UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-1085

Glen S. Evans

Petitioner - Appellant

v.

Bill Stange

Respondent - Appellee

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:20-cv-00097-SRC)

JUDGMENT

Before COLLOTON, BENTON, and KOBES, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

February 04, 2022

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

/s/ Michael E. Gans

Appendix A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

GLEN S. EVANS,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 4:20-cv-00097-SRC
	)	
BILL STANGE,	)	
	)	
Respondent.	)	

Memorandum and Order

In February 2013 Glen Evans drove his friend Matt Cook to Advance, Missouri, so Cook could "take care of some business" with someone. Cook, who was upset and was texting during the drive, said at one point: "I'm gonna kill him." Evans also saw that Cook had a gun. In Advance, Cook shot and killed Sean Crow in a McDonald's parking lot. Evans and Cook then drove back to Evans's house, where Cook stayed for a few days. While Cook and Evans were together at an Applebee's, Police officers arrested Cook—then arrested Evans later that night at Evans's house.

A state-court jury found Evans guilty of second-degree murder. Doc. 11-2 at p. 77. The state court sentenced Evans to twenty-five years imprisonment. Doc. 11-1 at p. 820; Doc. 11-2 at pp. 81–83. Evans appealed his conviction to the Missouri Court of Appeals, which affirmed. Doc. 11-6. He did not appeal to the Supreme Court of Missouri. A state motion court denied Evans's amended post-conviction relief motion after an evidentiary hearing. Doc. 11-8 at pp. 116–40. The Missouri Court of Appeals affirmed the motion court, Doc. 11-12, and the Supreme Court of Missouri denied transfer. Evans remains incarcerated. Doc. 5 at pp. 1–2. He now petitions this Court under 28 U.S.C. § 2254 for a writ of habeas corpus, alleging ineffective

Appendix B

assistance of his trial counsel and claiming the state trial court made various errors. *Id.* For the reasons discussed below, the Court denies Evans's petition.

I. Facts and Background

According to 28 U.S.C. § 2254(e), "[i]n a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." The Missouri Court of Appeals described the pertinent facts as follows:

> On Tuesday, February 19, 2013, [Evans] drove his friend Matt Cook (Cook) to Advance, Missouri, to "take care of some business" with a guy. During the drive, Cook was upset and at one point he said, "I'm gonna kill him." Cook was texting and told [Evans], "He thinks he's getting some pu**y." [Evans] also saw a gun that Cook told him belonged to his girlfriend, Jackie Rudd (Rudd).
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> When they arrived in Advance, Cook told [Evans] to pull into McDonald's. McDonald's was a combination fast food restaurant, convenience store, and gas station. Surveillance tapes showed [Evans] arrived at 7:10 p.m. After [Evans] parked, Cook exited the car and entered the convenience store, and returned about five minutes later with no purchases. Across the parking lot, Sean Crow (Crow) was sitting in his red pickup truck parked with the headlights on. Cook told [Evans] that the person he needed to see was in the red truck across the parking lot. Cook told [Evans] to pull around the back of McDonald's, which [Evans] did.
>
> Cook got out of the car and told [Evans] to pull across the highway and wait for him. As Cook walked away from [Evans] and toward Crow's truck, [Evans] saw the gun tucked in the back of his pants, in the small of his back. Cook then went up to Crow's truck, leaned in the truck window, and shot Crow in the eye with a .22 caliber pistol, killing him. Cook then ran back to [Evans]'s car, and told [Evans] to park at a nearby Dollar General store and let him out so he could walk over and check on Crow, get his phone, and check for evidence. Cook returned with $19 and Crow's phone. Cook later had [Evans] pull over so he could smash the phone and dispose of it in a dumpster.
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> [Evans] and Cook returned to [Evans]'s home. [Evans] told his friend Brent Montgomery (Montgomery) that Cook had just shot someone. Cook confirmed this fact and put the gun, a .22 caliber, to Montgomery's head and warned him not to say anything about it. Montgomery told Cook that he could not kill anyone with a .22 caliber, but Cook answered that he could at point blank range, and that he had

shot the man in the eye. [Evans] told Cook to get the gun out of Montgomery's face and to calm down. Montgomery soon left.

The next morning, Wednesday, February 21, 2013, [Evans] told his girlfriend Beth O'Neal (O'Neal), with whom he lived, that Cook needed a place to stay. O'Neal agreed he could stay at their place. Cook was gone most of that day but returned that night and spent most of Thursday and Friday with [Evans] and O'Neal. On Saturday, February 24, 2013, [Evans] was visited by his friend Jamie Abernathy (Abernathy). [Evans], Abernathy, O'Neal and Cook went to Applebee's. At some point, [Evans] took O'Neal home and then came back. While [Evans], Abernathy and Cook were at Applebee's, police officers came in and arrested Cook for nonsupport and Abernathy for a traffic warrant and took them away. [Evans] remained by himself but then left for another bar.

Later that night, at about 2:30 a.m., Sheriff Carl Hefner (Sheriff Hefner) and Trooper Steve Jarrell (Trooper Jarrell) went to [Evans]'s house to interview him because Cook was now a suspect in Crow's murder, and earlier [Evans] had been with Cook at Applebee's. The officers wanted to discern whether [Evans] had any information about the murder. However, after Sheriff Hefner knocked on his front door and O'Neal answered and let him in, [Evans] ran out the side door. Trooper Jarrell pursued [Evans], telling him to stop or he would shoot, but [Evans] continued to run. Eventually, [Evans] was apprehended. Trooper Jarrell asked [Evans] why he had run. [Evans] said he freaked out because he had been at Applebee's earlier with a friend who had been arrested for shooting someone in the head. [Evans] was brought to the sheriff's office where he was read and then waived his *Miranda* rights.

Trooper Scott Stoelting (Trooper Stoelting) interviewed [Evans], who claimed he did not know anything about Crow's murder. [Evans] told Trooper Stoelting he had picked up Cook and drunk a six-pack with him on February 19, 2013, but then left and did not see Cook again until the following Friday. When asked about going to Advance, Missouri, [Evans] said he had not been there in over a year.

