APPENDIX A

Alberts v. Perry, No. 21-5151,
United States Court of Appeals
for the Sixth Circuit

Judgment entered October 5, 2021

No. 21-5151

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN ALBERTS,

Petitioner-Appellant,

v.

GRADY PERRY, Warden,

Respondent-Appellee.

ORDER

Before: McKEAGUE, Circuit Judge.

John Alberts, a Tennessee prisoner proceeding pro se, appeals the district court's denial of his petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. Alberts has filed an application for a certificate of appealability ("COA") and a motion for the appointment of counsel.

In March 2008, a grand jury returned an indictment charging Alberts with eight counts of rape of a child, one count of solicitation of a minor to commit rape of a child, and one count of solicitation of sexual exploitation of a minor. *See State v. Alberts*, M2015-00248-CCA-R3-CD, 2016 WL 349913 (Tenn. Crim. App. Jan. 28, 2016) ("*Alberts II*"). The charges covered different victims, and the trial court severed the counts into four separate cases. *See id.* This § 2254 petition arises from one of those four cases—the four counts of rape of a child relating to the sexual abuse of six-year-old victim, N.H. *See id.*

Prior to trial, Alberts filed a motion to suppress evidence seized during a search of his car, asserting that such evidence, which included a laptop computer and a camera, was "fruit[] [of] a poisonous tree to an illegal and invalid search warrant." He argued that the affidavit supporting the search warrant failed to "state probable cause that [he] had done some illegal act" and failed to "state a nexus connecting the criminal activity to the place to be searched." The trial court granted the motion, and the State filed an interlocutory appeal. The Tennessee Court of Criminal Appeals

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remanded the matter to the trial court for further proceedings as to whether an exception to the warrant requirement applied. *State v. Alberts*, 354 S.W.3d 320, 324 (Tenn. Crim. App. 2011) ("*Alberts I*").

On remand, the trial court found that the automobile exception to the warrant requirement applied and denied the motion to suppress, concluding that "[t]he existence of probable cause for the search, combined with the conclusive presumption of exigency based upon the 'automobile exception' under Tennessee law, leads the [c]ourt to conclude that the search of [Alberts's] vehicle was a lawful search." In June 2013, the case proceeded to trial, where "the bulk of the direct evidence against [Alberts] consisted of images retrieved from the laptop computer" seized from his car. *Alberts II*, 2016 WL 349913, at *4. The jury ultimately convicted Alberts of all four charges, and the trial court sentenced him to four consecutive terms of twenty-five years' imprisonment to be served at 100%.

Alberts filed a motion for a new trial, challenging, among other things, the denial of his motion to suppress. He argued that the trial court erred by ruling that the automobile exception applied to the search of his car and contended further that the exception did not extend to the search of his laptop and camera. The trial court denied the motion, concluding that the automobile exception was properly applied and that the search of the laptop and camera contained within the vehicle was justified by the probable cause that existed to search the car. The court further found that Alberts waived the issue concerning the search of the laptop and camera, noting that the motion to suppress challenged the search of the vehicle and "touched on the laptop and the camera only as fruits of the poisonous tree," that the court's order on the motion to suppress following remand stated that the "sole inquiry" was whether probable cause existed to search the vehicle, and that Alberts never moved to suppress the results from the search of the laptop or camera and did not raise a contemporaneous objection to the admission of the incriminating images found on the laptop. The Tennessee Court of Criminal Appeals affirmed the judgment, and the Tennessee Supreme Court denied Alberts's application for permission to appeal. *Alberts II*, 2016 WL 349913, at *8, *perm. app. denied* (Tenn. June 23, 2016).

Alberts next filed a pro se state petition for post-conviction relief. The state trial court appointed counsel, who filed an amended petition raising a claim that trial counsel was ineffective for "failing to file a separate motion to suppress the search and examination of his laptop computer containing the images directly linking him to the sexual assaults alleged in the indictment." Alberts argued that the automobile exception to the warrant requirement did not justify the search and forensic examination of the laptop. Acknowledging that the automobile exception permits the search of containers found within a vehicle that are capable of concealing the object of a search, Alberts argued that pursuant to *Riley v. California*, 573 U.S. 373 (2014) and *United States v. Camou*, 773 F.3d 932 (9th Cir. 2014)—both decided after Alberts's trial—a laptop computer found in a vehicle does not constitute a container that is subject to search. After conducting an evidentiary hearing, the court denied the petition. The court found that defense counsel's performance was not deficient, explaining that counsel's motion to suppress was sufficient to preserve any challenge to the search of the laptop and that Alberts's claim of ineffectiveness was based on a change in the law surrounding computer and cell phone searches that developed years after trial counsel originally sought suppression of the evidence. The Tennessee Court of Criminal Appeals affirmed, and the Tennessee Supreme Court denied discretionary review. *Alberts v. State*, No. M2018-00994-CCA-R3-PC, 2019 WL 4415189, at *6 (Tenn. Crim. App. Sept. 16, 2019) ("*Alberts III*"), *perm. app. denied* (Tenn. Jan. 15, 2020).

In May 2020, Alberts filed his pro se § 2254 petition in the district court. His sole claim is that trial counsel was ineffective for failing "to file a motion to suppress the search of a laptop computer seized from a vehicle, where the vehicle [wa]s found parked and locked on the owner[']s private residential driveway, within a few feet of the home." Citing *Florida v. Jardines*, 569 U.S. 1 (2013), Alberts argued that the automobile exception does not apply to a warrantless search of a vehicle parked within the curtilage of a home.

The district court found that Alberts failed to present his habeas claim to the state courts, explaining the distinction between the claim Albert raised in his state petition for post-conviction relief—that counsel was ineffective for failing to file a motion to suppress the computer evidence

on the ground that the automobile exception did not allow for a search of the laptop as a "container" within the car—and the claim he asserted in his § 2254 petition—that counsel was ineffective for failing to argue that the automobile exception did not apply at all because the car was parked within the protected curtilage of the home. The court determined that the claim was procedurally defaulted because there was no longer an available state remedy that would allow Alberts to exhaust the claim. But rather than consider whether Alberts had established cause and prejudice to excuse the procedural default, the court analyzed the merits of the claim and concluded that Alberts was not entitled to habeas relief. The court declined to issue a COA.

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

Reasonable jurists could not disagree with the district court's merits-based denial of Alberts's claim for relief. To establish ineffective assistance of counsel, a defendant must show both that: (1) counsel's performance was deficient, i.e., that counsel's representation fell below an objective standard of reasonableness; and (2) the deficient performance resulted in prejudice to the defense. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984). The test for prejudice is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. When a habeas petitioner bases an ineffective assistance claim on counsel's failure to bring a suppression motion, the "[p]etitioner must 'prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice.'" *Robinson v. Howes*, 663 F.3d 819, 825 (6th Cir. 2011) (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986)).

The district court noted that at the evidentiary hearing on Albert's state post-conviction petition, trial counsel testified that, in moving to suppress the evidence, he focused on the problems

with the search warrant and the supporting affidavit and that, on remand, he believed that his challenge to the warrant had preserved any challenge to the search of the laptop computer as a "container" under the automobile exception. Counsel further testified that his understanding of the law at the time the matter was remanded for consideration of the automobile exception was that a computer was a "container" subject to search under the exception, but that "post-*Riley*," he would have filed a separate motion to suppress the computer evidence. And on appeal, appellate counsel, relying on *Riley*, argued that the search of the computer was not covered by the automobile exception. Counsel's testimony makes clear he made the arguments that, at the time, he believed made the strongest case for suppression. And, in fact, he was initially successful in the trial court. "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (per curiam). Such decisions, made for tactical purposes and based on reasonable grounds, are not sufficient to show ineffective assistance of counsel. *See Strickland*, 466 U.S. at 687.

In addition, an attorney's failure to foresee a change in the law is not ineffective assistance. *See, e.g.*, *United States v. Burgess*, 142 F. App'x 232, 240–41 (6th Cir. 2005). A habeas court must assess the adequacy of counsel's performance based on "counsel's perspective at the time," *Strickland*, 466 U.S. at 689, rather than "in the harsh light of hindsight," *Bell v. Cone*, 535 U.S. 685, 702 (2002). Therefore, "subsequent legal developments are relevant only if those developments were 'clearly foreshadowed by existing decisions.'" *Baker v. Voorhies*, 392 F. App'x 393, 400 (6th Cir. 2010) (quoting *Thompson v. Warden, Belmont Corr. Inst.*, 598 F.3d 281, 288 (6th Cir. 2010)). Aside from this narrow exception, "counsel is not ineffective for failing to predict the development of the law." *Thompson*, 598 F.3d at 288.

At the time of Alberts's trial, it was far from clear that the automobile exception might not apply to the search of a locked car parked within the curtilage of a home. Three months before trial, the Supreme Court clarified that the curtilage of a home is considered part of the home itself for purposes of the Fourth Amendment and that therefore any unlicensed intrusion into the

curtilage to gather evidence is considered a search for which consent or a warrant must be obtained. *Jardines*, 569 U.S. at 6–8. *Jardines* defined a home's curtilage as "the area 'immediately surrounding and associated with the home,'" *id.* at 6 (quoting *Oliver v. United States*. 466 U.S. 170, 180 (1984)), and "'intimately linked to the home, both physically and psychologically,' . . . where 'privacy expectations are most heightened,'" *id.* (quoting *California v. Ciraolo*, 476 U.S. 207, 213, (1986)). It was not until 2018 that the Supreme Court held in *Collins v. Virginia*, 138 S. Ct. 1663, 1671, 1675 (2018), that the automobile exception does not permit the warrantless entry of a home's curtilage in order to search a vehicle and concluded that a driveway, *under certain circumstances*, can be considered part of the home's curtilage. Cases from this court finding that driveways were not considered part of the curtilage of a home show that the Supreme Court's holding in *Collins*—to the extent it could even support Alberts's argument for suppression—was not "clearly foreshadowed" at the time of Alberts's trial. *See, e.g.*, *United States v. Galaviz*, 645 F.3d 347, 355–56 (6th Cir. 2011); *United States v. Estes*, 343 F. App'x 97, 101 (6th Cir. 2009).

Even if counsel should have foreseen these forthcoming legal developments and moved to suppress the computer evidence on that basis, Alberts has failed to make a substantial showing that any such motion to suppress would have been meritorious. *Collins* held that the automobile exception does not allow for a warrantless search of a car parked within a home's curtilage, but it did not hold than all driveways are considered part of the curtilage. Indeed, this court has recognized that *Galaviz* and *Estes*, cited above, survive *Collins*. *See United States v. Coleman*, 923 F.3d 450, 456 (6th Cir. 2019). There are four factors that serve as

> a guidepost to determining whether an individual has a reasonable expectation of privacy in an area, placing it within the home's curtilage: (1) proximity to the home; (2) whether the area is within an enclosure around the home; (3) uses of the area; and (4) steps taken to protect the area from observation by passersby.

Id. at 455 (citing *United States v. Dunn*, 480 U.S. 294, 301 (1987)). Alberts bore the burden of establishing that the search violated his Fourth Amendment rights, *see id.*, but he made no arguments and cited no facts or evidence to show that his car was parked in a part of the driveway that would fall within the home's curtilage. Although he stated that the driveway was "within a

few feet of the home," the proximity "factor is not determinative 'without reference to the additional *Dunn* factors.'" *United States v. May-Shaw*, 955 F.3d 563, 571 (6th Cir. 2020) (quoting *Daughenbaugh v. City of Tiffin*, 150 F.3d 594, 599 (6th Cir. 1998)), *cert. denied*, __S. Ct. __, 2021 WL 2405226 (U.S. June 14, 2021). Reasonable jurists could not debate the district court's determination that Alberts failed to establish both deficient performance and prejudice under *Strickland*.

Finally, the district court also briefly addressed the merits of the ineffective assistance claim that Alberts raised in state court, even though that claim was not raised in his § 2254 petition—that counsel should have filed a motion to suppress the computer evidence on the ground that the laptop did not constitute a "container" that was subject to search under the automobile exception. On appeal from the denial of his post-conviction petition, the Tennessee Court of Criminal Appeals held that counsel's failure to predict the change in the law brought by *Riley* and to file a motion to suppress on that basis did not amount to deficient performance. *Alberts III*, 2019 WL 4415189, at *6. Reasonable jurists could not disagree with the district court's conclusion that the state appellate court's resolution of this claim was neither contrary to, nor an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d); *Harrington v. Richter*, 562 U.S. 86, 100 (2011); *see also Thompson*, 598 F.3d at 288.

