No. _____

In The Supreme Court of the United States

Kemen Lavatos Taylor, II, Petitioner

v.

Governor Mark Dayton and Tom Roy, Commissioner of Corrections, Respondents.

INDEX TO APPENDIX

Appendix A

968 F.3d 857

Kemen Lavatos TAYLOR, II, Petitioner - Appellant
v.
Governor Mark DAYTON; Tom Roy, Commissioner of Corrections Respondents - Appellees

No. 19-2064

United States Court of Appeals, Eighth Circuit.

Submitted: June 18, 2020
Filed: August 4, 2020
Rehearing and Rehearing En Banc Denied September 15, 2020[*]

Counsel who represented the appellant was Zachary Allen Longsdorf of Inver Grove Heights, MN.

Counsel who represented the appellee was Jean Burdorf of Minneapolis, MN.

Before GRUENDER, WOLLMAN, and KOBES, Circuit Judges.

KOBES, Circuit Judge.

A jury convicted Kemen Lavatos Taylor II on one count of first-degree murder and two counts of attempted first-degree murder arising from the deaths of three teenagers in a planned, gang-related shooting. The Minnesota Supreme Court affirmed his convictions. *State v. Taylor* , 869 N.W.2d 1, 7 (Minn. 2015). Relevant here, the state trial court "issued a list of 'basic rules' for spectators at trial" that prohibited "profanity, threatening gestures, gum chewing, and cell phones," and it "required spectators to show photographic identification before being allowed entry into the courtroom." *Id.* at 10. On direct appeal, the Minnesota Supreme Court rejected Taylor's argument that the identification requirement violated his Sixth Amendment public trial right. *Id.* The district court[1] dismissed Taylor's petition for a writ of habeas corpus but granted a certificate of appealability on his "open trial-right claim." D. Ct. Dkt. 38 at 7. We affirm.

To grant a state prisoner's application for a writ of habeas corpus with respect to a claim adjudicated on the merits, the prisoner must show that the state court judgment "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established

[968 F.3d 859]

Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). A state court's decision is contrary to clearly established law "if the state court applies a rule that contradicts the governing law set forth" by Supreme Court cases or "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at" an opposite result. *Bell v. Cone* , 543 U.S. 447, 452–53, 125 S.Ct. 847, 160 L.Ed.2d 881 (2005) (quoting *Williams v. Taylor* , 529 U.S. 362, 405, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). An unreasonable application of clearly established law results "when a state court correctly identifies the governing legal standard but either unreasonably applies it to the facts of the particular case or unreasonably extends or refuses to extend the legal standard to a new context." *Munt v. Grandlienard* , 829 F.3d 610, 614 (8th Cir. 2016) (citing *Williams* , 529 U.S. at 407, 120 S.Ct. 1495). Unreasonable does not mean that the state court decision is merely incorrect: the prisoner must show it is "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter* , 562 U.S. 86, 103, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011).

Taylor claims the Minnesota Supreme Court's decision is both contrary to and an unreasonable application of *Waller v. Georgia* , 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) and *Presley v. Georgia* , 558 U.S. 209, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010) (per curiam). It is neither. Both *Waller* and *Presley* involved undisputed courtroom closures, and as *Presley* makes clear,

they provide "standards for courts to apply before excluding the public from any stage of a criminal trial." 558 U.S. at 213–14, 130 S.Ct. 721. In contrast, the Minnesota Supreme Court held that no closure occurred because "there is simply no evidence that the requirement was enforced, or, if so, that even a single individual—identifiable or not—was actually excluded." *Taylor* , 869 N.W.2d at 11–12. The court emphasized that it did "not 'uphold' the trial court's photo identification order," and only held "that the record simply does not support reversal." *Id.* at n.4. As a result, the Minnesota Supreme Court decided "whether a closure meriting Sixth Amendment concern has occurred at all," D. Ct. Dkt. 38 at 5, and did not need to evaluate whether the state trial court properly applied the standards for closing a courtroom set forth in *Waller* and *Presley* . Taylor points to no other alleged violation of Supreme Court precedent, and we hold that his petition was properly denied.

Taylor also claims the Minnesota courts improperly barred him from supplementing the record post-conviction to show that the photographic identification requirement barred some spectators from the courtroom. The district court denied the claim as procedurally defaulted and did not grant a certificate of appealability on it. D. Ct. Dkt. 38 at 5, 7. Although our jurisdiction depends on a certificate issuing, the failure of a certificate to specify an issue is not a jurisdictional bar to our review. *Gonzalez v. Thaler* , 565 U.S. 134, 143, 132 S.Ct. 641, 181 L.Ed.2d 619 (2012). We may exercise our discretion to address an issue outside the scope of the certificate in appropriate circumstances, *Armstrong v. Hobbs* , 698 F.3d 1063, 1068–69 (8th Cir. 2012), but we decline to expand the certificate of appealability here.

The judgment of the district court is affirmed.

Notes:

[*] Judge Stras did not participate in the consideration or decision of this matter.

[1] The Honorable David S. Doty, United States District Judge for the District of Minnesota, adopting the report and recommendations of the Honorable Leo I. Brisbois, United States Magistrate Judge for the District of Minnesota.

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil No. 16-3893(DSD/LIB)

Kemen Lavatos Taylor, II,

Petitioner,

v.

ORDER

Governor Mark Dayton; and
Tom Roy Commissioner of Corrections,

Respondents.

This matter is before the court upon petitioner Kemen Lavatos Taylor, II's objection to the January 22, 2019, report and recommendation (R&R) of Magistrate Judge Leo I. Brisbois. The R&R recommended that the court dismiss Taylor's petition for a writ of habeas corpus under 28 U.S.C. § 2254 and that the court not issue a certificate of appealability.

BACKGROUND

The underlying facts are fully set forth in the R&R and the court will not repeat them here. On October 4, 2012, a grand jury indicted Taylor on two counts of murder. At Taylor's jury trial, the Minnesota trial court required that all spectators in the gallery show photographic identification before entering the courtroom to prevent disruptions. Taylor claims that as a result of this order, several of his family members and friends were barred from attending the trial. Taylor was convicted on both

murder counts on March 5, 2014.

Taylor directly appealed the conviction to the Minnesota Supreme Court, raising, among other things, a Sixth Amendment claim that the photo-identification requirement violated his right to a public trial. Taylor did not request at that time to supplement the record. On August 26, 2015, the Minnesota Supreme Court affirmed Taylor's conviction and held that the photo identification requirement was "too trivial to constitute a true closure" of his trial. State v. Taylor, 869 N.W.2d 1, 11-12 (Minn. 2015). However, one of the justices wrote a dissenting opinion stating that "requiring members of the public to provide photo identification to enter a courtroom during trial is a bridge too far." Id. at 23.

On March 1, 2017, Taylor filed a petition for post-conviction relief in Minnesota state court. Taylor sought a hearing to introduce evidence that community members and his relatives had been denied access to his trial because they could not produce photo identification. On April 28, 2017, the state trial court denied the petition because Minnesota procedure requires that, in a post-conviction proceeding, all matters, which have already been fully and fairly litigation cannot be relitigated and matters that could have been raised on direct appeal cannot be raised in a subsequent post-conviction proceeding. See State v. Knaffla, 243 N.W.2d 737, 741 (Minn. 1976). On April 4, 2018, the Minnesota

Supreme Court affirmed the state trial court's denial of his post-conviction petition. Taylor v. State, 910 N.W.2d 35 (Minn. 2018).

On June 7, 2018, Taylor filed an amended petition for habeas corpus under § 2254. On January 22, 2019, the magistrate judge recommended that Taylor's amended habeas petition be dismissed and that no certificate of appealability be issued. Taylor now objects to the R&R.

DISCUSSION

I. Legal Standard

A federal court may grant habeas relief under § 2254 if it determines that the underlying state-court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or ... was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d). "[A] state court decision is contrary to clearly established federal law if it arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if it decides a case differently than the Supreme Court has on a set of materially indistinguishable facts." Brende v. Young, 907 F.3d 1080, 1085 (8th Cir. 2018) (internal citations omitted). This standard is difficult to meet, and a habeas petitioner must "show that the state court's ruling on the

claim ... presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Id. (internal citations omitted). The unreasonable application of those holdings must be objectively unreasonable, not merely wrong; even clear error will not suffice. White v. Woodall, 572 U.S. 415, 419 (2014).

The court reviews the R&R de novo. 28 U.S.C. § 636 (b)(1)(C); D. Minn. LR 72.2(b). After a careful review, the court finds that the R&R is well reasoned and correct. As a result, the court adopts the R&R and denies Taylor's § 2254 habeas petition.

II. Objections

Taylor first objects to the magistrate judge's conclusion that the photo-identification requirement is not contrary to or an unreasonable application of federal law. Taylor relies on Waller v. Georgia, 467 U.S. 39 (1984), (suppression motion-hearing closure), and Presley v. Georgia, 558 U.S. 209 (2012), (voir-dire closure), but that reliance is misplaced. Waller and Presley do not address the standard for whether an actual closure occurred in the first instance, but rather, the court's justification for the closure. In addition, the Minnesota Supreme Court did not apply Waller and Presley in concluding that the photo-identification requirement was not a closure of Taylor's trial. Accordingly, the magistrate judge properly held that the Minnesota Supreme Court's

decision "does not concern the standards for whether a trial closure is justified; it concerns instead the logically prior question of whether a closure meriting Sixth Amendment concern has occurred at all." ECF No. 33 at 16. The court must, therefore, adopt the R&R and Taylor's habeas petition must be denied.

Taylor next objects to the magistrate judge's conclusion that he procedurally defaulted on his attempt to supplement the record on his public-trial claim. "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that ... the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1). "Federal habeas corpus review is barred when a federal claim has not been fairly presented to the state court for a determination on the merits." Hall v. Delo, 41 F.3d 1248, 1249-50 (8th Cir. 1994) (internal citations omitted). "A habeas claim has not been fairly presented ... when the state court has declined to decide the federal claim on the merits because the petitioner violated a state procedural law." Id. at 1250.

The magistrate judge correctly found that the Minnesota trial court properly applied the procedural default rule because Taylor waived his right to request record supplementation during the post-conviction proceeding by failing to request that same supplementation on direct appeal. See Knaffla, 243 N.W.2d at 741.

In addition, the magistrate judge correctly found that Taylor failed to establish that he should be excused from his procedural default.

Taylor next objects to the magistrate judge's conclusion that the Minnesota Supreme court did not misapply clearly established federal law by affirming the trial court's exclusion of alternative-motive evidence. Specifically, Taylor argues that the Minnesota Supreme Court misapplied Crane v. Kentucky, 476 U.S. 683 (1986). However, the magistrate judge correctly noted that the Minnesota Supreme Court did not at all apply or analyze Crane because Crane does not address alternative-motive evidence.

Lastly, Taylor objects to the magistrate judge's determination that the combination of asserted errors does not justify habeas relief. As the magistrate judge correctly noted, however, the Eighth Circuit has held that cumulative error fails to support a habeas claim. Henderson v. Norris, 118 F.3d 1283, 1288 (8th Cir. 1997). Rather, each habeas claim must stand or fail on its own. See id. As a result, the R&R must be adopted in its entirety.

II. Certificate of Appealability

A certificate of appealabiilty cannot be granted unless the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Although the court remains fully satisfied that Taylor's habeas petition is properly dismissed on all grounds, the fact that a dissent was filed in his

direct appeal on the public trial claim shows that this issue is debatable among jurists. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). In addition, the court notes that a certificate of appealability was recently issued in a habeas petition involving an alleged Minnesota public trial-right deprivation. See Smith v. Smith, No. 17-673, 2018 WL 3696601 (D. Minn. Aug. 3, 2018). Accordingly, the public trial-right deprivation alleged here is "adequate to deserve encouragement to proceed further." Slack, 529 U.S. at 484 (internal citations omitted). As a result, the court will grant a certificate of appealability on Taylor's open trial-right claim.

CONCLUSION

Accordingly, **IT IS HEREBY ORDERED** that:

1. The objection [ECF No. 36] to the R&R is overruled;

2. The R&R [ECF No. 33] is adopted;

3. The amended petition for a writ of habeas corpus under § 2254 [ECF No. 24] is dismissed with prejudice; and

4. For purposes of appeal, the court grants a certificate of appealability under § 2253(c)(2) solely on the alleged violation of Taylor's public-trial right.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: April 16, 2019

s/David S. Doty
David S. Doty, Judge
United States District Court

Appendix C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Kemen Lavatos Taylor, II,	Case No. 16-cv-3893 (DSD/LIB)
Petitioner,	
v.	**REPORT AND RECOMMENDATION**
Tom Roy,	
Respondent.	

This matter came before the undersigned United States Magistrate Judge pursuant to a referral for report and recommendation in accordance with the provisions of 28 U.S.C. § 636 and Local Rule 72.1, as well as, upon Petitioner Kemen Lavatos Taylor's Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. [Docket No. 24].

For the following reasons, the Court recommends Petitioner's Amended Petition, [Docket No. 24], be **DENIED**, and further recommends declining to grant Taylor a certificate of appealability (COA).

I. Background

This case's procedural history is complicated, but understanding that history—especially Taylor's direct appeal—will help explain the discussion below. Thus, the Court will recount key, relevant aspects of Taylor's trial, his direct appeal, his first § 2254 petition, and his state-court petition for postconviction review, and then highlight the arguments raised by the present Amended Petition.

A. Trial

In October 2012, a grand jury indicted Taylor on nine counts of first-degree murder and first-degree attempted murder, including in relevant part one count of murder with premeditation

and two counts of murder while committing another felony. Register of Actions, State v. Taylor, Case No. 27-CR-12-33028 (State-Court Docket) (case-information section), available at http://pa.courts.state.mn.us (last accessed Jan. 3, 2019); cf. Minn. Stat. § 609.185 (a)(1), (3) (first-degree-murder statute). The charges concerned an August 2011, incident in which several teenagers were shot at; two were hit, and one (Rayjon Gomez) died. State v. Taylor, 869 N.W.2d 1, 7 (Minn. 2015) (Taylor I).

Two of the issues from Taylor's trial are relevant to the Amended Petition. See, (Pet.'s Mem., [Docket No. 25], at 8–12, 22–23. First, before the trial, the district court, "[t]o prevent disruptions by persons in the gallery, . . . issued a list of 'basic rules' for [trial] spectators," including bans on "profanity, threatening gestures, gum chewing, and cell phones." Taylor I, 869 N.W.2d at 10.[1] The court also "required spectators to show photographic identification before being allowed entry into the courtroom." Id. at 10. Taylor did not object to these rules, including the photo-ID requirement. Id.

