

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

LYNDON DAVIS
Petitioner

v.

DENNIS REAGLE
Respondent

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

APPENDIX OF PETITIONER

LYNDON C. DAVIS
Petitioner / Pro-Se
DOC # 232171
Pendleton Correctional Facility
4490 West Reformatory Road
Pendleton, IN 46064-9001

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LYNDON DAVIS

^v
DENNIS REAGLE

APPENDIX A (12 Pages)

Memorandum and Order from District Court
denying Habeas Corpus relief, ordered April 20, 2020
(LYNDON DAVIS V. DUSHAN ZETECKY)

Davis then moved to the driver's seat, Robert jumped into the passenger seat, and they drove away. Once in the car, Robert changed his shirt and hat, presumably to change his appearance during the getaway. A police pursuit ensued, and Davis exited the car, taking Robert's discarded shirt and hat with him. Davis called Wells for a ride and was apprehended when Wells came to pick him up.

Myles died from the gunshot wounds.

Davis v. State, 6 N.E.3d 509, 2014 WL 869537, *2-3 (Ind. Ct. App. Mar. 5, 2014) ("*Davis I*").

The defense's theory at trial was that Mr. Davis was present when Robert killed Mr. Myles, but Mr. Davis had no idea that Robert would kill Mr. Myles, never told Robert to kill Mr. Myles, and took no part in the shooting. R. Vol. II at 45-46, 50. According to the defense, Mr. Davis told Robert about Mr. Myles and the bounty because he was afraid for his own life. *Id.* at 51. Trial counsel acknowledged that Mr. Davis drove the car out of the apartment complex parking lot before Robert took over and began the highspeed pursuit. *Id.* at 472-73. Trial counsel argued it was not foreseeable to Mr. Davis that Robert would murder Mr. Myles in the middle of the morning with people around. *Id.* at 474.

The jury convicted Mr. Davis, and the trial court sentenced him to 55 years in prison. Dkt. 7-1 at 8. Mr. Davis appealed, arguing that he was convicted based on insufficient evidence. Dkt. 7-6. The Indiana Court of Appeals affirmed. *Davis I*, 2014 WL 869537, at *4-6. Mr. Davis sought transfer to the Indiana Supreme Court, which was denied. Dkt. 7-3 at 6.

Mr. Davis filed a state post-conviction petition alleging that trial counsel was ineffective for (1) failing to challenge the probable cause affidavit; (2) failing to investigate; (3) failing to impeach the State's witnesses; (4) failing to move to suppress his voluntary statements to police; (5) failing to object to an accomplice liability jury instruction; and (6) failing to object to the separation of the jurors once deliberations began. *See Davis v. State*, 2018 WL 4957199, at *3-5 (Ind. Ct. App. Oct. 15, 2018) ("*Davis II*"). He further alleged that appellate counsel was ineffective

for failing to raise the issues he raised in his post-conviction petition, including trial counsel's ineffectiveness. *Id.* at *6. The trial court denied Mr. Davis's petition following a hearing, and the Indiana Court of Appeals affirmed. *Id.* at *6. The Indiana Supreme Court denied Mr. Davis's petition to transfer. Dkt. 7-4 at 12.

Mr. Davis next filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in this Court, alleging that trial counsel was ineffective for (1) failing to investigate; (2) failing to impeach two of the State's witnesses with inconsistent statements; (3) failing to object to jury instructions on accomplice liability; and (4) failing to object to the separation of the jury once deliberations had begun.

II. Applicable Law

A federal court may grant habeas relief only if the petitioner demonstrates that he is in custody "in violation of the Constitution or laws . . . of the United States." 28 U.S.C. § 2254(a). Where a state court has adjudicated the merits of a petitioner's claim, a federal court cannot grant habeas relief unless the state court's adjudication

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

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

28 U.S.C. § 2254(d). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). "If this standard is difficult to meet, that is because it was meant to be." *Id.* at 102.

"The decision federal courts look to is the last reasoned state-court decision to decide the merits of the case." *Dassey v. Dittmann*, 877 F.3d 297, 302 (7th Cir. 2017) (en banc). If the last

reasoned state court decision did not adjudicate the merits of a claim, or if the adjudication was unreasonable under § 2254(d), federal habeas review of that claim is *de novo*. *Thomas v. Clements*, 789 F.3d 760, 766–68 (7th Cir. 2015). Under § 2254(d) or *de novo* review, “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.” 28 U.S.C. § 2254(e)(1).

III. Discussion

Mr. Davis alleges that trial counsel rendered ineffective assistance of counsel. To succeed on a claim that trial counsel was ineffective, a petitioner must show that counsel’s performance was deficient and prejudicial. *Maier v. Smith*, 912 F.3d 1064, 1070 (7th Cir. 2019) (citing *Strickland v. Washington*, 466 U.S. 668, 689–92 (1984)). Deficient performance means that counsel’s actions “fell below an objective standard of reasonableness,” and prejudice requires “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 688, 694.

The last reasoned opinion at issue here is the Indiana Court of Appeals’ decision affirming the denial of Mr. Davis’s petition for post-conviction relief. The Indiana Court of Appeals correctly articulated the *Strickland* standard in Mr. Davis’s post-conviction memorandum decision, *Davis II*, 2018 WL 4957199, at *6-7, but did not explicitly analyze the deficient performance or prejudice prongs of the ineffective assistance of counsel claims. Instead, the court set out each claim and recounted trial counsel’s testimony at the post-conviction hearing as it related to that claim. The court noted several times that trial counsel testified that his decisions were based on trial strategy. *Id.* at 9, 14. Then, at the end of each claim, the court stated either that reversal was not warranted or that Mr. Davis had not demonstrated ineffective assistance. *Id.* at 8, 10-12, 14. Because the court

appears to have credited trial counsel's testimony as providing valid strategic reasons, the Court construes the appellate court's decision as resting on the deficient performance prong and applies § 2254(d) deference to the state court's adjudication of that prong. But even if the Court were to apply de novo review, the conclusion would be the same. *See Sussman v. Jenkins*, 636 F.3d 329, 350 (7th Cir. 2011) ("[I]f a state court does not reach either the issue of performance or prejudice on the merits, then federal review of this issue is not circumscribed by a state court conclusion and our review is de novo.").

Mr. Davis complains about four aspects of trial counsel's performance. The Court will address each in turn.

1. Failure to Investigate

Mr. Davis alleges that trial counsel was ineffective for failing to investigate the circumstances of Robert Davis's trial. The State tried Robert first. *Compare Davis v. State*, 2013 WL 244112 at *2 (Ind. Ct. App. Jan. 23, 2013) (noting Robert Davis's trial occurred in January 2012), *with* *dk. 7-1 at 7-8* (showing Mr. Davis's trial occurred in February 2013). Mr. Davis alleges that the State's theory at Robert's trial was that Robert was the shooter, but when none of the eyewitnesses at his trial could identify him as the shooter, the State introduced a jury instruction on accomplice liability. *Dkt. 2 at 7; see also Davis*, 2013 WL 244112 at *2. Mr. Davis alleges that the State convicted Robert as an accomplice, only to subsequently try Mr. Davis as an accomplice with Robert as the shooter. *Id.* He argues that if his attorney "could have or would have presented the facts that Robert was cleared as the shooter and also convicted as a[n] accomplice at his own trial, these facts would have changed the outcome of the case." *Id.* at 7-8. He believes the State engaged in misconduct by trying Robert as an accomplice at his trial, only to subsequently say Robert was the shooter at Mr. Davis's trial. *Dkt. 8 at 11-12.*

The Indiana Court of Appeals held that Mr. Davis failed to show that his trial attorney was ineffective for his pretrial investigation, but it did not discuss this specific allegation. *Davis II*, 2018 WL 4957199, at *9-10. “When a state court rejects a prisoner’s federal claim without discussion, a federal habeas court must presume that the court adjudicated it on the merits unless some state-law procedural principle indicates otherwise.” *Lee v. Avila*, 871 F.3d 565, 567-68 (7th Cir. 2017) (citing *Harrington v. Richter*, 562 U.S. 86, 98 (2011)). “The *Richter* presumption applies when the state court’s decision expressly addressed some but not all of a prisoner’s claims.” Applying this standard, the Court finds that the Indiana Court of Appeals reasonably applied federal law with respect to trial counsel’s pretrial investigation.

