21-13337

Kelvin Wrenn
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Appendix A

Decision of The U.S. Court of Appeals Here

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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February 10, 2022

Clerk - Northern District of Alabama
U.S. District Court
Hugo L. Black United States Courthouse
1729 5TH AVE N
BIRMINGHAM, AL 35203

Appeal Number: 21-13337-E
Case Style: Kelvin Wrenn v. D. Toney, et al.
District Court Docket No: 7:18-cv-01563-RDP-SGC

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Any pending motions are now rendered moot in light of the attached order.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Gloria M. Powell, E
Phone #: (404) 335-6184

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-13337-E

KELVIN WRENN,

Petitioner-Appellant,

versus

D. TONEY,
ATTORNEY GENERAL OF THE STATE OF ALABAMA,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

ORDER:

Kelvin Wrenn, an Alabama prisoner serving a 60-year term of imprisonment for murder and conspiracy to commit murder, seeks a certificate of appealability ("COA") to appeal the denial of his 28 U.S.C. § 2254 habeas corpus petition, raising 9 claims for relief. He also moves for leave to proceed *in forma pauperis* ("IFP") and for judicial notice.

Mr. Wrenn's nine claims were as follows: (1) he was actually innocent; (2) his trial counsel was ineffective for failing to assert his innocence at trial, and appellate counsel was ineffective for failing to raise this issue on direct appeal; (3) his codefendant's statement was introduced into evidence at trial, in violation of the Confrontation Clause; (4) his trial counsel was ineffective by failing to compel his codefendant's attendance, and appellate counsel was ineffective for failing to raise this issue on direct appeal; (5) he was denied the right to have compulsory process to obtain

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his codefendant as a witness; (6) his trial counsel was ineffective by failing to obtain compulsory process for his codefendant; (7) his appellate counsel was ineffective by failing to raise trial counsel's ineffective assistance from Claim 6; (8) the trial court violated double jeopardy principles; and (9) his trial counsel was ineffective for failing to raise a double jeopardy issue.

To obtain a COA, Mr. Wrenn must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). If the district court denied a claim on the merits, he must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotation marks omitted). Where the district court denied a claim on procedural grounds, he must show that reasonable jurists would debate (1) whether the motion states a valid claim alleging the denial of a constitutional right, and (2) whether the district court's procedural ruling was correct. *Id.*

Here, reasonable jurists would not debate the district court's conclusion that Claims 1, 2, and 4-9 were procedurally barred because Mr. Wrenn failed to exhaust the claims, as he did not appeal the denial of his Alabama Rule of Criminal Procedure 32 petition. *See id.*; *see also Pruitt v. Jones*, 348 F.3d 1355, 1359 (11th Cir. 2003) (noting that Alabama state prisoners must seek an appeal to the Alabama Court of Criminal Appeals and a petition for discretionary review in the Alabama Supreme Court). Further, Mr. Wrenn's failure to exhaust matured into a procedural default because he did not petition for an out-of-time appeal within six months of learning that his Rule 32 petition had been denied. *See* Ala. R. Crim. P. 32.1(f), 32.2(c); *Ex parte Stephens*, 907 So.2d 1094, 1096 (Ala. Crim. App. 2005) (explaining that the proper method of seeking an out-of-time appeal from the denial of a Rule 32 petition is through the filing of a successive Rule 32 petition within six months of discovering the denial). Additionally, Mr. Wrenn did not sufficiently

establish cause for the default and prejudice or a fundamental miscarriage of justice as to any of these claims that would excuse the default. *McKay v. United States*, 657 F.3d 1190, 1196 (11th Cir. 2011).

Reasonable jurists also would not debate whether the district court erred by denying Claim 3 because the state court's conclusion that any Confrontation Clause violation was harmless was not contrary to, or an unreasonable application of, clearly established federal law, and was not based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d)(1), (2); *Slack*, 529 U.S. at 484. Mr. Wrenn did not show that the violation had a "substantial and injurious effect or influence" on the verdict, when the other evidence at trial established his involvement in the planning, preparation, execution, and cover-up of the crime, and when he ultimately was convicted of a lesser-included offense. *See Mason v. Allen*, 605 F.3d 1114, 1123 (11th Cir. 2010); *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

Mr. Wrenn's motions for COA are DENIED. His motions for IFP and judicial notice are DENIED AS MOOT.

/s/ Jill Pryor
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

KELVIN WRENN,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 7:18-cv-01563-RDP-SGC**
	)	
WARDEN T. TONEY, *et al.*,	)	
	)	
Respondents.	)	

MEMORANDUM OPINION

The Magistrate Judge filed a Report and Recommendation on August 24, 2021, recommending Petitioner Kelvin Wrenn's 28 U.S.C. § 2254 petition for *habeas corpus* relief be denied as procedurally defaulted and/or meritless. (Doc. 24). Wrenn filed objections to the Report and Recommendation on September 2, 2021. (Doc. 27).

Wrenn disagrees with the Magistrate Judge's recommendation that all but one of his habeas claims are procedurally defaulted because he could have, but did not, file a petition pursuant to Rule 32.1(f) of the *Alabama Rules of Criminal Procedure* to seek an out-of-time appeal from the denial of his Rule 32 petition. (Doc. 24 at 2, 7). Wrenn argues that the court should decide the issue in his favor based solely on his contention that he timely deposited a notice of appeal from the denial of his Rule 32 petition in the prison's internal mailing system. (Doc. 27 at 1-6). Wrenn's argument misses the mark.