Second, the district court excluded certain evidence that Taylor had wished to submit relative to two witnesses. Id. at 12. Under the prosecution's case theory, Taylor himself did not fire any shots during the August 2011, incident. Id. at 7. The shots during the incident were fried by Derrick Catchings and Donquarius Copeland, who along with Taylor were allegedly members of the Young-N-Thuggin gang. Id. The prosecution's account was that Taylor drove Catchings and Copeland into a north Minneapolis neighborhood to find "Skitz," an affiliate of another gang who had allegedly shot Taylor's younger brother. Id. After someone in the vehicle believed that he saw Skitz, Catchings and Copeland fired several shots at people in an alley—including the shot leading to Gomez's death. Id.

[1] The trial court stated that there had been actual instances of disruptions at past appearances. (See, Pet.'s Mem., [Docket No. 25], at 10) (quoting trial transcript).

At trial, Taylor wanted to introduce certain evidence that Catchings's and Copeland's motive for the shooting did not involve Taylor. Id. at 12. While not expressly explained, Taylor appears to believe that because he did not fire the critical shots his liability under Minnesota's first-degree-murder statute hinged on him sharing a motive with the shooters. (Pet.'s Mem., [Docket No. 25], at 22).[2] At trial, Taylor sought to ask "Copeland and Catchings about previous gang-related incidents," apparently to show that they had independent reasons—apart from avenging the shooting of Taylor's brother—to attack those associated with rival gangs. Taylor I, 869 N.W.2d at 12. The trial court excluded that evidence under Minnesota Rule of Evidence 403,[3] stating that "the fact that other people also had a motive that was either the same or different doesn't negate the fact that [Taylor] had a motive" and that "the fact that other people may have had different motives is [not] probative for anybody's case, and it certainly has the possibility of confusing the issues in the case." Id.[4]

Taylor's trial ended with the jury finding him guilty on all counts. Id. at 10. The court sentenced Taylor to life without the possibility of parole as well as two concurrent 180-month sentences. State-Court Docket; Pet.'s Mem., [Docket No. 25], at 1.

---

[2] In relevant part, Minnesota's first-degree-murder statute reads as follows:

> (a) Whoever does any of the following is guilty of murder in the first degree . . . :
>
> (1) causes the death of a human being with premeditation and with intent to effect the death of the person or of another; [or]
>
> . . .
>
> (3) causes the death of a human being with intent to effect the death of the person or another, while committing or attempting to commit burglary, aggravated robbery, kidnapping, arson in the first or second degree, a drive-by shooting, tampering with a witness in the first degree, escape from custody, or any felony violation of chapter 152 involving the unlawful sale of a controlled substance[.]

Minn. Stat. § 609.185(a)(1), (3).

[3] Under Rule 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

[4] Taylor I provides no citation for the quoted material, but it appears to be from the trial transcript.

B. Direct Appeal

After his conviction, Taylor—represented by appointed counsel—filed a direct appeal with the Minnesota Supreme Court. (Pet.'s Mem., [Docket No. 25], at 2; Resp. Mem., [Docket No. 30], at 5).[5] His counsel's appellate brief raised numerous issues, including that (1) the district court's photo-ID requirement violated Taylor's Sixth Amendment right to a public trial, and (2) the district court's Rule 403 ruling was erroneous because it denied Taylor the right to present evidence in his own defense and denied him the right to confront the witnesses against him. (Resp. Mem., [Docket No. 30], at 5–6); Taylor I, 869 N.W.2d at 10–14. Taylor also filed a pro se brief raising various other issues. (Resp. Mem., [Docket No. 30], at 6).

Taylor asserts that while his direct appeal was pending, he asked his appointed counsel to stay his appeal so as to press certain claims through a motion for postconviction relief. (Pet.'s Mem., [Docket No. 25], at 2). As Taylor explains it, "Minnesota requires appellants to seek a stay of their direct appeal in order to pursue postconviction issues and then combine both the direct appeal and postconviction appeal together if postconviction relief is denied." Id. (citing Minn. R. Crim. Pro. 28.02(4)(4); State v. Garasha, 393 N.W.2d 20 (Minn. Ct. App. 1986)).[6] Taylor alleges his appointed counsel refused to seek a stay, so Taylor asked his counsel to withdraw so that Taylor could proceed pro se. Id. at 2–3. His counsel filed that motion to withdraw on March 31, 2015—

[5] Minnesota defendants convicted of first-degree murder can appeal directly to the Minnesota Supreme Court, bypassing the state's intermediate court of appeals. Minn. R. Crim. Pro. 29.02(1)(a).

[6] Rule 28.02(4)(4) states that "[i]f, after filing a notice of appeal, a defendant determines that a petition for postconviction relief is appropriate, the defendant may file a motion to stay the appeal for postconviction proceedings." In Garasha, the Minnesota Court of Appeals analyzed competing threads of Minnesota caselaw and laid out the following rules for defendants seeking to raise ineffective-assistance-of-counsel claims:

> [A] defendant intending to raise the issue of ineffective assistance of trial counsel among other issues should first file a direct appeal. If an evidentiary hearing is necessary to resolve factual issues, the defendant should move the appellate court for a stay of the appeal pending the hearing. This procedure is not necessary if the legal basis for the claim is not available at the time of the direct appeal.

393 N.W.2d at 22 (citations and footnote omitted).

more than a month after the Minnesota Supreme Court had scheduled oral argument on Taylor's appeal for April 8, 2015. State v. Taylor, Case No. A14-0942, Order 2 (Minn. Apr. 28, 2015) (April 2015 Order). The Minnesota Supreme Court granted the motion to withdraw, and it altered the appeal's scheduling: the court would still consider the appeal on April 8, 2015, but on the "non-oral" calendar for nonargued cases. Id. at 1.

On April 8, 2015, the Minnesota Supreme Court met and considered Taylor's appeal as scheduled. Id. Later that day, Taylor's prior attorney submitted a motion by Taylor to stay the appeal so that Taylor could file a petition for postconviction relief in state court. Id. The motion asserted that Taylor "feels that it's appropriate for him to file a petition for postconviction relief to expand the record concerning effective assistance of counsel, newly discovered evidence, and to explore Brady material." State v. Taylor, No. 14-0942, Mot. to Stay Direct Appeal for Postconviction Proceedings Pursuant to Minn. R. Crim. P. 28.02, Subd. 4(4) at 2 (Minn. Apr. 8, 2015). The prosecution opposed the motion, noting (among other things) that the Supreme Court had already considered the case and that Taylor had not "provide[d] any specifics regarding his potential claims." State v. Taylor, No. A14-0942, State's Resp. to Mot. to Stay Direct Appeal for Postconviction Proceedings 1 (Minn. Apr. 22, 2015). The Minnesota Supreme Court denied the motion, observing that "[t]he appeal has been submitted to the court and an opinion will be filed in due course." April 2015, Order.

Taylor then moved to voluntarily dismiss his appeal, stating that he "feels and strongly believes that the issues raised in [his counsel's brief] are inadequate to warrant relief and do not meaningfully represent the issues and arguments which would show that [Taylor's] trial was unfair . . . ." State v. Taylor, No. A14-0942, Not. of Mot. and Mot. for Voluntary Dismissal of

Direct Appeal (May 26, 2015). He asserted that various issues had been inadequately factually developed below, describing them as follows:

> Appellant wants to raise and challenge among other issues: trial counsel's ineffectiveness for failing to call certain witnesses, failing to adequately challenge certain prejudicial and unconstitutional evidence, failing to present an adequate defense, failing to challenge the State's Brady violation; judicial bias on behalf of the trial judge; and misconduct on behalf the prosecution for intentionally suppressing and withholding Brady material, misstating burden of proof, and other various misconducts of conduct on by the prosecution.

Id.

In Taylor's view, to develop a factual record for these issues, he needed to petition the trial court for postconviction review first, do the needed factual record development there, and then proceed with his direct appeal. Id. Importantly, however, the issues that Taylor listed do not include the public-trial argument made by his appointed attorney's appellate brief.[7]

The Minnesota Supreme Court denied Taylor's motion to dismiss, and on August 26, 2015, issued an opinion affirming Taylor's convictions. Taylor I, 869 N.W.2d at 23. Addressing the trial court's photo-ID requirement, Taylor I observed in relevant part that "[t]he record does not show whether the identification requirement was enforced and, if so, whether anyone who sought to enter the courtroom could not." Id. at 10. In the Minnesota Supreme Court's view, this meant that there was no record evidence that "a significant portion of the public was unable to attend due to the identification requirement; that Taylor, his family, his friends, or any witnesses were excluded; or that any individuals actually excluded were known to Taylor." Id. at 11. The court thus concluded that the photo-ID requirement was not a "true" closure—that is, the closure was

[7] Indeed, the excerpted portion of the dismissal motion suggests that Taylor believed that the public-trial argument—like the other arguments in his appointed attorney's brief—was "inadequate to warrant relief" and "[did] not meaningfully represent the issues and arguments" suggesting that his trial had been unfair.

"too trivial to amount to a violation of the [Sixth] Amendment." Id. (quoting State v. Lindsey, 632 N.W.2d 652, 660–61 (Minn. 2001)) (internal citation omitted; brackets in Taylor I).

Taylor I also rejected Taylor's argument about the excluded evidence concerning Catchings and Copeland. As already noted, this argument had two prongs: Taylor argued that excluding the evidence violated his right to present evidence in his own defense, and that it violated his right to confront witnesses. As to the argument's first prong, Taylor I held that even if it had been error to exclude the evidence, the error was harmless. Id. at 12–13 ("We are satisfied beyond a reasonable doubt that a reasonable jury would have reached the same verdict even if Taylor had been able to present evidence that Copeland and Catchings had been involved in specific, prior gang-related incidents."). Criticially, the court stated, "the district court's assumed error did not preclude Taylor from exploring Copeland's and Catchings' gang-related motives; it only precluded evidence of particular previous acts." Id. at 13. Indeed, the court noted various things Taylor had been allowed to offer into evidence suggesting that Copeland and Catchings "were not primarily or solely motivated by the shooting of Taylor's brother." Id.

As for Taylor's confrontation argument, the court again assumed that excluding the evidence was error, but again found the error harmless. Id. at 13–14. The court noted that while Copeland's and Catchings's testimony was "critically important to the State's case," their testimony had been corroborated by multiple sources, Taylor had been able to impeach Copeland and Catchings in numerous ways, and Taylor had been able to "elicit a considerable amount of testimony on alternative motives." Id.

C. First § 2254 Petition

On November 14, 2016, Taylor filed this action's original petition for a writ of habeas corpus. (Pet. Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody

[Docket No. 1]). He asserted twelve grounds of relief, including (as relevant here) that (1) the state court's photo-ID requirement violated his right to a public trial; (2) the state court violated Taylor's right to due process by barring the introduction of evidence regarding Copeland's and Catching's alternative motives; and (3) his appellate counsel was ineffective because he had failed to look for spectators who had been prevented from attending his trial due to the photo-ID requirement. (Id. at 5, 7, 17).[8]

On March 1, 2017, Taylor filed a petition for postconviction relief in Minnesota state court. Pet. for Postconviction Relief, State v. Taylor, Case No. 27-CR-12-33208 (Minn. Dist. Ct. Mar. 1, 2017) (Postconviction-Relief Petition), filed within Resp't's App., [Docket No. 31] (Roy Appendix); see gen., Section I.D infra. The same day, he asked this Court to stay these § 2254 proceedings so that he could exhaust his state-court postconviction remedies. (Mot. for Stay of Proceedings [Docket No 11]). This Court promptly granted that motion. (Order [Docket No. 12]).

D. State Postconviction Proceedings

The gravamen of Taylor's state Postconviction-Relief Petition was that Taylor wanted to introduce evidence that various "[c]ommunity members" and "relatives of [Taylor]" had in fact been denied access to Taylor's trial because they "could not show a Photo ID"; he provided nine affidavits from individuals stating that they had been excluded from the trial. (Postconviction-Relief Pet. at 1).[9] Because Taylor I's public-trial-right discussion reflected there being no record evidence that the photo-ID requirement caused anyone's exclusion, Taylor sought an evidentiary hearing to "expand the record with respect to the courtroom closing." Id. at 2. Taylor further suggested that the decision by his direct-appeal counsel not to stay the direct appeal "in order to

[8] Because Taylor's original habeas petition is not consecutively paginated, references to it use the page numbers provided by the Court's ECF filing system.

[9] The affidavits are attached to the Postconviction-Relief Petition, filed as part of Respondent's Appendix.

expand the record on the closed courtroom issue" constituted ineffective assistance of counsel that itself violated Taylor's constitutional rights. Id.

The state trial court denied the Petition in an Order dated April 28, 2017. State v. Taylor, No. 27-CR-12-33208, Order Denying Pet'r's Req. for Postconviction Relief (Minn. Dist. Ct. Apr. 28, 2017) (hereinafter "April 2017, Order"), filed within Roy App. In that April 2017, Order, the court cited State v. Knaffla, 243 N.W.2d 737 (Minn. 1976), for the proposition that "in the case of post-conviction relief, all matters which have already been fully and fairly litigated should not be re-litigated," and Doppler v. State, 660 N.W.2d 797 (Minn. 2003), for the point that "[w]hen a petitioner bases his claims for post-conviction relief upon facts and issues that he either raised or knew about at the time of the direct appeal, Minnesota courts do not allow for reconsideration of those issues." Id. at 3. The court then determined that under this precedent, Taylor's attempt to factually supplement his public-trial-right argument was Knaffla-barred: he had already brought the public-trial-right argument to the Minnesota Supreme Court, which had rejected it. Id. at 4. The court also observed that while exceptions to the Knaffla rule exist, Taylor had not argued that they applied to his case. Id.

Taylor appealed that decision arguing that the district court had abused its discretion in refusing him an evidentiary hearing. Taylor v. State, No. A17-0965, Appellant's Br. and Addendum 4–5 (Minn. Aug. 29, 2017), filed within Roy App. In Taylor's view, the affidavits presented to the state court below comprised enough factual material to mandate an evidentiary hearing about a possible violation of his public-trial right. Id. at 6–8. He also claimed that Knaffla did not bar the Postconviction-Review Petition because of one of the rule's exceptions—that a postconviction-review petition can raise a previously addressed issue "when fairness so requires and the petitioner does not deliberately or inexcusably fail to raise the issue on direct appeal." Id.

at 8–9 (quoting Doppler, 660 N.W.2d at 801–02). In response, the State argued, inter alia, that because Taylor had not argued this interests-of-justice exception to the state district court, he had forfeited the argument. Taylor v. State, No. A17-0965, Resp't's Br. 6–7 (Minn. Oct. 12, 2017), filed within Roy App.