Accordingly, Alberts's application for a COA and motion for the appointment of counsel are **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX B

Alberts v. Perry, No. 3:20-cv-00408,
United States District Court
for the Middle District of Tennessee

Judgment entered December 10, 2020

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

JOHN ALBERTS,	)	
	)	
Petitioner,	)	
	)	No. 3:20-cv-00408
v.	)	
	)	JUDGE RICHARDSON
GRADY PERRY,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION

John Alberts, an inmate of the South Central Correctional Facility in Clifton, Tennessee, filed a pro se petition for a writ of habeas corpus under 28 U.S.C. § 2254 ("Petition") challenging his convictions and sentence for rape of a child less than 13 years of age. (Doc. No. 1.) The Respondent, Warden Grady Perry, filed an answer to the Petition (Doc. No. 9, "Answer"), and Petitioner filed a reply (Doc. No. 21). The Petition is ripe for review, and this court has jurisdiction pursuant to 28 U.S.C. § 2241(d). Having fully considered the record, the Court finds that an evidentiary hearing is not needed and that Petitioner is not entitled to habeas relief. The Petition will be denied and this action will be dismissed.

I. PROCEDURAL HISTORY AND EVIDENCE AT TRIAL

On March 10, 2008, a Williamson County, Tennessee grand jury returned an indictment charging Petitioner with eight counts of rape of a child, one count of solicitation of sexual exploitation of a minor, and one count of solicitation of a minor to commit rape of a child. (Doc. No. 8-1 at 4-7); *State v. Alberts*, No. M2015-00248-CCA-R3-CD, 2016 WL 349913, at *1 (Tenn. Crim. App. Jan. 28, 2016) (hereinafter "*Alberts II*"). The trial court subsequently severed, from the other six counts (which were themselves severed into three different trials), the four counts of

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rape of a child (Counts 1-4) concerning six-year-old victim H.N. *Alberts II*, 2016 WL 349913, at *1. The case proceeded to trial on those four counts.

After severance but prior to trial, Petitioner moved to suppress evidence obtained from a laptop computer seized from his car during the execution of a search warrant, on the ground that the search warrant was defective. *Alberts II*, 2016 WL 349913, at *1. The trial court granted the motion on May 25, 2010. *Id.* On interlocutory appeal, the Tennessee Court of Criminal Appeals ("TCCA") remanded for further proceedings to determine whether one of the exceptions to the warrant requirement applied. *State v. Alberts*, 354 S.W.3d 320, 323 (Tenn. Crim. App. 2011). On remand, the trial court found that the automobile exception to the warrant requirement applied and therefore denied the motion to suppress. *Alberts II*, 2016 WL 349913, at *4.

On June 5, 2013, Petitioner's trial commenced. *Alberts II*, 20156 WL 349913, at *4. The bulk of the direct evidence against Petitioner consisted of graphic images retrieved by the Tennessee Bureau of Investigation ("TBI") from the laptop computer. *Id.* A.S., a woman who grew up "as brother and sister" with Petitioner, and with whom Petitioner previously lived as an adult, testified that the girl in the images with Petitioner was H.N., the daughter of the girlfriend of Petitioner's brother. (Doc. No. 8-16 at 57-59, 69-70); *Alberts II*, 20156 WL 349913, at *4. A.S. also testified that the images were taken at the home she had shared with Petitioner, which H.N. had visited. (Doc. No. 8-16 at 63-65); *Alberts II*, 20156 WL 349913, at *4. K.N., H.N.'s mother, testified that H.N. was six years old at the time of Petitioner's alleged acts. (Doc. No. 8-16 at 77-78.)

The State also offered the testimony of Williamson County Sheriff's Office Detective Tameka Sanders and TBI Assistant Special Agent in Charge James Patterson. Together, Sanders and Patterson testified about the retrieval of the images; the content of the images (including oral

sex and vaginal penetration), the identification of Petitioner and H.N. as being the persons in the images, and other physical evidence gathered by law enforcement based on the images (e.g., camera, bed linens, and undergarments). (*See* Doc. Nos. 8-15, 8-16.) The State also introduced, through Sanders, a series of jailhouse letters written by Petitioner to his mother and brother, in which Petitioner confessed to leaving the photographs of himself and H.N. on the computer and asserted that H.N. encouraged and was a willing participant in the activities depicted therein. (Doc. No. 8-15 at 124-32.)

On June 7, 2013, the jury found Petitioner guilty on all four counts of rape of a child. *Alberts II*, 20156 WL 349913, at *4. The trial court thereafter denied Petitioner's motion for a new trial. (Doc. No. 8-12 at 110-19). On April 8, 2014, the court sentenced Petitioner to four consecutive 25-year terms of imprisonment to be served at 100%. (Doc. No. 8-11 at 119-122); *Alberts II*, 2016 WL 349913, at *4. Thus, Petitioner received a total effective sentence of 100 years of imprisonment. On January 28, 2016, the TCCA affirmed. *Alberts II*, 2016 WL 349913, at *4-8. On June 23, 2016, the Tennessee Supreme Court denied discretionary review. (Doc. No. 8-31.)

On May 3, 2017, Petitioner filed a pro se petition for state post-conviction relief. (Doc. No. 8-32 at 36-39.) The post-conviction court appointed counsel, who filed an amended petition. (*Id.* at 48-55.) On April 19, 2018, after holding an evidentiary hearing (Doc. Nos. 8-33, 8-34), the state post-conviction court denied relief. (Doc. No. 8-32 at 78-92.) On September 16, 2019, the TCCA affirmed. *Alberts v. State*, No. M2018-00994-CCA-R3-PC, 2019 WL 4415189, at *4-6 (Tenn. Crim. App. Sept. 16, 2019) (hereinafter "*Alberts III*"). On January 15, 2020, the Tennessee Supreme Court denied discretionary review. (Doc. No. 8-43.)

On May 8, 2020, Petitioner timely submitted the pending Petition. (Doc. No. 1.)

II. STANDARD OF REVIEW

1. Habeas Relief

The authority for federal courts to grant habeas corpus relief to state prisoners is provided by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Harrington v. Richter*, 562 U.S. 86, 97 (2011). "In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 68 (1991); 28 U.S.C. § 2254(a). The availability of federal habeas relief is further restricted where the petitioner's claim was "adjudicated on the merits" in the state courts. 28 U.S.C. § 2254(d). Under AEDPA, state courts are generally considered "adequate forums for the vindication of federal rights," *Burt v. Titlow*, 571 U.S. 12, 19 (2013), and "[a] federal court's collateral review of a state-court decision must be consistent with the respect due state courts in our federal system" *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). A federal court may not grant relief unless a petitioner establishes that the state court decision "'was contrary to' federal law then clearly established in the holdings of [the Supreme] Court; or that it 'involved an unreasonable application of' such law; or that it 'was based on an unreasonable determination of the facts' in light of the record before the state court." *Harrington v. Richter*, 562 U.S. 86, 100 (2011) (quoting 28 U.S.C. § 2254(d)).

A state court's decision is contrary to federal law when it "arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law," or when "the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at" an "opposite" result. *Williams v. Taylor*, 529 U.S. 362, 405 (2000); *see also Hill v. Curtin*, 792 F.3d 670, 676 (6th Cir. 2015) (en banc). An unreasonable application of federal law occurs when the state court, having invoked the correct governing legal principle, "unreasonably applies the

. . . [principle] to the facts of a prisoner's case." *Williams*, 529 U.S. at 409; *Hill*, 792 F.3d at 676. And for an unreasonable determination of the facts to occur, a federal court must find that a "state court's factual determination was 'objectively unreasonable' in light of the evidence presented in the state court proceedings." *Young v. Hofbauer*, 52 F. App'x 234, 236 (6th Cir. 2002). The Sixth Circuit presumes that a state court's factual determination is correct in the absence of clear and convincing evidence to the contrary. *Ayers v. Hudson*, 623 F.3d 301, 308 (6th Cir. 2010) (citing *Miller-El*, 537 U.S. at 340).

2. Exhaustion and Procedural Default

Before a federal court may review the merits of a claim brought under Section 2254, the petitioner must have "exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A); *Harrington*, 562 U.S. at 103. To be properly exhausted, a claim must be "fairly presented" through "one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 848 (1999). In Tennessee, a petitioner is "deemed to have exhausted all available state remedies for [a] claim" when it is presented to the TCCA. *Adams v. Holland*, 330 F.3d 398, 402 (6th Cir. 2003) (quoting Tenn. Sup. Ct. R. 39).

The exhaustion requirement works together with the procedural-default doctrine, which generally bars federal habeas review of claims that were procedurally defaulted in the state courts. *Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017); *O'Sullivan*, 526 U.S. at 848. A petitioner procedurally defaults his claim where he fails to properly exhaust available remedies (that is, fails to fairly present the claim through one complete round of the state's appellate review process), and he can no longer exhaust because a state procedural rule (or set of rules) have closed off any remaining state court avenue(s) that might otherwise exist for review of the claim on the merits. *Atkins v. Holloway*, 792 F.3d 654, 657 (6th Cir. 2015) (citing *Jones v. Bagley*, 696 F.3d 475, 483–

84 (6th Cir. 2012)). Procedural default also occurs where the state court "actually . . . relied on [a state] procedural bar as an independent basis for its disposition of the case." *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985).

To overcome a procedural default, a petitioner may show "good cause for the default and actual prejudice from the claimed error." *Benton v. Brewer*, 942 F.3d 305, 307 (6th Cir. 2019) (citing *Sawyer v. Whitley*, 505 U.S. 333, 338-39 (1992)); *Sutton v. Carpenter*, 745 F.3d 787, 790 (6th Cir. 2014) (citing *Coleman*, 501 U.S. at 754). A petitioner may establish cause by "show[ing] that some objective factor external to the defense" —a factor that "cannot be fairly attributed to" the petitioner—"impeded counsel's efforts to comply with the State's procedural rule." *Davila*, 137 S. Ct. at 2065 (citations omitted). Objective impediments include an unavailable claim or interference by officials that made compliance with the rule impracticable. *Id.* Attorney error does not constitute cause unless it entails constitutionally ineffective assistance of counsel. *Edwards*, 529 U.S. at 451-52; *Benton*, 942 F.3d at 307-08. Generally, however, a claim of ineffective assistance must be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default.[1] *Murray*, 477 U.S. at 489.

Ineffective assistance of post-conviction counsel may establish cause under two circumstances. First, the complete abandonment (of the representation) by counsel during state post-conviction proceedings without notice to the petitioner may establish cause to excuse default. *Maples v. Thomas*, 565 U.S. 266, 288-89 (2012). Second, ineffective assistance of post-conviction counsel may establish the cause needed to excuse procedural default regarding substantial claims

[1] If the ineffective-assistance claim is not presented to the state courts in the manner that state law requires, that claim is itself procedurally defaulted and can only be used as cause for the underlying defaulted claim if the petitioner demonstrates cause and prejudice with respect to the ineffective-assistance claim. *Edwards*, 529 U.S. at 452-53.

of ineffective assistance of trial counsel. *Martinez v. Ryan*, 566 U.S. 1, 17 (2012); *Trevino v. Thaler*, 569 U.S. 413, 429 (2013); *see also Sutton*, 745 F.3d at 792 (holding that *Martinez* and *Trevino* apply in Tennessee).

If cause is established, a petitioner must also demonstrate actual prejudice. To do so, a petitioner must demonstrate that the constitutional error "worked to his *actual* and substantial disadvantage." *Perkins v. LeCureux*, 58 F.3d 214, 219 (6th Cir. 1995) (emphasis in original) (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982)). This means that "a petitioner must show not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Garcia-Dorantes v. Warren*, 801 F.3d 584, 598 (6th Cir. 2015) (citations omitted); *Frady*, 465 U.S. at 170. In the alternative, because cause and prejudice is not a perfect safeguard against fundamental miscarriages of justice, a court may overlook these requirements if a petitioner presents an "extraordinary case" whereby a constitutional violation "probably resulted" in the conviction of someone who is "actually innocent" of the substantive offense. *Dretke v. Haley*, 541 U.S. 386, 392 (2004); *Benton*, 942 F.3d at 307.