Mr. Davis argues that if Robert was only convicted as an accomplice and not the shooter, and the State conceded at Mr. Davis’s trial that Mr. Davis was not the shooter, *see e.g.* R. Vol. II at 26, then it follows that Mr. Davis was not present at the crime and therefore was not the shooter or an accomplice.

Mr. Davis’s counsel was not ineffective for failing to present evidence in support of this theory. Mr. Davis’s trial counsel’s strategy was to admit that while Mr. Davis was at the apartment complex when the shooting occurred, he was not the shooter and lacked the *mens rea* necessary to be convicted as an accomplice. This was a reasonable strategy, as there was ample evidence that Mr. Davis was at the scene, including Mr. Davis’s taped statements to police in which he admitted to driving Robert out of the parking lot after hearing gun shots.

Moreover, the evidence about Robert’s trial was not exonerating. There is no evidence that Robert was “cleared” as the shooter. “A defendant may be charged as the principal but convicted as an accomplice. . . . Generally there is no distinction between the criminal liability of an accomplice and a principal.” *Castillo v. State*, 974 N.E.2d 458, 466 (Ind. 2012). As the Indiana

Court of Appeals in Robert's case notes, there was sufficient evidence to convict Robert as the principal or an accomplice. *Davis*, 2013 WL 244112 at *7. The jury's verdict would not indicate whether it convicted Robert as the principal or as the accomplice, because Indiana has abolished special verdict forms that, for example, distinguish between a principal and an accomplice. Ind. Trial Rule 49; see *Batalis v. State*, 887 N.E.2d 106, 109 (Ind. Ct. App. 2008) (finding it was harmless error to use special verdict forms distinguishing between liability as a principal and as an accomplice). There is no reasonable probability of a different outcome if trial counsel had introduced evidence that the jury in Robert's trial received an instruction on accomplice liability, because that does not mean that Robert was necessarily convicted as an accomplice.

Accordingly, § 2254(d) bars relief on this complaint about counsel's performance.

2. Failure to Impeach Witnesses

Mr. Davis contends that trial counsel was ineffective because he failed to impeach two of the State's witnesses, Parrish's daughter Aniya Lawson and neighbor Krystle Gavin, with inconsistent statements they had made to detectives and at a deposition. The Indiana Court of Appeals on post-conviction review held that counsel made a strategic decision not to impeach them. *Davis II*, 2018 WL 4957199, at *9-10. That holding constitutes a reasonable application of *Strickland*.

Trial counsel testified at the post-conviction hearing that he did not want to impeach Ms. Lawson or Ms. Gavin, explaining

My recollection is both she and the other witness, as you said a few minutes ago, testified to what they said they saw, and *they both said they didn't see you commit any crime. Why would I want to discredit either of those witnesses? They came out there, said they saw what happened, and that you didn't do anything wrong that they saw.* I don't want to discredit them. To the contrary, I want the jury to think they're the most truthful people in the trial.

...

Those women, as I've said to you a couple of times, I'm certain I could have impeached them if one of them said this happened at 3:00 o'clock, when, in fact, on another time she said it was 3:30. Or if she said you were wearing blue pants when, in fact, they were black. Those are not substantial inconsistencies. And even if they were, again, *I am not going to attack the only witnesses who help you.*

Dkt. 16-2. at 62, 71-72 (emphasis added). Ms. Lawson's testimony did not exonerate Mr. Davis as an accomplice, but it was overall consistent with the defense's theory. She testified that she saw an older man shoot her father, and that Lyndon Davis was not that older man. R. Vol. II at 64. She saw the passenger of a gold sedan slide over to the driver's seat and drive away quickly once the shooter returned to the car. *Id.* at 59, 67. Her testimony was helpful to Mr. Davis to the extent that she could not identify Mr. Davis as the passenger in the car. Her testimony was also consistent with the defense's evidence that Mr. Davis was the driver initially after the shooting before Robert took over and began a high-speed chase. The Indiana Court of Appeals correctly concluded that trial counsel was not ineffective for failing to impeach Ms. Lawson on any minor inconsistencies from her previous statement to police or her deposition.

Krystle Gavin testified that she heard the shooting and thought it was fireworks until she heard a girl cry. *Id.* at 89. She saw a gold sedan leave the lot at a normal speed and could not identify Mr. Davis as the shooter or passenger. *Id.* at 92-94, 99. Again, while not exonerating Mr. Davis of criminal activity, Gavin's testimony was consistent with the defense's theory, and therefore trial counsel was not ineffective for failing to impeach her on any minor inconsistencies.

Accordingly, § 2254(d) bars relief on this ground.

3. Failure to Object to Accomplice Liability Instruction

Mr. Davis argues that trial counsel was ineffective for failing to object to the jury instruction on accomplice liability. He asserts the instruction misstated the law and relieved the State of proving the relevant intent. Dkt. 2 at 13. The jury instruction stated:

Where two or more persons engage in the commission of an unlawful act, each person may be criminally responsible for the actions of each other person which were the probable and natural consequences of their common plan even though not intended as a part of the original plan.

A person who *knowingly or intentionally* aids, induces or causes another person to commit an offense commits that offense, even if the other person:

1. has not been prosecuted for the offense;
2. has not been convicted of the offense; or
3. has been acquitted of the offense.

To aid under the law is to *knowingly* aid, support, help or assist in the commission of a crime. Mere presence at the scene of the crime and knowledge that a crime is being committed are not sufficient to allow an inference of participation. It is being present at the time and place and knowingly doing some act to render aid to the actual perpetrator of the crime.

The presence of a person at the scene of the commission of a crime and a course of conduct before, during, and after the offense are circumstances which may be considered in determining whether such person aided and abetted the commission of such crime.

R. Vol. IV at 511 (emphases added). Mr. Davis cites to *Kane v. State*, 976 N.E.2d 1228, 1232 (Ind. 2012), where the Indiana Supreme Court held that the trial court erred for giving an instruction on accomplice liability that did not include a mental state. Here, the instruction accurately described the required *mens rea*. The Indiana Court of Appeals correctly concluded that trial counsel was not ineffective for not objecting to the instruction.

Accordingly, § 2254(d) bars relief on this complaint about counsel's performance.

4. Failure to Object to Separation of the Jury

Mr. Davis's last complaint is that his trial counsel erred by failing to object to the separation of the jury after they had convened to deliberate. In Indiana, jurors must be kept together once deliberations begin. *Bradford v. State*, 675 N.E.2d 296, 304-05 (Ind. 1996) (citing Ind. Code § 35-37-2-6(a)(1)), *reh'g denied*. However, Indiana Jury Rule 29 permits the separation of the jury during deliberation in a criminal case upon the parties' consent as long as the trial court instructs

the jurors (1) not to discuss the case with anyone, (2) not to speak with the parties, attorneys, or witnesses, (3) not to express any opinion about the case, and (4) not to listen to or read any media or outside sources about the trial.

After deliberating for nine hours, the jury was not close to a verdict and wanted to go home to rest. R. Vol. IV at 530-31. It was around 10:00 p.m., and the court stated, “I think given the circumstances with the weather and the fact that they’ve been at this for quite a while, that it would be prudent to have them take a fresh approach in the morning.” *Id.* at 531. Defense counsel and the State agreed. *Id.* The court provided the Jury Rule 29 instruction to the jury before they left for the evening. *Id.* at 533.

Mr. Davis’s trial counsel testified at the post-conviction hearing that he consented to the jury going home for the evening because everyone was tired, and the jurors gave him no reason to believe they would not be able to follow instructions to not discuss or read about the case. Dkt. 16-2 at 73-74. In his experience, he has objected to a jury being separated during deliberations only if there was evidence of efforts to tamper with the jurors. *Id.* at 73. He said if he thought the separation would harm Mr. Davis, he would have argued so to the court. *Id.* at 74. The Indiana Court of Appeals found trial counsel’s acquiescence to the separation for the evening to be a reasonable strategic decision. Mr. Davis provides no basis to conclude otherwise.

