to' clause.").
- 5 The issue raised by Claim 1C is not the same issue presented to the TCCA. On appeal from the denial of post-conviction relief, Petitioner asserted that counsel was ineffective for failing to argue that he could not be convicted on a theory of criminal responsibility because "no principal actor was ever charged or convicted of the offense." *Cole*, 2016 WL 2859196, at *6.
- 6 The case to which he referred is most likely *State v. Farmer*, 66 S.W.3d 188 (Tenn. 2001). As the TCCA noted in Petitioner's post-conviction appeal, "the

Farner opinion does not stand for the proposition that the principal offender must be known, only that there must be one." *Cole*, 2016 WL 2859196, at *9.

7 The Fifth Amendment right against self-incrimination is made applicable to "the States by reason of the Fourteenth Amendment." *Griffin*, 380 U.S. at 615.

8 A prosecutor engages in misconduct when his remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).

9 If Petitioner files a notice of appeal, he must also pay the full \$505.00 appellate filing fee or file a motion to proceed *in forma pauperis* and supporting affidavit in the Sixth Circuit Court of Appeals within thirty days.

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Cole v. State

Court of Criminal Appeals of Tennessee, AT JACKSON, May 11, 2016 Not Reported in S.W. Rptr. 2016 WL 2859196 (Approx. 9 pages)

2016 WL 2859196

Only the Westlaw citation is currently available.

SEE RULE 19 OF THE RULES OF THE COURT OF CRIMINAL APPEALS RELATING TO
PUBLICATION OF OPINIONS AND CITATION OF UNPUBLISHED OPINIONS.Court of Criminal Appeals of Tennessee,
AT JACKSON,

Demarcus Keyon COLE

v.

STATE of Tennessee

No. W2015-01901-CCA-R3-PC

Assigned on Briefs April 12, 2016

Filed May 11, 2016

Application for Permission to Appeal Denied by Supreme Court September 26, 2016

Appeal from the Circuit Court for Madison County, No. C-15-183, Roy B. Morgan, Jr., Judge

Attorneys and Law FirmsDemarcus Keyon Cole, Only, Tennessee, Pro Se (on appeal); and Joseph T. Howell,
Jackson, Tennessee (at hearing), for the appellant, Demarcus Keyon Cole.Herbert H. Slatery III, Attorney General and Reporter; Rachel E. Willis, Senior Counsel;
James G. (Jerry) Woodall, District Attorney General; and Alfred L. Earls, Assistant District
Attorney General, for the appellee, State of Tennessee.ALAN E. GLENN, J., delivered the opinion of the court, in which THOMAS T. WOODALL,
P.J., and ROBERT H. MONTGOMERY, JR., J., joined.**OPINION**

ALAN E. GLENN, J.

*1 The petitioner, Demarcus Keyon Cole, acting pro se, appeals the post-conviction court's denial of his petition for post-conviction relief, arguing he received ineffective assistance of counsel. After review, we affirm the denial of the petition.

FACTS

The petitioner was convicted of first degree felony murder and especially aggravated robbery and was sentenced to consecutive terms of life and twenty years, to be served consecutively to a six-year-sentence for a previous conviction. This court affirmed the judgments of the trial court on direct appeal, and the Tennessee Supreme Court denied the petitioner's application for permission to appeal.

On direct appeal, this court recited the underlying facts of the case as follows:

According to the State's proof at trial, the [petitioner] spent the evening of October 28-29, 2011, using cocaine and partying with friends at his Jackson apartment before he and two accomplices shot and robbed the victim, Demetris Cole. The victim died of his injuries two days later, and the [petitioner] was subsequently indicted for first degree premeditated murder, first degree felony murder, and especially aggravated robbery. The first degree premeditated murder count was, however, nolle prossed prior to trial.

The first witness at the [petitioner's] trial was Ebony Jenkins, who spent the evening of October 28-29 at the [petitioner's] apartment and was present when the victim was shot. She said the [petitioner], whom she had known for about a week, picked her up and took her to his apartment at about 9:00 p.m. that night and, after putting his two-year-old son to bed, used cocaine with her in the apartment. The victim arrived at about 10:00 p.m., and the three of them drank beer and smoked marijuana together. She and the [petitioner] used more cocaine, and later some of the [petitioner's] neighbors arrived to purchase marijuana from the victim. At about 1:00 a.m., while the [petitioner] was gone from the apartment, she and the victim had sexual intercourse in a bedroom. At about 3:30 or 4:00

Appendix 17a

a.m., the victim left to purchase more condoms and some cigarettes and she followed him out the door to get a cigarette from him before he left. Outside, she saw the [petitioner] and two other men in the [petitioner's] truck. She also saw the victim stop briefly to talk with the [petitioner].