Alabama has adopted a "prison mailbox rule" similar to that announced by the United States Supreme Court in *Houston v. Lack*, 487 U.S. 266, 275-76 (1988). *Lawson v. Thomas*, 2015 WL 9703422, at *2 n.1 (N.D. Ala. Dec. 17, 2015), *report and recommendation adopted*, 2016 WL 146231 (N.D. Ala. Jan. 13, 2016). Under *Houston*, "a *pro se* prisoner's federal habeas petition is

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deemed filed on the date it is delivered to prison authorities for mailing, which, absent evidence to the contrary, is presumed to be the date executed." *Id.*

The State of Alabama's acceptance of the mailbox rule--and the procedure it has developed to resolve a dispute as to whether a *pro se* Alabama petitioner did, in fact, utilize the prison mailbox rule to timely perfect his appeal--are separate matters. The proper procedure to litigate a mailbox rule dispute is found in Alabama Rule of Criminal Procedure 32.1(f), which allows a petitioner to obtain an out-of-time appeal if he has failed—through no fault of his own—to appeal the denial of a prior Rule 32 petition. *See Ex Parte Stephens*, 907 So. 2d 1094, 1096 (Ala. Crim. App. 2005); *Poole v. State*, 988 So. 2d 604, 605-07 (Ala. Crim. App. 2007). A petitioner seeking an out-of-time appeal must file a Rule 32.1(f) petition within six months after discovering the denial or dismissal of a Rule 32 petition. Ala. R. Crim. P. 32.2(c). Wrenn admittedly discovered the denial of his Rule 32 petition in time to pursue a Rule 32.1(f) petition for an out-of-time appeal. (Doc. 3 at 3). He did not file the appeal and cannot now do so. Nor does Wrenn's purported ignorance or mistaken interpretation of Alabama procedural rules does not supply the requisite cause to overcome the procedural of his unexhausted claims. Accordingly, this objection is **OVERRULED**.

With regard to the final claim addressed by the Magistrate Judge, Wrenn asserts that the admission of his co-defendant's facially incriminating testimonial statement violated the Confrontation Clause. (Doc. 27 at 6). However, the Report and Recommendation assumes the existence of a constitutional violation based on these facts. (Doc. 24 at 16). Wrenn has not presented any articulable objections to the Magistrate Judge's conclusion that the violation was harmless error under the facts of his case. (Doc. 24 at 13, 16-23). Accordingly, this objection also is **OVERRULED**.

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Having carefully reviewed and considered *de novo* all the materials in the court file, including the Report and Recommendation, and the objections thereto, the court **ADOPTS** the Magistrate Judge's Report and **ACCEPTS** her Recommendation. Accordingly, Wrenn's claims for *habeas corpus* relief pursuant to 28 U.S.C. § 2254 are due to be denied and this action dismissed with prejudice. A certificate of appealability is also due to be denied. A separate final judgment in accordance with this Memorandum Opinion will be entered.

DONE and **ORDERED** this September 16, 2021.

R. DAVID PROCTOR
UNITED STATES DISTRICT JUDGE

Appendix A

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

KELVIN WRENN,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 7:18-cv-01563-RDP-SGC**
	)	
WARDEN T. TONEY, *et al.*,	)	
	)	
Respondents.	)	

FINAL JUDGMENT

In accordance with the Memorandum Opinion entered contemporaneously herewith accepting and adopting the Magistrate Judge's Report and Recommendation, and with Rule 58 of the Federal Rules of Civil Procedure, the court **ORDERS** that Petitioner's claims in this action brought pursuant to 28 U.S.C. § 2254 are **DENIED** and the action is **DISMISSED WITH PREJUDICE**.

A certificate of appealability is **DENIED**. Petitioner is **ADVISED** that he may file a request for certificate of appealability and application to proceed *in forma pauperis* on appeal directly with the Court of Appeals for the Eleventh Circuit.

DONE and **ORDERED** this September 16, 2021.

R. DAVID PROCTOR
UNITED STATES DISTRICT JUDGE

Appendix A

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

KELVIN WRENN,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 7:18-cv-01563-RDP-SGC
	)	
WARDEN D. TONEY, *et al.*,	)	
	)	
Respondents.	)	

REPORT AND RECOMMENDATION

The petitioner, Kelvin Wrenn, a person in custody under a judgment of a court of Alabama, commenced this action by filing a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Doc. 1).[1] Wrenn challenges his 2015 convictions for murder and conspiracy to commit murder. (*Id.*). In accordance with the usual practices of this court and 28 U.S.C. § 636(b), the petition was referred to the undersigned magistrate judge for preliminary review. As discussed below, the undersigned concludes Wrenn's claims are procedurally defaulted and/or meritless.

I. BACKGROUND

In September 2012, Wrenn was indicted in Sumter County on two counts related to the killing of Detrick Bell—capital murder and conspiracy to commit

[1] Citations to the record refer to the document and page numbers assigned by the court's CM/ECF electronic document system and appear in the following format: (Doc. __ at __).

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murder. (Doc. 9-2). Both counts relied on the theory that Wrenn offered Sherman Collins money to kill Bell. (Doc. 9-2). On May 22, 2015, a jury convicted Wrenn of murder—a lesser included offense of capital murder—and conspiracy to commit murder. (Docs. 9-5, 9-6). On June 22, 2015, Wrenn was sentenced to 40 years imprisonment. (Doc. 9-7).

On direct appeal, Wrenn raised one issue: "Did the trial court err in admitting the partial statement of the co-defendant which was both hearsay and testimonial and not admissible under any exception?" (Doc. 9-10 at 6). On July 1, 2016, the Alabama Court of Criminal Appeals affirmed Wrenn's conviction by memorandum opinion. (Doc. 9-13). Wrenn's application for rehearing was overruled, and he sought further review in a petition for writ of certiorari in the Alabama Supreme Court. (Docs. 9-15, 9-16). On November 10, 2016, the Alabama Supreme Court denied the writ, and a certificate of judgment issued. (Docs. 9-17, 9-18).

On February 7, 2017, Wrenn filed a *pro se* petition for relief from conviction or sentence pursuant to Rule 32 of the *Alabama Rules of Criminal Procedure* (the "Rule 32 Petition"). (Doc. 9-19). The Rule 32 Petition asserted nine claims, including a version of the claim he exhausted on direct appeal. (Doc. 9-19 at 7-14). The sentencing court denied the Rule 32 Petition on March 23, 2018. (*See* Doc. 3 at 3). Wrenn did not receive notice of the denial of the Rule 32 Petition until April 5, 2018. (Doc. 3 at 3; Doc. 12 at 8). Wrenn alleges he filed objections to the dismissal

of the Rule 32 Petition on April 5, 2018, followed by a notice of appeal on April 13, 2018. (Doc. 12 at 8-9; Doc. 3 at 3). Wrenn contends he filed both of these documents by placing them in the prison legal mail system. (Doc. 3 at 3; Doc. 12 at 8-9). Wrenn has not produced copies of these documents, and the state court record does not reflect their filing. (*See* Docs. 9-1, 9-20).