III. ANALYSIS

Petitioner asserts one claim of constitutionally ineffective assistance of counsel. He contends that trial counsel failed to move to suppress the evidence seized from the laptop computer in his car on the specific basis that the automobile exception to the warrant requirement does not apply to a car that is "parked and locked" on the "protected curtilage" of a home – i.e., "on the private residential driveway within a few feet of the home." (Doc. No. 1 at 4-6 (citing *Florida v. Jardines*, 569 U.S. 1 (2013)); 21 at 5-12 (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 453-54 (1971)). Petitioner apparently contends that he raised this claim in state court, inasmuch as the

Petition states that "[a]ll grounds in this petition have been raised in state court." (Doc. No. 1 at 7.) Likewise, Respondent apparently contends that Petitioner exhausted this claim before the state courts, inasmuch as the Answer states that the Petition raises "the same claim" that was asserted in Petitioner's state post-conviction proceedings, and Respondent urges dismissal because the state courts' resolution (denial) of the claim was correct. (Doc. No. 9 at 10-12.)

However, Petitioner did not argue in state court that trial counsel was constitutionally ineffective for failing to make a "protected curtilage" argument in connection with the motion to suppress. In the state post-conviction petition and on his post-conviction appeal to the TCCA, Petitioner argued instead that trial counsel was ineffective for failing to move to suppress the computer evidence separately on the ground that a search pursuant to the automobile exception did not properly encompass a laptop computer as a "container" within the car. (*See* Doc. No. 8-37 at 8-10 (arguing trial counsel failed to move to suppress on ground that "the vehicle exception to the warrant requirement would not have legally justified the search and forensic examination of the laptop computer")); *Alberts III*, 2019 WL 4415189, at *6 (considering whether the automobile exception permitted the search of the computer as a "container" found inside a car that was "capable of concealing the object of the search"). Indeed, the nature of Petitioner's claim on state post-conviction proceedings is evident in the TCCA's ruling. The TCCA held that trial counsel was not ineffective for failing to file a motion to suppress based on the "container" argument, because that argument would have failed under existing law. *See Alberts III*, 2019 WL 4415189, at *4-6 (citing *United States v. Ross*, 456 U.S. 798 (1982); *California v. Acevedo*, 500 U.S. 565 (1991)). The TCCA also concluded that trial counsel was not ineffective for failing to argue that a

warrantless search of the computer was improper under *Riley v. California*, 573 U.S. 373 (2014), which was decided only after Petitioner's trial.[2] *Id.* at *6.

The claim Petitioner advances here concerns not the *scope* of the search of his car pursuant to the automobile exception, but an alternative ground to *wholly preclude* application of the automobile exception to justify the search of his car.[3] That is, Petitioner here claims that his trial counsel should have asserted that the automobile exception was inapplicable in this case because Petitioner's car was locked and within the curtilage of his home; in state post-conviction proceedings Petitioner argued that trial counsel should have asserted (via a separate motion to suppress) that the automobile exception (even if applicable) was not broad enough justify the search of the computer. Accordingly, Petitioner did not, as required, present a "protected curtilage" claim to the state courts in the first instance. *See id.* at *4-6. Because a state procedural rule

[2] In *Riley*, the Supreme Court held that law enforcement officers must secure a warrant before conducting a search of a cell phone, even if the warrantless search was conducted incident to a lawful arrest. *See Riley*, 573 U.S. at 386. In so doing, the Supreme Court noted that it was actually treating so-called "cell phones" as multi-functional "minicomputers" with substantial electronic storage capacity. *Id.* at 394. For this reason, *Riley* arguably is applicable to computers generally. But *Riley's* applicability to computers generally is disputed. *Starner v. Jenkins*, No. 3:15CV1841, 2016 WL 11384514, at *7 (N.D. Ohio May 31, 2016) (finding *Riley* inapplicable in part because the petitioner did "not allege that the police searched his cell phone; he concedes that the police searched his personal computers"), *report and recommendation adopted*, No. 15-CV-1841, 2016 WL 4135999 (N.D. Ohio Aug. 4, 2016) (Either way, it may already have been well understood, prior to *Riley*, that a warrantless search of a computers *other than a cell phone* generally could not be justified under the search-incident-to-lawful-arrest exception to the warrant requirement).

Notably, *Riley* did not involve the automobile exception; the warrantless search held unconstitutional in *Riley* was purportedly justified not by the automobile exception to the warrant requirement, but rather by the search-incident-to-lawful-arrest exception to the warrant requirement. *E.g.*, *id.* at 385-86. *Riley* held that a warrantless search of a cell phone is never justified by the search-incident-to-lawful-arrest exception to the warrant requirement, but it expressly held open the possibility that other exceptions to the warrant requirement could justify the warrantless search of a particular cell phone. *See id.* at 401-02.

[3] Respondent entirely misapprehends Petitioner's instant claim. In particular Respondent fails to grasp that Petitioner is now asserting *a new particular basis* to suppress the fruits of the search of the computer that (according to Petitioner) should have, but did not, prompt trial counsel to move separately to suppress those fruits. Accordingly, Respondent's legal analysis is of little assistance to the Court.

prohibits the state courts from considering this claim now, *Hall*, 795 F. App'x at 944, the claim is deemed exhausted (since there is no longer an "available" state remedy) but procedurally defaulted from federal habeas review. *Coleman*, 501 U.S. at 752-53; *Atkins*, 792 F.3d at 657. Thus, federal habeas review of this claim is barred unless the petitioner can demonstrate that cause and prejudice excuses the procedural default or that failure to consider the claims would result in a fundamental miscarriage of justice. *Benton*, 942 F.3d at 307; *Dretke*, 541 U.S. at 392.

Petitioner suggests that the default should be excused because he generally raised the Sixth Amendment and ineffective assistance of counsel in connection with the motion to suppress before the TCCA.[4] (*See* Doc. No. 21 at 6.) However, a petitioner does not exhaust his remedies for all ineffective assistance of counsel claims if the state courts are presented with only one aspect of counsel's performance. *Pillette v. Foltz*, 824 F.2d 494, 497-98 (6th Cir. 1987); *see also Wagner v. Smith*, 581 F.3d 410, 414, 417 (6th Cir. 2009) (citations omitted) ("To be properly exhausted, each claim must have been 'fairly presented' to the state courts," meaning that the petitioner presented "the same claim under the same theory . . . to the state courts."). Petitioner offers no other reason to excuse his procedural default, and the Court can discern none.

Although "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial," *Martinez*, 566 U.S. at 9, "federal courts are not required to address procedural default before deciding against a petitioner on the merits" of a habeas claim. *Hudson v. Jones*, 351 F.3d 212, 215-16 (6th Cir. 2003) (citing *Lambrix v. Singletary*, 520 U.S. 518, 524-25 (1997) ("Judicial economy might counsel giving the [substantive] question priority, for example, if it were easily resolvable against the habeas petitioner" over more complicated procedural-bar issues)); *see also* 28 U.S.C.

[4] Petitioner addresses his own procedural default despite Respondent's failure to raise it.

§ 2254(b)(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."); *Overton v. MaCauley*, 822 F. App'x 341, 346 (6th Cir. 2020) ("Although procedural default often appears as a preliminary question, we may decide the merits first."); *Kataja v. Nessel*, 775 F. App'x 194, 201 (6th Cir. 2019) (noting that when "habeas claims fail on the merits, the court . . . need not determine whether they are procedurally defaulted").

Accordingly, in cases in which the merits of a claim are more straightforward than the procedural-default analysis, a reviewing court may bypass the *Martinez* framework and "proceed directly to the merits" of a defaulted claim. *Hudson*, 351 F.3d at 216. This is such a case. Here, the Court need not resolve whether Petitioner has established cause under *Martinez* to excuse the procedural default of his claim because, in any event, the claim fails on the merits.

1. Legal Standard for Ineffective Assistance of Counsel

The Sixth Amendment to the United States Constitution guarantees the right of a person accused of a crime to the effective assistance of counsel. *Strickland*, 466 U.S. at 686 (citing *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). To prevail on a claim of constitutionally ineffective assistance of counsel, the petitioner must show (1) deficient performance of counsel and (2) prejudice. *Premo v. Moore*, 562 U.S. 115, 121 (2011); *Bell v. Cone*, 535 U.S. 685, 694-95 (2002); *Strickland*, 466 U.S. at 687.

Regarding the performance element, "[j]udicial scrutiny of counsel's performance must be highly deferential," *Strickland*, 466 U.S. at 689, because reasonable attorneys may disagree on the most appropriate strategy for defending a client. *Bigelow v. Williams*, 367 F.3d 562, 570 (6th Cir. 2004). Courts must therefore apply a "strong presumption" that a lawyer's conduct in discharging his duties "falls within the wide range of reasonable professional assistance." *Id.* at 570 (quoting

Strickland, 466 U.S. at 689); *Harrington*, 562 U.S. at 104. To establish that trial counsel's performance is constitutionally deficient, a petitioner must show that it falls below an objective standard of reasonableness, *Richardson v. Palmer*, 941 F.3d 838, 856 (6th Cir. 2019) (citing *Strickland*, 466 U.S. at 686-87), as measured by "prevailing professional norms." *Bigelow*, 367 F.3d at 570 (quoting *Strickland*, 466 U.S. at 687-88). A court must judge the reasonableness of counsel's challenged conduct on the totality of evidence of a particular case viewed at the time of counsel's conduct. *Strickland*, 466 U.S. at 695.

The prejudice element requires a petitioner to show that there is a "reasonable probability" that the outcome would have been different but for counsel's unprofessional errors. *Bigelow*, 367 F.3d at 570 (quoting *Strickland*, 466 U.S. at 694); *Premo*, 562 U.S. at 122. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Thus, "while the petitioner need not conclusively demonstrate his 'actual innocence,' the focus should be on whether the result of the trial was 'fundamentally unfair or unreliable,'" *Bigelow*, 367 F.3d at 570 (quoting *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993)), or "infect[ed] . . . with error of constitutional dimensions."[5] *Richardson*, 941 F.3d at 856 (quoting *Murray v. Carrier*, 477 U.S. 478, 494 (1986)).

2. Application

Petitioner is unable to establish either element of constitutionally ineffective assistance of counsel. First, Petitioner cannot demonstrate deficient performance. At the post-conviction hearing, trial counsel explained that he chose to focus the motion to suppress on the "multiple things wrong with th[e] search warrant" and supporting affidavit. (*See* Doc. No. 8-34 at 8-30.)

[5] The Court realizes that the final articulation in this sequence—asking whether the error is "of constitutional dimension—is circular (or tautological). Under that articulation, an error amounts to a constitutional violation only if it is an error "of constitutional dimension." This proposition is true as far as it goes, but it is not helpful because it merely restates the question it is designed to answer.

Nevertheless, trial counsel believed that he had preserved the issue of the validity of the search of the computer as a container, which was permitted under then-existing caselaw, for appeal. *See Alberts*, 2019 WL 4415189, at *4. Later, when representing Petitioner on appeal, trial counsel added an argument based on the new *Riley* decision. *Id.*

The Court must presume that trial counsel's decision to focus the motion to suppress on the deficiencies in the warrant might have been a sound strategic decision that is "virtually unchallengeable" on habeas review. *Strickland*, 466 U.S. at 689-90; *Dixon*, 737 F.3d at 1012. In particular, the decision of which among possible arguments to make is ordinarily entrusted to counsel's professional judgment. Indeed, such strategic decisions are generally applauded by the courts—at least where they reflect prioritizing the argument(s) counsel believes are the strongest. *See Smith v. Murray*, 477 U.S. 527, 536 (1986) (explaining that the process of "winnowing out weaker arguments" is "far from being evidence of incompetence").