[Evans] finally admitted he had driven Cook to Advance, Missouri on the night of February 19, 2013, at Cook's request because Cook had alleged he had "some business to take care of" there. [Evans] told police that although Cook had told him Crow was ripping people off on dope deals, [Evans] figured out after the shooting that the real reason Cook was upset with Crow was because he was sleeping with Cook's girlfriend, Rudd. [Evans] stated he initially thought there might be a fight or a "pistol whip" between Cook and Crow, so he looked the other way as he drove past Crow's truck and parked across the street to wait for Cook. As he was parking, [Evans] saw Cook already running back toward him. [Evans] told police he could not believe Cook could have "done it" already. [Evans] said when he asked Cook how he could kill someone with a .22 caliber pistol, Cook responded that he shot him in the eye. [Evans] said he also expressed surprise no

> one had heard the gunshot, but Cook assured him no one had heard it. Cook then told [Evans] to park at a Dollar General store and let him out so he could walk over and check on Crow, get his phone, and check for evidence. Cook returned with some money and Crow's phone, which he later smashed and disposed of in a dumpster. [Evans] then dropped Cook off at his girlfriend Rudd's house and went home.
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> The police analyzed [Evans]'s cell phone, but were unable to find any calls or text messages made from February 19, 2013, to February 23, 2013, because they had been erased. The police analyzed the phone Cook used that was registered to his girlfriend, Rudd. An analysis of the records for that phone revealed on February 19, 2013, Cook had contacted [Evans]'s phone at 2:24 p.m., and [Evans]'s phone had contacted Rudd's (Cook's) phone at 2:32 p.m. The records of these calls or text messages had been deleted from both phones. The record also showed that between 5:42 p.m. and 7:10 p.m. on February 19, 2013, 42 text messages were sent between Rudd's (Cook's) phone and Crow's phone.
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> Cook pled guilty to first-degree murder and received life in prison with no parole. The State charged [Evans] with first-degree murder as Cook's accomplice. After a trial, the jury was instructed on both first- and second-degree murder under an accomplice liability theory, and after deliberation, found [Evans] guilty of second-degree murder. [Evans] was sentenced by the trial court to twenty-five years' imprisonment.

Doc. 11-6 at pp. 2–5.

II. Standard

"A state prisoner who believes that he is incarcerated in violation of the Constitution or laws of the United States may file a petition for writ of habeas corpus in federal court pursuant to 28 U.S.C. § 2254[.]" *Osborne v. Purkett*, 411 F.3d 911, 914 (8th Cir. 2005), *as amended* (June 21, 2005). Federal habeas review exists only "as 'a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal.'" *Woods v. Donald*, 575 U.S. 312, 315 (2015) (per curiam) (quoting *Harrington v. Richter*, 562 U.S. 86, 102–03 (2011)). Accordingly, "[i]n the habeas setting, a federal court is bound by the AEDPA [the Antiterrorism and Effective Death Penalty Act] to exercise only limited and deferential review of underlying state court decisions." *Lomholt v. Iowa*, 327 F.3d 748, 751 (8th

Cir. 2003) (citing 28 U.S.C. § 2254). For a federal court to grant an application for a writ of habeas corpus brought by a person in custody by order of a state court, the petitioner must show that the state court's adjudication on the merits:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)–(2). A determination of a factual issue made by a state court is presumed correct unless the petitioner successfully rebuts the presumption of correctness by clear and convincing evidence. § 2254(e)(1).

A state court's decision is "contrary to" clearly established Supreme Court precedent "if the state court either 'applies a rule that contradicts the governing law set forth in [Supreme Court] cases' or 'confronts a set of facts that are materially indistinguishable from a decision of [the] Court and nevertheless arrives at a result different from [the] precedent.'" *Penry v. Johnson*, 532 U.S. 782, 792 (2001) (citing *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000)). An unreasonable application of clearly established Supreme Court precedent occurs where the state court identifies the correct governing legal principle but unreasonably applies that principle to the facts of the case. *Ryan v. Clarke*, 387 F.3d 785, 790 (8th Cir. 2004). Finally, a state court decision may be considered an unreasonable determination of the facts "only if it is shown that the state court's presumptively correct factual findings do not enjoy support in the record." *Id.*

III. Discussion

Evans asserts three grounds for relief in his amended habeas petition. Doc. 5. First, Evans claims that the trial court erred in denying his motion to suppress his statements to police and in admitting the statements at trial over his counsel's objection. *Id.* at pp. 5–11. Second, Evans claims that the trial court erred in denying his motion for judgment of acquittal due to

insufficient evidence. *Id.* at pp. 12–18. Third, Evans claims that his trial counsel was ineffective for failing to call Matthew Cook, Evans's codefendant, to testify. *Id.* at pp. 19–25.

A. Motion to suppress Evans's statements to police

In his first ground, Evans claims that the trial court erred in overruling his motion to suppress his statements to police, and in admitting that evidence at trial over his objection. Doc. 1 at p. 5. Evans claims that the officers did not have reasonable suspicion or probable cause to stop Evans, and that his subsequent statements during interrogation were the "fruit of the poisonous tree" and the only evidence supporting a finding of second-degree murder. *Id.* Evans presented this same argument on direct appeal, Doc. 11-3 at pp. 48–55, and the Missouri Court of Appeals disagreed, finding that based on the totality of the circumstances, "Trooper Jarrell had reasonable suspicion to detain [Evans]." Doc. 11-6 at pp. 10–11.

As a threshold matter, the Court finds that the Missouri Court of Appeals adjudicated Evans's claim "on the merits" within the meaning of § 2254(d). *See Johnson v. Williams*, 568 U.S. 289, 301 (2013). Because the Court of Appeals adjudicated his claim on the merits, Evans cannot obtain habeas relief under § 2254(a) unless the decision was either "contrary to, or involved an unreasonable application of, clearly established Federal law" under § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding" under § 2254(d)(2). *See* 28 U.S.C. § 2254.

The Missouri Court of Appeals found the following facts relevant as part of the "totality of the circumstances" supporting reasonable suspicion: (1) Trooper Jarrell and Sheriff Hefner went to Evans's house to interview him because he was with Cook at Applebee's when police officers arrested Cook; (2) Trooper Jarrell knew Evans was Cook's friend; (3) when Sheriff Hefner knocked at his door and was let in, Evans burst out the side door of the house running at a

sprint; (4) Evans continued fleeing after Trooper Jarrell told Evans to stop; and (5) after he was finally caught, when asked why he ran, Evans immediately brought up Cook and that he had shot someone in the head. Doc. 11-6 at pp. 3–4, 10–11.