On May 8, 2018, Wrenn submitted a second notice of appeal, addressed to the Clerk for the Alabama Court of Criminal Appeals. (Doc. 12 at 9, 12). In this submission, Wrenn noted the sentencing court had not taken any action on his first notice of appeal. (Doc. 12 at 9, 12). On May 18, 2018, the Clerk for the Court of Criminal Appeals sent a letter notifying Wrenn the appellate court had not received a notice of appeal and stating: "By copy of this letter, I am requesting the circuit clerk's office to process any notice of appeal that they may have received from you and forward it to this Court." (Doc. 12 at 13).

On June 12, 2018, Wrenn filed a petition for writ of mandamus in the Court of Criminal Appeals, alleging the Clerk of the sentencing court had not processed his notice of appeal, effectively denying him access to the courts. (Doc. 9-24 at 4-5). On July 18, 2018, the Court of Criminal Appeals transferred the mandamus petition to the sentencing court for consideration by the presiding judge. (Doc. 9-25) (*quoting* ALA. CODE § 12-17-24 (1975)) (providing a circuit clerk is supervised by the presiding circuit court judge). On August 14, 2018, the Sumter County Circuit

Court Clerk responded by letter, asserting: (1) the Clerk's office never received the April 13, 2018 notice of appeal; and (2) the only correspondence the Clerk's office received regarding Wrenn was sent by the Court of Criminal Appeals. (Doc. 9-28).

On September 18, 2018, Wrenn filed a "Motion to Take Judicial Notice" in the Court of Criminal Appeals; it noted he mailed both notices of appeal to the sentencing court through the prison's institutional mail system. (Doc. 9-26 at 1). Attached to the motion was an inmate request slip indicating the prison mailed correspondence to the Clerk of the sentencing court on April 13, 2018. (Doc. 9-26 at 2).[2] The Court of Criminal Appeals forwarded the motion to the sentencing court. (Doc. 9-27). The sentencing court has not taken further action.

The instant habeas petition—dated as signed on September 19, 2018—asserts the same claims Wrenn presented in his Rule 32 Petition. (Doc. 1 at 8-14). Wrenn concedes he did not appeal the denial of the Rule 32 Petition; he contends the sentencing court's actions prevented him from doing so. (Doc. 1 at 4). After three attempts, the respondents have produced the records necessary to rule on Wrenn's federal habeas claims. (Doc. 21; *see* Docs. 9, 10, 17).[3] Wrenn has responded, and

[2] Wrenn did not ask the prison to verify if he sent any mail on May 8, 2018. (Doc. 9-26 at 2).

[3] In response to the court's initial order to show cause, now-withdrawn counsel for the respondents argued all of Wrenn's claims were procedurally defaulted based on his failure to appeal the denial of his Rule 32 petition. (Doc. 10 at 6-8). After Wrenn responded (Doc. 12), the court termed the respondents' initial answer and exhibits because they failed to: (1) produce documents sufficient to address Wrenn's claims; and (2) thoroughly address several material issues. The court again directed the respondents to show cause why Wrenn's petition should not be granted and to produce

this matter is ripe for adjudication. (*See* Docs. 12, 23).

II. DISCUSSION

As explained below, Wrenn only exhausted one of his federal habeas claims on direct appeal. That claim fails on the merits. The remaining claims in the instant petition are procedurally defaulted. These conclusions are addressed below.

A. Exhaustion and Procedural Default

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal district court may entertain an application for a writ of habeas corpus filed by a person in custody pursuant to the judgment of a state court if his custody violates the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a). However, a state prisoner's failure to first exhaust the remedies available in the state courts of his conviction renders him ineligible for relief under § 2254. *See* 28 U.S.C. § 2254(b)(1)(A); *Kelley v. Sec'y for Dep't of Corr.*, 377 F.3d 1317, 1343-44 (11th Cir. 2004). The exhaustion rule requires the federal courts to allow the states the initial "opportunity to pass upon and correct errors of federal law in the state prisoner's conviction." *Fay v. Noia*, 372 U.S. 391, 438 (1963), *overruled on other grounds by Wainwright v. Sykes*, 433 U.S. 72 (1977).

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records from the state proceedings necessary to determine the issues presented. (Doc. 16 at 4). The respondents filed a response but produced no records. (Doc. 17). On April 1, 2021, the court ordered the respondents to file the transcript on direct appeal. (Doc. 18). On April 14, 2021, new counsel for the respondents complied. (Doc. 21).

A state prisoner generally is ineligible for federal habeas relief unless he has first exhausted the remedies available in the courts of the state of conviction. *See* 28 U.S.C. § 2254(b)(1)(A); *Kelley*, 377 F.3d at 1343-44. A state prisoner must first present any federal constitutional or statutory claim through one complete round of the state's trial and appellate review process, either on direct appeal or in state post-conviction proceedings. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999); *Mauk v. Lanier*, 484 F.3d 1352, 1357 (11th Cir. 2007). In Alabama, this includes presentation to the Alabama Supreme Court. *See Pruitt v. Jones*, 348 F.3d 1355, 1359 (11th Cir. 2003). Where a claim has not been exhausted in the state courts and the time in which to present the claim there has expired, the claim is deemed procedurally defaulted, and review in the federal courts is precluded. *See Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991); *McNair v. Campbell*, 416 F.3d 1291, 1305 (11th Cir. 2005).

Rule 4(a)(1) of the *Alabama Rules of Appellate Procedure* required Wrenn to file a notice of appeal in the sentencing court within 42 days of the March 23, 2018 order denying his Rule 32 petition. "Ordinarily, a notice of appeal is considered filed on the date it is received by the appropriate circuit clerk." *Cook v. Ala. Dep't of Corr.*, 292 So. 3d 1140, 1141 (Ala. Crim. App. 2019). Because he was incarcerated and proceeding *pro se*, Wrenn's appeal was subject to the so-called "prison mailbox rule," under which a pleading is considered filed on the date

deposited in the institution's internal mail system. *Id.* To timely appeal, Wrenn had to deposit a notice of appeal in the prison's mail system by May 4, 2018.