Furthermore, because the adequacy of counsel's performance is based on "counsel's perspective at the time," *Strickland*, 466 U.S. at 689, rather than "in the harsh light of hindsight," *Bell*, 535 U.S. at 702, subsequent legal developments are relevant only if those developments were "*clearly* foreshadowed by existing decisions," *Thompson v. Warden, Belmont Corr. Inst.*, 598 F.3d 281, 288 (6th Cir. 2010) (quoting *Lucas v. O'Dea*, 179 F.3d 412, 420 (6th Cir.1999)) (emphasis added). Outside of this narrow exception, "counsel is not ineffective for failing to predict the development of the law." *Id.* (citing *Lott v. Coyle*, 261 F.3d 594, 609 (6th Cir. 2001) (holding that counsel was not ineffective for failing to make a particular argument because "we cannot conclude that . . . counsel should have reasonably anticipated" the change in the law even though there were conflicting opinions in the state courts on the issue)); *see also Alcorn v. Smith*, 781 F.2d 58, 62 (6th Cir. 1986) (explaining that "nonegregious errors such as failure to perceive or anticipate a

change in the law . . . generally cannot be considered ineffective assistance of counsel"); *Dado v. United States*, No. 17-2013, 2018 WL 1100279, at *2 (6th Cir. Feb. 15, 2018) (observing that counsel is not required to predict new developments in substantive law); *Hopkins v. United States*, No. 17-1599, 2017 WL 9477084, at *2 (6th Cir. Nov. 27, 2017) (noting that trial counsel has no "general duty" to anticipate a change of law announced by the Supreme Court).

The validity of the alternate argument that Petitioner now suggests—that is, that his car was not subject to search under the automobile exception, because it was locked and parked on the home's curtilage – was not readily apparent at the time of trial. Three months before Petitioner's trial, in March 2013, the United States Supreme Court clarified that the curtilage is considered part of the home for Fourth Amendment purposes, and explained that, as a general matter, an intrusion by law enforcement onto the curtilage to gather evidence is "a search within the meaning of the Fourth Amendment" that is presumptively unreasonable without a warrant. *Florida v. Jardines*, 569 U.S. 1, 6-11 (2013). At that time, the Court defined "curtilage" as the area "immediately surrounding and associated with the home . . . intimately linked to the home, both physically and psychologically . . . where privacy expectations are most heightened," such as a "front porch." *Id.* at 6-7. However, it was not until *2018* that the Supreme Court expanded the scope of Fourth Amendment protections to reach, under certain circumstances, cars parked in the *driveway* of a home. In *Collins v. Virginia*, the Court held, for the first time, that a driveway may be considered part of a home's curtilage for Fourth Amendment purposes. 138 S. Ct. 1663, 1670-71 (2018). The Court also held, for the first time, that a vehicle parked on the curtilage of a home is not subject to warrantless search pursuant to the automobile exception.[6] *Id.* at 1671-72.

[6] As noted, below, the Supreme Court explained that in this context, a vehicle is within the curtilage of the home if it is on an enclosed driveway abutting the house.

The developments set forth in *Collins* were not "clearly foreshadowed" at the time of Petitioner's trial. *See, e.g.*, *United States v. Galaviz*, 645 F.3d 347, 356 (6th Cir. 2011) (concluding that police did *not* intrude upon curtilage by entering a driveway adjacent to a home that was not enclosed by any barrier where cars were parked near a public sidewalk); *United States v. Estes*, 343 F. App'x 97, 101 (6th Cir. 2009) (concluding driveway was *not* curtilage because it was not enclosed, the defendant had not taken any steps to protect it from observation by passersby, and it was used as a point of entry to the defendant's residence); *see also United States v. May-Shaw*, 955 F.3d 563 (6th Cir. 2020) (rejecting argument that prior Sixth Circuit caselaw had established "a broad rule that a carport is always within the curtilage of a home" and noting that "[e]very curtilage determination is distinctive and stands or falls on its own unique set of facts") (quoting *Daughenbaugh v. City of Tiffin*, 150 F.3d 594, 598 (6th Cir. 1998)); *Collins*, 138 S. Ct. at 1682 (Alito, J., dissenting) (concluding that the court's decision "use[d] the curtilage concept" in a new way and was a "substantial alteration" of Fourth Amendment law).

Petitioner cannot, therefore, rely on these eventually forthcoming legal developments to establish that trial counsel rendered constitutionally-deficient performance in connection with the motion to suppress litigated before his 2013 trial. *See, e.g.*, *Thompson v. Nagy*, No. 18-1747, 2018 WL 8731570, at *3 (6th Cir. Nov. 20, 2018) (holding counsel was not ineffective for failing to argue that a search of cell-site information violated the Fourth Amendment, because counsel did not yet have the benefit of the relevant legal developments in the Supreme Court's decision of *Carpenter v. United States*). Because Petitioner has offered no basis for the Court to deviate from the "strong presumption" that trial counsel's performance fell "within the wide range of reasonable professional assistance," *Strickland*, 466 U.S. at 689, he has not established deficient performance.

Petitioner also has not demonstrated prejudice. Assuming arguendo that trial counsel should have anticipated the legal developments in *Collins v. Virginia* and moved to suppress the images obtained from the laptop on that basis, Petitioner has not established that outcome of the motion to suppress would have been different. *Collins* did not establish a blanket rule barring the application of the automobile exception to all cars located in residential driveways. Rather, in *Collins* the Supreme Court "held that an *enclosed driveway abutting a house* constituted the curtilage of the home" for Fourth Amendment purposes, and the Court concluded that a car located *therein* could not be searched pursuant to the automobile exception. *See May-Shaw*, 933 F.3d at 569-70 (emphasis added) (citing *Collins*, 138 S. Ct. at 1670-71). Here, Petitioner does not allege that his car was parked in an "enclosed driveway abutting a home" similar to *Collins*. (*See* Doc. Nos. 1, 21.)

Nor does Petitioner allege other circumstances to suggest that Fourth Amendment protections might apply. As the Sixth Circuit has explained, where necessary the Court uses four factors as guideposts to determine whether a driveway area falls within a home's curtilage: (1) the proximity of the area to the home, (2) whether the area is within an enclosure around the home, (3) how that area is used, and (4) what the owner has done to protect the area from observation from passersby. *May-Shaw*, 955 F.3d at 563 (citing *United States v. Dunn*, 480 U.S. 294, 301 (1987); *Morgan v. Fairfield Cnty.*, 903 F.3d 553, 561 (6th Cir. 2018)). In the application of the *Dunn* factors, Petitioner bears the burden to establish that the challenged search violated his Fourth Amendment rights. *Id.* (citing *United States v. Coleman*, 923 F.3d 450, 455 (6th Cir. 2019); *United States v. Witherspoon*, 467 F. App'x 486, 490 (6th Cir. 2012)).

Here, Petitioner has made no allegations that address any of the *Dunn* factors aside from asserting that the driveway was within a few feet of the home. This alone is insufficient, however,

because the proximity factor "is not determinative 'without reference to the additional *Dunn* factors.'" *May-Shaw*, 955 F.3d at 571 (citing *Daughenbaugh*, 150 F.3d at 599). Furthermore, the record belies the suggestion that the circumstances could satisfy the *Dunn* factors. Petitioner's neighbor, Timothy Pratt, testified at the motion to suppress hearing that Petitioner's car was located in the "middle" of a shared driveway between two adjoining properties such that it was readily accessible to Pratt, who held the keys. (*See* Doc. No. 8-2 at 46-59.) Accordingly, Petitioner has not established that the trial court would have determined the driveway in question was an area "to which the activity of home life extends . . . and so is properly considered curtilage" such that heightened Fourth Amendment protections extended to Petitioner's car. *Id.* at 570 (quoting *Collins*, 138 S. Ct. at 1671; *Jardines*, 569 U.S. at 7). Moreover, Petitioner is not entitled to an evidentiary hearing "on issues that can be resolved be reference to the state [c]ourt record." *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007). Because Petitioner has not demonstrated a reasonable probability that the outcome of the motion to suppress would have been different had trial counsel made a "protected curtilage" argument, he has not established prejudice. *Strickland*, 466 U.S. at 694.

Accordingly, Petitioner is not entitled to habeas relief.[7]

[7] For the sake of completeness, Petitioner references *Riley v. California* in his reply in support of the instant habeas claim. (*See* Doc. No. 21 at 6-7.) While it is far from clear, to any extent that Petitioner may have belatedly intended to also raise the claim that he advanced before the state courts – i.e., that trial counsel should have moved to suppress on the ground that the search pursuant to the automobile exception did not extend to the contents of the laptop computer – the state courts' resolution of that claim was not contrary to, or an unreasonable application of, Supreme Court law. *Harrington,* 562 U.S. at 100. As discussed above, the Supreme Court did not decide *Riley v. California* – the case upon which the proposed motion is based – until after Petitioner's trial. It was, therefore, not unreasonable for the state courts to conclude that there was no foundation for a motion by trial counsel predicated on its rationale and that trial counsel did not act unreasonably by failing to predict future legal developments. *See Alberts*, 2019 WL 4415189, at *6.

IV. CONCLUSION

For the reasons set forth herein, Petitioner is not entitled to relief on his single habeas claim. Accordingly, the Petition under Section 2254 will be denied, and this action will be dismissed with prejudice. Because jurists of reason could not disagree with the Court's resolution of Petitioner's claims, the Court will deny a certificate of appealability.

An appropriate order will enter.

Eli Richardson

ELI RICHARDSON
UNITED STATES DISTRICT JUDGE

APPENDIX C

Alberts v. State, No. M2018-00994-CCA-R3-PC,
2019 WL4415189 (Tenn. Crim. App. Sept. 16, 2019)

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs May 15, 2019

JOHN BURLEY ALBERTS v. STATE OF TENNESSEE

Appeal from the Circuit Court for Williamson County
No. CR170296 Joseph A. Woodruff, Judge

No. M2018-00994-CCA-R3-PC

The Petitioner, John Burley Alberts, appeals the Williamson County Circuit Court's denial of his petition for post-conviction relief from his convictions for four counts of rape of a child, for which he is serving an effective 100-year sentence. He contends that the post-conviction court erred in denying his ineffective assistance of counsel claim. We affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ROBERT H. MONTGOMERY, JR., J., delivered the opinion of the court, in which NORMA MCGEE OGLE and CAMILLE R. MCMULLEN, JJ., joined.

Elizabeth A. Russell, Franklin, Tennessee, for the Appellant, John Burley Alberts.

Herbert H. Slatery III, Attorney General and Reporter; Brent C. Cherry, Senior Assistant Attorney General; Kim R. Helper, District Attorney General; Mary Katherine White, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The Petitioner's convictions relate to his sexual abuse of an eight-year-old child. He was charged with additional offenses related to other victims, but those counts were severed from the present case. After allegations of sexual misconduct surfaced, law enforcement officers determined that the Defendant, who had a prior conviction for a sexual offense, was in violation of the sex offender registry. The Defendant was arrested. After his arrest, investigators reviewed images on computers to which the Defendant had access. One such computer, a laptop, had been recovered from the trunk of the Defendant's car. The images on this computer provided a significant portion of the evidence which led to the convictions in the present case. *See State v. John Burley*

Appendix C

Alberts, No. M2015-00248-CCA-R3-CD, 2016 WL 349913 (Tenn. Crim. App. Jan. 28, 2016), *perm. app. denied* (Tenn. June 23, 2016).

The authorities obtained a warrant to search the car. The defense filed a motion to suppress the search of the car based upon insufficiency of the search warrant affidavit and sought suppression of the evidence obtained from the search of the computer as "fruit of the poisonous tree."

This court has previously summarized the evidence related to the discovery of the Defendant's offenses:

> Detective Tameka Sanders testified that she was employed by the Williamson County Sheriff's Office ("WCSO") and that she was the lead detective on the Defendant's case. Det. Sanders began investigating the Defendant after several parents reported that the Defendant had sexually abused their children. According to Det. Sanders, the abuse was reported on January 19, 2007. Det. Sanders "pulled [the Defendant's] records" and learned that he had been previously convicted of sexual abuse of a minor female.
>
> Det. Grant Benedict, also with the WCSO, testified that he "handle[d]" registered sex offenders in the county. After learning about the Defendant's prior record from Det. Sanders, Det. Benedict searched the county's sex offender registry for the Defendant's name and discovered that the Defendant had been living in Williamson County without registering as required. Accordingly, on January 31, 2007, Det. Benedict arrested the Defendant for violating the sex offender registry. While attempting to locate the Defendant prior to his arrest, Det. Benedict called one of the Defendant's former employers, who informed Det. Benedict that the Defendant had spent a lot of time on one of the computers at work.
>
> Timothy Pratt testified that he and the Defendant "grew up together" and that in 2007, he was living on Sweet Gum Lane in Lawrence County. He testified that the Defendant sometimes "stayed" at the house next door to his, which Mr. Pratt also owned. He recalled that the Defendant's car was "setting [sic] in [his] driveway when [he] came home one night." More specifically, the Defendant's car was located "in between" the driveway of the house where the Defendant had been staying and the driveway of Mr. Pratt's home. According to Mr. Pratt, the Defendant had already been arrested at that point, and he was not sure how the car came to be parked there. Mr. Pratt was aware of the Defendant's arrest because the Defendant was working for Mr. Pratt's brother at the time, and the

Defendant was arrested at a "job site." Mr. Pratt opined that someone from the construction company moved the Defendant's car following his arrest. The car was unlocked, but the keys were with the car. Mr. Pratt locked the car and put the keys in his work truck.