Accordingly, § 2254(d) bars relief on this complaint about counsel’s performance.

IV. Certificate of Appealability

“A state prisoner whose petition for a writ of habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal.” *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Instead, the prisoner must first obtain a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1).

“A certificate of appealability may issue . . . only if the applicant has made a substantial showing

of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). In deciding whether a certificate of appealability should issue, “the only question is whether the applicant has shown that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Buck*, 137 S. Ct. at 773 (citation and quotation marks omitted).

Rule 11(a) of the Rules Governing Section 2254 Proceedings in the United States District Courts requires the district court to “issue or deny a certificate of appealability when it enters a final order adverse to the applicant.” Here, no reasonable jurist could disagree that Mr. Davis’s claims are barred by 28 U.S.C. § 2254(d) or are otherwise without merit. A certificate of appealability is therefore denied.

V. Conclusion

Mr. Davis’s petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is **denied**, and a certificate of appealability shall not issue. Final judgment in accordance with this decision shall issue.

SO ORDERED.

Date: 4/20/2020

James Patrick Hanlon

James Patrick Hanlon
United States District Judge
Southern District of Indiana

Distribution:

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LYNDON DAVIS

232171

PENDLETON – CF

PENDLETON CORRECTIONAL FACILITY

Electronic Service Participant – Court Only

Andrew A. Kobe

INDIANA ATTORNEY GENERAL

andrew.kobe@atg.in.gov

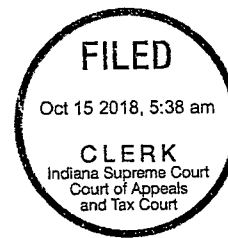
LYNDON DAVIS
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APPENDIX B (15 Pages)

Opinion on State Appeal from Post-Conviction
Review, Davis V. State, Cause No. 45 A03-1708-
PC-01912 (Ind. Ct. App, decided October 15, 2018)

MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



APPELLANT PRO SE

Lyndon C. Davis
Pendleton, Indiana

ATTORNEYS FOR APPELLEE

Curtis T. Hill, Jr.
Attorney General of Indiana

Michael Gene Worden
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Lyndon C. Davis,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Plaintiff.

October 15, 2018

Court of Appeals Case No.
45A03-1708-PC-1912

Appeal from the Lake Superior
Court

The Honorable Clarence D.
Murray, Judge

The Honorable Kathleen A.
Sullivan, Magistrate

Trial Court Cause No.
45G02-1406-PC-4

Brown, Judge.

- [1] Lyndon C. Davis appeals the denial of his petition for post-conviction relief.
We affirm.

Facts and Procedural History

- [2] The relevant facts as discussed in Davis's direct appeal follow:

Davis was involved with Terrell Wells and Philip Blake in a drug-dealing operation. Wells was the leader, with Blake under him, followed by Davis. On the side, Blake also worked with Parrish Myles.

Following a disagreement over the whereabouts of some drugs and/or drug money, Wells put a bounty on Myles. Davis met Wells at a park where they discussed the bounty. Davis, who resides in Chicago, then accompanied Wells and some other men to Griffith, Indiana where Myles lived. Wells took Davis to an apartment complex and showed him where Myles resided, all the while stressing that Myles needed to die.

Davis' uncle, Robert Davis ("Robert"), did not know Myles, but Davis informed him of the bounty. Davis then rode with Robert to show him where Myles lived. Once there, Davis pointed out Myles' vehicle, and Robert parked nearby. Robert then retrieved a t-shirt and hat from the trunk of his car, and the two men sat in the car for several minutes. Myles emerged from his apartment with his two children and spoke to Davis and Robert before he began walking to his vehicle. At that point, Robert exited the car and shot Myles.

Davis then moved to the driver's seat, Robert jumped into the passenger seat, and they drove away. Once in the car, Robert changed his shirt and hat, presumably to change his appearance during the getaway. A police pursuit ensued, and Davis exited the car, taking Robert's discarded shirt and hat with him. Davis called Wells for a ride and was apprehended when Wells came to pick him up.

Myles died from the gunshot wounds.

Davis v. State, No. 45A04-1304-CR-207, slip op. at 2-3 (Ind. Ct. App. March 5, 2014). The State charged Davis with murder. *Id.* at 3.

[3] At trial, the State presented the testimony of multiple individuals including Aniya Lawson who testified that her father, Parrish Myles, was shot by a man that jumped back into a car, that the person that was in the passenger's seat moved over to the driver's seat, and that they left. She testified that she was not really able to see anything about the person in the car. On cross-examination, Lawson testified that the man who did the shooting was not Davis and that the other person who was in the car did not exit the car. Krystle Gavin testified that she was a witness at the scene. On cross-examination, when asked if the occupants of the car were already in the car by the time you looked over," Gavin answered: "The one in the maroon shirt was getting in the car." Trial Transcript Volume II at 99. When asked if she knew whether Davis was the person she saw with the maroon shirt, she answered: "No, I don't." *Id.* The court also admitted a recorded interview of Davis which was over two hours in length and a subsequent interview of Davis which was over an hour in length.

[4] The trial court instructed the jury on accomplice liability. After the final instructions were given and the jury was removed from the courtroom to deliberate, the court stated: "Counsel, the jury has indicated that it is willing to continue with deliberations, but they are tired, as I'm sure we all are." Trial Transcript Volume IV at 530. The court indicated that it was going to adjourn

for the night and bring them back in the morning and asked counsel if they were “okay with that?” *Id.* The prosecutor indicated that the jury had “been out for roughly slightly over nine hours” and agreed. *Id.* at 531. The court stated: “I think given the circumstances with the weather and the fact that they’ve been at this for quite a while, that it would be prudent to have them take a fresh approach in the morning.” *Id.* Davis’s counsel stated: “Judge, I agree with you. May I just ask if they communicated anything specifically to the Court about wanting to go home or was there a note or just your decision?” *Id.* The court responded that the jury indicated they were not close to reaching a verdict and that they wanted to start again in the morning, and Davis’s counsel replied: “Sounds good.” *Id.* The jury returned to the courtroom, and the court indicated that it was going to adjourn for the evening and return the following morning. The court instructed the jury not to: discuss the case with anyone else; talk to attorneys, parties or witnesses; express any opinion to anyone else about the case; or listen to or read any outside or media accounts of the trial. The following day, the jury found Davis guilty.

[5] On direct appeal, Davis argued the evidence was insufficient to prove that he aided, induced, or caused the commission of murder. *Davis*, slip op. at 3. This Court affirmed. *Id.* at 6.

[6] On June 9, 2014, Davis filed a *pro se* petition for post-conviction relief. In July 2014, a public defender filed an appearance, Davis indicated he elected to proceed *pro se*, and the public defender filed a motion to withdraw. On September 3, 2014, Davis, *pro se*, filed an amended petition.

[7] On December 12, 2014, the court held a hearing. Attorney Benjamin Murphy, Davis's appellate counsel, and Attorney Kevin Milner, Davis's trial counsel and appellate co-counsel, testified. On September 19, 2016, the court denied Davis's petition. Discussion

[8] Before addressing Davis's allegations of error, we observe that Davis is proceeding *pro se*. Such litigants are held to the same standard as trained counsel. *Evans v. State*, 809 N.E.2d 338, 344 (Ind. Ct. App. 2004), *trans. denied*. We also note the general standard under which we review a post-conviction court's denial of a petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004); Ind. Post-Conviction Rule 1(5). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Fisher*, 810 N.E.2d at 679. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. *Id.* "A post-conviction court's findings and judgment will be reversed only upon a showing of clear error – that which leaves us with a definite and firm conviction that a mistake has been made." *Id.* In this review, we accept findings of fact unless clearly erroneous, but we accord no deference to conclusions of law. *Id.* The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. *Id.*

[9] Davis argues that his trial counsel and appellate counsel were ineffective on multiple bases. Generally, to prevail on a claim of ineffective assistance of counsel a petitioner must demonstrate both that his counsel's performance was deficient and that the petitioner was prejudiced by the deficient performance. *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), *reh'g denied*). A counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. *Id.* To meet the appropriate test for prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Perez v. State*, 748 N.E.2d 853, 854 (Ind. 2001). Failure to satisfy either prong will cause the claim to fail. *French*, 778 N.E.2d at 824. Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. *Id.*