Wrenn contends he deposited a notice of appeal in the prison's legal mail system on April 13, 2018. (Doc. 12 at 9, 11). This claim is bolstered by the prison's mail log, which reflects Wrenn did send mail to the Sumter County Circuit Court Clerk on April 13, 2018. (Doc. 12 at 11). However, Wrenn is not entitled to relief on these facts because, as explained below, he did not pursue an available state procedure to secure an out-of-time appeal to exhaust his Rule 32 claims.

"Timely filing of the notice of appeal is a jurisdictional act. It is the only step in the appellate process which is jurisdictional." Committee Comments to ALA. R. APP. P. 3. Absent statutory authorization, Alabama courts are unable to extend or modify the time for appeal, "even to relieve against mistake, inadvertence, accident, or misfortune." *Meeks v. State Farm Mut. Auto. Ins. Co.*, 243 So. 2d 27, 28 (Ala. 1970); ALA. R. APP. P. 2(b) ("an appellate court may not extend the time for taking an appeal").

Perhaps accounting for the jurisdictional predicament faced by *pro se* prisoners in Wrenn's position, effective June 1, 2005, Rule 32.1(f) of the *Alabama Rules of Criminal Procedure* allows a petitioner to obtain an out-of-time appeal if he failed—through no fault of his own—to appeal the denial of a prior Rule 32 petition. *See ex parte Stephens*, 907 So. 2d 1094, 1096 (Ala. Crim. App. 2005).

Therefore, a petition under Rule 32.1(f)—not the mandamus petition and motion for judicial notice filed by Wrenn—is "the proper method of seeking an out-of-time appeal from the denial of a prior Rule 32 petition." *Id.* Indeed, the mandamus remedy is not available to Wrenn because Rule 32.1(f) provides the procedural avenue to litigate the timeliness of his notice of appeal. *See Marshall v. State*, 884 So. 2d 900, 905 (Ala. 2003) ("the introduction of a remedy [such as Rule 32.1(f)] in addition to mandamus would destroy the possibility of mandamus because for that extraordinary writ to issue the petitioner must have *no* adequate legal remedy") (quotation marks omitted).

Wrenn could have filed a Rule 32.1(f) petition in the sentencing court to demand an out-of-time appeal; there he could have argued he was not at fault for failing to timely perfect the appeal of his Rule 32 Petition. *See Poole v. State*, 988 So. 2d 604, 605-07 (Ala. Crim. App. 2007) (remanding to sentencing court a Rule 32.1(f) petition with instructions to adjudicate petitioner's claim the sentencing court never received his timely-deposited notice of appeal from denial of Rule 32 petition). Furthermore, a petitioner seeking an out-of-time appeal must file a Rule 32.1(f) petition within six months after discovering the denial or dismissal of a Rule 32 petition. ALA. R. CRIM. P. 32.2(c). Because Wrenn discovered the sentencing court's denial of his Rule 32 Petition on April 5, 2018, his deadline to file a Rule 32.1(f) petition expired on October 5, 2018. (*See* Doc. 3 at 3). Therefore, with the

exception of the claim he exhausted on direct appea, Wrenn's federal habeas claims are unexhausted and procedurally defaulted. (Doc. 12 at 8-9).

There are two exceptions to application of the procedural default doctrine. Federal habeas review of a procedurally defaulted claim is permissible where a petitioner can demonstrate: (1) cause for the default and actual prejudice resulting from the alleged violation of federal law; or (2) failure to consider the claim will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750; *Ward v. Hall*, 592 F.3d 1144, 1157 (11th Cir. 2010). "To establish 'cause' for procedural default, a petitioner must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in the state court." *Henderson v. Campbell*, 353 F.3d 880, 892 (11th Cir. 2003). "To establish 'prejudice,' a petitioner must show that there is at least a reasonable probability the result of the proceeding would have been different." *Id.*

The "miscarriage of justice" exception applies "where a constitutional violation has resulted in the conviction of someone who is actually innocent." *House v. Bell*, 547 U.S. 518, 536 (2006). "'Actual innocence' means *factual* innocence, not mere legal insufficiency." *McKay v. United States*, 657 F.3d 1190, 1197 (11th Cir. 2011) (quoting *Bousley v. United States*, 523 U.S. 614, 623 (1998)). "[P]risoners asserting innocence as a gateway to defaulted claims must establish that, in light of new evidence, 'it is more likely than not that no reasonable juror would

have found petitioner guilty beyond a reasonable doubt.'" *House*, 547 U.S. at 536-37 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). To assert a credible gateway claim, a petitioner must present "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.'" *Id.* at 537 (*quoting Schlup*, 513 U.S. at 324).

Wrenn has not demonstrated the necessary cause to overcome the procedural default of his unexhausted claims. Wrenn had the burden to file a timely Rule 32.1(f) petition for an out-of-time appeal; he failed to do so and does not present any arguments to excuse the failure. Wrenn's ignorance of the law—state procedural rules—as a *pro se* litigant cannot establish cause to overcome a procedural default. *Boerckel*, 526 U.S. at 845; *Harmon v. Barton*, 894 F.2d 1268, 1276 (11th Cir. 1990); *Bonilla v. Hurley*, 370 F.3d 494, 498 (6th Cir. 2004) (*pro se* status and ignorance of rules for timely filing appeal on direct review in state court did not establish cause).

Additionally, Wrenn has not made a credible gateway claim of actual innocence. While Wrenn generally asserts his innocence, his argument amounts to nothing more than claiming the prosecution's theory of the case was "untrue" because he did not know Sherman Collins was going to murder the victim. (Doc. 1 at 8). Because Wrenn does not present new evidence of factual innocence, he cannot excuse his procedural default via the fundamental miscarriage of justice exception.

For the foregoing reasons, with the exception of the claim he exhausted on

direct appeal, the claims presented in the instant petition are due to be denied as procedurally defaulted.