Jenkins testified that when the victim returned to the apartment he received a telephone call from someone wanting to purchase marijuana. She said he was in the living room weighing and bagging the marijuana when the [petitioner] and two other men came into the apartment. As the three men walked to the back of the apartment, the victim asked which one wanted the bag of marijuana. Approximately thirty seconds later, the shorter of the [petitioner's] two companions returned to the living room and said, "This is a f * *ing robbery" as he pulled a gun on the victim. At about the same time, the second man came to the front of the apartment. One of the men ordered her to put blankets over her head, and she complied. As she sat on the couch with her head covered, she heard "a commotion" and one of the two men yelling to the victim, "Give me everything in your pockets. I want your money, your cellphone, your wallet, anything that you have in your pockets." Jenkins said she was unable to see anything, but the sounds she heard made her believe that the man she referred to as "the aggressor" was beating the victim.

*2 Jenkins testified that the men called the [petitioner] from the back and she heard the [petitioner] say, "I got a son. I got a son." To her, however, the [petitioner's] words did not sound sincere but instead as if he were putting on "an act" and pretending to be shocked at what was happening. She next heard "the aggressor" ordering the [petitioner] and the second man to leave, the sounds of their footsteps going down the stairs, and the sounds of further struggle between "the aggressor" and the victim. She then heard two gunshots, followed by three more gunshots. After hearing "the aggressor" leave the apartment, she removed the blankets from her head to find the victim lying on the floor covered in blood.

Jenkins testified that she called 9-1-1 on her cell phone. Later, as she was with Sergeant Chestnut of the Jackson Police Department preparing to go to the police department for an interview, she noticed she had a missed call from the [petitioner] on her cell phone. She gave Sergeant Chestnut the [petitioner's] phone number and he tried to reach the [petitioner] on his cell phone, but the [petitioner] did not answer. At Sergeant Chestnut's request, she then texted the [petitioner] using her own phone and, when the [petitioner] called back, handed her phone to Sergeant Chestnut so that he could talk to the [petitioner].

On cross-examination, Jenkins clarified that the scuffle between the aggressor and the victim did not ensue until after the [petitioner] had left the apartment. She acknowledged that the [petitioner] was not in the apartment when the victim was shot. She further acknowledged that she never mentioned the [petitioner's] voice having sounded insincere or fake in any of the three separate statements about the incident that she gave to the police. Finally, she testified that on one occasion, the [petitioner] had used the victim's vehicle to pick her up because the victim had borrowed the [petitioner's] vehicle to use on an out-of-town trip.

Officer Brandon Bankston of the Jackson Police Department testified that he was dispatched to the scene at approximately 4:50 a.m. When he arrived at the [petitioner's] apartment, he found Jenkins present and the victim, who had gunshot wounds to the chest and head, lying in front of the living room couch. A lot of blood was in the area, and it appeared as if a struggle had taken place. Although Jenkins informed them that a child had been present in the apartment, no child was located.

Officer Carrie Hart of the Jackson Police Department identified photographs she took of the crime scene, including ones that showed five .32 caliber shell casings and one spent .32 caliber bullet found in the living room and a bag with cocaine residue that was found in the bathroom.

Dr. Michael Revell, an emergency room physician at Jackson-Madison County General Hospital, testified that the victim arrived at the emergency room at approximately 5:30 a.m. in critical condition with gunshot wounds to his head, upper thorax, chest, abdomen, and hip. The victim ultimately became brain dead and passed away on October 31 after his family made the decision to have him removed from the ventilator.

Dr. Feng Li, the medical examiner who performed the autopsy of the victim's body, testified that the victim's cause of death was multiple gunshot wounds.

Aimee Oxley, Director of the Property and Evidence Unit of the Jackson Police Department, testified that no latent fingerprints of value were developed from the shell casings or any other items submitted in the case.

Tennessee Bureau of Investigation Special Agent Forensic Scientist Alex Brodhag, a firearms expert, testified that he determined that all five shell casings recovered in the case were fired from the same gun and that all three bullets—one recovered from the living room and two from the victim's body—were fired from the same gun. Because he did not have the gun, he was unable to determine whether the shell casings and the bullets were fired from the same gun.

*3 Investigator Gary Davidson, a criminal investigator with the Henderson Police Department, testified that on November 3, 2011, he searched a Henderson home at which the [petitioner] was present and recovered a Samsung AT & T cell phone, which he turned over to Sergeant Chestnut of the Jackson Police Department.