The Minnesota Supreme Court issued Taylor II on April 4, 2018, affirming the state court's denial of the Postconviction-Review Petition. Taylor v. State, 910 N.W.2d 35, 36 (Minn. 2018) (Taylor II). The decision rested on agreement with the State's forfeiture argument: because Taylor "did not argue in the district court that the interests-of-justice exception should be applied in his case," the court held, "he has forfeited appellate review of that argument." Id. at 38–39 (citing Brocks v. State, 883 N.W.2d 602, 605 (Minn. 2016)).

E. Amended § 2254 Petition

After the Minnesota Supreme Court issued Taylor II, Taylor informed this Court of the decision. (Letter [Docket No. 20]). This Court lifted the preexisting stay, and it ordered Taylor to file an amended § 2254 petition "representing the current status of issues in the present case." (Order [Docket No. 21]).

Taylor filed the Amended Petition on June 7, 2018. (Am. Pet. [Docket No. 25]). Therein, Taylor raises six arguments.[10]

- First, Taylor argues that Taylor I "unreasonably applied clearly established federal law" while determining that the state court had not violated his public-trial rights. Id. at 8.
- Second, Taylor contends that if he "is required to show prejudice" to bring his first argument, "he should be granted a hearing to present his claim because the Minnesota courts denied him an opportunity to present a factual basis for his claim and show prejudice . . . ." Id. at 12.

[10] Certain aspects of the Amended Petition suggest that there are only five arguments, see, e.g., Id. at 25 (summary of how arguments interconnect, referring to Arguments 1 through 5), but the Petition's argument section has six subheadings, one of which is misnumbered, see Id. at 15, 22. The Court also notes that in the following list, the Court has prioritized describing Taylor's arguments as he presents them. As the analysis section below shows, Taylor's actual arguments are sometimes difficult to decipher.

- Third, he claims that this Court should grant him a hearing "on cause and prejudice to show (1) that Minnesota's postconviction process is ineffective to protect Taylor's and other indigent applicant[s'] due process rights and (2) determine whether Taylor's appellate counsel rendered ineffective assistance of counsel by not providing Taylor access to the state postconviction process." Id. at 15.
- Fourth, he asserts that the trial court's decision to bar him from offering "alternative perpetrator evidence" violated his "Sixth Amendment right to present a complete defense." Id. at 22.
- Fifth, he suggests that the cumulative effect of the first and fourth errors listed above justifies issuance of a writ of habeas corpus. Id. at 23.
- Sixth, he argues that the ineffective assistance of his appellate counsel—noted above as a ground for excusing procedural default—is also a standalone ground for habeas relief. Id. at 24.

II. ANALYSIS

The Court will now address the arguments from the Amended Petition. By way of summary, the Court reaches the following conclusions: First, the Taylor I discussion of the trial court's photo-ID requirement was not contrary to, or an unreasonable application of, clearly established federal law. Second, Taylor procedurally defaulted his factually supplemented version of his public-trial argument. Third, while Taylor contends that—for at least two reasons—cause and prejudice exist which excuse that procedural default, neither argument has merit. Fourth, Taylor argues that the trial court's exclusion of alternative-motive evidence gives him a separate ground for habeas relief, but here too Taylor I's treatment of the issue is not contrary to, or a misapplication of, federal law. Fifth, Taylor's assertion that cumulative error supports a grant of habeas relief here is a wholly without merit: The Court has found no error which may be cumulated, and the Eighth Circuit does not provide habeas relief on the basis of cumulative error. Finally, the Court finds unpersuasive Taylor's claim that ineffective assistance of counsel provides him a standalone ground for habeas relief. For reasons discussed in the cause-and-prejudice discussion, Taylor has procedurally defaulted this ineffective-assistance argument as well.

A. The Photo-ID Requirement and Clearly Established Federal Law

Taylor first argues that the Minnesota Supreme Court unreasonably applied clearly established federal law in Taylor I's public-trial analysis. (Pet.'s Mem. [Docket No. 25], at 8–12). Taylor contends that Taylor I created a legally incorrect condition for finding public-trial-right violations—specifically, that to show such a violation, one must show that a court action "impacted a specific portion, or significant portion of the public." (Id. at 11). That condition, he says, is no part of clearly established federal law. (Id. at 11–12). Respondent maintains that Taylor I "was not contrary to or an unreasonable application of" Supreme Court precedent. (Resp. Mem., [Docket No. 30], at 11–14).

Section 2254(d)(1) limits the substantive legal grounds for granting a state-court prisoner's habeas claim concerning a matter that state courts have addressed:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

28 U.S.C. § 2254(d)(1).

As the Eighth Circuit has explained, "contrary to" and "unreasonable application of" have specific meanings here:

> In Williams v. Taylor, [529 U.S. 362 (2000)], the Supreme Court held that a state court decision is contrary to clearly established federal law if it arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if it decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. In addition, a state court decision is an unreasonable application of clearly established federal law if it identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Brende v. Young, 907 F.3d 1080, 1085 (8th Cir. 2018) (quoting Nash v. Russell, 807 F.3d 892, 896–97 (8th Cir. 2015)).

Of the three types of argument Brende notes, Taylor's argument alternated between claiming that (1) Taylor I reaches a conclusion opposite to one reached by the Supreme Court on a legal question, and (2) Taylor I identifies a correct legal principle from Supreme Court cases, but unreasonably applies it. (See gen., Pet.'s Mem., [Docket No. 25], at 8–12). Taylor relies here on two cases: Waller v. Georgia, 467 U.S. 39 (1984), and Presley v. Georgia, 558 U.S. 209 (2012) (per curiam). (See, Pet.'s Mem., [Docket No. 25], at 8–12). For the reasons discussed herein, however, the Court finds that Taylor I neither contradicts nor unreasonably applies those cases.

A review of Waller and Presley makes the point evident. In Waller, numerous defendants involved in a gambling operation had been charged under various Georgia statutes. 467 U.S. at 42. Before a trial of one defendant group, certain defendants moved to suppress various wiretaps and evidence seized from various defendants' homes. Id. at 41–42. Prosecutors moved to close any motion-related hearing, asserting that under Georgia statutes, public release of certain information used to justify the evidentiary seizures might make the evidence inadmissible. Id. at 42. The trial court granted the prosecution motion, closing the suppression hearing "to all persons other than witnesses, court personnel, the parties, and the lawyers." Id. After the hearing, the court suppressed certain materials; at the subsequent trial, held in open court, Waller and a codefendant were found guilty of certain statutory violations. Id.

On appeal, defendants argued that the trial-court decision to close the suppression hearing violated their Sixth Amendment public-trial right. Id. The Georgia Supreme Court affirmed, ruling that "the trial court had properly balanced petitioners' rights to a public hearing against the privacy rights of others under Georgia law and the Sixth Amendment." Id. at 43 (citing Waller v.

State, 303 S.E.2d 437 (Ga. 1983)). The United States Supreme Court subsequently granted certiorari.

Waller's first holding is that the Sixth Amendment public-trial right applies to a suppression hearing (as opposed to a trial itself). Id. at 44–47. As Taylor I concerns a trial closure, Taylor I is not contrary to, or an unreasonable application of, this first Waller holding.

A second part of Waller explains the tests that courts must apply to determine whether a particular closure is warranted. Id. at 48–49. Specifically, "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." Id. at 45, 48 (citing Press-Enter. Co. v. Super. Ct. of Cal., 464 U.S. 501, 510 (1984)). The Waller Court found that the trial-court decision to close the suppression hearing failed this test: the prosecutors' proffer on privacy was insufficiently specific; the resulting findings used to justify closure were overbroad; and the court did not consider alternatives to closing the entire hearing. Id. at 48–49. The Court thus determined that closing the suppression hearing had violated the petitioners' public-trial right. Id. at 48.

This second part of Waller is more pertinent to Taylor's argument, but even so, the Court finds that Taylor I is not contrary to, or an unreasonable application of, this second part of Waller. The primary discussion of Taylor I was determining the threshold matter of whether the trial court had closed a trial in the first instance. See, e.g., Taylor I, 869 N.W.2d at 12 ("Thus, we hold that the photographic identification requirement did not constitute a 'true' closure."). Only if that condition is met—that is, only if a closure actually occurred—does the need arise to consider the closure's justifications. The discussion and holding of Taylor I are distinct from the concerns in

Waller, which concerned an unambiguous closing and so had to delve into the trial-court rationales for the closing. Because nothing in Waller discusses the standard for whether or not a closure has occurred, this Court cannot say that Taylor I is contrary to Waller or unreasonably applies Waller.

Pressly provides Taylor no further support. The Pressly Court confronted a state-court judge who had excluded the public (including the defendant's uncle) from the voir dire at defendant's trial. 558 U.S. at 209–10. Pressly's first holding is that the Sixth Amendment public-trial right applies to voir dire proceedings. Id. at 213. Unsurprisingly, nothing in that discussion is in any tension with Taylor I, which concerned access to a trial itself.[11]

Pressly next turned to "exceptions to [the] general rule" that trial proceedings should be open. Id. The Court here quoted Waller at length:

> While the accused does have a right to insist that the *voir dire* of the jurors be public, there are exceptions to this general rule. "[T]he right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." "Such circumstances will be rare, however, and the balance of interests must be struck with special care." Waller provided standards for courts to apply before excluding the public from any stage of a criminal trial:
>
> "[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure."

Id. at 213–14 (quoting Waller, 467 U.S. at 45, 48) (citations omitted). After this discussion, the Pressly Court turned to that case's key issue: what Waller demands of trial-court judges with respect to assessing alternatives to fully closing a hearing. Id. at 214–16.

In affirming the Pressly trial court, the Georgia Supreme Court had held that "trial courts need not consider alternatives to closure absent an opposing party's proffer of some alternatives." Id. at 214. The U.S. Supreme Court determined that this flatly contradicted Waller's statement

[11] Indeed, in Pressly, the state-court judge who closed the voir dire proceedings expressly acknowledged that the trial itself would be open. 558 U.S. at 210.

that "the trial court must consider reasonable alternatives to closing the proceeding" because the Waller holding did not hinge—in any way—on whether a party had offered alternatives to closure. Id. at 214–15.

None of this is supportive of Taylor arguments here, for essentially the same reason that Waller does not lend him support. Taylor I does not concern the standards for whether a trial closure is justified; it concerns instead the logically prior question of whether a closure meriting Sixth Amendment concern has occurred at all. For this reason, the Court finds that Taylor I is not contrary to, or an unreasonable application of, any rule of law set forth in Pressly.[12]

B. Procedural Default of Taylor's Factually Supplemented Public-Trial Claim

Taylor's second argument is difficult to discern. (See, Pet.'s Mem., [Docket No. 25], at 12–15). Taylor appears to suggest in two ways that he did not procedurally default the issue of whether factual evidence supports the claim that people were actually excluded from his trial.[13] The Court disagrees: Taylor did procedurally default the supplemented public-trial claim, and each of his assertions attempting to avoid that conclusion is without merit.

Before seeking a writ of habeas corpus, a state prisoner must exhaust all available state remedies. See, 28 U.S.C. § 2254(b)(1). To give a state a chance to fix alleged violations of its prisoners' federal rights, "the prisoner must fairly present his claim in each appropriate state court (including a state supreme court with powers of discretionary review) . . . ." Baldwin v. Reese,

[12] That is not to say that every Court or even this Court would reach the same conclusion as the Minnesota Supreme Court. When addressing a § 2254 petition claiming that a state court legally erred, however, this Court does not review questions afresh; it merely determines if a state-court decision cannot possibly be reconciled with the identified U.S. Supreme Court precedent. See, e.g., Woods v. Donald, 135 S. Ct. 1372, 1376 (2015) ("When reviewing state criminal convictions on collateral review, federal judges are required to afford state courts due respect by overturning their decisions only when there could be no reasonable dispute that they were wrong."); Harrington v. Richter, 562 U.S. 86, 103 (2011) ("As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."). Assigned that specific task, the Court concludes that Taylor I is not contrary to, or an unreasonable application of, clearly established federal law.

[13] For the sake of clarity, the Court will refer to this claim as the supplemented public-trial claim.

541 U.S. 27, 29 (2004) (quoting cases; internal quotation marks omitted). A claim has been "fairly presented" in state court when either the state court rules on the claim's merits or, more relevant here, the petitioner "presents his claims in a manner that entitles him to a ruling on the merits." Gentry v. Lansdown, 175 F.3d 1082, 1083 (8th Cir. 1999) (citing Castille v. Peoples, 489 U.S. 346, 351 (1989)).

Here, the Minnesota courts did not address Taylor's supplemented public-trial claim on the merits. Whether he "fairly presented" that claim to the Minnesota courts thus hinges on whether he presented it "in a manner that entitle[d] him to a ruling on the merits." The answer here is plainly in the negative.

The Eighth Circuit Court of Appeals established in Hall v. Delo that "[a] federal claim has not been fairly presented to the state courts when the state court has declined to decide the federal claim on the merits because the petitioner violated a state procedural law." 41 F.3d 1248, 1250 (8th Cir. 1994) (citing Jones v. Jerrison, 20 F.3d 849, 854 (8th Cir. 1994)); see also, e.g., Yang v. Knutson, No. 18-cv-0014 (SRN/TNL), 2018 WL 4178189, at *7 (D. Minn. June 12, 2018) (quoting Hall), report and recommendation adopted, 2018 WL 4168995 (D. Minn. Aug. 30, 2018). That rule squarely applies here: the Minnesota courts refused to consider the supplemented public-trial claim because Taylor's attempt to raise it presented an unexcused violation of the state's Knaffla rule. See, Section I.D supra.

Furthermore, "[w]hen there is no longer any state court remedy available for a claim that has not previously been fairly presented to the state's highest court, that claim has been 'procedurally defaulted.'" Maxwell v. Gau, No. 12-cv-1770 (ADM/TNL), 2014 WL 1371912, at *9 (D. Minn. Apr. 8, 2014) (citing Coleman v. Thompson, 501 U.S. 722, 750 (1991); McCall v.

Benson, 114 F.3d 754, 757 (8th Cir. 1997)). Here, Knaffla precludes Taylor from trying to reassert his supplemented public-trial claim in state court, so that claim has been procedurally defaulted.

With this in mind, the Court turns to Taylor's apparent arguments why he has not procedurally defaulted the supplemented public-trial claim. First, Taylor points to 28 U.S.C. § 2254(e) and related caselaw. (Pet.'s Mem., [Docket No. 30], at 13). Section 2254(e) limits when federal courts can hold evidentiary hearings on claims: "[i]f *the applicant* has failed to develop the factual basis of a claim in State court proceedings," it states, "the court shall not hold an evidentiary hearing on the claim unless" certain special conditions apply. Cf. 28 U.S.C. § 2254(e)(2)(A)–(B) (setting conditions). Taylor claims that § 2254(e)'s use of "applicant" means that this rule does not apply to him, for it was not his—the applicant's—fault that he did not present the supplemented public-trial claim below. (Pet.'s Mem., [Docket No. 30], at 13).