[10] When considering a claim of ineffective assistance of counsel, a "strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Morgan v. State*, 755 N.E.2d 1070, 1072 (Ind. 2001). "[C]ounsel's performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption." *Williams v. State*, 771 N.E.2d 70, 73 (Ind. 2002). Evidence of isolated poor strategy, inexperience, or bad tactics will not support a claim of ineffective assistance of counsel. *Clark v. State*, 668

N.E.2d 1206, 1211 (Ind. 1996), *reh'g denied*, *cert. denied*, 520 U.S. 1171, 117 S. Ct. 1438 (1997). “Reasonable strategy is not subject to judicial second guesses.” *Burr v. State*, 492 N.E.2d 306, 309 (Ind. 1986). We “will not lightly speculate as to what may or may not have been an advantageous trial strategy as counsel should be given deference in choosing a trial strategy which, at the time and under the circumstances, seems best.” *Whitener v. State*, 696 N.E.2d 40, 42 (Ind. 1998). In order to prevail on a claim of ineffective assistance due to the failure to object, the defendant must show a reasonable probability that the objection would have been sustained if made. *Passwater v. State*, 989 N.E.2d 766, 772 (Ind. 2013) (citing *Wrinkles v. State*, 749 N.E.2d 1179, 1192 (Ind. 2001), *cert. denied*, 535 U.S. 1019, 122 S. Ct. 1610 (2002)). We apply the same standard of review to claims of ineffective assistance of appellate counsel as we apply to claims of ineffective assistance of trial counsel. *Williams v. State*, 724 N.E.2d 1070, 1078 (Ind. 2000), *reh'g denied*, *cert. denied*, 531 U.S. 1128, 121 S. Ct. 886 (2001).

A. Probable Cause Affidavit

- [11] Davis appears to argue that his trial counsel “could have used the deposition of Krystle Gavin to show evidence that the probable cause affidavit contained some false information that was very critical to the finding of probable cause.” Appellant’s Brief at 21. He asserts that the “probable cause affidavit/search warrant must be voided, and the fruits of the probable cause affidavit/search warrant excluded to the same extent as if probable cause was lacking on the face of the affidavit.” *Id.* at 28.

[12] Davis does not point out any specific inconsistencies between the probable cause affidavit and Gavin's statements.¹ He does not assert that the probable cause affidavit was admitted at trial or develop a cogent argument regarding how he was prejudiced. We cannot say that reversal is warranted on this basis.

B. Pre-Trial Investigation and Examination of Witnesses

[13] Davis argues that his trial counsel failed to investigate his case and depose or interview any of the State's witnesses before trial. He asserts that Lawson and Gavin were the State's key witnesses and that the depositions that his trial counsel received from the State contain "a very much inconsistent story to what each witness had testified at the trial." Appellant's Brief at 30. He argues that his trial counsel failed to attack Lawson and Gavin's inconsistent statements at trial.

[14] It is undisputed that effective representation requires adequate pretrial investigation and preparation. *Badelle v. State*, 754 N.E.2d 510, 538 (Ind. Ct. App. 2001), *trans. denied*. However, it is well-settled that we should resist judging an attorney's performance with the benefit of hindsight. *Id.* "When deciding a claim of ineffective assistance of counsel for failure to investigate, we

¹ Davis cites to "deposition of Krystle Gavin, P.C. App. p. 66" to support his assertion that "Krystle Gavin stated that she had never talked to the detectives and that the statement wasn't true that they say she had made." The page that Davis appears to cite comes from his proposed findings of facts and conclusions of law. See Appellant's Appendix Volume II at 66.

apply a great deal of deference to counsel's judgments." *Boesch v. State*, 778 N.E.2d 1276, 1283 (Ind. 2002), *reh'g denied*.

[15] When asked by Davis about the tactics he uses to build a defense before a trial, Davis's trial counsel testified that he gathers all the discovery, performs his own independent investigation, and deposes witnesses that are going to testify for the State. He also stated: "I will certainly discuss the evidence with you to get your input." Post-Conviction Transcript Volume 2 at 50. When asked if he interviewed or deposed any witnesses prior to the case, Davis's trial counsel answered: "I'm certain I did. I have no recollection, but I'd be shocked if I didn't depose all the substantive witnesses. I honestly don't remember." *Id.*

[16] With respect to the testimony of Gavin and Lawson, we observe that Davis's trial counsel stated:

My recollection is both she and the other witness, as you said a few minutes ago, testified to what they said they saw, and they both said they didn't see you commit any crime. Why would I want to discredit either one of those witnesses? Those are your best witnesses? They came out there, said they saw what happened, and that you didn't do anything wrong that they saw. I don't want to discredit them. To the contrary, I want the jury to think that they're the most truthful people in the trial.

Id. at 62.

[17] He also stated his decisions during trial were based on trial strategy and:

Those women, as I've said to you a couple of times, I'm certain I could have impeached them if one of them said this happened at

3:00 o'clock, when, in fact, on another time she said it was 3:30. Or if she said you were wearing blue pants, when, in fact, they were black. Those are not substantial inconsistencies. And even if they were, again, I am not going to attack the only witnesses who help you.

Id. at 71-72. Under the circumstances, we cannot say that reversal is warranted.²

C. Davis's Statement to Police

[18] Davis argues that his trial counsel failed to suppress his voluntary statement to detectives under Evidence Rules 403 and 404.³ He acknowledges that his

² To the extent Davis asks this Court to “weigh the witness’s credibility under the incredible dubiousity rule,” Appellant’s Brief at 35, we conclude that his claim amounts to a freestanding claim of error, which is not available in post-conviction proceedings. See *Martin v. State*, 760 N.E.2d 597, 599 (Ind. 2002) (“Freestanding claims that the original trial court committed error are available only on direct appeal.”); *Lambert v. State*, 743 N.E.2d 719, 726 (Ind. 2001) (holding that post-conviction procedures do not provide a petitioner with a “super-appeal” or opportunity to consider freestanding claims that the original trial court committed error and that such claims are available only on direct appeal), *reh’g denied, cert. denied*, 534 U.S. 1136, 122 S. Ct. 1082 (2002).

³ At the time of trial, Ind. Evidence Rule 403 provided: “Although 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 consideration of undue delay, or needless presentation of cumulative evidence.” (Subsequently amended eff. January 1, 2014). Ind. Evidence Rule 404 provided in part:

- (a) **Character Evidence Generally.** Evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

- (1) *Character of the accused.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

* * * * *

- (b) **Other Crimes, Wrongs, or Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if

statements that he did not plan to commit a crime with Robert, that he was not near the shooting to see what happened, and that he had no knowledge of the shooting before he left the scene of the crime were “not at all incriminating toward himself or Robert.” Appellant’s Brief at 36. He asserts that his statement cast a shadow over his character because it referenced his criminal lifestyle of selling drugs and associating with drug dealers and Robert’s history of being incarcerated for a prior murder.

- [19] Davis does not point to any specific portion of his recorded statements to support his assertion that his recorded statement cast a shadow over his character nor does he point to the record to show that he asked his trial counsel why he did not object to or move to suppress his statement. We cannot say that Davis has demonstrated ineffective assistance.

D. Jury Instruction

- [20] Davis argues that his trial counsel failed to object to the State’s tendered jury instructions on accomplice liability and cites *Kane v. State*, 976 N.E.2d 1228 (Ind. 2012).

- [21] We initially note that Davis’s trial counsel testified:

the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

(Subsequently amended eff. January 1, 2014).

I felt the instructions, as a whole, meaning the entire packet of instructions that Judge Murray would be reading to the jury, I felt was an accurate statement of the law. I can't remember which particular instruction say which particular things, but I do believe my recollection was thinking that it was a fair statement of the law, the entire group of instructions.

Post-Conviction Transcript Volume 2 at 98. He stated that he did not think there was an error in the accessory liability instruction.