Sergeant Chris Chestnut testified that Jenkins was being detained by patrol officers outside the apartment when he arrived at approximately 5:30 a.m. on the morning of the shooting. In their preliminary conversation, Jenkins told him that the apartment belonged to the [petitioner] but that he had left the apartment immediately prior to the shooting and had not returned. He asked her to ride to the police department with him for a more extensive interview and was sitting with her in his patrol vehicle when she told him that her cell phone, which had been retrieved for her from the [petitioner's] apartment, had a missed call on it from the [petitioner]. She then gave him the [petitioner's] cell phone number, and he called the [petitioner] on his cell phone. When the [petitioner] did not answer, he asked Jenkins to text him using her phone and ask him to call her. Within seconds, the [petitioner] called and Jenkins handed the phone to him.

Sergeant Chestnut testified that the [petitioner] was evasive when he asked him his location. He asked the [petitioner] to meet him at the police department, and the [petitioner] arrived there with his son at 6:40 a.m. and gave a statement. In the statement, which Sergeant Chestnut read aloud to the jury, the [petitioner] claimed that he was a robbery victim and had been forced at gunpoint to drive the perpetrators from the scene. He also claimed that they had spared his life only because he had his young son with him. The [petitioner's] statement reads in pertinent part:

I left the apartment around 3 a.m. I went and rode around the lot of the Mix Factory. When I was leaving the Mix Factory lot, I saw two dudes walking on Old Hickory.... I've seen them in the area before when I've been at my girl's house off Tracewood. I asked the dudes if they had some powder and they said they could get some. They said they wanted \$50 for a gram. They got in the truck with me and we rode back to my apartment. I went in my apartment and got some more cash. I got in my truck where the two dudes had stayed while I was in the apartment. We pulled out and was heading toward the bypass. One of the dudes, the short dark-skinned dude, asked me if I knew where he could get some weed. I called [the victim]. [The victim] said he had some weed for sale, and we turned around and went back to my apartment.

Me and the two dudes went in my apartment. When we got in the apartment, the two dudes pulled guns. They told me to get on the ground. I laid down and they started searching my pockets. They were asking [the victim] where the weed was at. I heard one of them smack [the victim]. The taller light-skinned dude told me to get up and leave. The short one had a gun on me while I got my son and left out of the apartment. Me and my son got in my truck, and the short one got in the back seat with my son. He was holding the gun on me. My son was crying. A couple of minutes later I heard three or four gunshots. The dude in my truck told me to crank up the truck and back up. The light-skinned dude got in the truck front passenger's seat and told me to drive.... They went through my stuff in my truck. They said for me to stop the truck.... They told me that they would kill me if I didn't have my son with me. The last time I saw them they were running down Talbot.... When they were robbing us, one of them said they were Crips.

*4 Sergeant Chestnut testified that he processed the [petitioner's] vehicle when he arrived at the police department and found a laptop computer in the backseat and a green and yellow jacket, which the [petitioner] said was his, in the front passenger seat. The [petitioner] also had his cell phone and cash in his pockets. All incoming and outgoing calls, as well as any text messages, had been deleted from the [petitioner's] phone and the [petitioner] was "extremely evasive" when he asked him why. According to Sergeant

9 Chestnut, the [petitioner] gave him "a couple of different answers," including the suggestion that the perpetrators must have done it.

Sergeant Chestnut testified that his next meeting with the [petitioner] was on October 31, 2011, in front of the Tractor Supply store at Carriage House and Highland. During their brief conversation, he informed the [petitioner] of the victim's death, told him that he wanted to ask him more questions, and requested that he follow him to his office. The [petitioner] replied that he needed to shower and eat and would call him back later to meet with him. An hour or two later, the [petitioner] called to tell him he had to take a friend to work but would call him later and meet with him. Still later, the [petitioner] called to tell him he had to attend a meeting at work but would come to his office to talk after the meeting was over. Ultimately, the [petitioner] never met with him on October 31.

Sergeant Chestnut testified that his next meeting with the [petitioner] was on November 2 in the parking lot of the Family Dollar Store in Henderson. He asked the [petitioner] at that time if he owned any firearms, and the [petitioner] "was very adamant that he never owned or possessed any firearms." The [petitioner] told him he was not staying at his apartment but would not disclose where he was currently living, other than that it was in Henderson. In another meeting, the [petitioner] again denied that he owned any firearms. A couple of weeks later, however, the [petitioner] informed Sergeant Chestnut that he had gone home after meeting with him in his office on October 29 and realized that he was missing two firearms from his apartment. The explanation he provided was that the missing weapons were ones he did not use and did not even realize were in his house until after he noticed them missing. The [petitioner] provided no explanation for why he had gone home to look for weapons that he allegedly had forgotten he owned.