Putting aside the "fault" question, § 2254(e) is inapposite here. Section 2254(e) says when an evidentiary hearing is appropriate for a claim, but whether that claim is procedurally defaulted is a separate, logically prior question. This is because if a claim is procedurally defaulted (and there is no showing of cause and prejudice sufficient to excuse the default), a federal court will not address the claim—no evidentiary hearing will be necessary. Thus, the Court finds unpersuasive Taylor's argument based on § 2254(e).[14]

Second, Taylor presents a bullet-point list of various facts that purportedly show that the Minnesota Supreme Court was wrong to decide in Taylor II that he had "forfeited his right to a hearing" on the supplemented public-right claim. (Pet.'s Mem., [Docket No. 30], at 13–15). These facts generally suggest that something unfair happened when Taylor's appellate counsel failed to

[14] Indeed, all of the cases Taylor cites in this section address § 2254(e) rather than the exhaustion and procedural-default issues of § 2254(b). See, Holland v. Jackson, 542 U.S. 649, 652–53 (2004) (discussing § 2254(e)); Williams v. Taylor, 529 U.S. 420, 431 (2000) (same); Davis v. Lambert, 388 F.3d 1052, 1061 (7th Cir. 2004) (same); Matheney v. Anderson, 253 F.3d 1025, 1039 (7th Cir. 2001) (same); Fisher v. Lee, 215 F.3d 438, 454 (4th Cir. 2000) (same).

move for a stay of Taylor's direct appeal. These facts may bear on whether cause exists sufficient to excuse Taylor's procedural default. But they do not change the fact that the Minnesota courts "declined to decide [Taylor's] federal claim on the merits because [he] violated a state procedural law." That test indicates whether or not a claim was "fairly presented," which in turn drives the determination of whether a claim has been procedurally defaulted. As a result, Taylor's factual recitation does not affect the conclusion that he procedurally defaulted the supplemented public-trial claim.

C. Cause and Prejudice Excusing Taylor's Default of His Factual Argument

The third argument in Taylor's Memorandum presents two reasons why this Court should excuse the procedural default of his supplemented public-trial claim: (1) he was unfairly prevented from getting needed supplementary factual material during his Taylor I appeal because of Minnesota procedures[15] that allegedly allow lawyers to decline to move to stay direct appeals to pursue postconviction-relief petitions; and (2) he received ineffective assistance of counsel when his appointed direct-appeal counsel refused to seek a stay of his direct appeal. (See, Pet.'s Mem., [Docket No. 30], at 15–19 (state-procedure discussion); 19–21 (ineffective-assistance discussion)). The Court will consider these two grounds in turn.

1. Arguments regarding Minnesota state process

Although the specifics of Taylor's argument regarding Minnesota state court procedures are unclear, it appears that Taylor's discussion of Minnesota procedures commingles three distinct arguments. As already noted, one argument is that these procedures generate cause and prejudice sufficient to excuse Taylor's procedural default of the supplemented public-trial claim. (Id. at 16–17). But Taylor also seems to suggest that Minnesota state procedures excuse him from needing

[15] Specifically, Rule 28.02(4)(4) of the Minnesota Rules of Criminal Procedure.

to meet the exhaustion requirement at all, (Id. at 15 (citing 28 U.S.C. § 2254(b)(1))), and furthermore, that they create an independent ground for habeas relief. (Id. at 16–18) (suggesting that Minnesota procedures violate due process). The Court will address these arguments in turn.

a) Exhaustion under 28 U.S.C. § 2254(b)

As previously noted, under § 2254(b)(1)(A), a habeas application "shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State." But § 2254(b)(1)(B) creates two exceptions; one is that § 2254(b)(1)(A) does not apply where "circumstances exist that render [the available state corrective] process ineffective to protect the rights of the applicant." Taylor claims that his situation fits into this exception. Specifically, he says that Minnesota procedures are ineffective at protecting prisoners' right because they give direct-appeal counsel the option to refuse to move to stay direct appeals to allow pursuit of postconviction-relief motions. (Pet.'s Mem., [Docket No. 30], at 15–16).

The Court disagrees. Section 2254(b)(1)(B)(ii) does not apply when the existing state-court remedy for an issue is "adequate" as opposed to "futile," with the latter existing where "the corrective process is so clearly deficient as to render futile any effort to obtain relief." Duckworth v. Serrano, 454 U.S. 1, 3–4 (1981); cf. Young v. Ragen, 337 U.S. 235, 238–39 (1949) ("The doctrine of exhaustion of state remedies . . . presupposes that some adequate state remedy exists."). Reviewing this case's procedural history, the Court cannot conclude that Rule 28.02(4)(4) creates a process that renders "any effort to obtain relief" futile. The record shows instead that Taylor's problems flowed from the particular sequence of actions in his case, not Minnesota rules.

Taylor repeatedly suggests that it was inappropriate for the Minnesota Supreme Court to deny his motion to stay his direct appeal during Taylor I. (Pet.'s Mem., [Docket No. 30], at 2, 4, 14, 16). He ignores, however, that the Minnesota Supreme Court received that motion on the day

it was scheduled to consider his appeal—and indeed, *after* it had considered it. See, Section I.B supra. Regardless of whose fault it was that the Minnesota Supreme Court got the motion at that late date, the events here do not show that Minnesota procedures themselves make relief-seeking futile. As a result, the § 2254(b)(1)(B)(ii) exception does not apply here and does not excuse Taylor's failure to exhaust his supplemented public-trial claim.

b) Cause and prejudice

The Court next considers whether Minnesota's state procedures provides cause and prejudice sufficient to excuse Taylor's procedural default of the supplemented public-trial argument. The Court need not address prejudice prong because the cause prong is dispositive. See, e.g., McCleskey v. Zant, 499 U.S. 467, 502 (1991).

As the Eighth Circuit has noted, "[c]ause typically turns on whether some objective circumstance external to the defense impeded counsel from raising the claim." Kennell v. Dormire, 873 F.3d 637, 640 (8th Cir. 2017), cert. denied sub nom. Kennell v. Griffith, 138 S. Ct. 2690 (2018). "A factor is external to the defense if it 'cannot fairly be attributed to' the prisoner." Davila v. Davis, 137 S. Ct. 2058, 2065 (2017) (quoting Coleman, 501 U.S. at 753). And the Supreme Court has noted that the rules for when a prisoner "may establish cause to excuse a procedural default . . . reflect an equitable judgment that only where a prisoner is impeded or obstructed in complying with the State's established procedures will a federal habeas court excuse the prisoner from the usual sanction of default." Martinez v. Ryan, 566 U.S. 1, 13 (2012).

Although Taylor does not discuss the objective-circumstance standard at all, his view presumably is that the discretion that Rule 28.02(4)(4) gives to appellate counsel is an "objective circumstance external to the defense"—a factor that cannot be fairly attributed to him—that prevented him from factually supplementing his public-trial argument.

The record now before the Court, however, does not suggest that Taylor was "impeded or obstructed in complying with the State's established procedures" in the present case. As discussed in the previous analysis concerning § 2254(b)'s exhaustion requirement, what ultimately prevented Taylor from successfully getting a stay of his direct appeal was not Rule 28.02, but the fact that the Minnesota Supreme Court received his motion to stay after that court had already held its Taylor I conference. Needless to say, the timing of that motion's receipt is not a circumstance "external to the defense." The defense's own conduct thus played a role in the procedural default, and so Taylor's Minnesota-procedure argument does not provide cause excusing the default.

c) Standalone habeas claim based on state procedures

Taylor's Minnesota-procedures discussion suggests that he believes that those procedures' alleged unfairness creates a standalone ground for habeas relief—distinct, that is, from whatever effect the procedures have in excusing his procedural default of the supplemented public-trial claim. That standalone argument, however, must fail; it is itself procedurally defaulted, and Taylor has not shown cause and prejudice sufficient to excuse that default.

Taylor clearly did not fairly present his procedure-based challenge to the Minnesota courts. As noted above, to properly exhaust a claim in state court, a prisoner "must fairly present his claim in each appropriate state court." Baldwin, 541 U.S. at 29. In this context, fair presentation occurs when "the state court rules on the merits of [the petitioner's] claims, or if [the petitioner] presents his claims in a manner that entitles him to a ruling on the merits." Gentry, 175 F.3d at 1083. Minnesota's state courts never considered the merits of Taylor's arguments about Minnesota state procedures, and that is entirely unsurprising—neither the Postconviction-Relief Petition or Taylor's brief to the Minnesota Supreme Court in Taylor II have any discussion of the procedural

conundrum ostensibly caused by Rule 28.02(4)(4) of the Minnesota Rules of Criminal Procedure. See gen., Postconviction-Review Mem.; Aplt.'s Br. and Addendum.

As a standalone ground for habeas relief, then, Taylor's Minnesota-procedure argument was never fairly presented. And just like Taylor's supplemented public-trial claim, Knaffla will bar Taylor from trying to bring the claim in state court now. This means that Taylor's Minnesota procedure argument, if construed as a standalone basis for habeas relief, has been procedurally defaulted. Procedural default can be excused upon a showing of cause and prejudice, of course, but Taylor makes no effort to show cause and prejudice here. This Court thus cannot give Taylor habeas relief on the basis of his Minnesota-procedures argument.

2. Ineffective assistance of counsel

The second way in which Taylor suggests that he can show cause and prejudice excusing the procedural default of his supplemented public-trial argument is by attributing it to ineffective assistance from his appellate counsel. (Pet.'s Mem., [Docket No. 30], at 19–21); (cf. Id. at 20–21) ("Fault for failing to seek a stay of direct appeal to pursue postconviction relief and build a factual record lies at least in part at the feet of Taylor's appointed counsel on direct appeal. As such, Taylor's right to effective assistance of appellate counsel was violated.").

Taylor faces a problem here: for ineffective assistance to qualify as cause and prejudice to excuse procedural default of an issue, the ineffective assistance must itself be constitutionally problematic. "In other words, ineffective assistance adequate to establish cause for the procedural default of some *other* constitutional claim is *itself* an independent constitutional claim." Edwards v. Carpenter, 529 U.S. 446, 451 (2000). And the U.S. Supreme Court has made clear that "the principles of comity and federalism that underlie our longstanding exhaustion doctrine . . . require *that* constitutional claim, like others, to be first raised in state court." Id. at 451–52.

For Taylor to use ineffective assistance as cause and prejudice to excuse his procedural default, then, he must have fairly presented that ineffective-assistance claim to the Minnesota courts as an independent claim. The Court again notes that fair-presentation occurs when "the state court rules on the merits of [the petitioner's] claims, or if [the petitioner] presents his claims in a manner that entitles him to a ruling on the merits." Gentry, 175 F.3d at 1083. Taylor did state in his Postconviction-Relief Motion that his appellate counsel provided him ineffective assistance. The entirety of that argument, however, reads as follows:

> Appellate counsel's decision not to stay petitioner's direct appeal in order to expand the record on the closed courtroom issue fell below an objective standard of reasonableness for appellate counsel and denied petitioner effective assistance of counsel as guaranteed by the state and federal constitutions. U.S. Const. amends. VI, XIV; Minn. Const. art. 1 § 6.

(Postconviction-Relief Mot. at 2).

The trial court did not explicitly address Taylor's ineffective-assistance claim. See gen., April 2017, Order. Taylor could have argued the point on appeal. Instead, Taylor's appellate brief in Taylor II has no argument whatsoever regarding ineffective assistance. (Aplt's Br. and Addendum at 9). Indeed, he specifically asserted that "counsel's strategy decisions on appeal are *not* likely to result in a finding of ineffective assistance of counsel." Id.

Faced with this, Taylor II determined that Taylor had forfeited appellate review of his ineffective-assistance claim. 910 N.W.2d at 37 n.4. Considering ineffective-assistance claims requires analysis of the standards laid out by Strickland v. Washington, 466 U.S. 668 (1984), the court said, and Taylor's failure to cite Strickland or provide any relevant argument meant that he had forfeited the issue. Taylor II, 910 N.W.2d at 37 n.4. Here again, Taylor failed to fairly present an issue to the Minnesota courts because they determined that a state procedural rule barred review of the issue.

And—also again—Taylor's ineffective-assistance argument cannot be exhausted now; Knaffla would bar any attempt to bring the argument in state court now. The issue has thus been procedurally defaulted, and Taylor has made no attempt to show cause and prejudice excusing the default.

Accordingly, this Court will not further consider Taylor's ineffective-assistance claim.

D. Alternative-Motive Evidence

Taylor also asserts a second Taylor I error: Taylor asserts that the Minnesota Supreme Court's holding that the trial court was justified in excluding Taylor's requested "alternative-motive evidence"[16] runs counter to Taylor's Sixth Amendment "right to present a complete defense." (Pet.'s Mem., [Docket No. 30], at 22). Taylor claims here that Taylor I "misapplied clearly established law" as laid out in Crane v. Kentucky, 476 U.S. 683 (1986). The Court finds this argument unpersuasive.

Because Taylor asserts that Taylor I "misapplied" Crane, he is required to show that Taylor I "identifies the correct governing legal principle from [Crane] but unreasonably applies that principle to the facts of the prisoner's case." Brende, 907 F.3d at 1085. Taylor's discussion is on this point, however, is unclear. Taylor I does not cite Crane at all, so it is a misnomer to charge Taylor I with misapplying it. See, Taylor I, 869 N.W.2d at 12–14. Taylor's point here instead seems to be that (1) Taylor I applied a harmless-error analysis to determine that, even if it had been error to exclude Taylor's requested alternative-motive evidence, the error was harmless, and (2) that harmless-error determination was a misapplication of clearly established law (i.e., Crane).

[16] In his memorandum, Taylor repeatedly uses the phrase "alternative perpetrator evidence." The Court finds this terminology confusing. There is no present dispute as to who fired the relevant shots here: the shooters were Copeland and Catchings. The key issue for Taylor's purposes, as presented here, is whether Copeland and Catchings shared a common motive with Taylor when they fired those shots. In the Court's view, then, it is clearer to refer to this discussion as one of alternative motive, not one of alternative perpetrators.

Crane, however, offers Taylor little assistance. Indeed, aside from generic references to a defendant's right to present a defense, Crane has nothing to do with the issues presented in the Amended Petition. In Crane, a 16-year-old defendant charged with murder filed a pretrial motion to suppress his confession, claiming it had been "impermissibly coerced." Crane, 476 U.S. at 684–85. After a hearing presenting different factual accounts of the confession, the trial court denied the motion. Id. at 685. At trial, the opening statements focused on the confession: the prosecution stressed it as evidence of guilt, and the defense counsel argued that it had numerous inconsistencies undercutting its credibility. Id. After the defense opening, the prosecution moved to prevent the defendant from introducing evidence about how the police obtained the defendant's confession, arguing that the confession's voluntariness was a "legal matter" previous established by the court. Id. at 686. The court agreed, stating that the defendant could not offer any "evidence about the duration of the interrogation or the individuals who were in attendance." Id. After the defendant was found guilty, he appealed, arguing that he had a constitutional right to present testimony about the circumstances of the confession as part of his defense. Id. The Kentucky Supreme Court affirmed, and the Supreme Court granted certiorari. Id. at 687.