- [22] In *Kane*, the Indiana Supreme Court held that the trial court erred by giving an instruction on accomplice liability which did not include a mental state at all and seemed to impose strict liability on the defendant for the unlawful acts of another. 976 N.E.2d at 1232. Here, the instruction specifically stated in part: "To aid under the law is to *knowingly* aid, support, help or assist in the commission of a crime." Trial Transcript Volume IV at 512 (emphasis added). Thus, *Kane* is distinguishable. To the extent Davis questions how he could have participated in the act of murder and suggests the evidence was insufficient, we note that this raises a freestanding claim, which is not available in post-conviction proceedings. See *Martin*, 760 N.E.2d at 599. Reversal is not warranted on this basis.

E. *Jury Separation*

- [23] Davis argues that his trial counsel failed to object to the separation of the jury for a lengthy period of time during the process of the deliberation.

[24] Generally, “[t]he Indiana Code requires the jury to be kept together once deliberations begin.” *Bradford v. State*, 675 N.E.2d 296, 304-305 (Ind. 1996) (citing Ind. Code § 35-37-2-6(a)(1)), *reh’g denied*. Ind. Jury Rule 29 provides that the “court shall not permit the jury to separate during deliberation in criminal cases unless all parties consent to the separation” and certain instructions are given.

[25] At the post-conviction hearing, trial counsel testified that he was “very comfortable with letting the jury go home, get some rest, and come back and hopefully rule my way.” Post-Conviction Transcript Volume 2 at 73. He indicated that the trial court allowed the jury to separate because the jurors were tired. He explained:

I believe the word tired is a good basis to allow these people to go home. I don’t remember, but often juries have elderly people, you often have people with health issues, you often have people with small children at home. I’m not going to punish this jury any more than they’re being punished by having to take time out of their lives to deliberate, unless I think it’s going hurt [sic] you. If I think it’s going to hurt you even one percent, I will make such an argument to the Court.

I saw nothing in this trial to concern me whatsoever about the jury’s behavior. I didn’t, for one minute, believe that if they were allowed to go home, that it would somehow compromise the verdict. The Judge instructed them, I’m certain, each day to ignore newspaper reports, and not discuss the case with anybody, et cetera, et cetera. So in the absence of any reason to think that this jury was going to be messed with, correct, I would not have complained about them going home. And I’m certain I didn’t.

Post-Conviction Transcript Volume 2 at 73-74. Trial counsel also testified that all of his decisions were based on trial strategy. We cannot say that reversal is warranted on this basis.

F. *Appellate Counsel*

[26] Davis appears to argue that his appellate counsel was ineffective for failing to raise the issues that he raised in his petition including that his trial counsel was ineffective. The Indiana Supreme Court has held that appellate counsel's failure to raise a claim of ineffective assistance of trial counsel is not deficient representation because the claim may be presented in post-conviction proceedings and appellate counsel is not required to raise this claim on direct appeal. *Conner v. State*, 711 N.E.2d 1238, 1252 (Ind. 1999), *reh'g denied, cert. denied*, 531 U.S. 829, 121 S. Ct. 81 (2000). We also note that Davis's trial counsel served as co-counsel for his direct appeal and arguing one's own ineffectiveness is not permissible under the Rules of Professional Conduct. *See Caruthers v. State*, 926 N.E.2d 1016, 1023 (Ind. 2010). Further, in light of the discussion above, we cannot say that Davis has demonstrated that his appellate counsel was deficient or that he was prejudiced.

Conclusion

[27] For the foregoing reasons, we affirm the post-conviction court's denial of Davis's petition for post-conviction relief.

[28] Affirmed.

Bailey, J., and Crone, J., concur.

LYNDON DAVIS

^v
DENNIS REAGLE

APPENDIX C (15 Pages)

Application for Certificate of Appealability to
the United States Seventh Circuit Court filed
May 14, 2020.

U.S.C.A. - 7th Circuit
RECEIVED
MAY 14 2020 DS

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

LYNDON DAVIS

Petitioner

v.

DUSHAN ZETECKY

Respondent

cause number

1:19-CV-00088-JPH-MJD

APPLICATION FOR CERTIFICATE OF APPEALABILITY

Comes now, Petitioner, Pro se, and Pursuant to 28 U.S.C. § 2253 and Fed. R. App. P. 22(b) request this court to issue a certificate of appealability for an appeal from the District Court's April 20, 2020, final Judgment denying habeas Corpus relief in this Matter. In Support of this request, Petitioner alleges and States as follows:

1. Petitioner, Pro se, filed a Petition for Writ of habeas Corpus relief in this Matter Pursuant to 28 U.S.C. § 2254, in the District Court challenging the Constitutional Validity of his State Court Conviction.

2. In his § 2254 Petition, Petitioner alleged that his Conviction is Constitutionally infirm because:

A. Ground ONE : Davis's Counsel Was ineffective for failing to do a Pretrial investigation of Davis's Case before Davis went to trial to learn of available facts that could have changed the outcome of the case.

B. Ground two : Davis's Counsel Was ineffective for failing to impeach the State's two key eye-witnesses Aniya Lawson and Krystle Gavins with their prior to trial inconsistent statements.

C. Ground three : Davis's Counsel Was ineffective for failing to object to the State's accomplice Liability Jury Instruction.

D. Ground four : Davis's Counsel Was ineffective for failing to object to the Separation of the Jury during the Process of deliberation

3. On April 20, 2020, the District Court entered a final Judgment denying Petitioner's § 2254 Petition.

4. Petitioner desires to appeal the District Court's Judgment to the United States Court of Appeals for the Seventh Circuit.

5. Petitioner Cannot appeal the District Court's Judgment Unless a Certificate of appealability issues.

6. On April 20, 2020, the District Court decline to issue a certificate of appealability.
7. The Petitioner Would like to only receive appealability for his Ground One and Ground two issues because they are the stronger and any reasonable Jurist Would find the District Court's assessment of the Constitutional Claims debatable or Wrong.
8. The Petitioner's § 2254 Petition raises a Substantial Showing of the denial of federal Constitutional rights under both grounds one and two for the clear reasons:

Ground One: The Petitioner Lyndon C. Davis, Was denied his right to effective assistance of Counsel Under the Sixth Amendment to the United States Constitution when his Attorney Kevin Milner, failed to investigate the facts to the case before the trial that could have changed the outcome of the case.

Lyndon, and Robert Davis (Davis, herein, and Robert herein) Were both Charged with the Murder of Parrish Myles Pertaining to this case. With no physical evidence linking Robert or Davis to the Murder, the State presented three eye witnesses who claim to have Saw the

Shooting took place and could describe the shooter, Robert and Davis was never picked out as the shooter or any participant of this crime by any of the state's witnesses and had no physical evidence linking them to this crime. In January 2012, the state tried Robert with a theory that he was the one who had shot and killed the victim on the case, but none of the state's witnesses were able to point Robert out in court as the shooter they had seen or even as a participant of the crime. The state changed their theory up and went with a different theory of accomplice liability with a state's misinterpretation of the law of accomplice liability and Robert was found guilty for murder under an accomplice liability jury instruction for aiding as an accomplice.

The next year, in February 2013, the state tried Davis in a separate trial (with no clue of what happened at Robert's trial) and the state came with a theory without any objection that Robert was indeed the shooter and killed the victim, and that Davis was guilty under accomplice liability for aiding Robert. The state used the same three eyewitnesses from Robert's trial at Davis's trial and after they gave a description of the shooter they had seen, the state still went on with the trial as if Robert was identified. This is pure prosecutorial misconduct on the state's behalf for falsifying the record just to obtain a

Conviction by Presenting False Evidence.

In the District Court's final judgment, the Court clearly pointed out that the Indiana Court of Appeals only articulated the Strickland Standard in Mr. Davis's Post-Conviction Memorandum decision (Davis II, 2018 WL 4957199, at *6-7), and that the Indiana Court of Appeals did not explicitly analyze the deficient Performance or Prejudice Prongs of Davis's ineffective claims, that they only went to their decision from Counsel's Post-Conviction testimony of trial strategy. This is not a reasonable application of clearly established federal law "The Strickland Standard" as determined by the Supreme Court of the United States. The District Court applied § 2254(d) deference to the State Court's adjudication of ~~the~~ Prong of Performance, but failed to apply the § 2254(d) deference to the State Court's adjudication of the Prejudice Prong, so the District Court did not correctly apply the Strickland Standard and a reasonable application of clearly established federal law when it denied Davis's claims of ineffective assistance of Counsel. Davis's claims has to be addressed de novo.