Det. Sanders learned that the Defendant had recently lived in the home of A.B. and D.B., two of the parents who initially reported the abuse. Det. Sanders also learned from Det. Benedict that the Defendant "had spent a large amount of time on the computer at his workplace." Therefore, she called A.B. and asked whether there was a computer in their home that the Defendant had used. A.B. confirmed that there was a computer and that the Defendant had used it. A.B. agreed to turn the computer over to Det. Sanders. When Det. Sanders collected the computer, A.B. told her that the Defendant had a laptop that he kept in the trunk of his car and that he also owned a digital camera. Det. Sanders testified that she believed the Defendant "was very protective of [the computer]" because "he kept it in the trunk of his car." According to Det. Sanders, A.B. told her about the computer on January 25, 2007.

Det. Sanders testified that she and Det. Benedict planned to go to the auto dealership where the Defendant had recently worked and where he apparently spent a lot of time on the computer. On February 6, 2007, the detectives drove to Lawrence County, where the dealership was located, and met with Lieutenant Denton of the Lawrence County Sheriff's Office. Det. Sanders explained that, because she and Det. Benedict did not have jurisdiction in Lawrence County, she wanted to apprise local law enforcement of the investigation as a professional courtesy. Lt. Denton accompanied the detectives to the automobile dealership. The owner of the dealership, Jimmie Pennington, consented to a search of the workplace computer used by the Defendant. Det. Benedict conducted a "pre-search" of the computer, in which all of the images contained on the computer flashed on the screen in quick succession. Det. Benedict testified that the pre-search revealed "a variety of images of obviously underage[ ] girls in various states of undress and sexual positions and performing sex acts." Det. Sanders estimated that the pornographic images numbered in the "[hundreds] if not thousands." Additionally, Det. Sanders thought that she recognized one of the victims in a picture. Mr. Pennington denied having any knowledge of the pornographic images.

After viewing the pictures on the workplace computer, Lt. Denton left to get a search warrant. Mr. Pennington agreed to let the detectives take the computer for further testing. Detectives Sanders and Benedict then

went to Sweet Gum Lane "to take some pictures" at the house where the Defendant had been staying. When they arrived, they found the Defendant's car in the driveway. The detectives took pictures and attempted to talk to . . . Mr. Pratt, but no one was home at the time. The detectives left and "kind of drove around," "went and got lunch," and then went back to Sweet Gum Lane "later in the evening." This time, there was a car in the Pratts' driveway, and the detectives were able to talk to Erica Pratt, Mr. Pratt's wife. Ms. Pratt told Det. Sanders that the Defendant "liked taking pictures of the kids" with his camera, but he would ignore her son "and photograph the girls only."

Ms. Pratt told the detectives that her husband had the keys to the Defendant's car, but he was not home at the time. Approximately one hour later, Lt. Denton arrived with the search warrant. Det. Sanders testified that she never actually saw the search warrant. Also, she believed that she had probable cause to search the Defendant's car without a warrant at that point but chose to defer to Lt. Denton and wait for a warrant because she and Det. Benedict were in his jurisdiction. Mr. Pratt arrived home around the same time that Lt. Denton arrived with the warrant, and Mr. Pratt gave the car keys to the officers. A laptop and digital camera were found in the trunk of the Defendant's car. A subsequent analysis of the laptop revealed images depicting the Defendant and [the victim] engaged in various sex acts, which resulted in the indictments for four counts of rape of a child in this case.

Id. at *2-3.

On February 8, 2010, the trial court filed an order granting the motion to suppress on the basis that the search warrant failed to state sufficient probable cause, and this court granted the State's application for an interlocutory appeal. On June 21, 2011, this court held that the trial court should have considered whether the search was nevertheless a permissible warrantless search and remanded the case. *State v. Alberts*, 354 S.W.3d 320, 320-22, 324 (Tenn. Crim. App. 2011).

Following remand, the trial court filed an order on June 21, 2012, which reversed its earlier order granting the motion to suppress. The court ruled that, despite the insufficiency of the warrant, the officers had probable cause to conduct a warrantless search pursuant to the automobile exception to the warrant requirement. *See John Burley Alberts*, 2016 WL 349913, at *4. After the Defendant was convicted at a trial in June 2013, he appealed. He challenged (1) the applicability of the automobile exception and (2) the search of the computer. This court held that (1) the trial court properly determined that the officers properly conducted a warrantless search pursuant to the automobile exception and (2) the Defendant waived a challenge to the search of the

computer because he did not challenge the search of the computer in a pretrial motion to suppress. With regard to the latter holding, this court concluded, "An argument that evidence from the laptop should have been suppressed as fruit of the poisonous tree is not the same as a claim that a search warrant should have been obtained after the laptop was seized but before a forensic analysis was conducted." *Id.* at *8.

After this court denied relief in the Petitioner's appeal of his convictions and the supreme court denied his application for permission to appeal, the Petitioner filed the present post-conviction action. As relevant to this appeal, he alleged that he received the ineffective assistance of counsel because trial counsel failed to file a motion to suppress the evidence obtained as a result of the warrantless search of the Petitioner's computer.

The post-conviction court conducted a hearing, at which trial counsel testified that, in the course of his representation of the Petitioner, they met extensively. Counsel agreed that the Petitioner was arrested initially for a violation of the sex offender registry and that the Petitioner was on the registry due to a prior conviction for a violent sexual crime, for which the Petitioner had served a lengthy prison sentence.

Relative to the present case, trial counsel testified that he filed two motions to suppress and an amendment to one of the motions. He said he focused on the motion to suppress which attacked the sufficiency of the affidavit for the arrest warrant. With regard to the search of the Petitioner's car which resulted in the seizure of the computer, counsel said "multiple issues" existed with the warrant and affidavit. He noted that "it was cut off from the bottom," that the Petitioner was misidentified in the affidavit by an unknown person's name, that the affidavit failed to state a "nexus between criminal activity and the object to be searched or the automobile to be searched," and that the warrant was issued by Lawrence County authorities for a search in Bedford County. Counsel said, "Everyone knew what that motion to suppress was about. It was about the images on the computer. Nothing else in that car was incriminating. It was always about the computer, we all knew that." Counsel explained that his understanding of the law as it existed at the time was that the police had the authority to search a car pursuant to the automobile exception and to search any containers inside the car which had the potential to contain the object of the search, which included the computer and a camera that were in the Petitioner's trunk. Counsel said that the police had prior knowledge of the computer and that the police had been interested in the computer, not the car, when they searched the Petitioner's car. Counsel said that if caselaw existed to support the position that the computer was not a container and not subject to the automobile exception, he would have filed another motion to suppress.

Trial counsel testified that, at the time of the search of the Petitioner's vehicle and seizure of the computer, the Petitioner was subject to community supervision for life due to his status as a sex offender. Counsel said that it was his understanding that the

conditions of community supervision for life allowed law enforcement to conduct a search of the Petitioner's computer. Counsel said, though, that the rules were "always changing" and that reference should be made to the rules at the time of the search. Counsel said, however, that the State never argued that the search was valid because the Petitioner was subject to community supervision for life. Counsel said the Defendant's charge for violating the sex offender registry was dismissed. Counsel agreed the dismissal was based upon the original judgment being void because the judgment form did not contain a box to check indicating community supervision for life.

Trial counsel testified that he considered the motion to suppress to include "[e]verything the search warrant covered." He thought the police knew about the Petitioner's computer at the time they obtained the warrant and noted a neighbor had told the police about the Petitioner's computer.

Trial counsel testified that the trial court initially granted the motion to suppress after a hearing, that the State appealed, that the Court of Criminal Appeals remanded the case for reconsideration, and that the trial court denied the motion to suppress without a hearing following the remand. Counsel said he did not have the opportunity to address whether he had waived a challenge to the search of the computer's contents. Counsel said that, in his opinion, he had preserved the issue.

Trial counsel testified, "It's my understanding the state of the law at that time [of the motion to suppress] allowed them to search the computer, because it was a container." Counsel said that *Riley v. California*, 573 U.S. 373 (2014), which held that cell phones could not be searched incident to arrest, was decided after the Petitioner's trial and before the motion for a new trial was heard. Counsel said he argued at the hearing on the motion for a new trial that pursuant to *Riley*, the Petitioner's computer was not a container which could be searched pursuant to the automobile exception.

Trial counsel testified that he did not make a tactical decision not to file a separate motion to suppress the evidence from the search of the computer. He said that before the Supreme Court's *Riley* decision, he would not have filed a separate suppression motion for the computer but that following *Riley*, he would file a separate suppression motion for the computer.

Trial counsel testified that, aside from the digital images of the Petitioner committing a sex act with the victim, which were stored on the Petitioner's computer, the State had evidence consisting of letters written by the Petitioner and potential testimony of the victim. Counsel said the victim did not testify at the trial, and counsel could not recall if the victim disclosed abuse in her forensic interview. Counsel agreed that the victim in this case and the victims in the severed counts had undergone forensic

interviews and that the State did not offer as trial evidence the forensic interview for the victim in the present case.

Trial counsel testified that another attorney drafted the Petitioner's brief in the appeal of the convictions and that trial counsel represented the Petitioner at oral argument. Counsel said he argued that the trial court erred in denying the motion to suppress and noted that the trial court had ruled that the automobile exception applied to the computer because it was a container. Counsel said he argued to the appellate court that *Riley* and *United States v. Camou*, 773 F.3d 932 (9th Cir. 2014) supported suppression of the evidence from the computer. Counsel said he argued to the appellate court that he had not waived the issue in the trial court.

The post-conviction court denied relief. It found that trial counsel's performance was not deficient because at the time of the conviction proceedings, the law provided that the police had the authority to search a container within a vehicle if the container were capable of concealing the object of the search. The court found that, based upon the law as it existed at the time, counsel did not perform deficiently in failing to file a separate motion to suppress the evidence obtained from the search of the computer. The court found that the issue regarding the contents of the computer was addressed on the merits by the trial court. Based upon its determination that counsel did not perform deficiently, the post-conviction court concluded that the Petitioner's ineffective assistance of counsel claim must fail.

On appeal, the Petitioner contends that the post-conviction court erred in denying relief. Post-conviction relief is available "when the conviction or sentence is void or voidable because of the abridgement of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." T.C.A. § 40-30-103 (2012). A petitioner has the burden of proving his factual allegations by clear and convincing evidence. *Id.* § 40-30-110(f) (2012). A post-conviction court's findings of fact are binding on appeal, and this court must defer to them "unless the evidence in the record preponderates against those findings." *Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); *see Fields v. State*, 40 S.W.3d 450, 456-57 (Tenn. 2001). A post-conviction court's application of law to its factual findings is subject to a de novo standard of review without a presumption of correctness. *Fields*, 40 S.W.3d at 457-58.

To establish a post-conviction claim of the ineffective assistance of counsel in violation of the Sixth Amendment, a petitioner has the burden of proving that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see Lockhart v. Fretwell*, 506 U.S. 364, 368-72 (1993). The Tennessee Supreme Court has applied the *Strickland* standard to an accused's right to counsel under article I, section 9 of the Tennessee Constitution. *See State v. Melson*, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

A petitioner must satisfy both prongs of the *Strickland* test in order to prevail in an ineffective assistance of counsel claim. *Henley*, 960 S.W.2d at 580. "[F]ailure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim." *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). To establish the performance prong, a petitioner must show that "the advice given, or the services rendered . . . are [not] within the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975); *see Strickland*, 466 U.S. at 690. The post-conviction court must determine if these acts or omissions, viewed in light of all of the circumstances, fell "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. A petitioner "is not entitled to the benefit of hindsight, may not second-guess a reasonably based trial strategy by his counsel, and cannot criticize a sound, but unsuccessful, tactical decision." *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994); *see Pylant v. State*, 263 S.W.3d 854, 874 (Tenn. 2008). This deference, however, only applies "if the choices are informed . . . based upon adequate preparation." *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992). To establish the prejudice prong, a 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." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

The question before this court is whether the trial court erred in determining that the Petitioner failed to prove that he received the ineffective assistance of counsel based upon trial counsel's not having filed a separate motion to suppress the evidence obtained from the search of the computer. As we have stated, trial counsel filed a motion to suppress the evidence obtained from the search of the Petitioner's car, which included the evidence obtained from the search of the computer as "fruit of the poisonous tree." *See Wong Sun v. United States*, 371 U.S. 471 (1963). At the time the motion to suppress was litigated and at the time of the trial, the existing law provided that the automobile exception to the warrant requirement permitted the search of a container found inside a car if the container was capable of concealing the object of the search. *See United States v. Ross*, 456 U.S. 798 (1982); *see also California v. Acevedo*, 500 U.S. 565 (1991).