The resulting Crane decision does refer generally to a defendant's "fundamental constitutional right to a fair opportunity to present a defense." Id. at 684; see Id. at 690–91. But the Crane decision hinged on the Kentucky Supreme Court's misunderstanding of what it means for a confession to be voluntary. It says nothing about the contours of the right to present a defense in a case like Taylor's. Crane says nothing about alternative-motive evidence, and nothing about how to make harmless-error determinations in cases involving such evidence. Given this, there is no basis for finding that Taylor I misapplied clearly established law in Crane.

E. Cumulative Error

Taylor's fifth argument is that cumulative error—i.e., the combination of asserted errors regarding Taylor's public-trial right and his right to present alternative-motive evidence—justifies issuance of a writ of habeas corpus. (Pet.'s Mem., [Docket No. 30], at 23–24). As a threshold matter, as the discussion above shows, there are simply no errors here to combine. Furthermore, Taylor simply misstates the law here: The Eighth Circuit has repeatedly said that "cumulative error does not call for habeas relief, as each habeas claim must stand or fall on its own." Henderson v. Norris, 118 F.3d 1283, 1288 (8th Cir. 1997) (quoting Scott v. Jones, 915 F.2d 1188, 1191 (8th Cir. 1990)); see also, Davis v. Grandlienard, No. 13-CV-2449 (DSD/JJK), 2015 WL 1522186, at *6 (D. Minn. Mar. 31, 2015) (quoting Henderson), aff'd, 828 F.3d 658 (8th Cir. 2016). Taylor's cumulative-error argument thus fails.

F. Standalone Claim of Ineffective Assistance of Counsel

Taylor's final argument is that he has a standalone ineffective-assistance-of-counsel claim derived from his direct-appeal counsel's decision not to move for a stay of the direct appeal. (Pet.'s Mem., [Docket No. 30], at 24). The claim is "standalone" in the sense that Taylor presents this ineffective-assistance claim as an independent reason for why he merits habeas relief—as opposed to his third argument, in which he uses ineffective assistance as a potential source of cause and prejudice excusing the procedural default of his factual-support-for-public-trial-right claim. (*Compare* Id. *with* Id. at 19–22).

This argument fails for the same reasons discussed in Section II.C.2 supra. For ineffective-assistance to provide cause and prejudice excusing his procedural default of the supplemented public-trial claim, he is required to demonstrate that the ineffective-assistance claim was itself constitutionally problematic. In other words, Taylor must show that his ineffective-assistance

claim was a standalone claim for it to even provide cause and prejudice. But as discussed at length above, Taylor procedurally defaulted his ineffective-assistance claim, and has offered nothing showing cause and prejudice excusing that procedural default. Thus, Taylor's ineffective-assistance fails twice—it fails both as a generator of cause and prejudice and as a standalone ground for habeas relief.

G. Certificate of Appealability

One final point: a § 2254 habeas corpus petitioner cannot appeal an adverse ruling on his petition unless he is granted a certificate of appealability (COA). 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22(b)(1). A COA cannot be granted unless the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). In this case, it is highly unlikely that any other court, including the Eighth Circuit Court of Appeals, would treat Taylor's current Petition differently than it is being treated here. It is therefore recommended that Taylor not be granted a COA in this matter.

III. Conclusion

Based on the foregoing, and on all of the files, records, and proceedings herein, **IT IS HEREBY RECOMMENDED** that:

1. Taylor's Amended Petition, [Docket No. 24], be **DENIED**; and

2. No certificate of appealability be issued.

Dated: January 22, 2019

s/ Leo I. Brisbois
Leo I. Brisbois
United States Magistrate Judge

NOTICE

Filing Objections: This Report and Recommendation is not an order or judgment of the District Court and is therefore not appealable directly to the Eighth Circuit Court of Appeals.

Under Local Rule 72.2(b)(1), "a party may file and serve specific written objections to a magistrate judge's proposed finding and recommendations within 14 days after being served a copy" of the Report and Recommendation. A party may respond to those objections within 14 days after being served a copy of the objections. *See* Local Rule 72.2(b)(2). All objections and responses must comply with the word or line limits set forth in Local Rule 72.2(c).

Appendix D

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STATE of Minnesota, Respondent
v.
Kemen Lavatos TAYLOR, II, Appellant.

No. A14–0942.

Supreme Court of Minnesota.

Aug. 26, 2015.

Lori Swanson, Attorney General, Saint Paul, MN, and Michael O. Freeman, Hennepin County Attorney, Jean E. Burdorf,

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Assistant County Attorney, Minneapolis, MN, for respondent.

Kemen Lavatos Taylor, II, Stillwater, MN, pro se.

Considered and decided by the court without oral argument.

OPINION

LILLEHAUG, Justice.

Kemen Lavatos Taylor, II, was convicted of one count of first-degree murder and two counts of attempted first-degree murder related to the shooting of three teenagers. On direct appeal, he alleges eight errors committed by the trial court. We affirm the convictions.

I.

On October 4, 2012, a grand jury indicted Taylor on two counts of murder related to the shooting death of Rayjon Gomez: first-degree premeditated murder and first-degree murder while committing a drive-by shooting. Taylor was also indicted on attempted first-degree murder charges related to two victims who survived the shooting.

The State's theory of the case at trial was as follows. On the night of August 24, 2011, Taylor drove a group of individuals associated with the Young–N–Thuggin gang ("YNT") to a certain neighborhood (known as "the lows") in north Minneapolis in a blue van to look for an individual known as Skitz. Skitz was affiliated with a rival gang and had allegedly shot Taylor's younger brother. Taylor sought to retaliate against Skitz and other members of the rival gang. Besides Taylor, 25 years old at the time, the van's occupants included Derrick Catchings, Donquarius Copeland, M.L., T.B., and Taylor's younger brother, all teenagers. As they drove through the neighborhood, somebody in the van thought he saw Skitz. Taylor drove a little further and parked the van. Catchings and Copeland got out and fired shots at several people in an alley. The shots hit Gomez, age 13, who died at the scene, wounded D.T., and missed D.H. Skitz was not among the victims.

D.T. and D.H. testified that they had been riding bikes in the lows that night with Gomez. While they were in an alley, they heard shots come from behind them. Gomez exclaimed that he had been hit. D.T. was hit in the shoulder by one of the bullets. Neither D.T. nor D.H. saw who fired the shots into the alley. Later that night, Skitz, who was D.T.'s cousin, told D.T. that the shooters were looking for Skitz because he had shot Taylor's brother.

Testifying as part of a plea agreement, Catchings acknowledged that he was a member of YNT and that he had killed Gomez. He testified that, on the afternoon of August 24, 2011, he was at a house known as the "Nest," where he hung out with T.B., M.L., and Copeland. At some point, the group got into a blue van, driven by Taylor. The van went to Taylor's house to pick up Taylor's younger brother, who associated with people from YNT. Taylor's brother got in the van, and the group talked about how he had been shot by Skitz, who affiliated with an "opposition" gang.[1] According to Catchings, Taylor suggested that the group go to the lows to look for Skitz, or if they could not find Skitz, to look for rival gang members. Catchings had a semi-automatic handgun with him, which he showed to the group, including Taylor.

Catchings testified that Taylor drove the van to the lows. As they drove through

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the lows, M.L. said that he saw Skitz. Taylor drove to the next block and parked. Catchings and Copeland got out to find Skitz. Catchings and Copeland approached an alley and saw people riding bikes, one of whom Catchings thought was Skitz. Catchings handed the gun to Copeland, who shot at the individual. Copeland handed the gun back to Catchings, who fired several more shots. Copeland and Catchings then returned to the van, and Copeland said that he thought he had shot Skitz. Taylor told the group "to keep [it] between the people in the van." Taylor drove the group back to the Nest, where everybody but Taylor and his brother got out. Catchings hid the gun in the Nest, but it was seized by police several days later during a raid.

Copeland also testified as part of a plea agreement, and his testimony generally mirrored that of Catchings. Copeland testified that the same group of four was hanging out at the Nest on August 24, 2011. Copeland was a member of YNT, and testified that Catchings and M.L. associated with YNT. According to Copeland, a significant amount of fighting between YNT and Skitz's gang had occurred that summer.

Copeland testified that Taylor, his cousin, picked the group up in his blue van and went to Taylor's house to pick up Taylor's brother. The group discussed how Skitz had shot Taylor's brother. Catchings suggested they go to the lows to shoot at members of the rival gang. Taylor responded: "If that's what you all want to do, then that's what you all gonna do," and drove the group to the lows. Upon arriving, Copeland noticed two individuals from the rival gang. M.L. also said he saw Skitz. Taylor parked the vehicle, Copeland and Catchings got out, and the two ran to an alley. Catchings stopped at the alley because he said he saw Gomez, with whom Catchings had a "beef." Catchings shot several times at Gomez and the other two victims. He then handed the gun to Copeland, who fired several more shots. Catchings and Copeland returned to the van, and Copeland told the group: "I think I shot somebody." Taylor replied "[y]ou all didn't pop nobody." Taylor then drove the group back to the Nest and dropped off Copeland, Catchings, M.L., and T.B.

Both Copeland and Catchings acknowledged that they did not initially implicate Taylor when talking with police. Catchings did not implicate Taylor because he "didn't want to bring nobody else in it." Copeland was concerned about getting the others in trouble, and believed that only the shooters should get in trouble. Copeland and Catchings agreed to testify against Taylor when they negotiated guilty pleas to second-degree murder.

T.B. also testified for the State, but he was a hostile witness. At the time of trial, T.B. had not been charged with a crime for his participation in the Gomez shooting, and he was not testifying as part of a plea agreement. His version of events generally echoed the testimony of Copeland and Catchings: M.L., T.B., Copeland, and Catchings were hanging out at the Nest. Copeland and Catchings were members of YNT. Taylor picked them up in a van, and eventually drove them to pick up his younger brother. The group talked about how Skitz shot Taylor's brother. Taylor then drove to the lows, where T.B. saw a rival gang member; Taylor drove a little further and parked. Copeland and Catchings jumped out of the van with a gun. T.B. heard some shots; Copeland and Catchings got back in the van, and one of them exclaimed: "I think I got ... Rayjon!" As the group drove away, Copeland and Catchings joked about what had just happened. Taylor reportedly told them to "[s]top talkin' about it, be about it."

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The other two alleged members of the group in the van, M.L. and Taylor's brother, did not testify at trial. The record does not explain why.

Three jailhouse informants testified. The first jailhouse informant, M.P., testified that he and Taylor shared a cell during November 2012.

Taylor told M.P. that he was the driver of the vehicle used in the murder of Gomez, and that the group had been looking to retaliate against Skitz. Taylor told M.P. that, before Catchings and Copeland got out of the van to shoot, they advised Taylor's brother that: "We gonna get down for ya, we gonna lay somebody down. We're gonna kill somebody." After the shooting, Taylor told those in the van: "Be quiet, don't say nothin' if we caught." Generally, M.P. displayed considerable knowledge about the specific facts of the crime, testifying about the gun used and the neighborhood.

The second jailhouse informant, H.P., agreed to testify as part of a plea agreement for an unrelated offense. At trial, he changed his story and claimed that Taylor had not told him anything about the case. A police investigator later testified that H.P. told him that he was "extremely afraid to testify [that day] in court," and was worried that when he went back to prison "he would be attacked."

The third jailhouse informant, C.R., testified that he had known Taylor for around 10 years and that Taylor was affiliated with YNT. Taylor told C.R. that he was driving a group to look for members of Skitz's gang to shoot in retaliation for the shooting of somebody that Taylor knew. According to C.R., he decided to testify against Taylor because he was upset that Taylor would use his influence over "juveniles" to have them commit crimes: "He could have prevented it, but he put them in that situation to do what they did." Taylor apparently could coerce the "juveniles" to be the shooters, because he was a "big homey," or their superior.[2]

The district court also admitted two phone calls made by Taylor while in jail. In the first phone call, Taylor called an individual and expressed regret for not posting bail: "That's why I should've bailed out, man. If I would've bailed out, I'da been on the run right now." The individual responded: "They would've came and tried to pick your ass up for that charge." Then Taylor said: "But I would've been gone."

In the second phone call, Taylor called his girlfriend and discussed having her call his attorneys. His girlfriend asked: "Alright, and, and I'm just, I was wit' you that day all that shit happened." Taylor responded: "Tell 'em yea, any questions they have, tell you (inaudible)." Taylor's girlfriend was not called as a witness by either side.

Taylor took the stand in his defense. He denied that he was in a gang or clique. He also denied any involvement in the shooting of Gomez. He acknowledged that he had previously been convicted of two unrelated felonies: fifth-degree possession of narcotics and possession of a firearm. At the time of the trial, he was in prison for the latter offense.

On rebuttal, the State called a gang expert from the Minneapolis Police Department. The expert examined two photographs that had been previously admitted without objection. In the first, Taylor appeared to be displaying a YNT symbol. In the second, Taylor appeared to be displaying a sign of disrespect to Skitz's gang. In the opinion of the expert, relying

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on those photographs, and on other undescribed information gathered from social media, police reports, jail calls, and school resource officers, Taylor was a gang member.

The jury found Taylor guilty of all counts. He was convicted of one count of first-degree murder and two counts of first-degree attempted murder.

On direct appeal, Taylor alleges eight errors committed by the district court: (1) it excluded from the courtroom members of the public that did not have photographic identification; (2) it excluded evidence supporting an alternative motive of the eyewitnesses; (3) it admitted testimony from a gang expert identifying Taylor as a gang member; (4) it gave jury instructions on aiding and abetting liability that did not include certain elements; (5) it did not sua sponte instruct the jury that appellant's prior convictions could

only be used for impeachment purposes; (6) it violated his right to a speedy trial; (7) it admitted a note protected by attorney-client privilege; and (8) it admitted prison phone call recordings. We consider each alleged error in turn.

II.

We first consider Taylor's argument that the district court's photographic identification requirement violated his right to a public trial. To prevent disruptions by persons in the gallery, the district court issued a list of "basic rules" for spectators at trial. Besides prohibiting profanity, threatening gestures, gum chewing, and cell phones, the court required spectators to show photographic identification before being allowed entry into the courtroom. Taylor did not object. The record does not show whether the identification requirement was enforced and, if so, whether anyone who sought to enter the courtroom could not.