Under the Sixth Amendment Davis has a right to a fair trial, and has a right to effective Counsel. The Sixth Amendment imposes on Counsel a duty to investigate because reasonable effective assistance must be truly based on a clear

Professional decisions and informed legal choices that can be made only after investigation of options. If there is only one Plausible line of defense, the Court concluded, Counsel must conduct a "Reasonably

Substantial investigation" into that line of defense, since there can be no strategic choice that renders such an investigation Unnecessary. See *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). also see *Raygoza v. Hulick*, 474 F.3d 958 (7th Cir 2007) cert denied, 552 U.S. 1033 (2007) (counsel was ineffective in failing to investigate and present alibi defense)

If Davis's Counsel would have presented the evidence at Davis's trial that Robert was not identified as the shooter and was convicted as a accomplice at his own trial under accomplice liability this would have changed the outcome of Davis's case, the reasonable probability is there and any reasonable jurist would agree. Davis has made a substantial showing of the denial of a Constitutional right to effective Counsel with this issue of Ground one and is asking this Court to grant appealability from the District Court's Denial of this claim that Davis's Counsel was not ineffective.

Ground Two = The Petitioner Lyndon C. Davis was denied his right to effective assistance of Counsel under the Sixth Amendment of the United States Constitution when his Attorney failed to impeach the state's two key eyewitnesses Aniya Lawson and Krystle Gavins with their prior to trial inconsistent statements.

With no physical evidence to the case against Davis, the State presented three eyewitnesses during Davis's trial for testimony. Two of the State's eyewitnesses Aniya Lawson, and Krystal Gavins had made inconsistent, and contradicting; out of court statements to Police and taken in a deposition by Davis's Co-defendant's Attorney prior to Davis going to trial that were very conflicting to their trial testimonies at Davis's trial.

Davis's Attorney was in possession of these out of court statements and depositions and was aware that these two witnesses were falsely testifying and he allowed them to lie/perjure themselves on the stand without any attempt to impeach them. Counsel admitted at the Post-Conviction hearing that he was aware that these two witnesses were lying.

On the stand, but tried to explain that it was his strategy not to show that these two state's witnesses were lying on the stand because they somehow was helping Davis (See Post-Conviction transcript, and the District Court's Final Judgment). Davis was not aware of the depositions or Counsel's strategy before the trial.

The State's eyewitness and Victim's daughter, Aniya Lawson, was the State's Key Witness. Her testimony became the facts to Davis's case as she testified what she witnessed at the crime scene the day of the murder. Every time Davis's case is commented about from the Court of Appeals of Indiana, they are referring to Aniya Lawson's testimony like a bible scripture.

At Davis's Post-Conviction hearing, Davis presented a copy of his Probable Cause Affidavit to his case, and a copy of the depositions taken of Aniya Lawson and Krystal Gavin on November 3, 2011, to show the court as evidence that Aniya Lawson told three totally, and blatantly different stories to what she says she had witnessed at the crime scene before Davis went to trial, and that she had been coerced by the state to change her statement as well (see these documents).

Aniya Lawson's coerced testimony places the vehicle that Davis was sitting inside within inches of the crime scene, when Davis had given a statement saying that the vehicle was parked nowhere near the shooting or

near the Crime Scene. Reading from Davis's Probable Cause affidavit to his Case to Aniya Lawson's deposition; it is clear to see that Aniya Lawson told three different stories to what happened at the crime scene.

Story one: (Davis's Probable Cause affidavit) Aniya Lawson gave a statement to Police that a man walked up to her father on foot while he was taking trash to a dumpster and started a conversation with her father. After walking back to her father's truck where she sat with her younger brother, the man shot her father in the back then ran and got into the passenger seat of a car before driving away.

Story two: (Aniya Lawson's deposition), Aniya Lawson stated that two men drove up in a gold colored car and spoke to her father as he was coming back from taking trash to the dumpster and walking back to the father's truck where she sat with her younger brother. She then witnessed the passenger wearing a red shirt, exit the vehicle and run around to the driver side of the vehicle to shoot her father before getting back into the passenger seat of the car and the driver driving away. When asked did she see the driver? She said "No; but her brother saw the driver and said that the driver wore all black." She also stated that the driver never left the car and that's why she didn't get a chance to see him.

Story three: (Aniya Lawson's deposition), Aniya Lawson

Stated that two men drove up in a gold colored car and spoke to her father and as they talked, the driver of the vehicle wearing a red colored shirt exited the vehicle, then ran around to the passenger side of the vehicle and shot her father. Then she saw the passenger wearing a white T-shirt, scoot over to the driver seat of the car and wait on the shooter who use to be the driver, to return back to the vehicle and enter the passenger seat of the car before the car drove away. Story three became her trial testimony.

Aniya Lawson's stories two and three are both stated in her deposition, and in the same deposition she agreed to making the statement to the police in the Probable Cause affidavit (See Aniya Lawson's deposition submitted as evidence to the Post-Conviction Court). The State's eyewitness Krystle Cravin's testimony was not as nearly damaging as Aniya Lawson's, but she still have inconsistencies in her testimony and she should have been impeached because she was a State's witness.

Davis believes that the State took Davis's own statement to police and tried to craft a testimony story for Aniya Lawson to make Davis look guilty for the crime. To discredit Davis's own statement that he was not near

the Crime Scene. In Davis's 2013, Indiana Court of Appeals decision, the Court of Appeal referred to Davis's statement of not being near the Crime Scene; but also referred to the testimony of Aniya Lawson that put Davis near the Crime Scene and Concluded that it would be assessing witness Credibility to go against her testimony.

Aniya Lawson Lied on the Stand at Davis's trial and not only does the State know that she falsely testified, but Davis's Counsel Kevin Milner also was aware that she falsely testified. Davis's Counsel denied Davis his rights under the Sixth Amendment to have a fair trial, and to have effective representation by his counsel. Counsel was ineffective for failing to use the evidence of the inconsistent statements of the State's witnesses at Davis's trial to impeach them when he was aware that they was falsely testifying. Without Aniya Lawson's testimony the State had nothing. Impeachment should have been a part of Counsel's defense because her testimony was Prejudice.

Under the Strickland Standard, Davis's Counsel was obligated to use the information of the prior inconsistent statements to impeach the State's key witnesses. See Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Also see Moppett v. Kolb, 930 F.2d 1156 (7th Cir. 1991) "Trial Counsel's failure to introduce prior inconsistent statements of

Witnesses Constituted ineffective assistance of Counsel."

Since U.S. V. Agurs, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), the Supreme Court has then consistently held that a conviction obtained by knowing use of Perjured testimony is fundamentally Unfair and must be set aside if there is any likelihood that the false testimony could have affected the Judgment of the Jury, and that this rule apply whether the Prosecution knew of the Perjury or Merely Should have known of Perjury & I.D.

In the District Court's final Judgment denying the Petitioner's Habeas Corpus Petition, the Court stated that the Indiana Court of Appeals did not correctly use the Strickland Standard when it analyzed Davis's ineffective assistance of Counsel Claims because they did not analyze the deficient Performance or Prejudice Prongs, that they only recounted trial Counsel's testimony at the Post-Conviction Court's hearing as related to the claims and declared trial strategy. Then the District Court give an assessment of this claim stating that the Indiana Court of Appeals held that Counsel Made a Strategic decision not to impeach the state's witnesses, and that that holding constitutes a reasonable application of Strickland. In the District Court's ruling, they are referring to the State's record of Anya Lawson's testimony and are now stating that her testimony helped Davis. This is all a denial of Davis's Constitutional rights because they haven't even read the evidence of her prior inconsistent statements that were then Presented to the Post-Conviction Court and are not acknowledging

that she falsely testified at Davis's trial. The District Court is down playing Anya Lawson's other statements as "minor inconsistencies" when there is nothing "minor" about her inconsistencies, and any reasonable jurist would agree. Any reasonable jurist would also agree that the Indiana Court of Appeals and Southern District Court did not correctly use the Strickland standard when they both assessed this issue, because there are countless other decisions by federal courts across the circuits that has found ineffective assistance against a counsel for failing to impeach and most courts would agree with Davis if this issue was in front of them that Davis's counsel was ineffective for not impeaching the state's key witnesses who were falsely testifying against his client when he had the evidence to do so by possessing their prior inconsistent statements. The District Court only gave 2254(d) deference to the state's adjudication of the performance and not the prejudice of (IAC).