Sergeant Chestnut identified photographs that had been taken by the [petitioner's] phone. These appeared to show two different guns that had been photographed inside the [petitioner's] apartment—a small caliber weapon consistent with a .22, .25, or a .32, and a medium to large caliber semiautomatic firearm. He stated that during the investigation, he never released any information about where the victim had been shot or what caliber weapon had been used. Sergeant Chestnut also identified a photograph of the victim obtained from the surveillance tape of an Exxon at Carriage House and Highland, which showed the victim at 2:56 a.m. on the day of the shooting wearing the same green and yellow jacket that the [petitioner] had in his vehicle later that morning.

Craig Hobson, the human resource generalist at the company where the [petitioner] worked, testified that the [petitioner] did not work on Monday, October 31. On cross-examination, he agreed that he was not the [petitioner's] direct supervisor and therefore would not necessarily have known if the [petitioner] had a meeting with his "boss" on October 31. On redirect, he testified that there was no record of the [petitioner's] having drawn any pay for working on October 31.

*5 Kyneshia Williams, the [petitioner's] girlfriend at the time of the shooting, testified that she had met the victim through the [petitioner], who purchased cocaine from him. She said the [petitioner] called her at 3:53 a.m. on October 29, 2011, to ask her if she would "set up [the victim] at a store in Jackson so that [the petitioner] could rob him." The [petitioner] told her he was hoping to get "dope and money." When she refused to participate, the [petitioner] asked if she was sure and then said, "Well, let me know so I can make other plans." The [petitioner] called her again that night, telling her that he was at his mother's house because his apartment was being cleaned and that he was going to "get off dope" and wanted her to move to Clarksville with him. He said nothing about the victim's having just been shot at his apartment or of his having been kidnapped and robbed. The following Sunday, the [petitioner] showed up at her house. When she asked him about the victim, he told her that the victim had been shot five times with a hollow point .32 caliber weapon—twice in the head, once in the arm, once in the chest, and once somewhere else—and that he was dead. Williams testified that she had been in the [petitioner's] apartment in the past and that the [petitioner] had shown her a .40 caliber silver gun that he kept on top of his mirror in his bedroom and a .32 caliber gun that he kept in his closet.

The victim's mother, Dosha Howard, identified the store surveillance photograph of the victim wearing his green and yellow jacket. She said she and her family searched for the jacket after the victim's death but were unable to find it.

LeGraine Poston, who acknowledged that he had a conviction for attempted aggravated burglary, testified that in February 2013, he was incarcerated at the Madison County Jail in the same pod as the [petitioner], who, agitated and seeking advice, told him about his

case. According to Poston, the [petitioner] said that he had set the victim up for a robbery because he wanted to "get high," that all that was supposed to happen was a robbery but that things had not gone according to plan, and that he did not want to take the blame for something that someone else had done. He said he waited a couple of months to contact Sergeant Chestnut to tell him what he had learned because it was difficult and dangerous to contact the police while in jail. On cross-examination, he was unable to say why the [petitioner] had picked him to confide in out of all the inmates that shared their pod. On redirect, he testified that in his statement to Sergeant Chestnut, he said that the [petitioner] told him that all the victim had to do was to give up his money.

Sergeant Al Colon of the Jackson Police Department testified that he collected the victim's clothing from the hospital and found \$611 in cash in the pocket of the victim's pants.

Curtis Blake Bailey, who acknowledged he was on probation for an aggravated assault conviction, testified that he was housed at the C-Pod of the Madison County Jail with Poston when the [petitioner], who appeared "skittish," was brought to the jail. He said he saw the [petitioner] talking with Poston that night. He never saw the [petitioner] talking with anyone else and, after that first night, did not see the [petitioner] again.

Patrick Williams, a senior GIS analyst for the City of Jackson-Madison County Planning Department, testified that he had, at the request of the prosecutor, prepared a map of the city showing various cell phone calls with their times and the cell phone towers that had transmitted the calls.

William C. Carroll, a senior investigator with AT & T, identified the [petitioner's] cell phone records, which were introduced as an exhibit. Using the cell phone records and the map that had been prepared by Patrick Williams, Carroll testified that the [petitioner's] cell phone either placed or received a total of twenty-nine phone calls between 4:50 a.m., when Jenkins' 9-1-1 call was placed, and 6:00 a.m. The records indicated that the [petitioner] was moving from one location in the city to another during that time and that he never called 9-1-1 or law enforcement.

The [petitioner] elected not to testify and rested his case without presenting any witnesses. Following deliberations, the jury convicted him of first degree felony murder and especially aggravated robbery.

State v. Demarcus Keyon Cole, No. W2013-02850-CCA-R3-CD, 2014 WL 7269813, at *1 -5 (Tenn. Crim. App. Dec. 22, 2014), *perm. app. denied* (Tenn. May 18, 2015).