B. Merits

Wrenn raised one issue on direct appeal: the propriety of allowing Collins's testimonial statement regarding the murder for hire scheme. (Doc. 9-10 at 6, 11-19). The sentencing court allowed—over objections—an investigator to testify to his co-defendant's statement Wrenn offered him $2,000 to murder Bell; the court allowed this testimony on the grounds it was not offered for the truth of the matter asserted but to show the progress of the investigation. (Doc. 9-10 at 11; *see* Doc. 21-13 at 66).[4] Later—again over Wrenn's objection—the prosecution offered a redacted version of Collins's statement into evidence. (Doc. 9-10 at 11; *see* Doc. 21-14 at 107). During closing arguments, the prosecution referred to Collins's statement that Wrenn offered him $2,000 to kill Bell. (Doc. 21-15 at 28).

While Wrenn directed much of his direct appeal to arguing Collins's statement constituted hearsay under the *Alabama Rules of Evidence* (*see* Doc. 9-10 at 11-15), he also presented arguments under the Confrontation Clause (*see* Doc. 9-10 at 16-19) (citing *Davis v. Washington*, 547 U.S. 813 (2006) (testimonial parts of

[4] Specifically, the prosecution argued Wrenn had attacked the legitimacy of the investigation; it contended Collins's statement showed the progression to the ultimate decision to charge Wrenn with capital murder. (Doc. 21-14 at 106-07). The trial court issued a limiting instruction to that effect and gave a similar instruction when charging the jury. (Doc. 21-13 at 81-82; Doc. 21-15 at 43). While not material to Wrenn's federal habeas claims, this background provides helpful context.

interrogation are inadmissible and should be redacted or excluded to avoid due process violation), and *Crawford v. Washington*, 541 U.S. 36 (2004) (when testimonial evidence—such as a statement taken by police during interrogation—is at issue, the Sixth Amendment requires witness unavailability and a prior opportunity to cross-examine)). Wrenn's instant federal petition can be fairly read to include this Sixth Amendment claim. Specifically, in claim three Wrenn contends he "was denied the right to confront the witness against [him when] the State introduced false [the] testimony of" Sherman Collins's statement. (Doc. 1 at 10).[5] Adhering to the liberal construction afforded *pro se* pleadings, to the extent this claim encompasses the Confrontation Clause claim raised on direct appeal, the court will review it on the merits.

The Sixth Amendment guarantees criminal defendants the right to confront adverse witnesses. U.S. CONST. amend. VI. Thus, the Confrontation Clause prevents the admission of a co-defendant's pretrial confession that implicates another defendant unless the confessor testifies, allowing cross-examination. *Cruz v. New York,* 481 U.S. 186, 189–90 (1987). The admission of such a confession cannot be cured by a limiting instruction. *Bruton v. United States,* 391 U.S. 123, 126, 135-37 (1968).

[5] To the extent Wrenn's reference to false testimony could constitute an attempt to assert a claim under *Giglio v. U.S.*, 405 U.S. 150 (1972), it would be procedurally defaulted because it was not presented on direct appeal or otherwise exhausted in state court.

The Alabama Court of Criminal Appeals acknowledged the Confrontation Clause component of Wrenn's direct appeal. (Doc. 9-13 at 4). However, the appellate court did not address the constitutional violation; instead, it concluded any error regarding Collins's statement was harmless because the jury acquitted Wrenn of capital murder, convicting him instead of the lesser-included offense of murder. (*Id.*). In affirming Wrenn's conviction, the court reasoned the capital murder acquittal indicated the jury "disregarded Investigator Davis's testimony about Collins's statement." (Doc. 9-13 at 4-6) (quoting *Leverett v. State*, 462 So. 2d 972, 977 (Ala. Crim. App. 1984)).

To be entitled to federal habeas relief, Wrenn must show the Court of Criminal Appeals' harmless error holding resulted in "actual prejudice." *Brecht,* 507 U.S. 6198, 637 (1993).

> Under this test, relief is proper only if the federal court has "grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict.'" *O'Neal v. McAninch,* 513 U.S. 432, 436 (1995). There must be more than a "reasonable possibility" that the error was harmful. *Brecht, supra,* at 637. The *Brecht* standard reflects the view that a "State is not to be put to the arduous task of retrying a defendant based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was actually prejudiced by the error." *Calderon v. Coleman,* 525 U.S. 141, 146 (1998) (*per curiam*).

Davis v. Ayala, 576 U.S. 257, 267-68 (2015) (parallel citations omitted, alterations incorporated). When faced with a challenge to a state court's harmless error finding, this standard "subsumes" AEDPA's requirements. *See Fry v. Pliler,* 551 U.S. 112,

120 (2007). Accordingly, while a federal habeas court need not "formal[ly]" apply both *Brecht* and the requirements of AEDPA, the statute is nevertheless a precondition to habeas relief. *Id.* at 119-20; *Ayala*, 576 U.S. at 270 ("In sum, a prisoner who seeks federal habeas corpus relief must satisfy *Brecht,* and if the state court adjudicated his claim on the merits, the *Brecht* test subsumes the limitations imposed by AEDPA.").

Under AEDPA, federal habeas relief regarding any claim adjudicated on the merits[6] in state court is only available when the challenged decision:

> (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). The significantly limited scope of federal habeas review is designed to "'guard against extreme malfunctions in the state criminal justice systems' and not as a means of error correction." *Greene v. Fisher*, 565 U.S. 34, 38 (2011) (quoting *Harrington v. Richter*, 562 U.S. 86, 101 (2011)). "The usual 'presumption that state courts know and follow the law' is even stronger in the AEDPA context because § 2254(d)'s 'highly deferential standard for evaluating

[6] The Alabama Court of Criminal Appeals' harmless error holding is a decision on the merits for purposes of this analysis. *Ayala*, 576 U.S. at 269.

state-court rulings demands that state-court decisions be given the benefit of the doubt.'" *Allen v. Sec'y, Fla. Dep't of Corr.*, 611 F.3d 740, 748 (11th Cir. 2010) (alterations incorporated) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002)).