The court applied the Supreme Court's holding in *Sokolow* that "[w]hen evaluating reasonable suspicion, courts consider the totality of the circumstances, including factors that may be consistent with innocent conduct when considered alone, but that, when taken together, may amount to reasonable suspicion." Doc. 11-6 at p. 11 (citing *State v. Kelly*, 119 S.W.3d 587, 594 (Mo. Ct. App. 2003)); *United States v. Sokolow*, 490 U.S. 1, 8–10 (1989). The court's application of this well-established precedent was not unreasonable—even apart from Evans's statement after he was caught, based on the other facts the Missouri Court of Appeals identified, the police had reasonable suspicion to conduct a *Terry* stop. *See Terry v. Ohio*, 392 U.S. 1, 5–6, 30 (1968). The Missouri case the court relied on, *State v. Kelly*, articulates that:

> Evasion—the consummate act of which is flight—is a "pertinent factor in determining reasonable suspicion." *Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000). Flight "is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." *Id.* at 125, 120 S. Ct. 673 (unprovoked flight from uniformed officers in high crime area justified reasonable suspicion of criminal activity and stop to investigate further). This is true even though there are also innocent reasons for fleeing from the police. *Id.* Even where the conduct articulated as justification for the stop is ambiguous and susceptible of an innocent explanation, if it also suggests criminal activity, then detention to resolve the ambiguity does not violate the Fourth Amendment. *Id.* (citing *Terry*, 392 U.S. at 5–6, 30, 88 S. Ct. 1868).

Kelly, 119 S.W.3d at 594–95. Evans's known connection to Cook, combined with his flight from the house after Sheriff Hefner went inside, provided reasonable suspicion for the stop.

The Court observes, however, that Evans's detention, transportation via police car to the police station, and questioning at the police station extended beyond the boundaries of a *Terry* stop and are "indistinguishable from a traditional arrest." *See Dunaway v. New York*, 442 U.S.

200, 212 (1979). Thus, if Evans did not consent, the police needed probable cause—not just reasonable suspicion—to proceed beyond the "brief and narrowly circumscribed intrusions" justified by *Terry* and its progeny. *Id.* at pp. 211–12. Additionally, the Court clarifies that Evans was not "seized" for Fourth Amendment Purposes until he was apprehended—which occurred *after* he continued fleeing, disregarding Trooper Jarrell's command to stop.

Though the court of appeals did not mention it, the Court notes that Mo. Rev. Stat. § 575.150 (2009), in effect at the time of the events in this case, states:

> 1. A person commits the crime of resisting or interfering with arrest, detention, or stop if, knowing that a law enforcement officer is making an arrest, or attempting to lawfully detain or stop an individual or vehicle, or the person reasonably should know that a law enforcement officer is making an arrest or attempting to lawfully detain or lawfully stop an individual or vehicle, for the purpose of preventing the officer from effecting the arrest, stop or detention, the person:
>
> (1) Resists the arrest, stop or detention of such person by using or threatening the use of violence or physical force or by fleeing from such officer;
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> . . . .
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> 2. This section applies to:
>
> (1) Arrests, stops, or detentions, with or without warrants;
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> . . . .
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> 4. It is no defense to a prosecution pursuant to subsection 1 of this section that the law enforcement officer was acting unlawfully in making the arrest. However, nothing in this section shall be construed to bar civil suits for unlawful arrest.

As discussed above, the Missouri Court of Appeals found that, based on the totality of the circumstances, the police had reasonable suspicion to temporarily detain Evans when he fled from his house after police showed up to ask him questions about the murder. So when Evans continued to flee after Trooper Jarrell identified himself and told Evans to stop, the police then had probable cause to arrest Evans for the crime of resisting detention under Mo. Rev. Stat. § 575.150 (2009). Therefore, even if Evans's detention and questioning exceeded the boundaries

of a *Terry* stop, the Missouri courts' decisions were not "contrary to," or did not "involve[] an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1), because the police had probable cause to arrest Evans.

For these reasons, the Court denies the first ground in Evans's petition for habeas relief.

B. Insufficient evidence

In his second ground, Evans challenges the trial court's denial of his motion for judgment of acquittal, arguing that the State presented insufficient evidence at trial to prove beyond a reasonable doubt that he had the purpose of promoting second degree murder. Doc. 5 at p. 12. As he argued in his direct appeal, Evans claims that "there was no evidence that Evans believed that Matthew Cook intended to kill Sean Crow nor that it was a likely result of driving Cook to Advance." *Id.*; Doc. 11-6 at p. 5. Therefore, Evans claims, his conviction violated due process. Doc. 12 at p. 10 (citing *In re Winship*, 397 U.S. 358, 364 (1970)). The Missouri Court of Appeals rejected this same argument on direct appeal, finding the evidence the State presented at trial sufficient to allow "a reasonable juror [to] find that Evans aided Cook in Crow's murder." Doc. 11-6 at p. 8.

As a threshold matter, the Court finds that the Missouri Court of Appeals adjudicated Evans's claim "on the merits" within the meaning of § 2254(d). *See Johnson*, 568 U.S. at 301. Because the Court of Appeals adjudicated his claim on the merits, Evans cannot obtain habeas relief under § 2254(a) unless the decision was either "contrary to, or involved an unreasonable application of, clearly established Federal law" under § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding" under § 2254(d)(2).

The Missouri Court of Appeals explained that under the law of accessory liability in Missouri, which emanates from statute, "[a] person is criminally responsible for the conduct of another when either before or during the commission of an offense, with the purpose of promoting the commission of the offense, he aids or agrees to aid or attempts to aid such other person in planning, committing or attempting to commit the offense." Doc. 11-6 at p. 6 (citing *State v. Barnum*, 14 S.W.3d 587, 590 (Mo. 2000), *as modified* (Apr. 25, 2000); Mo. Rev. Stat. § 562.041.1(2)). The court explained that while the doctrine of accomplice liability "comprehends any of a potentially wide variety of actions intended by an individual to assist another in criminal conduct, the evidence need not show the defendant personally committed every element of the crime." *Id.* (citing *Barnum*, 14 S.W.3d at 591) (internal citation omitted).

The court identified three highly relevant circumstances for inferring accomplice liability: (1) "where there is a statement or conduct by the defendant or . . . by a codefendant in the presence of defendant prior to the murder indicating a purpose to kill a human"; (2) where "the murder is committed by means of a deadly weapon and the accomplice was aware that the deadly weapon was to be used in the commission of a crime"; and (3) "where there is evidence that the accessory either participated in the homicide or continued in the criminal enterprise when it was apparent that a victim was to be killed." *Id.* at pp. 6–7 (citing *State v. Gray*, 887 S.W.2d 369, 376 (Mo. 1994)). The court also noted that "acts or conduct of an accused subsequent to an offense" can provide a permissible inference of guilt "if they tend to show a consciousness of guilt by reason of a desire to conceal the offense or role therein." *Id.* at p. 7 (citing *State v. Fitzgerald*, 778 S.W.2d 689, 691 (Mo. Ct. App. 1989)); see also *id.* (citing *State v. Johns*, 34 S.W.3d 93, 112 (Mo. 2000); *State v. Harrison*, 698 S.W.2d 564, 566 (Mo. Ct. App. 1985) (listing flight as an act that can show consciousness of guilt)).