*6 The petitioner filed a timely *pro se* petition for post-conviction relief, as well as an amended petition, in which he asserted several claims of ineffective assistance of counsel. The post-conviction court appointed counsel to represent the petitioner, and counsel filed two more amended petitions. The post-conviction court conducted an evidentiary hearing on the petitioner's claims, at which the petitioner and trial counsel testified.

The petitioner testified that he was charged with first degree murder, felony murder, and especially aggravated robbery. He was initially appointed original counsel, but, because of a conflict, trial counsel was appointed to represent him at trial and on direct appeal. The petitioner testified that counsel did not file a pretrial motion to determine whether he was competent at the time of the offenses. He claimed that counsel should have done so because it was noted in the police report that the petitioner "was acting strangely and unkempt and hadn't slept in several days." However, the petitioner admitted that he had no previous history of mental illness and that he never asked counsel to file a motion for a mental evaluation.

The petitioner testified that trial counsel failed to seek suppression of his "cellphone and the contents thereof" because they were obtained "without the use of a warrant." The petitioner was unable to say specifically what incriminating evidence was obtained from his phone, other than "they was alleging I called a witness, and ... they tried to compare a witness to the records." On cross-examination, the petitioner acknowledged that he voluntarily went to the police station and that, while there, he allowed the investigator to see his cell phone.

The petitioner next claimed that trial counsel should have filed a motion for a bill of particulars; however, he acknowledged that the prosecutor's office had an open file policy. He also claimed that counsel should have investigated the criminal records of two of the State's witnesses, but he could not explain how that investigation would have impacted the outcome of the trial.

The petitioner testified that trial counsel should have moved to strike a portion of Ebony Jenkins' testimony concerning her impression that the petitioner's statements during the criminal episode "sounded fake." He elaborated that such testimony was not in the purview of a lay witness. The petitioner further faulted counsel for failing to object to the amendment of the indictment, even though he admitted that counsel discussed the amendment with him and advised that they should agree to the amendment.

The petitioner testified that trial counsel should have requested a more specific jury instruction on criminal responsibility and the requirement of a unanimous verdict. He also claimed that counsel should have requested a jury instruction on "causation" as an element of homicide. The petitioner further claimed that counsel should have challenged that his conviction was based on a theory of criminal responsibility when no principal actor was ever charged or convicted of the offense. On cross-examination, the petitioner acknowledged that Tennessee Code Annotated section 39-11-407 specifies that a person can be convicted under a theory of criminal responsibility even if the principal actor is not charged or convicted.

The petitioner testified that trial counsel should have challenged Kyneshia Williams' testimony about a phone call she received from him concerning his wanting to arrange a robbery of the victim. However, the petitioner could not explain how such a challenge would have affected the outcome of the case.

*7 The petitioner testified that trial counsel failed to object to testimony by Patrick Williams, a GIS analyst, and William Carroll, an AT & T investigator, about his cell phone records and the location of cell phone towers. He elaborated that the testimony was hearsay and violated his right to confront witnesses. He said that the map generated by Mr. Williams was used to show the jury "the relation to the calls that was transmitted by [his] phone." On cross-examination, the petitioner agreed that both witnesses were qualified to testify as expert witnesses and to introduce the records.

The petitioner lastly asserted that trial counsel should have objected to portions of the prosecutor's closing argument because the prosecutor misstated the evidence, misled the jury about the law, and argued facts outside the record.

Trial counsel, an attorney with fourteen years' experience, testified that he did not file a motion to suppress any information obtained from the petitioner's cell phone because the petitioner voluntarily provided his cell phone to the investigator. Counsel believed that, at that point in the investigation, the petitioner was actually still perceived as a victim, not a suspect. Counsel said that he did not file a motion to suppress the other cell phone records because those came from the petitioner's cell phone service provider and were not obtained by searching the petitioner's phone. Counsel stated that there was no legal basis to suppress the testimony of either expert witness who testified about the location of cell towers and the petitioner's proximity to them when he made or received calls. Counsel recalled challenging "the veracity" of some of the records by bringing out that there was "a glitch in the system" used by the witness from AT & T. However, the records were lawfully obtained from the phone company.

Trial counsel testified that Ebony Jenkins' testimony at trial that the petitioner "sounded fake" was the first time she had said that. However, he saw no basis to request the testimony to be stricken, although he did impeach her testimony with her prior inconsistent statements. Counsel testified that Kyneshia Williams was "the biggest problem witness that [they] had," and he challenged her testimony "as well as [he] could." Counsel recalled impeaching LeGraine Poston's testimony by showing that he was related to the victim and that he waited eight or nine months before reporting that the petitioner had confessed to him.

Trial counsel testified that the petitioner's contention that he could not be convicted under a theory of criminal responsibility for the acts of another because no principal actor had been charged or convicted was "not the current status of the law."