The record reflects that trial counsel filed a motion to suppress which conformed to the law as it existed at the time. After the trial, the Supreme Court decided *Riley*, which provided support for an argument that the warrantless search of the computer ran afoul of the Fourth Amendment. As a result, counsel raised the issue in the motion for a new trial and argued that *Riley* applied. Counsel again raised the issue in the appeal of the convictions. We have reviewed the motion for a new trial and the amended motion for a new trial, which are in this court's record of the Petitioner's previous appeal. In both the motion and the amended motion for a new trial, counsel stated, "The defendant also argues that the vehicle exception to the warrant requirement does not extend to

searching the Kodak camera and Dell laptop found in his automobile." The trial court and the appellate court concluded that the Petitioner had waived the issue by failing to raise it before the trial, which is consistent with the Rules of Criminal Procedure. *See* Tenn. R. Crim. P. 12(b)(2)(C) (stating that a motion to suppress evidence must be made before the trial), 12(f) (stating that a party waives any defense, objection, or request by failing to comply with rules requiring that the matter be raised before the trial); *John Burley Alberts*, 2016 WL 349913, at *8.

This court has said, "Trial counsel cannot be held to a standard of being clairvoyant concerning a case not yet decided." *Darryl Lee Elkins and Rhonda Grills v. State*, Nos. E2005-02153-CCA-R3-PC, E2005-02242-CCA-R3-PC, 2008 WL 65329, at *6 (Tenn. Crim. App. Jan. 7, 2008), *perm. app. denied* (Tenn. May 27, 2008). In *Robert Anthony Fusco v. State*, No. M2016-00825-CCA-R3-PC, 2017 WL 6316621, at *8 (Tenn. Crim. App. Dec. 11, 2017), this court determined, before *Riley* had been decided, that the petitioner's trial counsel had not provided ineffective assistance by not filing a motion to suppress incriminating cell phone data found when two cell phones were discovered during the search of a vehicle. *See also Jeffrey L. Vaughn v. State*, No. W2015-00921-CCA-R3-PC, 2016 WL 1446140, at *5 (Tenn. Crim. App. Apr. 12, 2016), *perm. app. denied* (Tenn. Aug. 19, 2016). We conclude that the record supports the post-conviction court's determination that the Petitioner failed to prove that trial counsel's performance was deficient.

The post-conviction court concluded that because the Petitioner failed to show deficient performance, his ineffective assistance of counsel claim must fail. As we have stated, a petitioner must establish both deficient performance and prejudice in order to prevail on an ineffective assistance of counsel claim, the post-conviction court did not err in denying relief. *See Goade*, 938 S.W.2d at 370.

In consideration of the foregoing and the record as a whole, the judgment of the post-conviction court is affirmed.

ROBERT H. MONTGOMERY, JR., JUDGE

APPENDIX D

State v. Alberts, No. M2015-00248-CCA-R3-CD,
2016 WL 349913 (Tenn. Crim. App. Jan. 28, 2016)

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
October 27, 2015 Session

STATE OF TENNESSEE v. JOHN BURLEY ALBERTS

Appeal from the Circuit Court for Williamson County
No. I-CR033269 Michael W. Binkley, Judge

No. M2015-00248-CCA-R3-CD

Following a jury trial, the Defendant, John Burley Alberts, was convicted of four counts of rape of a child, see Tennessee Code Annotated section 39-13-522, and received an effective sentence of one hundred years to be served at one hundred percent. On appeal, the Defendant contends (1) that the trial court erred in denying the Defendant's motion to suppress evidence obtained from a warrantless search of the Defendant's car, and (2) that evidence obtained from a laptop computer recovered from his car should have been suppressed because officers did not acquire a search warrant prior to performing a forensic analysis of the computer. Because we conclude that the search was valid under the automobile exception to the warrant requirement and that the Defendant has waived review of the second issue, the judgments of the trial court are affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and ROBERT W. WEDEMEYER, JJ., joined.

Vanessa Pettigrew Bryan, District Public Defender; James L. Elkins III (at trial and on appeal), Benjamin Cody Signer (on appeal), and David Shannon Lee Christensen (at trial), Assistant District Public Defenders, for the appellant, John Burley Alberts.

Herbert H. Slatery III, Attorney General and Reporter; Brent C. Cherry, Senior Counsel; Kim R. Helper, District Attorney General; and Mary Katharine White, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTUAL BACKGROUND

On March 10, 2008, a Williamson County grand jury returned an indictment charging the Defendant as follows: four counts of rape of a child (victim 1, Counts 1-4);

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three counts of rape of a child (victim 2, Counts 5-7); one count of solicitation of sexual exploitation of a minor (unspecified victim, Count 8); one count of solicitation of a minor to commit rape of a child (unspecified victim, Count 9); and one count of rape of a child (victim 3, Count 10). See Tenn. Code Ann. §§ 39-13-522, -529. Subsequently, the counts were severed, and this appeal concerns only the Defendant's convictions in Counts 1-4, relating to the sexual abuse of eight-year-old H.N.[1]

On November 12, 2009, the Defendant filed a motion to suppress evidence seized from a search of his car. The Defendant argued that the search warrant obtained by law enforcement was invalid because it failed to show probable cause. The Defendant contended that the search warrant failed to establish a nexus "among the criminal activity, the place to be searched, and the items to be seized." Thus, the Defendant asserted that the search was illegal and that evidence obtained pursuant to the search—in particular, a laptop computer—should be suppressed as "fruit of the poisonous tree."[2] The trial court held a hearing on the motion on January 6, 2010.[3]

At the suppression hearing, following argument from counsel but before any proof was offered, the trial court granted the motion to suppress based solely on "the four corners" of the search warrant. The court found that the warrant was "woefully inadequate." The trial court further found that it was limited to a consideration of the validity of the warrant on its face and that it could not consider an alternative basis offered by the State that would justify the search—the automobile exception to the warrant requirement. The State disagreed, asserting that, regardless of the warrant's flaws, officers had probable cause to conduct the search of the car, and thus, a warrantless search was proper pursuant to the automobile exception. Although the trial court disagreed with the State's argument, it allowed the State to make an extensive "offer of proof" so that the State could develop a record in order to appeal the court's denial of the motion.

Detective Tameka Sanders testified that she was employed by the Williamson County Sheriff's Office ("WCSO") and that she was the lead detective on the Defendant's case. Det. Sanders began investigating the Defendant after several parents reported that the Defendant had sexually abused their children. According to Det. Sanders, the abuse was reported on January 19, 2007. Det. Sanders "pulled [the

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[1] It is the policy of this court to utilize initials when referring to minors and rape victims.

[2] Under the "fruit of the poisonous tree" doctrine, any evidence obtained through the exploitation of an unlawful search must be suppressed. See Wong Sun v. United States, 371 U.S. 471, 488 (1963).

[3] The suppression issues were addressed by a different judge, The Honorable Jeffrey S. Bivins.

Defendant's] records" and learned that he had been previously convicted of sexual abuse of a minor female.[4]

Det. Grant Benedict, also with the WCSO, testified that he "handle[d]" registered sex offenders in the county. After learning about the Defendant's prior record from Det. Sanders, Det. Benedict searched the county's sex offender registry for the Defendant's name and discovered that the Defendant had been living in Williamson County without registering as required. Accordingly, on January 31, 2007, Det. Benedict arrested the Defendant for violating the sex offender registry. While attempting to locate the Defendant prior to his arrest, Det. Benedict called one of the Defendant's former employers, who informed Det. Benedict that the Defendant had spent a lot of time on one of the computers at work.

Timothy Pratt testified that he and the Defendant "grew up together" and that in 2007, he was living on Sweet Gum Lane in Lawrence County. He testified that the Defendant sometimes "stayed" at the house next door to his, which Mr. Pratt also owned. He recalled that the Defendant's car was "setting [sic] in [his] driveway when [he] came home one night." More specifically, the Defendant's car was located "in between" the driveway of the house where the Defendant had been staying and the driveway of Mr. Pratt's home. According to Mr. Pratt, the Defendant had already been arrested at that point, and he was not sure how the car came to be parked there. Mr. Pratt was aware of the Defendant's arrest because the Defendant was working for Mr. Pratt's brother at the time, and the Defendant was arrested at a "job site." Mr. Pratt opined that someone from the construction company moved the Defendant's car following his arrest. The car was unlocked, but the keys were with the car. Mr. Pratt locked the car and put the keys in his work truck.

Det. Sanders learned that the Defendant had recently lived in the home of A.B. and D.B., two of the parents who initially reported the abuse.[5] Det. Sanders also learned from Det. Benedict that the Defendant "had spent a large amount of time on the computer at his workplace." Therefore, she called A.B. and asked whether there was a computer in their home that the Defendant had used. A.B. confirmed that there was a computer and that the Defendant had used it. A.B. agreed to turn the computer over to Det. Sanders. When Det. Sanders collected the computer, A.B. told her that the Defendant had a laptop that he kept in the trunk of his car and that he also owned a digital camera. Det. Sanders

[4] The exact offense that the Defendant was convicted of is unclear from the record. However, the conviction was apparently ten years prior to the beginning of this investigation, and the Defendant served eight years in prison.

[5] Although not the subject of this appeal, A.B. and D.B. reported that the Defendant had abused two of their children, and we will utilize initials when referring to them in order to protect the identity of those victims.

testified that she believed the Defendant "was very protective of [the computer]" because "he kept it in the trunk of his car." According to Det. Sanders, A.B. told her about the computer on January 25, 2007.

Det. Sanders testified that she and Det. Benedict planned to go to the auto dealership where the Defendant had recently worked and where he apparently spent a lot of time on the computer. On February 6, 2007, the detectives drove to Lawrence County, where the dealership was located, and met with Lieutenant Denton of the Lawrence County Sheriff's Office. Det. Sanders explained that, because she and Det. Benedict did not have jurisdiction in Lawrence County, she wanted to apprise local law enforcement of the investigation as a professional courtesy. Lt. Denton accompanied the detectives to the automobile dealership. The owner of the dealership, Jimmie Pennington, consented to a search of the workplace computer used by the Defendant. Det. Benedict conducted a "pre-search" of the computer, in which all of the images contained on the computer flashed on the screen in quick succession. Det. Benedict testified that the pre-search revealed "a variety of images of obviously underage[] girls in various states of undress and sexual positions and performing sex acts." Det. Sanders estimated that the pornographic images numbered in the "[hundreds] if not thousands." Additionally, Det. Sanders thought that she recognized one of the victims in a picture.[6] Mr. Pennington denied having any knowledge of the pornographic images.

After viewing the pictures on the workplace computer, Lt. Denton left to get a search warrant. Mr. Pennington agreed to let the detectives take the computer for further testing. Detectives Sanders and Benedict then went to Sweet Gum Lane "to take some pictures" at the house where the Defendant had been staying. When they arrived, they found the Defendant's car in the driveway. The detectives took pictures and attempted to talk to the Mr. Pratt, but no one was home at the time. The detectives left and "kind of drove around," "went and got lunch," and then went back to Sweet Gum Lane "later in the evening." This time, there was a car in the Pratts' driveway, and the detectives were able to talk to Erica Pratt, Mr. Pratt's wife. Ms. Pratt told Det. Sanders that the Defendant "liked taking pictures of the kids" with his camera, but he would ignore her son "and photograph the girls only."

Ms. Pratt told the detectives that her husband had the keys to the Defendant's car, but he was not home at the time. Approximately one hour later, Lt. Denton arrived with the search warrant. Det. Sanders testified that she never actually saw the search warrant. Also, she believed that she had probable cause to search the Defendant's car without a warrant at that point but chose to defer to Lt. Denton and wait for a warrant because she and Det. Benedict were in his jurisdiction. Mr. Pratt arrived home around the same time that Lt. Denton arrived with the warrant, and Mr. Pratt gave the car keys to the officers.