In light of these principles, the Missouri Court of Appeals conducted a review "limited to a determination of whether there is sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt," while "accept[ing] as true all of the evidence favorable to the state, including all favorable inferences drawn from the evidence, and disregard[ing] all evidence and inferences to the contrary." Doc. 11-6 at p. 6 (citing *State v. Grim*, 854 S.W.2d 403, 405 (Mo. 1993)). Based on this standard of review, the court found the following facts sufficient to allow "a reasonable juror [to] find that Evans aided Cook in Crow's murder":

- Evans knew Cook was angry, "knew Cook had a gun with him when he drove him to Advance to 'take care of some business' with Crow," and "[o]n the way to Advance, Cook said, 'I'm gonna kill him.'"
- "When Cook exited [Evans]'s car to confront Crow, [Evans] saw Cook had the gun tucked into the back of his pants."
- Evans "waited until all the gas pumps were cleared of customers before driving around to the back of McDonald's and letting Cook out of his car" and then "witnessed Cook walking to Crow's truck with a gun and did nothing to stop him or alert authorities."
- After Cook shot Crow, Evans drove to a nearby store "and let Cook out so Cook could go back to Crow's truck and check for evidence, as well as take his cell phone and money."
- Evans "stopped the car on the way back home so Cook could destroy Crow's cell phone and discard it in a dumpster."
- "Cook had been texting Crow on the way to Advance and told [Evans], 'He thinks he's getting some pu**y."
- "[Evans] ran from the police when they came to his house," then "initially denied all involvement," and "lied about the fact that he was with Cook, drove him to Advance, or had even been to Advance in a year."

Doc. 11-6 at pp. 7–8.

These factual findings of the Missouri Court of Appeals are "presumptively correct" and also "enjoy support in the record." *See Ryan v. Clarke*, 387 F.3d 785, 790 (8th Cir. 2004). Nothing in Evans's petition or the state-court records suggests that the Court of Appeals based its ruling "on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2). Further, in a

§ 2254 setting the Court must consider "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Evans v. Luebbers*, 371 F.3d 438, 441 (8th Cir. 2004) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Applying the *Jackson v. Virginia* standard to the Missouri Court of Appeals' factual findings, the Court is "satisfied that the Missouri Court of Appeals' resolution of this issue was not contrary to, or an unreasonable application of, clearly established federal law." *Evans*, 371 F.3d at 442. Accordingly, the Court denies the second ground in Evans's petition for habeas relief.

C. Ineffective assistance of counsel

In his third ground, Evans alleges that his trial counsel was ineffective because he failed to investigate and call Evans's codefendant, Matthew Cook—"a favorable witness"—to testify at trial. Doc. 1 at p. 19. According to Evans, "Cook had made statements during a police interview that exonerated Evans of any knowledge and/or fault." *Id.*

The Missouri Court of Appeals adjudicated this claim on the merits in its decision denying Evans's postconviction appeal, Doc. 11-12 at p. 12, so Evans cannot obtain habeas relief under § 2254(a) unless the decision was either "contrary to, or involved an unreasonable application of, clearly established Federal law" under § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding" under § 2254(d)(2). To grant relief under § 2254, the Court must conclude that the state court unreasonably applied the *Strickland* test or that, in reaching its conclusions regarding the performance of Evans's attorney, it made unreasonable factual conclusions. *Gabaree v. Steele*, 792 F.3d 991, 998 (8th Cir. 2015). *Strickland* requires Evans to show that his counsel's

performance was deficient, and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

The Missouri Court of Appeals addressed several ineffective-assistance-of-counsel claims in denying Evans post-conviction relief. The Court of Appeals noted that, under *Strickland*, to succeed in these claims Evans must show that "(1) his counsel failed to exercise the customary skill and diligence of a reasonably competent attorney under similar circumstances" and that "(2) his counsel's deficient performance prejudiced him." Doc. 11-12 at p. 8 (citing *Anderson v. State*, 196 S.W.3d 28, 33 (Mo. 2006) (citing *Strickland*, 466 U.S. at 687–92)). Addressing the same ineffective-assistance-of-counsel claim Evans raises here, the court held as follows:

> In Paragraph 8(b) of the amended Rule 29.15 motion, [Evans] claimed Trial Counsel failed to call [Cook], a favorable witness to [Evans]'s defense. To prevail on a claim of ineffective assistance of counsel for failure to call a favorable witness, a movant must show Trial Counsel knew or should have known of the existence of the witness, that a reasonable investigation would have resulted in the location of the witness, the witness would testify, and the information would have aided and improved the defense. *Hutchinson v. State*, 150 S.W.3d 292, 304 (Mo. banc 2004).
>
> The motion court found [Cook] would not have testified at the trial so [Evans] fails in his claim Trial Counsel failed to call a favorable witness. The State was seeking the death penalty against [Cook] at the time of [Evans]'s trial. [Cook], after entering a guilty plea for first-degree murder, testified at the evidentiary hearing. The motion court found it credible that [Cook] would not have testified at the trial while the State sought the death penalty against him. The motion court did not find [Cook]'s other testimony credible. We defer to the credibility determinations of the motion court. *Barton*, 432 S.W.3d at 760 (internal citation omitted). The motion court did not clearly err denying Movant's claim against Trial Counsel for failing to call Co-Defendant.

Doc. 11-12 at p. 12.

The decisions of the Missouri Court of Appeals are entitled to deference. 28 U.S.C. § 2254(d). The court's application of *Strickland*, 466 U.S. at 687, was reasonable in concluding Evans's counsel was not ineffective because Cook would not have testified at trial due to the

State's seeking the death penalty against him at that time. The court's decision is not contrary to, nor does it involve, an unreasonable application of federal law. Further, the factual findings of the Missouri Court of Appeals (deferring to the motion court's credibility findings) are "presumptively correct" and also "enjoy support in the record." *See Ryan*, 387 F.3d at 790. Nothing in Evans's petition or the state-court records suggests that the Court of Appeals' ruling was "based on an unreasonable determination of the facts," including the motion court and Court of Appeals' determination that Cook would not have testified at trial. *See* § 2254(d)(2).