In investigating the case and preparing for trial, trial counsel did not see any basis for filing a motion for a mental evaluation of the petitioner. The petitioner was able to communicate with him, and the petitioner's "mental competency never came up and was never in question."

Trial counsel testified that he agreed to the amendment of the indictment because it removed "attempted" from the charge, which actually raised the State's burden of proof. Counsel also testified that he did not think any portion of the prosecutor's closing argument was objectionable, elaborating, "The State argued its version of the facts." Counsel stated

that the district attorney's office had an open file discovery policy, and he was able to get a copy of everything he needed to prepare for trial.

After the hearing, the post-conviction court made oral findings, followed by a written order, denying the petition. Noting that it assessed the credibility of the witnesses in making its determinations, the post-conviction court found that the petitioner failed to carry his burden of proof as to any of his allegations.

ANALYSIS

*8 On appeal, the petitioner argues that the post-conviction court erred in finding that trial counsel's representation was not ineffective. He claims that counsel's performance was deficient in that counsel: (1) failed to challenge his convictions, which were based on a theory of criminal responsibility, when a principal offender was not charged or convicted; (2) failed to file a motion to suppress evidence obtained from his cell phone; (3) failed to challenge the testimony of expert witnesses concerning his cell phone records, and the location of cell towers and his proximity to those towers when he made or received calls; and (4) failed to explain settlement offers from the State. The petitioner also argues that post-conviction counsel did not render effective assistance.

The post-conviction petitioner bears the burden of proving his allegations by clear and convincing evidence. See Tenn.Code Ann. § 40-30-110(f). When an evidentiary hearing is held in the post-conviction setting, the findings of fact made by the court are conclusive on appeal unless the evidence preponderates against them. See *Tidwell v. State*, 922 S.W.2d 497, 500 (Tenn.1996). Where appellate review involves purely factual issues, the appellate court should not reweigh or reevaluate the evidence. See *Henley v. State*, 960 S.W.2d 572, 578 (Tenn.1997). However, review of a trial court's application of the law to the facts of the case is *de novo*, with no presumption of correctness. See *Ruff v. State*, 978 S.W.2d 95, 96 (Tenn.1998). The issue of ineffective assistance of counsel, which presents mixed questions of fact and law, is reviewed *de novo*, with a presumption of correctness given only to the post-conviction court's findings of fact. See *Fields v. State*, 40 S.W.3d 450, 458 (Tenn.2001); *Burns v. State*, 6 S.W.3d 453, 461 (Tenn.1999).

To establish a claim of ineffective assistance of counsel, the petitioner has the burden to show both that trial counsel's performance was deficient and that counsel's deficient performance prejudiced the outcome of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); see *State v. Taylor*, 968 S.W.2d 900, 905 (Tenn.Crim.App.1997) (noting that same standard for determining ineffective assistance of counsel that is applied in federal cases also applies in Tennessee). The *Strickland* standard is a two-prong test:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687.

The deficient performance prong of the test is satisfied by showing that "counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." *Goad v. State*, 938 S.W.2d 363, 369 (Tenn.1996) (citing *Strickland*, 466 U.S. at 688; *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn.1975)). Moreover, the reviewing court must indulge a strong presumption that the conduct of counsel falls within the range of reasonable professional assistance, see *Strickland*, 466 U.S. at 690, and may not second-guess the tactical and strategic choices made by trial counsel unless those choices were uninformed because of inadequate preparation. See *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn.1982). The prejudice prong of the test is satisfied by showing a reasonable probability, i.e., a "probability sufficient to undermine confidence in the outcome," that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

*9 Courts need not approach the *Strickland* test in a specific order or even "address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.* at 697;

see also *Goad*, 938 S.W.2d at 370 (stating that "failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim").

The petitioner first argues that trial counsel provided ineffective assistance by failing to challenge his convictions, which were based on a theory of criminal responsibility, when a principal offender was not charged or convicted. The post-conviction court found that the petitioner's contention that he could not be convicted under a theory of criminal responsibility for the conduct of another when no principal actor was ever charged or convicted of the offense was without merit. The court noted that such assertion was contrary to the law, as Tennessee Code Annotated section 39-11407 "clearly allows the [petitioner] in this case to be prosecuted and convicted as charged."

The petitioner acknowledges the statutory support for the post-conviction court's finding but attempts to distinguish his case from falling under its purview by asserting that the principal offender must at least be "known," and the one in his case was not. Citing *State v. Farner*, 66 S.W.3d 188, 205 (Tenn.2001), the petitioner maintains that "one cannot be convicted pursuant to a theory of criminal responsibility if there is no other person who is guilty of the crime as a principal." *Id.* (citing *Pierce v. State*, 168 S.W. 851, 856 (Tenn.1914)). However, the *Farner* opinion does not stand for the proposition that the principal offender must be known, only that there must be one. In this case, the proof at trial revealed the existence of another actor in the criminal episode for whose conduct the petitioner was criminally responsible.