Taylor argues that the district court's identification requirement violated his right to a public trial. "Whether the right to a public trial has been violated is a constitutional issue that we review de novo." *State v. Brown,* 815 N.W.2d 609, 616 (Minn.2012).

Both the U.S. and the Minnesota Constitutions provide that "[i]n all criminal prosecutions the accused shall enjoy the right to a ... public trial." U.S. Const. amend. VI ; Minn. Const. art. I, § 6. The public trial right is " 'for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.' " *State v. Lindsey,* 632 N.W.2d 652, 660 (Minn.2001) (quoting *Waller v. Georgia,* 467 U.S. 39, 46, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984)). But "the right to a public trial is not an absolute right." *State v. Fageroos,* 531 N.W.2d 199, 201 (Minn.1995). In some situations, a courtroom closure may be justified. To determine whether a closure is justified, we have adopted the U.S. Supreme Court's *Waller* test, which provides:

> "[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure."

Fageroos, 531 N.W.2d at 201 (quoting *Waller,* 467 U.S. at 48, 104 S.Ct. 2210).

Taylor does not argue that the photographic identification requirement constituted a full closure of the courtroom, but rather that it constituted a partial closure.

[869 N.W.2d 11]

For both full and partial closures, we apply the *Waller* test. *State v. Mahkuk,* 736 N.W.2d 675, 685 (Minn.2007).

We have considered partial closures in two cases. In *Mahkuk,* the district court allowed police officers to exclude the defendant's brother and a cousin from the courtroom. 736 N.W.2d at 684–85. We held that the district court failed to make findings adequate to support its closure decision. *Id.* at 685. In *Fageroos,* the district court closed the courtroom to all spectators during the testimony of two minor victims of sexual assault.[3] 531 N.W.2d at 200–01. Similar to *Mahkuk,* we held that the district court failed to articulate its findings supporting the need for closure with sufficient specificity and detail. *Fageroos,* 531 N.W.2d at 202.

But before we can apply the *Waller* test to determine if a closure is justified, we must determine whether a closure even occurred. After all, "[n]ot all courtroom restrictions implicate a defendant's right to a public trial." *Brown,* 815 N.W.2d at 617. In *Brown,* the district court locked the courtroom doors during jury instructions. *Id.* However, the courtroom was never cleared of all spectators, those in attendance were told they

were welcome to stay, no individual was ever ordered removed, and the jury instructions "did not comprise a proportionately large portion of the trial proceedings." *Id.* at 618. We held that, for those reasons, the district court's conduct "did not implicate Brown's right to a public trial." *Id.*

To reach that holding in *Brown,* we relied on our previous decision in *State v. Lindsey,* in which we characterized the trial court's decision to exclude underage spectators as "not a true closure, in the sense of excluding all or even a significant portion of the public from the trial." 632 N.W.2d 652, 660 (Minn.2001). In *Lindsey,* we considered whether a closure "was too trivial to amount to a violation of the [Sixth] Amendment." *Id.* at 660–61 (quoting *Peterson v. Williams,* 85 F.3d 39, 42 (2d Cir.1996)); *see also State v. Silvernail,* 831 N.W.2d 594, 600–01 (Minn.2013) (applying *Lindsey* 's "triviality" standard and holding that the locking of courtroom doors during the State's closing argument was not a closure). We identified several factors to consider when determining whether a "true closure" occurred: whether "all or even a significant portion of the public" was excluded; whether the defendant, his family, his friends, or any witnesses were excluded; and whether any individuals actually excluded were known to the defendant. *Lindsey,* 632 N.W.2d at 660–61.

Here, Taylor argues that a partial closure occurred because "there are members of the public who do not have photo identification and could not attend [Taylor's] trial." But the district court's identification restriction is more analogous to *Lindsey,* in which the restriction was too trivial to constitute a true closure, than to the partial closures in *Mahkuk* or *Fageroos.* As in *Lindsey,* here there is no evidence in the record that a significant portion of the public was unable to attend due to the identification requirement; that Taylor, his family, his friends, or any witnesses were excluded; or that any individuals actually excluded were known to Taylor. Further, unlike in *Lindsey,* in which two unidentified minors were actually excluded, here there is simply no evidence that the requirement was enforced, or, if so, that even a single individual—identifiable

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or not—was actually excluded. Thus, we hold that the photographic identification requirement did not constitute a "true" closure.

Although we have no constitutional ground for reversal,[4] we caution district courts that they should not require those who wish to attend a public trial to produce identification as a condition of entry to the courtroom, unless there is good cause and no reasonable alternative under the *Waller* test.[5] We do not want anyone to be discouraged from attending or viewing proceedings in Minnesota courts.[6]

III.

We next consider Taylor's argument that the district court committed reversible error when it excluded certain evidence related to a possible alternative motive of the eyewitnesses. To cast doubt on whether he was involved in the shooting, Taylor sought to counter the State's claim that he and the others had the same motive to kill by showing that the shooters had a motive that did not involve Taylor. He wanted to do this by asking Copeland and Catchings about previous gang-related incidents. The district court excluded the evidence under Rule 403, reasoning that "the fact that other people also had a motive that was either the same or different doesn't negate the fact that Mr. Taylor had a motive.... I don't think the fact that other people may have had different motives is probative for anybody's case, and it certainly has the possibility of confusing the issues in the case."

On appeal, Taylor argues that the exclusion of evidence was erroneous under two theories: his right to introduce evidence in his defense and his right to confront witnesses. Such alleged constitutional error is subject to harmless-error review. *See State v. Blom,* 682 N.W.2d 578, 622 (Minn.2004) (applying harmless-error review to an "erroneous exclusion of evidence that violates

the defendant's right to present evidence"); *State v. Pride,* 528 N.W.2d 862, 867 (Minn.1995) (applying harmless-error review to "Confrontation Clause errors").

A.

Assuming without deciding that the district court erred in excluding the evidence, and applying the harmless-error test to the exclusion, we "must be satisfied beyond a reasonable doubt that an average jury (i.e., a reasonable jury) would have reached the same verdict 'if the evidence had been admitted and the damaging potential of the evidence fully realized.' " *State v. Greer,* 635 N.W.2d 82, 90 (Minn.2001) (quoting *State v. Post,* 512 N.W.2d 99, 102 (Minn.1994)).

We are satisfied beyond a reasonable doubt that a reasonable jury would have reached the same verdict even if Taylor had been able to present evidence that

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Copeland and Catchings had been involved in specific, prior gang-related incidents. This is because the district court's assumed error did not preclude Taylor from exploring Copeland's and Catchings' gang-related motives; it only precluded evidence of particular previous acts. Indeed, some evidence of alternative gang-related motives of the shooters was admitted at trial. Catchings testified that, while Skitz was the target, the group drove around to look for members of the "opposition," suggesting that Skitz's gang affiliation (as well as Taylor's brother's gang affiliation) was related to the retaliation. T.B. testified that the van was pursuing a member of the rival gang who was not Skitz. Copeland testified that Catchings "had a beef" with Gomez, and that Catchings both recognized and intentionally targeted Gomez. T.B. further testified that one of the shooters, on reentering the van, said "I think I got [Gomez]," suggesting that Gomez, a member of the opposition gang, was the target. Thus, Taylor had and used evidence that the shooters were not primarily or solely motivated by the shooting of Taylor's brother.[7] Evidence of other incidents would not have added much. Therefore, the district court's error, if any, under the "right to present evidence" theory, was harmless.

B.

Applying the harmless-error test to an assumed violation of the Confrontation Clause, we must determine "whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." *Pride,* 528 N.W.2d at 867 (quoting *Delaware v. Van Arsdall,* 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)). To do so, we look to a variety of factors, including: the importance of the testimony to the prosecution; whether the testimony was cumulative; the presence or absence of evidence corroborating or contradicting the testimony on material points; the extent of cross-examination otherwise permitted; and the overall strength of the prosecution's case. *Pride,* 528 N.W.2d at 867 (quoting *Van Arsdall,* 475 U.S. at 684, 106 S.Ct. 1431).

Here, any assumed Confrontation Clause error was harmless beyond a reasonable doubt. It is true that the testimony of Copeland and Catchings was critically important to the State's case. But not only was their testimony on material points corroborated by each other's testimony, it was corroborated by the testimony of T.B. and jailhouse informants. T.B.'s corroborating eyewitness testimony was particularly significant, as it was not induced by a plea deal. Further, although Taylor was not allowed to impeach Copeland and Catchings regarding several specific prior incidents, he was able to extensively

[869 N.W.2d 14]

impeach them based on their trial testimony, their plea agreements, their criminal history, and the inconsistent stories they told to police. And, as

we indicated previously, even in light of the district court's ruling, Taylor was able to elicit a considerable amount of testimony on alternative motives. Thus, the district court's error, if any, under the Confrontation Clause was harmless.

IV.

We next consider Taylor's argument that the district court committed reversible error when it allowed a gang expert to testify that Taylor was a member of a gang.

We have "never categorically prohibited the use of gang expert testimony." *State v. Jackson,* 714 N.W.2d 681, 691 (Minn.2006). But we have cautioned that "district courts should exercise caution in admitting gang-expert testimony because of the potential for such experts to unduly influence the jury." *State v. Blanche,* 696 N.W.2d 351, 374 (Minn.2005). To be admissible, "gang expert testimony 'must add precision or depth to the jury's ability to reach conclusions about matters that are not within its experience.' " *Jackson,* 714 N.W.2d at 691 (quoting *State v. DeShay,* 669 N.W.2d 878, 888 (Minn.2003)).

We will assume without deciding that the district court erred in admitting expert testimony that Taylor was a member of a gang. We then determine whether the assumed error was harmless. An error is harmless if there is no reasonable possibility that it "substantially influence[d] the jury's decision." *DeShay,* 669 N.W.2d at 888.

Here, there is no reasonable possibility the gang expert's opinion substantially influenced the jury's decision. The expert's testimony was cumulative to other admitted evidence that suggested, if not established, that Taylor was either a member of, or clearly associated with, YNT. *See DeShay,* 669 N.W.2d at 888 (holding that there was no reasonable possibility that gang-expert testimony substantially influenced the guilty verdict because the testimony was "for the most part, duplicative of testimony given by witnesses with first-hand knowledge of the relevant events and which established that [the defendant] was a member of, and involved with, a group that operated as a criminal gang"); *see also State v. Lopez–Rios,* 669 N.W.2d 603, 613 (Minn.2003). Without objection from Taylor, the district court admitted two photographs of Taylor flashing hand symbols. The police officer (not the gang expert) who authenticated the evidence testified, without objection, that one picture depicted YNT's gang symbol and the other depicted a symbol of disrespect to Skitz's gang. C.R., one of the jailhouse informants, testified that Taylor was affiliated with YNT, and was a "big homey" to the shooters. Finally, Catchings testified that not only did Taylor drive a group of YNT members and associates to the lows to look for the "opposition," but that Taylor actually suggested that they go to the lows to look for Skitz, or if they could not find Skitz, to look for rival gang members.

Therefore, any reasonable juror would have concluded, even absent the gang expert's testimony, that Taylor was either a member of, or associated with, YNT. The gang expert's testimony was cumulative and harmless.

V.

We next consider Taylor's argument that the district court improperly instructed the jury on accomplice liability. While district courts have broad discretion to formulate appropriate jury instructions, a district court abuses its discretion if the

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jury instructions "confuse, mislead, or materially misstate the law." *State v. Kelley,* 855 N.W.2d 269, 274 (Minn.2014). To determine if a jury instruction correctly states the law, we analyze the criminal statute and the case law under it. *See State v. Kuhnau,* 622 N.W.2d 552, 556 (Minn.2001). Where there is a conflict between the Minnesota Jury Instructions Guide, Criminal (CRIMJIG) and the statute or our case law, the latter two control. *See State v. Koppi,* 798 N.W.2d 358, 364 (Minn.2011).

Because Taylor did not object to the jury instructions, we review for plain error. *Kelley,* 855 N.W.2d at 273 ; *see also State v. Earl,* 702 N.W.2d 711, 720 (Minn.2005) ("Failure to object to jury instructions generally results in a waiver of the issue on appeal."). Under the plain-error doctrine, Taylor must show that there was: "(1) an error; (2) that is plain; and (3) the error must affect substantial rights." *Kelley,* 855 N.W.2d at 273–74. Even if Taylor "satisfies the first three prongs of the plain-error doctrine, we may correct the error only if it 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.' " *Id.* at 274 (quoting *State v. Crowsbreast,* 629 N.W.2d 433, 437 (Minn.2001)).

A.

The district court instructed the jury that "a defendant may be found guilty of a crime even though somebody else actually commits the criminal acts, provided the defendant intentionally aided, advised, hired, counseled, conspired with, or otherwise procured the other person or persons to commit the crime." This was largely a recitation of the accomplice liability statute, captioned "Liability for Crimes of Another." The statute provides that "[a] person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime."Minn.Stat. § 609.05, subd. 1 (2014). The district court further instructed the jury:

> Mere presence at the scene of a crime, without more, is not enough for you to impose liability under the aiding and abetting law. Such a person is merely a witness. However, a person's presence does constitute aiding and abetting if it is done knowing that a crime will be or is being committed and intending that it further the commission of the crime.

The two elements in the district court's instruction regarding a defendant's presence—knowledge and intent—come from our case law and CRIMJIG 4.01. However, the current version of CRIMJIG 4.01, published in 2014 after Taylor's trial, adds a third element: that the defendant's presence "*did aid* the commission of the crime." 10 Minn. Dist. Judges Ass'n, *Minnesota Practice—Jury Instruction Guides, Criminal,* CRIMJIG 4.01 (5th ed.2014) (emphasis added). Taylor argues that the lack of the third element in the district court's instruction was error.

It is unclear why CRIMJIG 4.01 adopted this third element that requires the State to prove the efficacy of a defendant's presence. In *State v. Mahkuk,* we identified two elements for determining whether a defendant's presence "intentionally aids" another in committing a crime: (1) the defendant knew that the "alleged accomplices were going to commit a crime"; and (2) the defendant "intended his presence or actions to further the commission of that crime." 736 N.W.2d 675, 682 (Minn.2007). We said nothing about whether the State must prove beyond a reasonable doubt that the defendant's presence actually "did aid" the commission of the crime. *See id.* We reiterated those same "important and necessary principles"

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in *State v. Milton,* 821 N.W.2d 789, 805–06 (Minn.2012). In that case, we similarly did not include whether the defendant "did aid" the commission of the crime as an element. *See id.*

To support his argument that aiding and abetting necessarily includes an efficacy element, Taylor cites *State v. Parker,* 282 Minn. 343, 356, 164 N.W.2d 633, 641 (1969) ("Certainly mere presence on the part of each would be enough if it is intended to *and does aid* the primary actors." (emphasis added)). But *Parker* cannot be read as requiring the State to prove beyond a reasonable doubt that a defendant's presence was effective in aiding the primary actor. Rather, *Parker* acknowledges that efficacy is probative for the jury to consider in deciding whether a defendant

"intentionally aids" another: whether he knew about the crime and intended for his presence to further its commission.