In his habeas petition, Evans also argues that his trial counsel was ineffective for failing to investigate whether "Cook had made any out-of-court statements about what had happened the night of the murder that could be favorable for the Defense." Doc. 5 at p. 21. He elaborates further in his Traverse, claiming that his trial counsel was unaware of a recorded interview with Cook that the State disclosed before trial. Doc. 12 at pp. 13–14. The Missouri Court of Appeals specifically addressed this argument, agreeing with the motion court that Evans waived the claim because he did not allege it in his amended Rule 29.15 motion. Doc. 11-12 at p. 10; *see also* Doc. 11-8 at pp. 133-34 (noting that "[a]t the evidentiary hearing, [Evans] raised for the first time many other allegations of ineffective assistance of counsel, including . . . the failure to offer into evidence Mr. Cook's recorded interview with police" and that "none of these issues were raised in [Evans]'s amended motion"). The court further observed that in Missouri, "[c]laims not raised in a Rule 29.15 motion are waived on appeal," and that "[a] movant cannot remedy pleading defects by refining or expanding a claim or presenting new evidence on appeal." *Id.* at p. 9 (citing *Dorsey v. State*, 448 S.W.3d 276, 284 (Mo. 2014)).

According to the Supreme Court, "[f]ederal habeas courts reviewing the constitutionality of a state prisoner's conviction and sentence are guided by rules designed to ensure that state-

court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism." *Martinez v. Ryan*, 566 U.S. 1, 9 (2012). For this reason, federal habeas courts "will not review a claim rejected by a state court if the decision of the state court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Walker v. Martin*, 562 U.S. 307, 314 (2011). "[T]he state-law ground may be a substantive rule dispositive of the case, or a procedural barrier to adjudication of the claim on the merits." *Id.* at 315. The adequacy of a state procedural rule is a question of federal law, *Lee v. Kemna*, 534 U.S. 362, 375 (2002), and "[t]o qualify as an 'adequate' procedural ground, a state rule must be 'firmly established and regularly followed.'" *Walker*, 562 U.S. at 316 (citing *Beard v. Kindler*, 558 U.S. 53, 60–61 (2009)).

Here, Missouri Supreme Court Rule 29.15 states in relevant part:

> The motion to vacate shall include every claim known to the movant for vacating, setting aside, or correcting the judgment or sentence. The movant shall declare in the motion that the movant has listed all claims for relief known to the movant and acknowledging the movant's understanding that the movant waives any claim for relief known to the movant that is not listed in the motion.

Mo. Sup. Ct. R. 29.15. Missouri courts have repeatedly held that any claim not raised in a Rule 29.15 motion is waived. *See, e.g.*, *Shockley v. State*, 579 S.W.3d 881, 899 (Mo. 2019), *reh'g denied* (Sept. 3, 2019); *McNeal v. State*, 500 S.W.3d 841, 845 n.3 (Mo. 2016); *Dorsey v. State*, 448 S.W.3d 276, 284 (Mo. 2014); *Barton v. State*, 432 S.W.3d 741, 756 (Mo. 2014); *Mallow v. State*, 439 S.W.3d 764, 769 (Mo. 2014); *McLaughlin v. State*, 378 S.W.3d 328, 340 (Mo. 2012); *Johnson v. State*, 333 S.W.3d 459, 471 (Mo. 2011); *State v. Clay*, 975 S.W.2d 121, 141 (Mo. 1998), *as modified on denial of reh'g* (Sept. 22, 1998); *Shaw v. State*, No. WD 83935, 2021 WL 5570375, at *4 (Mo. Ct. App. Nov. 30, 2021); *Cooper v. State*, 621 S.W.3d 624, 630 (Mo. Ct. App. 2021), transfer denied (June 1, 2021); *Hogan v. State*, 631 S.W.3d 564, 576 (Mo. Ct. App.

2021); *Polk v. State*, 605 S.W.3d 427, 433 (Mo. Ct. App. 2020); *Hill v. State*, 532 S.W.3d 744, 750 (Mo. Ct. App. 2017); *Haddock v. State*, 425 S.W.3d 186, 191 (Mo. Ct. App. 2014); *Wright v. State*, 453 S.W.3d 234, 238 (Mo. Ct. App. 2014); *Pines v. State*, 778 S.W.2d 724, 725 (Mo. Ct. App. 1989); *see also Francis v. Miller*, 557 F.3d 894, 899 (8th Cir. 2009) (stating that Rule 29.15 is a "firmly established and regularly followed" state procedural rule that provides "well-established procedures that movants are required to follow in order to have their claims considered post-trial").

As the Eighth Circuit held in *Francis*, where "[t]he Missouri Court of Appeals refused to address the merits of [the petitioner]'s failure-to-investigate claim because she did not include it in her post-conviction motion filed under [Rule] 29.15," here "[t]here is no avoiding a conclusion that the Missouri Court of Appeals relied on a 'firmly established and regularly followed' state procedural rule" in rejecting Evans's failure-to-investigate claim. *Francis*, 557 F.3d at 899.

However, the Court may still review the defaulted claim if Evans can show "cause for the default and actual prejudice as a result of the alleged violation of federal law." *Harris v. Wallace*, 984 F.3d 641, 648 (8th Cir. 2021) (citing *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)). In *Coleman*, the Supreme Court established that "'ineffective assistance of counsel *during state post-conviction proceedings* cannot serve as cause to excuse factual or procedural default.'" *Id.* (emphasis added) (citing *Wooten v. Norris*, 578 F.3d 767, 778 (8th Cir. 2009)). However, in *Martinez* the Supreme Court created a "narrow exception" to *Coleman* where:

> (1) the claim of ineffective assistance of trial counsel was a "substantial" claim; (2) the "cause" consisted of there being "no counsel" or only "ineffective" counsel during the state collateral review proceeding; and (3) the state collateral review proceeding was the "initial" review proceeding with respect to the "ineffective-assistance-of-trial-counsel claim."

Harris, 984 F.3d at 648 (citing *Kemp v. Kelley*, 924 F.3d 489, 499 (8th Cir. 2019), *cert. denied sub nom. Kemp v. Payne*, 140 S. Ct. 2770 (2020); *Martinez*, 566 U.S. at 14); *see also Franklin v. Hawley*, 879 F.3d 307, 313 (8th Cir. 2018) (citing *Martinez*, 566 U.S. at 10) (holding that "it is clear that the *Martinez* exception applies only if the procedural default occurs during the *initial-review* of the ineffective assistance claim" rather than during appeals from initial-review collateral proceedings).