9. Davis has made a substantial showing that he was denied his constitutional right to have a fair trial, and his constitutional right to effective assistance of counsel.

The Indiana Court of Appeals, and the Indiana Southern District Court rulings involved an unreasonable application of clearly established federal law under the Strickland standard. The Sixth Amendment guarantees the right to effective assistance of counsel applicable to the states through the Fourteenth Amendment. Strickland v. Washington.

10. This Court should issue a Certificate of appealability because Petitioner has alleged that Pursuant to 28 U.S.C. § 2253 he has shown (1) that reasonable Jurist Would find this Court's assessment of the Constitutional Claims debatable or wrong, or (2) that reasonable Jurist Would find it debatable whether the Petition State's a Valid claim of the denial of a Constitutional right, and debatable whether the District Court was correct in it's Procedural ruling. Slack V. Mc Daniel, 529 U.S. 473, 484 (2000); Fed. R. App. P. Rule 2A(b)

WHEREFORE, Petitioner request the Court to issue appealability for an appeal to the United States Court of Appeals for the Seventh Circuit.

Date May 6, 2020

Lyndon Davis
Lyndon Davis
Petitioner, Pro Se
Pendleton Correctional Facility
4490 West Reformatory Road
Pendleton, Indiana 46064-9001

CERTIFICATE OF SERVICE

I certify that I Sent today a Copy of the
Petitioner's Request for a Certificate of Appealability to
the United States Court of Appeals for the Seventh Circuit,
and also sent a Copy by first class U.S. Mail to :

Andrew A. Kobe
Deputy Attorney General
IGCS, 5th floor
302 West Washington Street
Indianapolis, IN 46204-2794

May 6, 2020

Date

Lyndon Davis

Lyndon Davis

Doc# 232171

Pendleton Correctional Facility

4490 West Reformatory Road

Pendleton, IN 46064-9001

LYNDON DAVIS

V.

DENNIS REAGLE

APPENDIX D. (1 Page)

Order denying request for appealability
decided on December 1, 2020.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Submitted November 20, 2020

Decided December 1, 2020

Before

FRANK H. EASTERBROOK, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

No. 20-1769

LYNDON DAVIS,
Petitioner-Appellant,

Appeal from the United States District
Court for the Southern District of
Indiana, Indianapolis Division.

v.

No. 1:19-cv-00088-JPH-MJD

DENNIS REAGLE,
Respondent-Appellee.

James Patrick Hanlon,
Judge.

ORDER

Lyndon Davis has filed a notice of appeal from the denial of his petition under 28 U.S.C. § 2254 and an application for a certificate of appealability. This court has reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED.

LYNDON DAVIS

V.

DENNIS REAGLE

APPENDIX E (14 Pages)

Petition for Rehearing filed for request for
appealability to the Seventh Circuit Court
on December 18, 2020.

United States Court of Appeals

cause NO. 20-1769

LYNDON DAVIS
Petitioner-Appellant

V.

DENNIS REAGLE
Respondent-Appellee

Appeal from the United States District
Court for the Southern District of
Indiana, Indianapolis Division

NO. 1:19-CV-00088-JPH-MJD

James Patrick Hanlon
Judge.

PETITION FOR REHEARING/REHEARING
ENBANC CONCERNING APPLICATION FOR
CERTIFICATE OF APPEALABILITY

LYNDON DAVIS

Appellant, Pro Se

DOC # 232171

Pendleton Correctional Facility
4490 West Reformatory Road
Pendleton, IN 46064-9001

LEGAL AUTHORITY

A request for reconsideration of a denial of a Certificate of appealability Should be treated the same as a Petition for rehearing, no matter what caption it bears, first because a denial of Certificate of appealability ends the appeal, and second, because a belief that the appellant is entitled to prevail on the merits means that a Certificate of appealability should have issued. A request for a Certificate of appealability is enough to put the case in the Court of appeals. Denial thus may be reviewed by the United States Supreme Court on writ of certiorari. And order that terminates the appeal, and may be reviewed by the Supreme Court, also should be eligible for review by the full Court of appeals. The denial of a request for a Certificate of appealability will present the sort of legal question that justifies rehearing en banc, that option should be available, even though the search for a needle in the haystack of pro se motions has a potential to tax the appellate court's resources. Consequently a

document that seeks review by the Court en banc will be distributed to all active Judges. A request for rehearing en banc poses, not the question whether any particular active Judge would deem a constitutional issue substantial, but whether an important and controlling issue of law requires resolution by the full Court either to maintain uniformity within the Court or to resolve a question of exceptional importance. That is the standard set by the Fed. R. App. P. 35 (a). An appeal does not come before any of the Judges (other than the two who acted on the original panel under Operating Procedure 1(a)(1), for decision unless en banc review first is granted, otherwise the panel's resolution stands. Moreover, even when rehearing en banc is granted, this does not empower any particular Judge to issue a certificate unilaterally. Once the case has been set for hearing en banc, the majority prevails. See *Thomas v. United States*, 328 F.3d 305, April 16, 2003, 7th Circuit - US Court of Appeals.

STATEMENT OF THE ISSUE

Petitioner, Lyndon Davis, is asking to have all the Judges of the Court to review his request for a Certificate of appealability to appeal the decision of the District Court for the Southern District of Indiana, Indianapolis Division, which dismissed the Petitioner's claims for habeas Corpus relief. The Petitioner's request for a Certificate of appealability was denied by a two Judge Panel of this Court on December 1, 2020. The Petitioner argues that he should have received a positive judgement by the two Panel Judges, and that his Motion for appealability should have been granted concerning his Constitutional claims (See Petitioner's application for appealability).

ARGUMENT

The Petitioner, Lyndon Davis, argues that he filed a application for a Certificate of appealability on May 14, 2020, seeking permission to appeal two of the four issues/claims that were dismissed by the District Court for the Southern District of Indiana, Indianapolis Division, for habeas Corpus relief (1) (Ground One) Ineffective assistance of Counsel for failing to conduct a pretrial investigation to the Petitioner's case to learn of available facts that could have changed the

Outcome of the Petitioner's Case, And (2) (Ground Two)
Ineffective assistance of Counsel for failing to impeach
the States two key eyewitnesses to the Case Aniya Lawson,
and Krystle Gavins, with their prior to trial inconsistent
statements that were different from their trial testimony
that could have also changed the outcome of the case.

The Petitioner argues that his Sixth Amendment
Constitutional right to effective assistance of Counsel was
violated due to his trial Counsel's representation of his
case. The Petitioner argues that his trial Counsel's full
representation was under the norms of an effective Counsel
guaranteed to a defendant by the Sixth Amendment of the
United States Constitution, and that he should be allowed to appeal
his issues/claims.

(1) The Petitioner argues that his Lawyer/Counsel failed
to investigate his case before the case went to trial. The
Petitioner argues that he was convicted at his trial of
murder as an accomplice under the Indiana's accomplice
liability law by the state under a theory that he aided a
co-defendant, Robert Davis (The Principle), who was the
shooter who had killed the victim to the case. The Petitioner,
Lyndon Davis, and Robert Davis, were tried separately in two
separate trials with Robert being tried first with a theory

From the State that Robert Was the Shooter Who had Killed the Victim Until Robert Was not Identified as the Shooter at trial by any of the three State's eyewitnesses. After Robert Was not Identified as the Shooter, the State Proceeded on at his trial with a new theory that although Robert Wasn't Identified as the Shooter or even as a Participant by the Eyewitnesses, that they were Sure that Robert Played a role in the Crime and Could be Convicted as an accomplice Under the accomplice Liability Law. The State Presented a accomplice Liability Jury instruction to Robert's Jury and he Was found guilty for Murder as an accomplice.