We made clear in *Mahkuk* and *Milton* the elements required to prove accomplice liability under Minn.Stat. § 609.05, subd. 1. We decline to add an efficacy element. Thus, the district court did not err.

B.

The district court also instructed the jury on "expansive liability," as it is labeled in the accomplice-liability statute. *See* Minn.Stat. § 609.05, subd. 2 (2014). The expansive liability subdivision states that "[a] person liable [for aiding and abetting] is also liable for any other crime committed in pursuance of the intended crime if reasonably foreseeable *by the person* as a probable consequence of committing or attempting to commit the crime intended." Minn.Stat. § 609.05, subd. 2 (emphasis added). Here, the district court instructed the jury that "[t]he law further provides that a defendant who intentionally aids and abets another person in the commission of a crime is not only guilty of the intended crime, but also of any other crime which was a reasonably foreseeable and probable consequence of trying to commit the intended crime." While the statute requires that the other crimes committed in pursuance of the intended crime be reasonably foreseeable *by Taylor,* the district court's instruction did not specify that.

We have both "suggest[ed]" and "urge[d]" district courts to use the statutory language of "reasonably foreseeable to the person" when instructing jurors on expansive liability. *See State v. Earl,* 702 N.W.2d 711, 722 (Minn.2005) ; *State v. Vang,* 774 N.W.2d 566, 582 (Minn.2009). But we have never held that a failure to do so automatically constitutes reversible plain error. *See Vang,* 774 N.W.2d at 582 ("[W]e do not conclude that failure to do so automatically constitutes plain error that affects a defendant's substantial rights."); *State v. Yang,* 774 N.W.2d 539, 558 n. 6 (Minn.2009) ("But the failure to include such language does not require automatic reversal, particularly when the record clearly indicates that it was reasonably foreseeable to appellant that if he aided and abetted [gang] members in shooting at the [rival gang members], some of the [rival gang members] would be injured or killed."). In fact, we have previously held that a jury instruction omitting such language was not plainly erroneous, as it "did not serve to confuse or mislead the jury and did not materially misstate the law." *State v. White,* 684 N.W.2d 500, 509 (Minn.2004).

Even were we to assume that the district court's instruction was plainly erroneous, we would look to the record to determine whether the jury would have understood the reasonable foreseeability requirement. *See Vang,* 774 N.W.2d at 582 ; *Yang,* 774 N.W.2d at 558 n. 6. Here, the jury would have understood the reasonable

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foreseeability to be from Taylor's perspective. In closing, the State emphasized Taylor's knowledge and motive: he wanted to "kill Skitz or kill somebody who is associated with Skitz, anybody in [the rival gang]" and he "knew that [Catchings] had a[gun] with him. He had seen the gun." In other words, Taylor was "literally and figuratively the driving force behind this murder.... [I]t was put in motion when the defendant put his foot on the gas pedal, put his hands on the steering wheel, and drove the teenagers down to the lows for one purpose—to look for Skitz or any other enemy." The jury could not have understood the "reasonable foreseeability" of the murder to be from someone else's perspective; the State emphasized that Taylor premeditated and intended for Copeland and Catchings to kill "Skitz or any other enemy." Thus, the district court's instruction did not affect any of Taylor's substantial rights.

C.

Also regarding expansive liability, Taylor argues that the district court should have specifically instructed the jury on the original intended crime. The expansive liability subdivision provides that

"[a] person liable [for aiding and abetting] is also liable for any other crime committed in pursuance of *the intended crime* if reasonably foreseeable by the person as a probable consequence of committing or attempting to commit the crime intended." Minn.Stat. § 609.05, subd. 2 (emphasis added).

Taylor cites several cases in which we identified the specific intended crime. *See State v. Atkins,* 543 N.W.2d 642, 646–47 (Minn.1996) ; *State v. Russell,* 503 N.W.2d 110, 114 (Minn.1993) ; *State v. Merrill,* 428 N.W.2d 361, 369 (Minn.1988). But none of these cases can be fairly read to require the district court to specify for the jury the original intended crime. Rather, we merely outlined the elements of an offense, adapted to the particular facts of the case. We have, on at least three occasions, upheld jury instructions that did not specify the original intended crime. *See Earl,* 702 N.W.2d at 722 n. 1 ; *White,* 684 N.W.2d at 509 ; *State v. Peirce,* 364 N.W.2d 801, 809 (Minn.1985). Thus, the district court did not commit plain error.

Even were we to assume that the district court committed plain error, it could not have affected a substantial right. The State and its witnesses made very clear that the original intended crime was to shoot Skitz or another member of "the opposition." There was no room for the jury to misapply expansive liability to some other intended crime.

VI.

We next consider Taylor's argument that the district court committed reversible error when it allowed the State to impeach him with two prior felony convictions without a limiting instruction. Because Taylor did not request such an instruction, he must show plain error.[8]

Taylor's prior convictions were admitted under Rule 609, which provides that evidence of a defendant's prior convictions, either punishable by more than 1 year of imprisonment or involving dishonesty or a false statement, may be admissible, subject to some limitations. The rule specifies that the evidence may be used "[f]or the purpose of attacking the credibility of a witness." Minn. R. Evid. 609(a).

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Taylor cites only *State v. Bissell* to support his argument that the lack of a limiting instruction about how to use prior convictions is plain error. In that case, the district court refused, over the defendant's request, to caution the jury to use the defendant's prior convictions solely for determining credibility. *State v. Bissell,* 368 N.W.2d 281, 283 (Minn.1985). *Bissell* is distinguishable. In the current case, Taylor made no such request.

It is true that, in *Bissell,* we analogized evidence of prior convictions to *Spreigl* evidence and stated that "the trial court, on its own, should give a limiting instruction both when the evidence is admitted and as part of the final instructions to the jury." *Bissell,* 368 N.W.2d at 283 (citing *State v. Forsman,* 260 N.W.2d 160, 169 (Minn.1977)). In the case cited for that proposition, *Forsman,* we stated that, for *Spreigl* evidence, trial courts "should, sua sponte, give an unequivocal limiting instruction both at the time the evidence is admitted and at the close of trial." *Forsman,* 260 N.W.2d at 169. But, in *Forsman,* we ultimately held that, "in the absence of a request, [the district court's] failure to do so was not reversible error." *Id.* We have consistently held the same in other cases regarding *Spreigl* evidence. *See State v. Vick,* 632 N.W.2d 676, 685 (Minn.2001) ("[W]hile trial courts are advised, even absent a request, to give a cautionary instruction upon the receipt of other-crimes evidence, failure to do so is not ordinarily reversible error."); *State v. Williams,* 593 N.W.2d 227, 237 (Minn.1999) ("While a trial court should generally still provide [limiting] instructions *sua sponte* to ensure that the 404(b) evidence is not used for an improper purpose, the failure to provide limiting instructions absent a request is not reversible error."); *State v. Wahlberg,* 296 N.W.2d 408, 420 (Minn.1980) ("It would have been better, in the instant case, had the trial court given a limiting instruction sua sponte [regarding prior bad acts],

but its failure to do so is not reversible error where, as here, defense counsel did not request one."). Because *Bissell* and analogous *Spreigl* cases do not require a limiting instruction to be given sua sponte, the district court did not err, much less plainly err.

Further, the lack of an instruction here was not prejudicial, nor did it affect the outcome of the case. *See State v. MacLennan,* 702 N.W.2d 219, 236 (Minn.2005) ("In order to show that the [plain] error has affected his substantial rights, the defendant must show that the error was prejudicial and that it affected the outcome of the case."). Like the defendant, every eyewitness and jailhouse witness had a criminal record. Taylor cross-examined each witness extensively using criminal history, challenging the witnesses' credibility by using words like "con," "trickster," and "criminal."

In a trial full of such witnesses, the State never suggested that criminal history should be used for any purpose other than determining Taylor's credibility as a witness. *See Bissell,* 368 N.W.2d at 283. When the State used Taylor's prior convictions in closing, it was only for impeachment: "[T]aylor didn't want you to believe some of the State's witnesses because they are criminals. Well, the defendant testified, and he's a criminal. What [opposing counsel] said to you is that criminals are inherently unreliable. Well you know what? Then that makes the defendant's testimony inherently unreliable."

Finally, although the district court did not deliver the limiting instruction provided in CRIMJIG 2.02, it did provide analogous instructions at other points during the trial. In instructing the jury on evaluating the "testimony and credibility of the witnesses," the district court told the jury

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that it "should and may take note of," among other things, "[w]hether the witness has been convicted of a crime, especially one involving dishonesty or [a] false statement." While not as strong an instruction as CRIMJIG 2.02, it conveyed to the jury that prior convictions should be used for impeachment. And when the State impeached Taylor using other prior bad conduct, such as giving a false name to a police officer, the district court instructed the jury:

> [T]he defendant is not on trial for any conduct that occurred on dates other than August 24th, 2011. Thus, you may not convict him solely on the basis of conduct occurring on other dates. Similarly, you may not use such evidence to conclude that the defendant has a particular character trait or that he acted in conformity with such trait. And finally, you may not use such evidence to conclude that the defendant is a person who deserves to be punished. To do so would be unfair.

This instruction is similar to CRIMJIG 2.01, the *Spreigl* instruction. Thus, failing to give the limiting instruction sua sponte did not affect a substantial right.

VII.

We next consider Taylor's pro se argument[9] that he was deprived of his right to a speedy trial. Criminal defendants have the right to a speedy trial under the constitutions of both the United States and Minnesota. U.S. Const. amend. VI ; Minn. Const. art. I, § 6. Claimed Sixth Amendment violations are subject to de novo review. *State v. Brown,* 815 N.W.2d 609, 616 (Minn.2012).

A.

We have adopted the test articulated by the U.S. Supreme Court in *Barker v. Wingo* for speedy trial challenges. *See State v. Widell,* 258 N.W.2d 795, 796 (Minn.1977) (citing *Barker v. Wingo,* 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972)). Under the *Barker* test, we must consider: "(1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asserted his or

her right to a speedy trial; and (4) whether the delay prejudiced the defendant." *State v. Windish,* 590 N.W.2d 311, 315 (Minn.1999) (citing *Barker,* 407 U.S. at 530–33, 92 S.Ct. 2182). None of these factors is "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant." *Barker,* 407 U.S. at 533, 92 S.Ct. 2182. In other words, we must "engage in a difficult and sensitive balancing process." *Id.*

On the first prong, the delay from the date of indictment, *see State v. Jones,* 392 N.W.2d 224, 235 (Minn.1986), to the first day of trial was 1 year and 4 months. Further, the trial did not begin until over 100 days after Taylor's speedy trial demand. A delay that exceeds 60 days from the date of the demand raises a presumption that a violation has occurred, and we must apply the remaining factors of the test. *See Windish,* 590 N.W.2d at 315–16 ; *see also* Minn. R.Crim. P. 11.09.

On the second prong, the key question is "whether the government or the criminal defendant is more to blame for th[e] delay."

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Vermont v. Brillon, 556 U.S. 81, 90, 129 S.Ct. 1283, 173 L.Ed.2d 231 (2009) (quoting *Doggett v. United States,* 505 U.S. 647, 651, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992)). But "different weights should be assigned to different reasons." *Barker,* 407 U.S. at 531, 92 S.Ct. 2182. For instance, a "[d]eliberate delay 'to hamper the defense' weighs heavily against the prosecution," while " 'neutral reason[s] such as negligence or overcrowded courts' weigh less heavily." *Brillon,* 556 U.S. at 90, 129 S.Ct. 1283 (quoting *Barker,* 407 U.S. at 531, 92 S.Ct. 2182). "When the overall delay in bringing a case to trial is the result of the defendant's actions, there is no speedy trial violation." *State v. DeRosier,* 695 N.W.2d 97, 109 (Minn.2005).

Only one delay was fairly attributable to the State: the unavailability of a State's witness. This was before Taylor requested a speedy trial, and the delay was for good cause. The only delay after Taylor requested a speedy trial was to resolve a conflict of interest between Taylor's counsel and his codefendant's counsel. This was not attributable to the State, and was also for good cause. Because both continuances were for good cause, this factor weighs against a speedy trial violation.

On the third prong, Taylor asserted his right to a speedy trial over 100 days before trial. This weighs in Taylor's favor.

On the fourth and final prong, again adopting the analysis of *Barker,* we have identified three interests to consider in determining whether a defendant suffered prejudice: "(1) preventing oppressive pretrial incarceration; (2) minimizing the anxiety and concern of the accused; and (3) preventing the possibility that the defense will be impaired." *Windish,* 590 N.W.2d at 318 (citing *Barker,* 407 U.S. at 532, 92 S.Ct. 2182). We have noted that the third interest, preventing "impairment of a defendant's defense, is the most serious." *Id.* (citing *Doggett v. United States,* 505 U.S. 647, 655, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992)).

If a defendant is already in custody for another offense, as Taylor was here, the first two interests are not implicated. *Id.* The only remaining question is whether the defense was likely harmed by the delay. *See id.* ("A defendant does not have to affirmatively prove prejudice; rather, prejudice may be suggested by likely harm to a defendant's case."). In other words, Taylor has to suggest "evidentiary prejudice." *Doggett,* 505 U.S. at 657, 112 S.Ct. 2686.

Typically, such prejudice is suggested by memory loss by witnesses or witness unavailability.*See Barker,* 407 U.S. at 531, 92 S.Ct. 2182 ; *State v. Jones,* 392 N.W.2d 224, 235–36 (Minn.1986). In this case, Taylor's novel argument is that he was prejudiced because the delay gave the State the

opportunity to secure plea agreements with his codefendants.

We reject the notion that the procurement of a plea agreement constitutes unfair prejudice. *See United States v. Abad,* 514 F.3d 271, 275 (2d Cir.2008) ("[The defendant] contends that the delay allowed the government to locate certain 'key prosecution witnesses'.... But this is not the sort of prejudice contemplated by *Barker* 's fourth factor. That prejudice is concerned with impediments to the ability of the defense to make its own case ...; the opportunity for the prosecution to prepare for trial does not, on its own, amount to prejudice to the defense."). Notably, there is no allegation that the delay was manufactured by the State. *See State v. Anderson,* 275 N.W.2d 554, 555 (Minn.1978) (concluding there was no speedy trial violation in part because the defendant did not show "that there was any attempt by the state to unfairly delay the prosecution in order to gain a tactical advantage").

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Thus, this factor weighs against a speedy trial violation.

Based on the four factors as balanced, Taylor's speedy trial rights were not violated. The delay was not greatly excessive, the continuances were either not objected to or were for good cause, and Taylor identifies no unfair prejudice.