Here, Evans does not even raise a shadow of a *Martinez* claim. Instead, he merely repeats the defaulted ineffective-assistance-of-trial-counsel argument he made to the Missouri Court of Appeals. Even construing his petition liberally, Evans "has not even attempted to show cause for his default"; therefore, the Court does not address the *Martinez* issue. *See Prince v. Lockhart*, 971 F.2d 118, 122 (8th Cir. 1992) (reversing the district court's grant of habeas corpus where "the district court should not have addressed" the procedural default issue because the petitioner "ha[d] not even attempted to show cause for his default"); *see also Bracken v. Dormire*, 247 F.3d 699, 703 (8th Cir. 2001) (stating that "district courts must be as mindful as the appellate courts to adjudicate on the merits only those claims that the prisoner properly raises and to avoid those issues that have not been properly raised"); *Jones v. Jerrison*, 20 F.3d 849, 856 (8th Cir. 1994) (finding that, "[d]espite ample opportunity to do so, [the petitioner] did not make [cause and prejudice] allegations in the district court, the proper place to plead and prove exceptions to procedural default").

Accordingly, the Court denies the third ground in Evans's petition for habeas relief.

IV. Certificate of Appealability

The Court finds that Evans has not made a substantial showing of the denial of a constitutional right, as is required before a certificate of appealability can issue. 28 U.S.C.

§ 2253(c); *see also Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997) (explaining that a "substantial showing" is a showing the "issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings"). Therefore, the Court does not issue a certificate of appealability as to any claims raised in Evans's § 2254 petition.

V. Conclusion

The Court denies Petitioner Glen Evans's amended petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus by a Person in State Custody. Doc. 5. The Court dismisses Evans's [5] amended petition with prejudice. The Court does not issue a certificate of appealability.

So Ordered this 28th day of December 2021.

SLR. CL

STEPHEN R. CLARK
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

COPY

GLEN S. EVANS,	)	
PETITIONER,	)	
	)	
VS.	)	CASE NO. 4:20-CV-00097-SRC
	)	
BILL STANGE,	)	
RESPONDENT.	)	

PETITIONER'S TRAVERS TO THE STATE'S RESPONSE

COMES NOW, Petitioner, Glen S. Evans, pro se, and in forma pauperis, and in reply to the Attorney General's opposition to his Petition For a Writ of Habeas Corpus, hereby states the following:

STANDARD FOR GRANTING RELIEF

"In the habeas setting, a federal court is bound by the AEDPA [Antiterrorism and Effective Death Penalty Act] to exercise only limited and deferential review of underlying state court decisions." Lomholt v. Iowa, 327 F.3d 748, 751 (8th Cir. 2003). Under this standard, a federal court may not grant habeas relief to a state prisoner unless the state

court's adjudication of a claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1); or "was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding," 28 U.S.C. § 2254(d)(2). Williams v. Taylor, 529 U.S. 362, 379, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). The federal law must be clearly established at the time the petitioner's state conviction became final, and the source of doctrine for such law is limited to the United States Supreme Court. Williams, 529 U.S. at 380-83; Jones v. Norman, 633 F.3d 661, 666 (8th Cir. 2011).

A state court's decision is "contrary to" clearly established Supreme Court precedent when it is opposite to the court's conclusion on a question of law, or different than the court's conclusion on a set of materially indistinguishable facts. Williams, 529 U.S. at 412-13; Carter v. Kemna, 255 F.3d 589, 591 (8th Cir. 2001). A state court's decision is an "unreasonable application" of Supreme Court precedent if it "identifies the correct governing legal principle from [the Supreme Court's] decisions, but unreasonably applies that principle to the facts of the prisoner's case." Williams, 529 U.S. at 413. Merely erroneous or incorrect application of clearly established federal law does not suffice to support a grant of habeas relief. Instead, the state court's application

of such law must be objectively unreasonable. Id. at 409-411; Jackson v. Norris, 651 F.3d 923, 925 (8th Cir. 2011).

Finally, when reviewing whether a state court decision involves an "unreasonable determination of the facts" in light of the evidence presented in the state court proceedings, this Court must presume that state court findings of basic, primary, or historical facts are correct unless the petitioner rebuts the presumption with clear and convincing evidence. 28 U.S.C. § 2254(e)(1); Rice v. Collins, 546 U.S. 333, 338-39, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006); Collier v. Norris, 485 F.3d 415, 423 (8th Cir. 2007). However, erroneous findings of fact do not ipso facto ensure that grant of habeas relief. Instead, the determination of such facts must be unreasonable in light of the evidence of record. Collier, 485 F.3d at 423; Weaver v. Bowersox, 241 F.3d 1024, 1030 (8th Cir. 2001).

MERITS OF GROUNDS FOR RELIEF

GROUND ONE

THE TRIAL COURT ERRED IN OVERRULING PETITIONER, GLEN EVANS' MOTION TO SUPPRESS HIS STATEMENTS TO POLICE, AND IN ADMITTING THAT EVIDENCE AT TRIAL OVER COUNSEL'S OBJECTION. BY THEIR OWN ADMISSION, OFFICERS DID NOT STOP EVANS ON REASONABLE SUSPICION OR PROBABLE CAUSE THAT HE HAD COMMITTED A CRIME, AND THUS, EVANS' STATEMENTS UNDER INTERROGATION WERE BOTH THE "FRUIT OF THE POISONOUS TREE" AND THE ONLY EVIDENCE SUPPORTING A FINDING OF SECOND DEGREE MURDER, SO THAT PETITIONER WAS PREJUDICED AND A MANIFEST INJUSTICE RESULTED THEREFROM.

In this case, the State claims that Petitioner, Glen Evans' (Evans) association with Matthew Cook (Cook) four days after the offense, along with his flight when the authorities visited his home, gave them reasonable suspicion to chase him down. At the outset, it is notable that the authorities did not subjectively believe that Evans was implicated in the offense, but only considered him a witness. Specifically, Trooper Steve Jarrell testified he came to speak with Evans after learning that Evans was a "potential witness" (Tr.11, 16). Therefore, Jarrell had no authority to stop Evans at the time he chased Evans down and apprehended him. The apprehension was a violation of Evans' Fourth Amendment constitutional right.

While the test for reasonable suspicion is an objective one, and thus, the authorities' subjective beliefs are not conclusive, their lack of suspicion at the point when Evans was stopped, strongly suggests a corresponding lack of objective justification. In view of what the authorities knew at the time, this was objectively as well as subjectively reasonable.

Evans was not the only person with Cook when Cook was arrested four days after the murder; one other person was present who had no involvement whatsoever (Tr.11). The authorities had no more on Evans at the time than they had on the other person present during Cook's arrest. Evans was with Cook and one other person far away from the scene of the offense four days later. That is all authorities knew of his involvement. Then Evans fled from them. The State failed to show a sufficient connection between the offense and the stop. Furthermore, at the time of the stop, all the authorities believed was that Evans might know something about Cook, but not that Evans was in any way involved.