[6] Det. Sanders had previously interviewed two of the victims, both daughters of A.B. and D.B.

A laptop and digital camera were found in the trunk of the Defendant's car. A subsequent analysis of the laptop revealed images depicting the Defendant and H.N. engaged in various sex acts, which resulted in the indictments for four counts of rape of a child in this case.

On February 8, 2010, the trial court entered an order granting the Defendant's motion to suppress. The court concluded that the search warrant did "not establish probable cause . . . [or] a sufficient nexus as required." The court found that it was "compelled to review the search warrant on the four corners of the warrant only." Therefore, the trial court did not consider the alternate basis for the search offered by the State—that it was a valid warrantless search pursuant to the automobile exception.

On March 8, 2010, the State filed a motion in the trial court to allow an interlocutory appeal pursuant to Tennessee Rule of Appellate Procedure 9. The State asserted that the trial court had erred by granting the Defendant's motion to suppress. Specifically, the State argued that the trial court erred when it concluded that it was limited to considering the search warrant and that it could not consider whether an exception to the warrant requirement applied. The trial court granted the State's motion on May 25, 2010, and this court granted the State's application for interlocutory appeal on July 15, 2010.

On appeal, a panel of this court concluded that the trial court should have considered the State's theory that, regardless of the validity of the search warrant, the search of the Defendant's car could be justified under one of the exceptions to the warrant requirement. See State v. Alberts, 354 S.W.3d 320, 323 (Tenn. Crim. App. 2011). Thus, the case was remanded for the trial court to consider the validity of the warrantless search of the Defendant's car. Id. at 323-24.

On remand, the trial court reversed its earlier decision and denied the Defendant's motion to suppress, finding that the automobile exception justified the warrantless search of the Defendant's car. The court stated that "[a]lthough the affidavit for the warrant failed to include a substantial portion" of the evidence known to officers at the time of the search, the officers did have probable cause to conduct the search.

The case proceeded to trial in June 2013, and the bulk of the direct evidence against the Defendant consisted of images retrieved from the laptop computer. After seizing the laptop from the Defendant's car, Det. Sanders sent it to the Tennessee Bureau of Investigation ("TBI") for forensic analysis. The TBI subsequently submitted a report to Det. Sanders suggesting that, based on several pictures found on the laptop, there might be "local victims." Additionally, although the digital camera was never subjected to forensic analysis, the TBI was able to determine that many of the pictures on the laptop had been taken with and uploaded to the computer from a Kodak EasyShare Camera,

which matched the type of camera taken from the Defendant's trunk. Det. Sanders isolated several pictures of a young girl engaged in various sex acts with the Defendant whom she believed might be a local victim and began trying to identify her.

Because the Defendant had previously lived with them, Det. Sanders decided to show pictures of one of the victims to A.B. and D.B. Det. Sanders printed off pictures of the victim, "cut the bad parts out," and showed them to A.B., who was able to identify the girl in the pictures as H.N. A.B. told Det. Sanders that H.N. was the daughter of K.N., who was the Defendant's brother's girlfriend. Also, from viewing the background of the pictures, A.B. was able to determine that the pictures had been taken at the home the Defendant had shared with herself, D.B., and their young children. According to A.B., H.N. had visited their home several times.

A jury convicted the Defendant as charged in Counts 1-4 with four counts of rape of a child. Following a sentencing hearing, the trial court sentenced the Defendant to consecutive sentences of twenty-five years on each count, resulting in a total effective sentence of one hundred years to be served at 100%. It is from these judgments that the Defendant now appeals.

ANALYSIS

On appeal, the Defendant contends that the trial court erred in denying his motion to suppress evidence recovered pursuant to a warrantless search of his car. In particular, the Defendant argues that his car was not "readily mobile" at the time of the search and that officers lacked probable cause to search his vehicle and, thus, the automobile exception does not apply. Alternatively, the Defendant argues that even if the warrantless search of his vehicle was legal, the subsequent analysis of the laptop computer[7] amounted to a warrantless search to which no exception to the warrant requirement applies. In response, the State avers that the search of the Defendant's car was proper under the automobile exception, which requires only probable cause to search without any separate showing of exigency. The State further responds that the Defendant has waived the issue regarding the search of the laptop because he raised it for the first time in his motion for new trial.

I. Standard of Review

A trial court's findings of fact on a motion to suppress are conclusive on appeal unless the evidence preponderates against them. State v. Binette, 33 S.W.3d 215, 217

[7] The Defendant includes the digital camera recovered from his trunk in the challenged search; however, the trial testimony is clear that the camera was never analyzed by the TBI, and the only incriminating images introduced were recovered from the laptop.

(Tenn. 2000). Questions about the "credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). Both proof presented at the suppression hearing and proof presented at trial may be considered by an appellate court in deciding the propriety of the trial court's ruling on a motion to suppress. State v. Henning, 975 S.W.2d 290, 299 (Tenn. 1998); State v. Perry, 13 S.W.3d 724, 737 (Tenn. Crim. App. 1999). However, the prevailing party "is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from the evidence." Odom, 928 S.W.2d at 23. Furthermore, an appellate court's review of the trial court's application of law to the facts is conducted under a de novo standard of review. State v. Walton, 41 S.W.3d 75, 81 (Tenn. 2001) (citations omitted).

B. Search of the Defendant's Vehicle

The Defendant first posits that the search of his car was illegal and that any evidence seized as a result should have been suppressed. The Defendant argues that the automobile exception does not apply because his car "was not sufficiently mobile to justify a warrantless search" and the officers lacked probable cause.

The Fourth Amendment to the United States Constitution and article I, section 7 of the Tennessee Constitution protect against unreasonable searches and seizures. Any "warrantless search or seizure is presumed [to be] unreasonable, and evidence discovered as a result thereof is subject to suppression unless the State demonstrates by a preponderance of the evidence that the search or seizure was conducted pursuant to one of the narrowly defined exceptions to the warrant requirement." State v. Simpson, 968 S.W.2d 776, 780 (Tenn. 1998).

One such exception to the general rule requiring a warrant is the "automobile exception," which permits an officer to search an automobile when there is probable cause to believe that the vehicle contains contraband. Carroll v. United States, 267 U.S. 132, 149 (1925). The United States Supreme Court has explained that the justification for the automobile exception is two-fold: (1) it is often impractical for officers to obtain search warrants due to the inherent mobility of automobiles; and (2) an individual's expectation of privacy is reduced in an automobile. Pennsylvania v. Labron, 518 U.S. 938, 940 (1996); California v. Carney, 471 U.S. 386, 392-93 (1985). Although early cases applying the automobile exception analyzed whether both probable cause and exigent circumstances existed to justify a warrantless search, the United States Supreme Court has since eliminated the exigency analysis. See Maryland v. Dyson, 527 U.S. 465, 466-67 (1999) ("[U]nder our established precedent, the 'automobile exception' has no separate exigency requirement."). Our supreme court adopted this approach in State v. Saine, 297 S.W.3d 199, 207 (Tenn. 2009). Thus, when an officer has probable cause to

believe that an automobile contains contraband, one of two courses of action is constitutionally reasonable: the officer may seize the automobile and obtain a search warrant or instead may search the automobile immediately. Chambers v. Maroney, 399 U.S. 42, 52 (1975).

First, we address the Defendant's argument that the automobile exception does not apply because his car was not "sufficiently mobile" at the time of the search. In support of this argument, the Defendant points out that he was incarcerated at the time that the search was carried out and that the car was parked at a private residence. Thus, he concludes, the officers were required to obtain a valid warrant before conducting the search.

In differentiating between the particular circumstances of this case and other cases where the automobile exception has been applied, the Defendant directs us to State v. Leveye, wherein our supreme court drew a distinction between "fluid" and "stable" situations involving vehicles. 796 S.W.2d 948, 951 (Tenn. 1990). In that case, the court recognized that where "a parked car presents a 'fluid situation' it is probably reasonable to search without a warrant, but if 'stable' a warrant would be required." Id. However, it is important to note that the Leveye court discussed this distinction when analyzing whether exigent circumstances existed. Id. at 950-51. In doing so, the court was relying upon a 1976 Tennessee Supreme Court case that espoused what has now become an outdated view: that there is no exigency per se in the inherent mobility of cars. Id. (citing Fuqua v. Armour, 543 S.W.2d 64, 67 (Tenn. 1976)).

We say outdated because in Saine, our supreme court, like the United States Supreme Court in Dyson, was unequivocal in its holding that "the automobile exception does not require a separate finding of exigency under the Tennessee Constitution." 297 S.W.3d at 207. Rather, the general trend has been toward an emphasis on the inherent mobility of vehicles without regard to the particular circumstances of a case. See 3 Wayne R. LaFave, Search & Seizure, § 7.2(b) (5th ed.) (noting that courts now routinely "uphold warrantless searches with virtually no inquiry into the facts of the particular case, reasoning that whether any kind of exigent circumstances claim could plausibly be put forward is totally irrelevant").

Indeed, even before Saine, a panel of this court rejected the idea that "the United States Supreme Court's decision in [Labron], signal[ed] a return to 'some particularized restriction on mobility.'" State v. Jose Roberto Ortiz, No. M1998-00483-CCA-R3-CD, 1999 WL 1295988, at *15 & n.4 (Tenn. Crim. App. Dec. 30, 1999) (noting that it did not "believe the Supreme Court intended the phrase 'readily mobile' to be synonymous with 'imminently mobile.'"). The Ortiz court explained that

> [w]hile the mobility of automobiles is part of the reasoning behind [the automobile exception], the question is not . . . whether the car is likely to be driven off; the question is whether probable cause that contraband is within the vehicle supports a search within the scope that a warrant would have authorized. It is the characteristic mobility of all automobiles, not the relative mobility of a car in a given case, . . . which allows for warrantless searches when probable cause exists.

Ortiz, 1999 WL 1295988, at *15 (citing United States v. Perry, 925 F.2d 1077, 1081 n.4 (8th Cir. 1991)). Therefore, a full ten years before our supreme court's Saine decision, the Ortiz court had already rejected the idea that the United States Supreme Court's decisions left open the possibility of a distinction "between vehicles parked in public places and elsewhere or [a] 'return to some particularized restriction on mobility.'" Ortiz, 1999 WL 1295988, at *15 (citing Leveye, 796 S.W.2d at 952-53).

Additionally, while the Defendant asserts that the Leveye court's distinction was more recently cited with approval in State v. Jason Paul Sherwood, No. M2005-01883-CCA-R3-CD, 2007 WL 189376, at *10 (Tenn. Crim. App. Jan. 26, 2007), perm. app. denied (Tenn. May 14, 2007), we note that Sherwood was decided by this court two years before our supreme court explicitly eliminated the exigency requirement. Therefore, even if there was some life left in the distinction between fluid and stable situations involving vehicles that was recognized in Leveye, it does not survive in light of our supreme court's decision in Saine. Accordingly, the Defendant's argument that his car was not readily mobile within the meaning of the automobile exception is without merit.

Next, we must determine whether probable cause existed justifying the warrantless search of the Defendant's car. The Defendant contends that although the officers may have had "good cause to continue investigating [him]," they did not have the probable cause necessary to justify a warrantless search of his vehicle. Further, the Defendant argues that "even after the officers discovered child pornography" on his work computer, "they had no information indicating that any evidence relating to the child rape case" would be found on the laptop.

"Probable cause is a flexible, common-sense standard," Texas v. Brown, 460 U.S. 730, 742 (1983), which generally requires "a reasonable ground for suspicion, supported by circumstances indicative of an illegal act." State v. Johnson, 854 S.W.2d 897, 899 (Tenn. Crim. App. 1993). Additionally, we note that with regard to the automobile exception, "[t]he scope of a warrantless search based on probable cause is no narrower—and no broader—than the scope of a search authorized by a warrant supported by probable cause. Only the prior approval of the magistrate is waived; the search otherwise is as the magistrate could authorize." United States v. Ross, 456 U.S. 798, 823 (1982).