The Petitioner argues that one year after Robert Was tried and Convicted for Murder Under Indiana's accomplice Liability Law as an accomplice, the State tried the Petitioner in a Separate trial for the Same Murder with a theory that Robert Was indeed the Shooter Who had Killed the Victim, and that the Petitioner, Lyndon Davis, Was guilty of being Robert's accomplice to the Murder under Indiana's accomplice Liability Law. The Petitioner's Jury Was given an accomplice Liability Jury instruction and the Petitioner Was also found Guilty for Murder as an accomplice. The Petitioner argues that the State Committed Misconduct at his trial by Presenting Robert

Who Was not Present at the Petitioner's trial, as the Shooter of the Case to Show a Principle in order to Convict the Petitioner as an accomplice to the Case as required under Indiana's accomplice Liability Law. The Petitioner argues that the State used the Same three eyewitnesses for his trial that Were Used for Robert's trial to give identity to a Shooter and Was aware that Robert Was not Identified at his own trial by these Same eyewitnesses, but Proceeded the Petitioner's trial as Robert Was indeed Identified.

The Petitioner argues that his trial Counsel Was not aware that Robert Was not identified at his own trial as the Shooter, and that Robert Was found guilty as an accomplice under the Same accomplice Liability Jury instruction that Was Presented to the Petitioner's Jury. The Petitioner argues that his attorney's defense at trial also Placed Robert as the Shooter, When it is a fact that no one had testified to Seeing Robert Shoot and Kill the Victim, not even the Petitioner. That his attorney's defense was prejudice to the trial, and helped the State Place Robert as the Principle to the Case at the trial in which allowed the State to Push their accomplice Liability theory to Convict the Petitioner as

an accomplice to Murder. That if his Attorney Would have conducted a Pretrial investigation of the case in the norms of a Competent Attorney, that Counsel Would have Known at the Petitioner's trial (or before trial) that the State Was Pushing a false theory at the Petitioner's trial (or Was Seeking to Push a false theory at the Petitioner's trial).

The Petitioner argues that his Attorney's lack of Pre-trial investigation of his case put his case in Peril, and that his Conviction Was a result of an Unfair trial. The Petitioner argues that if this issue/claim Was explained to any Jurist, that they Would agree that the Petitioner's Sixth Amendment right to effective assistance of counsel Was Violated, and that the District Court's assessment of this claim is indeed debatable or Wrong. The Petitioner Was indeed Wrongfully Convicted and any Jurist Would agree. The Petitioner is asking this Court to grant appealability for this issue/claim.

(2) The Petitioner argues that at his trial, his Attorney Was aware, and had Proof, that the State's two eyewitnesses Aniya Lawson, and Krystle Gavin, were both falsely testifying at the Petitioner's trial to what they both Were stating that

they had Witnessed at the Scene of the Crime. The Petitioner's Attorney had received Prior to trial a Copy of a deposition taken of both eyewitnesses that were Conducted by the Petitioner's Co-defendant, Robert Davis's attorney that was never Presented to the Petitioner before his trial, or was never Presented at the trial as evidence, that both Contained Statements that were in Contradiction to their trial testimonies and Could have discredited both eyewitnesses. With no physical evidence to the case, the State depended on the testimony of three eyewitnesses (Aniya Lawson, Knystle Gartin, and Rosa Orphny) to make a case against the Petitioner at his trial. The only defense that was available to defend the Petitioner against the State's eyewitnesses were to impeach them and the petitioner's Attorney failed to do so.

The Petitioner argues that he has Presented evidence at his Post-conviction hearing to Prove that the two stated eyewitnesses were falsely testifying at his trial. Also it was Stated by the Petitioner's Attorney at the hearing that he was aware that they were falsely testifying, but that he did not Want to Show that the State's witnesses were "Lying" at the trial. That he did not Want to impeach

them, or to discredit them at the trial. Krystle Gavin's testimony was not damaging to the Petitioner's case at trial, but it should have been brought to the Jury's attention that she stated in her deposition that she did not see the shooting, and only saw a Gold Colored car like the one the Petitioner and his Co-defendant were occupying leaving the apartment complex.

The State's eyewitness, and the victim's daughter, Aniya Lawson was the State's key eyewitness and her trial testimony is the reason for the State's conviction against the defendant (Petitioner) and his Co-defendant as stated in their Indiana Court of Appeals decision's. The Petitioner argues that without Aniya Lawson's trial testimony the State does not have a case against him and Robert Davis. That Aniya Lawson's testimony is the only testimony to place the Petitioner as a participant of the crime by stating that she saw the occupants of a Gold Colored car like the car that the Petitioner occupied commit the crime. The Indiana Court of Appeals stated that Aniya Lawson's trial testimony placed the Petitioner as a participant, and discredits the Petitioner's

own statement to the Police that the car was nowhere near the spot where the crime had taken place. The Petitioner has shown as evidence to the Post-conviction Court that Aniya Lawson had given four different stated accounts to what she had witnessed that were hot and cold in difference (See application for Certificate of appealability to read all four statements). The Petitioner has also pointed to the record of Rosa Orphrey's trial testimony that contradicts Aniya Lawson's testimony of seeing the gold colored car within inches of the spot where the shooting took place. State's eyewitness Rosa Orphrey testified that she had seen the shooting as well, but that she never saw a gold colored car near the scene of the crime. Rosa Orphrey's trial testimony corroborates the Petitioner's statement to the Police that the car that he occupied was nowhere near the shooting.

The Petitioner argues that his Attorney's failure to use the State's eyewitness's prior to trial inconsistent statements to discredit their trial testimonies put his case in peril, and that his conviction was the result of an unfair trial. The Petitioner argues that if this issue / claim was explained to

any Jurist, that that Jurist would agree that the Petitioner's Sixth Amendment right to effective assistance of Counsel was indeed violated, and that the District Court's assessment of this claim is also debatable or wrong. The Petitioner was indeed wrongfully convicted and any Jurist would agree if presented with the evidence that the Petitioner has provided to the State Courts. The Petitioner is asking this Court to grant appealability for this issue / claim. None of the state's eyewitnesses identified the Petitioner as a participant of this crime.

CONCLUSION

The question when deciding whether to issue a Certificate of appealability is the debatability of the underlying Constitutional claim, not the resolution of that debate. The Petitioner has satisfied the requirements of 28, U.S.C.S. § 2253, and is asking this Court to grant a Certificate of appealability for both of his claims / issues. A Petitioner need not demonstrate that he will prevail in order to receive a Certificate of

appealability. The Petitioner Must only demonstrate that a reasonable Jurists Would find the district Court's assessment of the Constitutional claims debatable or Wrong.

Respectfully Submitted this 13 day of December 2020

Lyndon Davis

Appellant, Pro Se

DOC # 232171

Pendleton Correctional
Facility

4490 W. Reformatory Rd
Pendleton, IN 46064-9001

CERTIFICATE OF SERVICE

I Certify that I Sent a Copy of this request
for a rehearing en banc for a Certificate of Appealability
to the United States Court of Appeals for the Seventh
Circuit, and also Sent a Copy by First Class U.S Mail
to :

Andrew A. Kobe
Deputy Attorney General
I.G.C.S, 5th Floor
302 W. Washington Street
Indianapolis, IN 46204-2794

December 13, 2020

Date

Lyndon Davis
DOC # 232171
Pendleton Correctional
Facility
4490 West Reformatory Road
Pendleton, IN 46064-9001

LYNDON DAVIS

V.

DENNIS REAGLE

APPENDIX F (1 Page)

Order denying rehearing on January 11, 2020.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

January 11, 2021

Before

FRANK H. EASTERBROOK, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

No. 20-1769

LYNDON DAVIS,

Petitioner-Appellant,

v.

DENNIS REAGLE,

Respondent-Appellee.

Appeal from the United States District
Court for the Southern District of
Indiana, Indianapolis Division.

No. 1:19-cv-00088-JPH-MJD

James Patrick Hanlon,
Judge.

ORDER

Petitioner-appellant filed a petition for rehearing and rehearing *en banc* on December 18, 2020. No judge in regular active service has requested a vote on the petition for rehearing *en banc*, and all members of the original panel have voted to deny panel rehearing. The petition for rehearing *en banc* is therefore DENIED.

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