For purposes of § 2254(d), a decision is "contrary to" federal law if a state court arrives at a conclusion opposite that reached by the Supreme Court on a question of law or if the facts of a state court case are materially indistinguishable from those of a Supreme Court case but the state court arrives at a conclusion opposite that of the Supreme Court. *Thaler v. Haynes*, 559 U.S. 43, 47 (2010). An "unreasonable application" of Supreme Court precedent occurs if a state court identifies the correct governing legal rule from the Supreme Court's cases but unreasonably applies it to the facts of the state court case. *White v. Woodall*, 572 U.S. 415, 425 (2014). An "unreasonable determination of the facts in light of the evidence presented" is a "demanding standard," requiring a habeas petitioner to show "the state court's decision was 'so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Dunn v. Madison*, 138 S. Ct. 9, 11 (2017) (quoting *Harrington*, 562 U.S. at 103). State court determinations of factual issues enjoy a presumption of correctness, and the petitioner bears the burden of rebutting it by clear and convincing evidence. *Wood v. Allen*, 558 U.S. 290, 293 (2010). In light of the foregoing, the issue here is whether the Alabama Court of Criminal Appeals'

rejection of Wrenn's Sixth Amendment Claim was: (1) contrary to or involved an unreasonable application of clearly established federal law; or (2) based on an unreasonable determination of the facts. *Ayala*, 576 U.S. at 269.

Returning to the merits of Wrenn's Sixth Amendment claim, a co-defendant's "testimonial statements" facially incriminating a defendant violate the Confrontation Clause despite any cautionary instructions. *Bruton*, 391 U.S. 123 at 136-37; *Crawford*, 541 U.S. at 68. Here, Collins's statement directly incriminated Wrenn and is clearly testimonial because "the primary purpose of the interrogation [was] to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822. Collins did not appear at trial, and his unavailability was not established. Wrenn was not afforded an opportunity for cross-examination. The court assumes, without deciding, these facts demonstrate a constitutional violation. *See Ayala*, 576 U.S. at 260.

In analyzing the harmful effects of Confrontation Clause violations, the Eleventh Circuit considers a number of factors: (1) the importance of the testimony to the prosecution's case; (2) whether the testimony was cumulative; (3) the overall strength of the prosecution's case; (4) the frequency of the error; and (5) the presence or absence of evidence corroborating or contradicting the testimony on material points. *Delaware v. Van Ardsall*, 475 U.S. 673, 684 (1986); *Mason v. Allen,* 605 F.3d 1114, 1123-24 (11th Cir. 2010) (per curiam); *Cargill v. Turpin,* 120 F.3d 1366,

1375–76 (11th Cir. 1997). Errors are harmless if there is significant corroborating evidence or the state's evidence of guilt is overwhelming. *Guzman v. Sec'y, Dep't of Corr.*, 663 F.3d 1336, 1355 (11th Cir. 2011). Conversely, errors are harmful if there are "significant weaknesses" in the case against the defendant. *Id.* at 1355–56. A case has significant weaknesses if it "boils down" to a credibility contest. *Id.* A court is compelled to rule in a petitioner's favor if there is a "'grave doubt' about the harmlessness of the error based upon the record." *Id.* at 1356. To analyze the relevant factors, a summary of the proceedings in the sentencing court follows.[7]

The prosecution's theory was that Collins agreed with Wrenn—during a June 16, 2012 barbeque at Wrenn's house—to commit the contract murder of Bell. (*See* Doc. 21-3 at 123). The defense contended Wrenn was a hardworking, long-haul truck driver with a clean record, a family, and no real motive to commit the offenses. (Doc. 21-11 at 58-62). The defense also contended the investigation was flawed and focused only on facts supporting Wrenn's guilt. (Doc. 21-11 at 67-68).

Wrenn and Collins knew each other through their respective girlfriends, who were sisters. (Doc. 21-11 at 98-101). Collins and his girlfriend lived in New Orleans, while Wrenn and his girlfriend lived in Sumter County. (Doc. 21-11 at 98-

[7] The Alabama Court of Criminal Appeals set forth evidence presented at trial in its opinion on direct appeal. (Doc. 9-13 at 1-4). Wrenn does not dispute or challenge any aspect of the state appellate court's recitation of the trial evidence as an unreasonable factual finding. This court's summary of the trial testimony incorporates the Court of Criminal Appeals' historical factual findings, along with additional evidence in the trial record.

101). Very early on the morning of June 16, 2012, Collins, his girlfriend, and members of her family arrived at Wrenn's home in Sumter County. (Doc. 21-7 at 40; Doc. 21-11 at 106-107). Wrenn demanded that Collins, his girlfriend, and her family members leave; they did and rented a hotel room in Meridian, Mississippi. (*See* Doc. 21-7 at 40; Doc. 21-11 at 107-110). That afternoon, Collins and his girlfriend returned to Wrenn's home, where he was hosting a barbeque. (Doc. 21-7 at 40).

Wrenn's brother and next-door neighbor, Rodriguez Brunson, was planning a concert with his rap group at the Morning Star Community Center on the evening of June 16, 2012. (Doc. 21-11 at 111). Wrenn gave Brunson a check to rent the center that night. (Doc. 21-11 at 114-115). Wrenn claimed one of the members of the rap group asked him to assist with security; Wrenn in turn asked Collins to assist him. (Doc. 21-7 at 40-41). However, Brunson testified his step-father, Tommy Nixon, was the only person scheduled to work security. (Doc. 21-11 at 130-132).[8] Brunson also testified he answered in the negative when Wrenn asked whether Collins could work security. (Doc. 21-11 at 150).

Around 10:00 p.m., Wrenn and Collins drove to the Community Center in Wrenn's vehicle. (Doc. 21-12 at 18). Wrenn took his .22 pistol and gave Collins a .454 pistol, which at the time was the largest handgun in production in the world.

[8] Nixon testified he was the only person working security at the event. (Doc. 21-12 at 23, 56-57).

(Doc. 21-7 at 41; *see* Doc. 21-14 at 35-36). After the rap performance around 11:00 p.m., Collins approached a group, including Bell. (*See* Doc. 21-11 at 154; Doc. 21-12 at 106). Witnesses testified a man wearing an orange shirt—later identified as Collins—shook Bell's hand before shooting him in the back of the head; the shooter then walked away. (Doc. 21-12 at 82-84, 89, 106).