Kyneshia Williams testified at trial that the petitioner tried to involve her in his plan to rob the victim of his "dope and money." *Demarcus Keyon Cole*, 2014 WL 7269813, at *5. When she declined to participate, the petitioner said that he would "make other plans." *Id.* Ebony Jenkins testified that the robbery began when the petitioner came into the apartment with two other men, one of whom pulled a gun on the victim and announced, "This is a f*cking robbery." *Id.* at *1. One of the men directed Ms. Jenkins to put blankets over her head. *Id.* Ms. Jenkins heard the man she identified as "the aggressor" beat the victim and order the petitioner and the other man to leave the apartment. *Id.* Ms. Jenkins heard gunshots and then heard the aggressor leave. *Id.* She testified at trial that the petitioner's protestations to the aggressor "did not sound sincere," and she thought that he was putting on "an act" rather than actually being a victim of the robbery. *Id.* Accordingly, the proof established the existence and criminal conduct of one for whom the petitioner was criminally responsible and trial counsel was not deficient for failing to challenge the petitioner's convictions on that basis.

The petitioner next argues that trial counsel provided ineffective assistance by failing to file a motion to suppress evidence obtained from his cell phone. The post-conviction court found that there was no basis to seek suppression of the petitioner's cell phone records, as the evidence showed that the petitioner gave consent for the forensic search of his phone. The court further found that the petitioner failed to show how the outcome of the case would have been different had counsel filed such a motion to suppress.

*10 The petitioner contends that the post-conviction court's ruling "misapprehends the evidence." He concedes that Sergeant Chestnut obtained his phone by consent on the first occasion but maintains that there was no consent on the second occasion, which occurred when he was in custody on unrelated charges several weeks later. According to the petitioner, his phone was removed from the property room and given to Sergeant Chestnut, who then performed a forensic evaluation of his phone. The petitioner maintained that Sergeant Chestnut recovered pictures of "weapons which were alleged to be the murder weapon[s]" and utilized call and text records to create maps to establish his location "in the hours and days following the robbery and homicide." The petitioner maintains that he did not consent to the second search of his phone.

Regardless of whether counsel should have filed a motion to suppress the search of the petitioner's cell phone, we cannot conclude that there is any reasonable probability that the result of the proceeding would have been different had a motion to suppress been filed and granted. The bulk of the incriminating evidence against the petitioner came in the form of witness testimony from Kyneshia Williams, Ebony Jenkins, and LeGraine Poston, as well as the petitioner's evasiveness with the police. Moreover, as we will discuss in the section below, the call and text records that were used to create maps of the petitioner's location were recovered from the petitioner's cell phone service provider, not the phone, and were, thus, appropriate evidence. Any minimal information gleaned from the petitioner's phone was auxiliary.

The petitioner next argues that trial counsel provided ineffective assistance by failing to challenge the testimony of expert witnesses concerning his cell phone records and the location of cell towers and his proximity to those towers when he made or received calls. He argues that the expert witnesses' testimony was based on evidence illegally obtained from his cell phone. The post-conviction court found that the experts who testified concerning the petitioner's cell phone records and location of cell phone towers were properly qualified to give the testimony and evidence that they gave.

Contrary to the petitioner's assertion, the record indicates that the expert witnesses based their testimony on records maintained by the service provider and not on information gleaned from the petitioner's phone. In fact, Sergeant Chestnut testified that when he examined the petitioner's phone, he discovered that "[a]ll incoming and outgoing calls, as well as any text messages, had been deleted" from the phone. *Demarcus Keyon Cole*, 2014 WL 7269813, at *4. The petitioner provides no other legal basis for counsel to have objected to the expert witnesses' testimony and has thus failed to prove that counsel was ineffective.

Along with this issue, the petitioner contends that trial counsel was ineffective for failing to "investigate, research and prepare to properly impeach" expert witness William Carroll or present a defense expert to counter Mr. Carroll's testimony. The petitioner, however, did not include this allegation in his petition for post-conviction relief, and no evidence to support the claim was presented at the evidentiary hearing. He has, therefore, failed to prove his allegations by clear and convincing evidence or establish that he was prejudiced by the failure to have a defense expert witness testify.