B.

In the alternative, Taylor argues that his trial counsel's failure to move for dismissal on speedy trial grounds constitutes ineffective assistance. We disagree.

To satisfy a claim of ineffective assistance of counsel, "(1) the defendant must prove that counsel's representation fell below an objective standard of reasonableness; and (2) the defendant must prove there was a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *State v. Nicks,* 831 N.W.2d 493, 504 (Minn.2013) (citing *Strickland v. Washington,* 466 U.S. 668, 687–96, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Even assuming that Taylor's trial counsel's performance fell below an objective standard of reasonableness in failing to move for a dismissal for lack of a speedy trial, it is highly unlikely that the result of the proceeding would have been different. The delays were for good cause, Taylor was already incarcerated on a different conviction, and Taylor has not identified any unfair prejudice.

VIII.

We next consider Taylor's pro se argument that the district court erred when it admitted into evidence a note seized from his jail cell in which he described T.B. as a "lying snitch ass." Taylor argues that the note was protected by attorney-client privilege.

The constitutions of both the United States and Minnesota "guarantee a right of legal representation to anyone charged with a crime." *State v. Willis,* 559 N.W.2d 693, 697 (Minn.1997) (citing U.S. Const. amend. VI ; Minn. Const. art. I, § 6). However, the attorney-client privilege, provided by Minn.Stat. § 595.02, subd. 1(b) (2014), is not a constitutional right. *State v. Andersen,* 784 N.W.2d 320, 333 (Minn.2010). We have declined to articulate a standard by which a defendant can "prevail on a claim that an intrusion into the attorney-client relationship amounted to a violation of the right to counsel." *Id.* at 334. We need not announce such a standard in this case, as the jail cell note was not protected by attorney-client privilege.

The attorney-client privilege protects from disclosure "communications that seek to elicit legal advice from an attorney acting in that capacity, that relate to that purpose, and that are made in confidence by the client ... unless the privilege is waived." *Nat'l Texture Corp. v. Hymes,* 282 N.W.2d 890, 895 (Minn.1979). "The existence of the [attorney-client] privilege is a question of fact which must be proved by the one asserting it." *Sprader v. Mueller,* 265 Minn. 111,

117, 121 N.W.2d 176, 180 (1963). We give "great deference to the district court's findings of fact and will not set them aside unless clearly erroneous," which requires a "definite and firm conviction that a mistake occurred." *Andersen,* 784 N.W.2d at 334.

The district court found that the note did not communicate anything to defense counsel regarding the case. In other words, the note did not seek to elicit legal advice from defense counsel. Deferring to the district court's finding, and given the language used in the note, it is likely that Taylor made the note for himself to express

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frustration or anger, not for his counsel in order to secure legal advice. Further, the district court had the benefit of reviewing the entirety of the seized materials in camera and excluded those that Taylor intended to communicate to his attorney. The district court's factual finding on the jail cell note was not clearly erroneous.

IX.

We next consider Taylor's pro se argument that the district court abused its discretion when it admitted a jail call recording. Due to an error by Taylor, that section of his brief, if any, is missing. It is therefore unclear about which recording Taylor complains.

We deem arguments waived on appeal if a pro se supplemental brief "contains no argument or citation to legal authority in support of the allegations." *State v. Krosch,* 642 N.W.2d 713, 719 (Minn.2002). However, if a "prejudicial error is obvious on mere inspection," we may consider the allegation. *Louden v. Louden,* 221 Minn. 338, 339, 22 N.W.2d 164, 166 (1946). On mere inspection, no error is obvious in the admission of the two phone calls Taylor made from jail.

The first call—in which Taylor said that he wished he had posted bail in order to be "on the run"—was admitted to show consciousness of guilt. We have held that a "[f]light before apprehension" may be considered by the jury as "suggestive of a consciousness of guilt." *State v. McTague,* 190 Minn. 449, 453, 252 N.W. 446, 448 (1934). Although Taylor's statements in the phone call merely expressed a desire to flee and did not constitute actual flight or an attempted escape, they were suggestive of a consciousness of guilt. *See Straight v. State,* 397 So.2d 903, 908 (Fla.1981) ("When a suspected person in any matter attempts to escape or evade a threatened prosecution by flight, concealment, resistance to lawful arrest, *or other indications after the fact of a desire to evade prosecution,* such fact is admissible, being relevant to the consciousness of guilt which may be inferred from such circumstance." (emphasis added)). Thus, the admission of the first call recording does not appear to be a prejudicial error.

In the second call, Taylor asked his girlfriend to call his lawyers to tell them that she was with him on the day of the murder. The phone call was relevant to both Taylor's credibility and his consciousness of guilt, as it suggested an attempt to manufacture a false alibi. Thus, the admission of the call was not error.

X.

Finally, Taylor argues that even if each trial error was individually harmless, the cumulative effect of the errors deprived him of a fair trial. We have assumed two errors without deciding: admitting gang expert testimony and precluding certain evidence of the shooters' involvement in previous gang-related incidents.

Taylor would be entitled to a new trial if those errors, "when taken cumulatively, had the effect of denying [him] a fair trial." *State v. Keeton,* 589 N.W.2d 85, 91 (Minn.1998). But we cannot say that, absent the complained-of errors, the jury would have reached a different verdict. *See State v. Jackson,* 714 N.W.2d 681, 698 (Minn.2006). This is not a "very close factual case." *State v. Underwood,* 281 N.W.2d 337, 340 (Minn.1979) ; *see also State v. Erickson,* 610 N.W.2d 335, 340–41 (Minn.2000) ("Unlike *Underwood,* the facts in

the instant case are not close. The evidence against appellant was very strong, and included two confessions and his accomplice's testimony."). Here, the State presented the detailed testimony of two convicted accomplices and another eyewitness that placed Taylor as the driver of the van with the motive and intent to aid and abet a shooting.

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Those witnesses corroborated each other on material points, and were further corroborated by the detailed testimony of two jailhouse informants. Further, Taylor's own words—in the jail cell note and in two recorded phone calls—were suggestive of guilt. In light of the strength of the State's case, the value of further evidence of the alternative motive of the shooters (when it had already been established) and the harm of the cumulative gang expert testimony (when Taylor's gang affiliation had already been established) was so minimal that it could not have affected the jury's verdict. The cumulative effect did not deprive Taylor of a fair trial.

For the foregoing reasons, we affirm Taylor's first-degree murder and attempted first-degree murder convictions.

Affirmed.

Dissenting, PAGE, J.

PAGE, Justice (dissenting).

I respectfully dissent from that part of the court's decision upholding[1] the trial court's requirement that members of the public provide photo identification in order to attend Taylor's trial. In *State v. Brown,* we authorized trial courts to lock courtroom doors during the time when the jury is being instructed. 815 N.W.2d 609, 617–18 (Minn.2012). We extended our approval of locking the courtroom doors to closing arguments in *State v. Silvernail,* 831 N.W.2d 594, 600–01 (Minn.2013). Today we take another step in our march to limit the public's access to our courtrooms. While I fully acknowledge my role in authoring the court's decisions in both *Brown* and *Silvernail,* requiring members of the public to provide photo identification to enter a courtroom during trial is a bridge too far.[2] The dissent in *State v. Silvernail,* 831 N.W.2d 594, 607–09 (Minn.2013) (Anderson, Paul H., J., dissenting), referred to the "recent phenomenon [of] 'creeping courtroom closure.' " The trial court's actions here and today's decision leads me to conclude that the *Silvernail* dissent got it right. It is time to revisit our holdings in *Brown* and *Silvernail.*

Although we permitted the courtroom closures in *Brown* and *Silvernail,* we cautioned trial courts that "the act of locking courtroom doors ... creates the appearance that Minnesota's courtrooms are closed or inaccessible to the public." *Brown,* 815 N.W.2d at 618 ; *see also Silvernail,* 831 N.W.2d at 601 n. 2. We further noted that "[t]rial courts should therefore commit such acts carefully and sparingly" and that "[t]o facilitate appellate

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review in future cases ... the better practice is for the trial court to expressly state on the record why the court is locking the courtroom doors."*Brown,* 815 N.W.2d at 618 ; *see also Silvernail,* 831 N.W.2d at 601 n. 2. Our cautionary statement has not been followed, as evidenced by the fact that we have denied nine petitions for review since *Brown* that have challenged a trial court's decision to close or lock the courtroom doors at various stages of the trial.[3]

I, like the court, am "extremely reluctant to overrule our precedent," and I understand that we require a "compelling reason" to do so. *State v. Lee,* 706 N.W.2d 491, 494 (Minn.2005). It is clear to me now, however, that the practice of closing courtrooms to the public has creeped "its way into the routine of many of Minnesota's criminal courts." *Silvernail,* 831 N.W.2d at 609 (Anderson, Paul H., J., dissenting). The breadth and scope of the closures that are occurring compel me to conclude that it is time to stop the creep.[4]

For these reasons, I respectfully dissent.

Notes:

[1] Catchings testified that Gomez associated with the same rival gang.

[2] C.R. also testified that Taylor asked him for advice on whether Taylor should fabricate an alibi by having his mother testify that the van was broken at the time of the murder.

[3] Although at the time we did not describe the action as a partial closure, we characterized it as such in *Mahkuk,* 736 N.W.2d at 685.

[4] By this decision, we do not "uphold" the trial court's photo identification order, as the dissent suggests. Rather, we hold that the record simply does not support reversal. The dissent's charge that the court is on a "march" to limit public access is inaccurate.

[5] In *Crawford v. Marion County Election Board,* 553 U.S. 181, 199, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008), the U.S. Supreme Court took judicial notice that the elderly, those with economic or personal limitations, the homeless, and those with religious objections to being photographed are less likely to have government-issued photo identification.

[6] "One of our solemn obligations is to ensure Minnesota's courts remain open and accessible to all. Upholding this commitment is a central mission of our Judicial Branch, and it guides our every step...." Chief Justice Lorie S. Gildea, Speech to Minnesota State Bar Association (June 26, 2014).

[7] For instance, in opening, Taylor's trial counsel argued that:

> [T]he evidence is going to show that this was actually about Rayjon Gomez, the person who was killed, that he was the target of the shooting all along, and he was the target of the shooting because Derrick Catchings had a problem with him, that it went back a little ways. They had a beef. You are going to hear testimony about that, but this had nothing to do with [Taylor's brother], it was never about [him], that this was about a problem with Derrick Catchings and Rayjon Gomez and that that was in fact the motivation for the shooting.
>
> Further, in closing, Taylor's trial counsel characterized Copeland and Catchings as gang members with a motive to shoot Gomez: "They are hanging out at the Nest, they are scouting the opposition, they are looking for the opposition, they are doing drills, they are active in the streets, they are making a name for themselves."

[8] The record does not reflect whether Taylor's decision not to ask for the instruction was, as is sometimes the case, trial strategy. *See State v. Goodloe,* 718 N.W.2d 413, 424 (Minn.2006).

[9] Taylor's former appellate counsel made and briefed the arguments previously discussed. Taylor, who filed a pro se supplemental brief that raised additional issues, terminated this representation 8 days before the case was submitted to the court.

[1] The court asserts that it is not upholding the trial court's photo identification order. But, when the court states: "[W]e have no constitutional ground for reversal," it is, in fact, saying that the trial court's photo identification order was not erroneous. Thus, the court *is* upholding the trial court's order. Otherwise, the court would not be saying that there is "no constitutional ground for reversal" because any error would be structural error requiring reversal. *See State v. Bobo,* 770 N.W.2d 129, 139 (Minn.2009) (explaining that denial of a defendant's right to a public trial constitutes structural error); *State v. Brown,* 732 N.W.2d 625, 630 (Minn.2007) ("Structural errors require automatic reversal because such errors 'call into question the very accuracy and reliability of the trial process.' " (quoting *State v. Osborne,* 715 N.W.2d 436, 447 n. 8 (Minn.2006))).

[2] In the same way that requiring voters to present photo identification in order to receive a ballot for an election has the potential to create an unconstitutional burden on the right to vote, *see Veasey v. Abbott,* 796 F.3d 487, 512 (5th Cir.2015) (holding that the voter-identification statute at issue had an impermissible discriminatory effect on Hispanics and African–Americans), requiring the public to present photo identification in order to enter a courtroom during trial has the potential to unconstitutionally burden a defendant's right to a public trial.

[3] *See State v. Hicks,* 837 N.W.2d 51 (Minn.App.2013), *rev. denied on courtroom closure* (Minn. Nov. 13, 2013); *State v. Mosby,* A12–0988, 2013 WL 2923486 (Minn.App. June 17, 2013), *rev. denied* (Minn. Sept. 17, 2013); *State v. Trautman,* No. A12–0929, 2013 WL 2301796 (Minn.App. May 28, 2013), *rev. denied* (Minn. Aug. 6, 2013); *State v. Richmond,* No. A12–0899, 2013 WL 1942995 (Minn.App. May 13, 2013), *rev. denied* (Minn. July 16, 2013); *State v. Perez–Martinez,* No. A11–2003, 2012 WL 5476112 (Minn.App. Nov. 13, 2012), *rev. denied* (Minn. Jan. 29, 2013); *State v. Juma,* No. A11–2142, 2012 WL 4856158 (Minn.App. Oct. 15, 2012), *rev. denied on courtroom closure,* (Minn. Jan. 15, 2013); *State v. Irby,* 820 N.W.2d 30 (Minn.App.2012), *rev. denied on courtroom closure* (Minn. Nov. 20, 2012); *State v. Cook,* No. A11–1332, 2012 WL 3263760 (Minn.App. Aug. 13, 2012), *rev. denied* (Minn. Oct. 24, 2012); *State v. Thomas,* No. A11–1215, 2012 WL 3023335 (Minn.App. July 23, 2012), *rev. denied* (Minn. Oct. 16, 2012).

[4] The irony is not lost on me that, on one hand, the court is quick to permit trial courts to lock the courtroom doors or otherwise deny access to courtrooms to individual citizens; while on the other hand, the court is in haste to expand the use of video cameras in those same courtrooms in the name of public access and education, without regard to the harm that the expanded camera coverage may cause. *See Promulgation of Amendments to the Minn. Gen. Rules of Prac.,* No. ADM09–8009, Mem. at 1–2 (Minn. filed Aug. 12, 2015) (Page, J., dissenting).

Appendix E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-2064

Kemen Lavatos Taylor, II

Appellant

v.

Governor Mark Dayton and Tom Roy, Commissioner of Corrections

Appellees

Appeal from U.S. District Court for the District of Minnesota
(0:16-cv-03893-DSD)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Stras did not participate in the consideration or decision of this matter.

September 15, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix F

28 U.S. Code § 2254 - State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)

(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)

(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

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

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

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

(e)

(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.