Det. Sanders testified that she initiated an investigation of the Defendant after receiving reports that he had sexually abused several children. Prior to the search of the Defendant's car, Det. Sanders learned that the Defendant had a laptop computer and digital camera which he typically kept in the trunk of his car. Also, Detectives Sanders and Benedict found "hundreds if not thousands" of pornographic images of minor females on a computer located at the Defendant's workplace, including an image which Det. Sanders believed depicted a local victim. When the detectives spoke with Ms. Pratt, she told them that the Defendant liked to take pictures of young girls. According to Det. Sanders, she felt that she had probable cause to search the Defendant's vehicle without a warrant but waited for Lt. Denton to procure the warrant because she was in his jurisdiction.

From these facts, we conclude that the detectives had probable cause to search the Defendant's car for a laptop, which they believed contained child pornography and possibly evidence of the Defendant's sexual abuse of local victims. Here, contrary to the Defendant's assertion, it is irrelevant that the Defendant was initially being investigated for rape of a child and not child pornography. Through the course of an investigation into the child sexual abuse allegations, the detectives developed probable cause that they would find evidence of child pornography on the Defendant's laptop. We have located no authority, and the Defendant has provided none, that would disallow a search supported by probable cause where an investigation into one crime provides probable cause that evidence of another crime will be found in a particular place. Consequently, there was sufficient probable cause to support a warrantless search of the Defendant's vehicle, and this issue is without merit.

B. Search of the Laptop Computer

Next, the Defendant contends that, even if the automobile exception authorized the warrantless search of his vehicle, officers should have secured a search warrant before conducting a forensic analysis of the laptop. The Defendant argues that "[t]he search of a computer or other electronic device is a search separate from the search that uncovers the device." The State responds that the Defendant has waived review of this issue because he made this argument for the first time in his motion for new trial.

Prior to trial, the Defendant filed a motion to suppress evidence obtained from the search of his vehicle. In support of that motion, he argued that the search warrant obtained was invalid and that the laptop computer in particular should be suppressed as fruit of the poisonous tree. The motion to suppress specifically stated that the search of the vehicle "resulted in [the] seizure of a computer." (Emphasis added). Although the Defendant's motion was initially granted, the trial court reversed its decision following an interlocutory appeal to this court. The Defendant did not file any other motions to suppress and, importantly, did not argue that a search warrant was required before police

searched the laptop itself until his motion for new trial. In fact, up until the motion for new trial, the Defendant's contention had always been that the evidence obtained from the laptop computer should have been suppressed because of its connection to the alleged illegal search of the car—he had never before asserted that the subsequent forensic analysis of the laptop was a separate search wholly removed from the search of the car, therefore requiring a warrant.

A motion to suppress evidence must be made before trial. See Tenn. R. Crim. P. 12(b)(2)(C). "The failure to file a pretrial motion to suppress constitutes a waiver unless good cause for the failure to raise the matter pretrial is timely shown." State v. Zyla, 628 S.W.2d 39, 41 (Tenn. Crim. App. 1981); see Tenn. R. Crim. P. 12(f). In this case, when denying the motion for new trial, the trial court specifically found that the Defendant had waived this issue because he raised it for the first time in his motion. Nevertheless, on appeal, the Defendant fails to offer any reason why the issue should not be treated as waived. An argument that evidence from the laptop should have been suppressed as fruit of the poisonous tree is not the same as a claim that a search warrant should have been obtained after the laptop was seized but before a forensic analysis was conducted. Therefore, the proper course would have been for the Defendant to challenge the search of the laptop in a pretrial motion to suppress. Accordingly, the Defendant is not entitled to review of this issue.

CONCLUSION

Based on the foregoing and the record as a whole, the judgments of the trial court are affirmed.

D. KELLY THOMAS, JR., JUDGE

APPENDIX E

State v. Alberts, 354 S.W.3d 320 (Tenn. Crim. App. 2011)

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
January 11, 2011 Session

STATE OF TENNESSEE v. JOHN B. ALBERTS

Appeal from the Circuit Court for Williamson County
No. I-CR033269 Jeff Bivens, Judge

No. M2010-01208-CCA-R9-CD - filed June 21, 2011

The Williamson County Grand Jury indicted Appellant, John B. Alberts, for eight counts of rape of a child, one count of solicitation of a minor to commit rape of a child, and one count of solicitation of sexual exploitation of a minor. Appellant filed a motion to suppress evidence recovered through the execution of a warrant to search Appellant's car. At the hearing on the motion to suppress, the trial court granted Appellant's motion based upon the conclusion that the search warrant was invalid. At the hearing, before the trial court announced its decision, the State argued an alternative theory that the search was valid as a warrantless search through an exception to the warrant requirement i.e., probable cause with exigent circumstances. The trial court declined to rule on the validity of the search based upon this alternative theory. The State asked for and was granted an interlocutory appeal pursuant to Rule 9 of the Tennessee Rules of Appellant Procedure to determine if the trial court can consider the alternative theory to uphold the search. We have concluded that the trial court should consider an alternative theory to determine if the search was valid as a warrantless search based on probable cause and exigent circumstances. We remand the case back to the trial court for proceedings in accordance with this opinion.

Tenn. R. App. P. 9 Appeal as of Right; Judgment of the Circuit Court is Remanded.

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

Robert E. Cooper, Jr., Attorney General and Reporter; Lindsy Paduch Stempel, Assistant Attorney General; Ron Davis, District Attorney General, and Mary K. White, Assistant District Attorney General, for the appellant, State of Tennessee.

Vanessa P. Bryan, District Public Defender and James L. Elkins, III, Assistant Public Defender, Franklin, Tennessee, for the appellee, John B. Alberts.

Appendix E

OPINION

Factual Background

In January 2007, three parents reported to Detective Tameka Sanders of the Williamson County Sheriff's Department that Appellant had sexually abused their children. The victims alleged that Appellant had licked their vaginas. Detective Sanders began her investigation and discovered that Appellant had been convicted ten years before for performing oral sex on a nine-year-old girl. Subsequently, Appellant was arrested on January 31, 2007 for violation of the sex offender registration law.

Also in January 2007, the parents of one of the victims reported to Detective Sanders that Appellant had used their computer in their home. Detective Sanders obtained consent to search the computer and took possession of it. The detective did not testify as to any images contained on the victim's parents' computer. The victim's mother also told Detective Sanders that Appellant had a laptop and a digital camera that he kept in the trunk of his car.

On February 6, 2007, Detective Sanders, accompanied by Detective Grant Benedict of the Williamson County Sheriff's Department and Lieutenant Robert Denton of the Lawrence County Sheriff's Department, went to Appellant's former place of employment to check the computer. Mr. Jimmie Pennington, the proprietor, signed a consent to search form for the search of the computer primarily used by Appellant during his employment. The search revealed images numbering in the hundreds or thousands of sexually provocative photographs of young girls. While the images were flashing on the screen, Detective Sanders thought she recognized one of the victims in one of the images.

Lieutenant Denton left the business to obtain a search warrant. While Lieutenant Denton went to get a search warrant, Detectives Sanders and Benedict located Appellant's residence at 50 Sweet Gum Lane. They spotted Appellant's car parked in the driveway. Detectives Sanders and Benedict interviewed a neighbor who told them that Appellant liked to take pictures of children, but he would only take pictures of girls. While they were waiting for Lieutenant Denton to return with the search warrant, the detectives secured Appellant's car. When Lieutenant Denton returned with a search warrant, the officers had Appellant's neighbor unlock Appellant's car. The officers searched the car and seized a laptop computer and a digital camera. The computer contained photographs of Appellant kissing the victims,

one victim performing fellatio on Appellant, and Appellant performing cunnilingus on one of the victims.

In March 2008, the Williamson County Grand Jury indicted Appellant for eight counts of rape of a child, one count of solicitation of a minor to commit rape of a child, and one count of solicitation of sexual exploitation of a minor. On November 12, 2009, Appellant filed a motion to suppress the evidence, in particular the laptop computer, seized as a result of the search warrant obtained by Lieutenant Denton. The trial court held a hearing on the motion on January 6, 2010. On February 8, 2010, the trial court filed an order granting Appellant's motion to suppress based solely on the conclusion that the search warrant was invalid. On March 8, 2010, the State petitioned the trial court for an interlocutory appeal pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure. The trial court granted the State's request on May 25, 2010. This Court granted the application for interlocutory appeal on July 15, 2010.

ANALYSIS

On appeal, the State argues that the trial court erred in determining that after having decided that the search warrant was invalid, it was restrained from considering any exceptions to the warrant requirement to establish that the search was reasonable. Appellant argues that the trial court did not err.

This Court will uphold a trial court's findings of fact in a suppression hearing unless the evidence preponderates otherwise. *State v. Hayes*, 188 S.W.3d 505, 510 (Tenn. 2006) (citing *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996)). On appeal, "[t]he prevailing party in the trial court is afforded the 'strongest legitimate view of the evidence and all reasonable and legitimate inferences that may be drawn from that evidence.'" *State v. Carter*, 16 S.W.3d 762, 765 (Tenn. 2000) (quoting *State v. Keith*, 978 S.W.2d 861, 864 (Tenn. 1998)). "Questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." *Odom*, 928 S.W.2d at 23. Our review of a trial court's application of law to the facts is de novo, with no presumption of correctness. *State v. Walton*, 41 S.W.3d 75, 81 (Tenn. 2001) (citing *State v. Crutcher*, 989 S.W.2d 295, 299 (Tenn. 1999); *State v. Yeargan*, 958 S.W.2d 626, 629 (Tenn. 1997)). When the trial court's findings of fact are based entirely on evidence that does not involve issues of witness credibility, however, appellate courts are as capable as trial courts of reviewing the evidence and drawing conclusions and the trial court's findings of fact are subject to de novo review. *State v. Binette*, 33 S.W.3d 215, 217 (Tenn. 2000). Further, we note that "in evaluating the correctness of a trial court's ruling on a pretrial motion to suppress, appellate courts may consider the proof adduced both at the suppression hearing and at trial." *State v. Henning*, 975 S.W.2d 290, 299 (Tenn. 1998). The

question presented by the State in this case is one of law. Therefore, there is no presumption of correctness with regard to the trial court's decision. *Walton*, 41 S.W.3d at 81.

At the hearing on the motion to suppress, the trial court expressed the belief that it was restrained from considering any alternate theories because it was restricted to a review of the warrant in ruling on the motion to suppress. It is true that, "Tennessee law is clear that in determining whether or not probable cause supported issuance of a search warrant only the information contained within the four corners of the affidavit may be considered." *State v. Keith*, 978 S.W.2d 861, 870 (Tenn. 1998) (citing *State v. Jacumin*, 778 S.W.2d 430, 432(Tenn. 1989)). This language refers to a court's determination whether or not the warrant itself is valid. This language does not prevent a court from determining whether a search is valid based on an exception to the warrant requirement. We have found no legal impediment to prevent the trial court from addressing the State's argument that the search was permissible as a warrantless search based on the existence of probable cause to search and exigent circumstances. We point out that in the case at hand, the State presented this argument to the trial court prior to the trial court's ruling on the validity of the warrant.

The trial court allowed the State to present an offer of proof with regard to probable cause and exigent circumstances. However, the trial court made no factual findings regarding the validity of the search as a warrantless search. Because we can find no precedent preventing the trial court from determining whether an exception to the warrant requirement applies to the facts at hand when the search warrant has been determined to be invalid, the trial court should make findings of fact regarding this issue and rule on the validity or invalidity of the search of Appellant's car as a warrantless search. Both the Fourth Amendment to the United States Constitution and article I, section 7 of the Tennessee Constitution protect individuals against unreasonable searches and seizures by government agents. *See* U.S. Const. amend. IV; Tenn. Const. art. I, § 7. Under both constitutions, "a warrantless search or seizure is presumed unreasonable, and evidence discovered as a result thereof is subject to suppression unless the State demonstrates that the search or seizure was conducted pursuant to one of the narrowly defined exceptions to the warrant requirement." *Yeargan*, 958 S.W.2d at 629 (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 454–55, 91 S. Ct. 2022, 29 L.Ed.2d 564 (1971)); *see also State v. Garcia*, 123 S.W.3d 335, 343 (Tenn. 2003). As stated above, in the hearing on remand, the State will have the burden of proof to show the search of Appellant's car is a valid warrantless search.

CONCLUSION

For the foregoing reasons, we remand this case for the trial court to conduct further proceedings to determine whether one of the exceptions to the warrant requirement exists in the facts at hand.

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JERRY L. SMITH, JUDGE