It has been held that the exercise of certain facts do, in and of themselves, give rise to reasonable suspicion. These include when "(1) the person stopped is present at or close to the scene of the reported disturbance soon after dispatch, and (2) that person's behavior indicates a determination to avoid any encounter with the responding officers." State v. Hernandez, 954 S.W.2d 639, 643 (Mo.App.W.D.1997). While each

case must be taken on its individual facts, this suggests, contrary to the State's contention, that flight alone does not justify detention, even if flight is "the consumate act of evasion."

The normal rule is that "all evidence obtained by searches and seizures in violation of the Constitution is inadmissible in state court." Mapp v. Ohio, 367 U.S. 643, 655, 81 S.Ct. 1648, 6 L.Ed.2d 1081, 86 Ohio Law Abs. 513 (1961). Application of this exclusionary rule extends beyond the direct product of a constitutional illegality. It also requires exclusion of the "fruit of the poisonous tree," that is, "evidence discovered and later found to be derivative of a Fourth Amendment violation." State v. Miller, 894 S.W.2d 649, 654 (Mo.banc 1995). The fruit of the poisonous tree doctrine holds that evidence obtained as a result of an illegal seizure should be suppressed. Id. at 656-57; Wong Sun v. United States, 371 U.S. 471 (1963). The issuance of **Miranda** warnings did not remove the taint from a statement obtained through exploitation of the illegal arrest. Brown v. Illinois, 422 U.S. 590 (1975).

The authorities lacked reasonable suspicion to stop Evans, and therefore, the stop was unlawful. The error in admitting the evidence based upon that unlawful stop was plain, and since the State relied substantially on Evans' statement, its admission was a manifest injustice. Therefore, Petitioner's conviction should be reversed.

GROUND TWO

THE TRIAL COURT ERRED IN OVERRULING PETITIONER, GLEN EVANS' MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE EVIDENCE AND IN PRONOUNCING JUDGMENT AND SENTENCE AGAINST HIM FOR SECOND DEGREE MURDER UPON THE JURY'S VERDICT, IN THAT, THERE WAS INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THE ESSENTIAL ELEMENT OF THE CRIME, THAT EVANS HAD THE PURPOSE OF PROMOTING SECOND DEGREE MURDER, AS THERE WAS NO EVIDENCE THAT EVANS BELIEVED THAT MATTHEW COOK INTENDED TO KILL SEAN CROW, NOR THAT IT WAS A LIKELY RESULT OF DRIVING COOK TO ADVANCE, MISSOURI.

In this case, Petitioner, Glen Evans (Evans) was found guilty of murder in the second degree, under accomplice-liability. It is uncontested that Evans' alleged accomplice, Matthew Cook (Cook) shot and killed the victim, Sean Crow on February 19, 2013. In order for Evans to be convicted as an accomplice to second degree murder, the State has the burden to prove beyond a reasonable doubt, that Eavns knew or was aware that Cook's conduct was causing or practically certain to cause death of the victim, Sean Crow, and if with the purpose of promoting or furthering the commission of murder in the second degree, Evans acted with or aided Cook in committing that offense. See §§ 562.041.1 and 565.021 R.S.Mo.

Evans told authorities that he thought there might be a "pistol-whipping" or "fight," but did not anticipate that Cook would actually kill Sean Crow (St.Ex. 8, III, 19:20). There was no evidence that Evans drove to Advance, Missouri with the intent to promote a murder. Furthermore, the evidence, consisting of surveillance videos, Evans' friends' testimony, and Evans' statement to the authorities, was insufficient to prove beyond a reasonable doubt that Evans took Cook to Advance, Missouri with the intent to facilitate the murder of Sean Crow.

The State was required to prove that Evans could have reasonably anticipated that Cook would kill Sean Crow. However, there was no such evidence presented by the State to suggest that Evans had any knowledge whatsoever about Cook's intentions. To confirm this fact, Cook testified that he did not formulate his intent until after he had exited the vehicle that Evans was driving (Evid.Tr.23-27). Cook further testified that Evans had no knowledge of who he was planning to meet (Evid.Tr.14-15, 28-29). Finally, Cook testified that after the shooting, he did tell Evans that he had shot someone, but he did not tell Evans the identity of the victim (Evid.Tr.14-16).

Cook's testimony at the evidentiary hearing was consistent with his statements made to police during the recorded interview, as they exonerated Evans and implicated Cook (himself) as acting alone in the murder of Sean Crow.

The State's evidence did not reflect facts nor admissions needed to establish Evans' guilt of murder in the second degree, by acting with another. To be found guilty of murder in the second degree under Section 565.021, the State would have to show at trial first, that Matthew Cook caused the death of the victim, and either:

(1) that Mr. Cook was aware that his conduct was causing or was practically certain to cause the death of Sean Crow, or

(2) that it was Mr. Cook's purpose to cause the death of Sean Crow, or

(3) that it was Mr. Cook's purpose to cause serious physical injury to Sean Crow.

MAI-CR3d 314.04.

Evans was charged with acting with Cook in committing this offense. Section 562.041. Accordingly, to be guilty of murder in the second degree, in addition to the elements of that crime, in which Cook committed, the State would need to show that Evans aided or encouraged Cook with the purpose of committing the charged crime, and acted with the purpose of promoting or furthering Cook's actions in committing the crime of murder in the second degree. Section 562.041;

MAI-CR3d 314.04

As a matter of due process, the State is required to adduce affirmative evidence to support every element of the

charge. In re Winship, 397 U.S. 358, 364 (1970). Here, however, the State failed to adduce any such affirmative evidence to support the elements of murder in the second degree under accomplice-liability. Section 562.041. Furthermore, there was no such evidence presented by the State to suggest that Evans aided or encouraged Cook in committing the offense. To hold one liable for the acts of another, that individual must have acted with or aided before or during the crime with the purpose of promoting that offense. See § 562.041.1(2).

The legal and logical issues in Douglas v. State, 410 S.W.3d 290 (Mo.App.E.D.2013) are very similar to the issues in this case. In Douglas the court found that this evidence did not give rise to accomplice liability, for the defendant did not admit that he drove the vehicle "knowing that the purpose of driving the vehicle was for Smith to commit the crime." Id. at 298. Here, likewise, Evans did not admit that he knew a murder was contemplated, and there is no evidence suggestive of any such knowledge.