Nixon was in the parking lot when he heard the shot. While running back toward the Community Center, he saw a man later identified as Collins walking away. (Doc. 21-12 at 53-55, 115-117). Nixon continued to the Community Center and fired several rounds into the air to coax bystanders away from the victim and back inside. (*Id.*). Wrenn ignored Nixon's instruction to go inside, saying he needed to leave. However, Wrenn's vehicle was stuck in a ditch, so he returned to the scene of the shooting. (*Id.* at 61). Investigator Luther Davis of the Sumter County Sheriff's Office investigated the crime scene; he included Wrenn's vehicle in the crime scene because it "seemed out of place." (Doc. 9-13 at 2). Wrenn's vehicle was towed to the Sumter County Sheriff's Office, where Wrenn went to inquire about it the following day; while there, Investigator Davis interviewed Wrenn. (*Id.*). In his initial interview, Wrenn stated he was at the Community Center when Bell was killed and that he had attempted to leave after Nixon told people to move away from the scene. (Doc. 9-13 at 2). Wrenn solidified his statement in writing. (Doc. 21-7 at 8).

After learning the suspected shooter—still unidentified at this point—had arrived with Wrenn, Investigator Davis interviewed Wrenn for a second time on June 17, 2012. (Doc. 9-13 at 2; Doc. 21-12 at 191-92). During the second interview, Wrenn said he went to the Community Center with "Sherman from New Orleans," who was wearing an orange shirt. (Doc. 21-7 at 10). Wrenn stated he attempted to leave but his car got stuck in a ditch. (Doc. 21-7 at 10). Over the next four days, Wrenn gave three more interviews, each time providing new details. (*See* Doc. 9-13 at 3).

On June 18, 2012, Wrenn added that on the night of the murder he pointed out Bell to Collins and told Collins he did not like Bell because he had robbed his mother's house. (Doc. 9-13 at 3; Doc. 21-13 at 3-4). Wrenn also noted he gave Collins a pistol and stated he asked Collins about the weapon's location on the day after the killing; Wrenn shared this location with Investigator Davis, but officers were unable to locate it. (Doc. 9-13 at 3). Notably, Wrenn stated during his third interview he had "tried to stop" Collins. Because Wrenn's statement implied knowledge of Collins's intent, Investigator Davis asked what he was trying to stop Collins from doing. Wrenn offered no explanation. (Doc. 9-13 at 3).

On June 20, 2012, Wrenn made a fourth statement to Investigator Davis. This time Wrenn explained he tried to stop Collins from shooting Bell after he saw Collins reaching for his pistol while moving toward Bell. (Doc. 9-13 at 3; Doc. 21-12 at 16-

17; *see* Doc. 21-13 at 15). On June 21, Wrenn made a fifth statement, this time to State Bureau of Investigation Agents David Ratliff and Bryan Manley. (*See* Doc. 21-13 at 23-24). During this statement, Wrenn claimed he was armed because he had been asked to work security and Collins was armed because Wrenn asked him to assist. (Doc. 9-13 at 3; Doc. 21-7 at 40-41).

Following Collins's statement to Investigator Davis that Wrenn offered to pay him to murder Bell, the state charged Wrenn with capital murder. After deliberations, the jury convicted Wrenn of murder, a lesser included offense of capital murder, and conspiracy to commit murder. (Docs. 9-5, 9-6). As previously mentioned, the Alabama Court of Criminal Appeals concluded the jury's verdict—acquitting Wrenn of capital murder—showed the harmlessness of any error regarding the introduction of Collins's statement. (Doc. 9-13 at 4-6).

Returning to the five factors the Eleventh Circuit has enumerated when examining claims under *Bruton*,[9] three of them clearly weigh against Wrenn. As to the importance of Collins's statement, the trial record is replete with evidence—even without Collins's statement—implicating Wrenn in every phase of the crimes: planning; preparation; execution; and cover-up. When compared to this evidence,

[9] Again, these factors include: (1) the importance of the testimony to the prosecution's case; (2) whether the testimony was cumulative; (3) the overall strength of the prosecution's case; (4) the frequency of the error; and (5) the presence or absence of evidence corroborating or contradicting the testimony on material points. *Mason,* 605 F.3d at 1123-24; *Cargill,* 120 F.3d at 1375–76.

Collins's statement was relatively unimportant. The same evidence also reveals the strength of the prosecution's case against Wrenn, weighing against him as to that factor. As to frequency, Collins's statement was referenced only twice in the jury's presence: (1) once during the testimony of Investigator Davis (Doc. 9-13 at 66); and (2) once during closing arguments (Doc. 21-15 at 28).[10] Accordingly, mentions of Collins's statement were infrequent.

The other two factors weigh in Wrenn's favor, but not decisively so. Collins's statement was the only allusion to specific evidence that Wrenn offered him money to kill Bell. Accordingly, it was not cumulative of other testimony on this point; neither was there corroborating evidence. However, in light of the evidence presented at trial and the jury's verdict, the Court of Criminal Appeals' conclusion that any error regarding admissions of Collins's statement was harmless did not run afoul of § 2254(d). Wrenn's acquittal of the capital offense is the best indicator that admission of Collins's statement was harmless.[11] Additionally, the trial record in this case does not reveal significant weaknesses in the case against the Wrenn. *See Guzman,* 663 F.3d at 1355-56. In light of the trial record, there is no "grave doubt" about the harmlessness of the error. *Id.* at 1356.

---

[10] While Collins's statement was admitted as an exhibit, arguments concerning its admission were conducted outside the presence of the jury. (Doc. 21-14 at 107).

[11] While not determinative here, it also indicates the jury followed the sentencing court's instructions that Collins's statement was only offered to show the course of the investigation—not to show Wrenn, in fact, offered to pay Collins to murder Bell.

For these reasons, Wrenn's Sixth Amendment claim fails on the merits.

III. RECOMMENDATION

For the foregoing reasons, the undersigned **RECOMMENDS** Wrenn's claims be **DENIED WITH PREJUDICE** as procedurally defaulted or meritless. In accordance with Rule 11 of the *Rules Governing 2254 Proceedings*, the undersigned **FURTHER RECOMMENDS** a certificate of appealability be **DENIED**. A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, a "petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), or that "the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotation omitted). Based on the foregoing discussion, the undersigned is of the opinion Wrenn has failed to make the requisite showing.