The petitioner next argues that trial counsel provided ineffective assistance by failing to explain settlement offers from the State. He specifically asserts that trial counsel "never explained the ramifications of refusing the multiple plea offers by the [S]tate, never explained the likelihood of conviction and the potential sentence." The petitioner, however, did not include this issue in his post-conviction petition or raise it at the evidentiary hearing; thus, the post-conviction court made no ruling on the matter for this court to review. Issues not included in a post-conviction petition may not be raised for the first time on appeal and are waived. See *Walsh v. State*, 166 S.W.3d 641, 645 (Tenn.2005) ("Issues not addressed in the post-conviction court will generally not be addressed on appeal."); *Cauthern v. State*, 145 S.W.3d 571, 599 (Tenn.Crim.App.2004) ("[A]n issue raised for the first time on appeal is waived.")

*11 The petitioner lastly asserts that post-conviction counsel did not render effective assistance, in that counsel did not perform "as counsel envisioned under *Martinez v. Ryan*, [132 S.Ct. 1309 (2012)], *Trevino v. Thaler* [133 S.Ct. 1911 (2013)], and *Sutton v. Carpenter* [745 F.3d 787 (6th Cir.2014)]," or Tennessee Supreme Court Rule 28.

We initially note that a petitioner does not have a constitutional right to the effective assistance of post-conviction counsel. See *Frazier v. State*, 303 S.W.3d 674, 680 (Tenn.2010); *Stokes v. State*, 146 S.W.3d 56, 60 (Tenn.2004); *House v. State*, 911 S.W.2d 705, 712 (Tenn.1995). The right to counsel is statutorily based, found in Tennessee Code Annotated section § 40-30-107(b). "This statutory right, does not, however, serve as a basis for relief on a claim of ineffective assistance of counsel in a post-conviction proceeding and does not include 'the full panoply of procedural protection that the Constitution requires be given to defendants who are in a fundamentally different position—at trial and on first appeal as of right.'" *Frazier*, 303 S.W.3d at 680 (citing *House*, 911 S.W.2d at 712). "All that due process requires in the post-conviction setting is that the defendant have 'the opportunity to be heard at a meaningful time and in a meaningful manner.'" *Stokes*, 146 S.W.3d 56, 61 (Tenn.2004) (quoting *House*, 911 S.W.2d 705, 711 (Tenn.1995)). Specifically, a full and fair hearing only requires "the opportunity to present proof and argument on the petition for post-conviction relief." *House*, 911 S.W.2d 714.

In pertinent part, Tennessee Supreme Court Rule 28 provides:

Appointed or retained counsel shall be required to review the pro se petition, file an amended petition asserting other claims which petitioner arguably has or a written notice that no amended petition will be filed, interview relevant witnesses, including petitioner and prior counsel, and diligently investigate and present all reasonable claims.

Tenn. Sup.Ct. R. 28, § 6(C)(2). This court has repeatedly held that violations of Rule 28 by post-conviction counsel do not afford the remedial right of a second post-conviction hearing. See, e.g., *Thaddeus Johnson v. State*, No. W2014-00053-CCA-R3-PC, 2014 WL 7401989, at *9 (Tenn.Crim.App. Dec. 29, 2014), *perm. app. denied* (Tenn. May 18, 2015); *Anthony Boyland v. State*, No. W2013-01226-CCA-MR3-PC, 2014 WL 3818612, at *14 (Tenn.Crim.App. Aug. 4, 2014), *perm. app. denied* (Tenn. Nov. 20, 2014); *Jonathan Everett v. State*, No. W2013-02033-CCA-R3-PC, 2014 WL 3744498, at *6-7 (Tenn.Crim.App. July 28, 2014), *perm. app. denied* (Tenn. Nov. 19, 2014).

The petitioner's contention that the above mentioned federal rulings establish the right of effective assistance of counsel at a post-conviction evidentiary hearing has been addressed and rejected by another panel of this court, with its analysis we agree. See *David Edward Niles v. State*, No. M2014-00147-CCA-R3-PC, 2015 WL 3453946, at *67 (Tenn.Crim.App. June 1, 2015), *perm. app. denied* (Tenn. Sept. 17, 2015). The record in this case shows that counsel substantially complied with the "minimum standard of service to which post-conviction counsel is held." *Frazier*, 303 S.W.3d at 681. Post-conviction counsel twice amended the petitioner's post-conviction petition and, at the evidentiary hearing, post-conviction counsel thoroughly questioned the petitioner and trial counsel about the petitioner's claims. The record does not reflect that post-conviction counsel failed to comply with Rule 28, and the petitioner was afforded "the opportunity to be heard at a meaningful time and in a meaningful manner." *James Patterson v. State*, W2009-01874-CCA-R3-PC, 2011 WL 579122 at *5 (Tenn.Crim.App. Feb. 17, 2011), *perm. app. denied* (Tenn. July 14, 2011).

CONCLUSION

*12 Based on the foregoing authorities and reasoning, we affirm the denial of the petition.

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