The parties agree on the legal standard. Where second degree murder is involved, "[w]hen a defendant has embarked on a course of criminal conduct with others, he is responsible for those crimes which he could reasonably anticipate would be part of that conduct." State v. Robinson, 196 S.W.3d 567, 570 (Mo. App.S.D.2006). Here, the question is whether the State proved

that Evans could have reasonably anticipated that Cook would kill Sean Crow when Evans drove Cook to Advance, Missouri. The mere fact that Evans may have driven Cook and anticipated some level of violence is not sufficient.

The trial court erred in overruling Petitioner's motion for judgment of acquittal at the close of the evidence and in pronouncing judgment and sentence against him for second degree murder upon the jury's verdict, in that, the State presented insufficient evidence to prove beyond a reasonable doubt the essential element of the crime, that Evans had the purpose of promoting second degree murder, as there was no evidence that Evans believed that Matthew Cook intended to kill Sean Crow, nor that it was a likely result of driving Cook to Advance, Missouri. The trial court's error was plain, and therefore, Petitioner's conviction should be reversed.

GROUND THREE

TRIAL COUNSEL WAS INEFFECTIVE BY FAILING TO INVESTIGATE, AND FAILING TO CALL A FAVORABLE WITNESS TO TESTIFY, IN THAT, PETITIONER, GLEN EVANS' CODEFENDANT, MATTHEW COOK HAD MADE STATEMENTS DURING A POLICE INTERVIEW THAT EXONERATED EVANS OF ANY KNOWLEDGE AND/OR FAULT. COUNSEL'S COMPLETE OMISSION TO INVESTIGATE AND ATTEMPT TO INTRODUCE THIS VITAL EVIDENCE SO UNDERMINED THE PROPER FUNCTIONING OF THE ADVERSARIAL PROCESS THAT THE TRIAL CANNOT BE RELIED ON AS HAVING PRODUCED A JUST RESULT, AND WAS PREJUDICIAL TO PETITIONER.

In this case, the motion court's conclusions regarding the testimony of Matthew Cook (Cook) are unsupported by the record. Cook did not state in his testimony that he would not have testified as a witness on behalf of Petitioner, Glen Evans (Evans). Rather, he testified that he would have testified unless he was facing the death penalty (Evid.Tr.28-29). Following Evans' trial, Cook did in fact secure a plea bargain, plead guilty, and avoided the death penalty. Thus, had trial counsel attempted to speak with Cook, counsel could have determined both, his probable testimony, and the limited circumstances in which Cook would have been willing to testify.

Respondent argued two additional points: (1) that Cook's testimony, had he testified, would not have refuted Evans' statements to the police, and (2) that Cook's recorded

interview and statement to the police would not have been admissible because it is hearsay testimony and would not apply as an exception to the hearsay rule.

Respondent's first point requires an unassailable conclusion that in all instances, a person who overheard another state that he or she intended to kill some unknown person would believe that person was speaking literally. Respondent ignores the overt logical incongruity inherent in that contention; that the assertion of Cook that he had not yet formulated the intent to kill the victim during the time period in which he was texting with the victim countermanded any conclusion that the comment was taken seriously. Cook's statement that he had not yet formulated the intent to kill the victim, if believed by the jury, would have directly refuted any possibility that Evans had a genuine belief that Cook was going to shoot the victim. This testimony provided absolute support for Evans' claim that he did not believe Cook was actually going to commit murder that evening.

Respondent's second point that Cook's recorded interview and statement to the police would not have been admissible is irrelevant, because Evans has established that there were limited circumstances in which Cook would have testified. The simple fact that trial counsel failed to investigate and discover the audio recording, and failed to determine if Cook would testify on behalf of Evans and repeat the claims he made

in his interview with police constitutes ineffective assistance. Counsel never even attempted to speak with Cook or Cook's counsel, to interview Cook to determine whether Cook would be willing to testify for Evans at his criminal trial (Evid.Tr.57). Counsel claimed that he did not attempt to interview or depose Cook (Id.). See Towns v. Smith, 395 F.3d 251, 259 (6th Cir. 2005)(ineffective assistance where counsel "made absolutely no attempt" to communicate with crucial witness that would have testified that defendant did not commit crime). Here, furthermore, counsel admitted he was unaware of the recorded statement and was unaware this evidence had been disclosed by the State (Evid.Tr.57-58).

Respondent's argument also overlooks the fact that counsel was unaware of the existence of this recording and could have found other ways to introduce portions of this evidence to the jury, other than the actual admission of the recording. For example, counsel could have examined the officers who interviewed Cook to confirm that Cook stated Evans had no knowledge of his intent to shoot the victim. "The sources of information used to cross-examine a witness can be hearsay and need not themselves be admissible in evidence." State v. Brooks, 960 S.W.2d 479, 493 (Mo. 1997); see also State v. Dewey, 86 S.W.3d 434, 439-441 (Mo.App.W.D.2002).

In this case, counsel simply failed to investigate, interview, depose, or make any such attempts, and failed to

ascertain the probable circumstances in which Cook would have testified favorably as a result. This was not the result of any trial strategy. Rather, this was simply counsel's failure to make a minimum effort to determine if Cook would have been a viable witness. Grooms v. Solem, 923 F.2d 88, 90 (8th Cir. 1991)("it is unreasonable not to make some effort to contact [alibi witnesses] to ascertain whether their testimony would aid the defense").

In this case, the complete omission on the part of counsel to attempt to introduce this vital evidence "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 687-88 (1984). Here, therefore, Petitioner's conviction should be reversed.

CONCLUSION

WHEREFORE, based on the facts presented herein, the Missouri Court of Appeals clearly overlooked material matters of fact and law, and its decision was based on an unreasonable determination of the facts in light of the evidence presented in the state-court proceedings, and its decision involved an unreasonable application of clearly established law as determined by the Supreme Court of the United States. Therefore, Petitioner respectfully moves this Honorable Court to issue a writ of habeas corpus, reverse his conviction, vacate his sentence, and order that Petitioner be afforded a new and fair trial, or be released from custody.

Respectfully submitted,

/s/ Glen S. Evans

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PETITIONER, PRO SE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A TRUE AND CORRECT COPY OF THE FOREGOING WAS MAILED POSTAGE PAID, THIS 1st DAY OF May, 2020 TO:

CLERK OF THE COURT
UNITED STATES DISTRICT COURT
111 S. 10TH STREET, SUITE 3.300
ST. LOUIS, MO 63102

PETITIONER PROCEEDS PRO SE, AND IN FORMA PAUPERIS, AND REQUESTS OF THE COURT CLERK TO FORWARD A COPY OF THIS DOCUMENT TO THE OFFICE OF THE ATTORNEY GENERAL

/s/ Glen S. Evans
Petitioner, pro se