IV. NOTICE OF RIGHT TO OBJECT

Any party may file specific written objections to this report and recommendation. Any objections must be filed with the Clerk of Court within 14 calendar days from the date the report and recommendation is entered. Objections should specifically identify all findings of fact and recommendations to which

objection is made and the specific basis for objecting. Objections also should specifically identify all claims contained in the petition that the report and recommendation fails to address. Objections should not contain new allegations, present additional evidence, or repeat legal arguments. An objecting party must serve a copy of its objections on each other party to this action.

Failing to object to factual and legal conclusions contained in the magistrate judge's findings or recommendations waives the right to challenge on appeal those same conclusions adopted in the district court's order. In the absence of a proper objection, however, the court may review on appeal for plain error the unobjected to factual and legal conclusions if necessary in the interests of justice. 11th Cir. R. 3-1. An objecting party must serve a copy of its objections on each other party to this action.

On receipt of objections, a United States District Judge will make a de novo determination of those portions of the report and recommendation to which specific objection is made and may accept, reject, or modify in whole or in part, the findings of fact and recommendations made by the magistrate judge. The district judge must conduct a hearing if required by law. Otherwise, the district judge may exercise discretion to conduct a hearing or otherwise receive additional evidence. Alternately, the district judge may consider the record developed before the magistrate judge, making an independent determination on the basis of that record.

The district judge also may refer this action back to the magistrate judge with instructions for further proceedings.

A party may not appeal the magistrate judge's report and recommendation directly to the United States Court of Appeals for the Eleventh Circuit. A party may only appeal from a final judgment entered by a district judge.

DONE this 24th day of August, 2021.

Staci G. Cornelius

STACI G. CORNELIUS
U.S. MAGISTRATE JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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March 04, 2022

Kelvin Wrenn
Bibb County CF - Inmate Legal Mail
565 BIBB LN
BRENT, AL 35034

Appeal Number: 21-13337-E
Case Style: Kelvin Wrenn v. D. Toney, et al.
District Court Docket No: 7:18-cv-01563-RDP-SGC

Electronic Filing
All counsel must file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing are available on the Court's website.

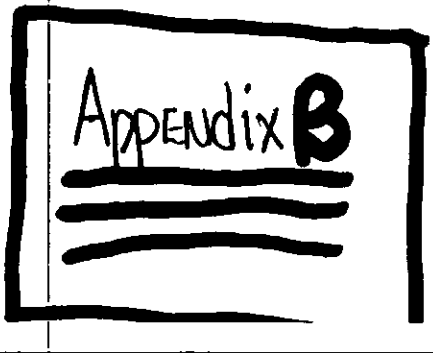
The enclosed order has been ENTERED. NO FURTHER ACTION WILL BE TAKEN ON THIS APPEAL.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Gloria M. Powell, E
Phone #: (404) 335-6184

MOT-2 Notice of Court Action



IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-13337-E

KELVIN WRENN,

Petitioner-Appellant,

versus

D. TONEY,
ATTORNEY GENERAL OF THE STATE OF ALABAMA,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

Before: JILL PRYOR and LAGOA, Circuit Judges.

BY THE COURT:

Kelvin Wrenn filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's order dated February 10, 2022, denying his motion for a certificate of appealability in his appeal from the district court's denial of his *pro se* 28 U.S.C. § 2254 habeas corpus petition. Because Wrenn has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motion, his motion for reconsideration is DENIED.

REL: 07/01/2016

Court of Criminal Appeals

State of Alabama
Judicial Building, 300 Dexter Avenue
P. O. Box 301555
Montgomery, AL 36130-1555

MARY BECKER WINDOM
Presiding Judge
SAMUEL HENRY WELCH
J. ELIZABETH KELLUM
LILES C. BURKE
J. MICHAEL JOINER
Judges

D. Scott Mitchell
Clerk
Gerri Robinson
Assistant Clerk
(334) 229-0751
Fax (334) 229-0521

MEMORANDUM

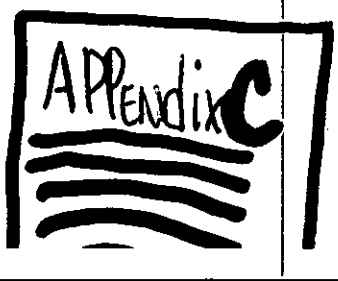
CR-14-1535 Sumter Circuit Court CC-12-110

Kevin Wrenn v. State of Alabama

WINDOM, Presiding Judge.

Kevin Wrenn appeals his convictions for murder, a violation of § 13A-6-2, Ala. Code 1975, and conspiracy to commit murder, a violation of §§ 13A-4-3 and 13A-6-2, Ala. Code 1975, and his resulting sentences to 40 years in prison for his murder conviction and 20 years in prison for his conspiracy conviction.

Late in the evening of June 16, 2012, Deitrick Bell suffered a fatal gunshot wound to the back of his head while



he was standing outside of the Morning Star Community Center. Bell was at the community center to see a rap concert. Rodriegez Brunson, who is Wrenn's half-brother, was inside the community center when he heard the gunshot. Rodriegez ran outside where he saw Bell lying on the ground. Rodriegez was attempting to resuscitate Bell when Tommy Nixon, who was working at the event as a security guard, fired several rounds into the air to coax bystanders away from the victim and back inside the community center. Wrenn disregarded Nixon's admonition to go inside, telling Nixon that he needed to leave. However, Wrenn's vehicle was stuck in some mud, so he returned to the scene of the shooting.

According to Rodriegez, he learned from people outside the community center that Sherman Collins, who had arrived at the concert with Wrenn, was the individual who had shot Bell. Nixon recalled that Collins was withdrawn from the crowd, leaning against a wall, while Wrenn was mingling throughout the night.

Investigator Luther Davis of the Sumter County Sheriff's Office investigated the crime scene and determined that Wrenn's vehicle should be included in the crime scene because it "seemed out of place." (R. 585.) Wrenn's vehicle was eventually towed to the sheriff's office.

The morning after the shooting, Wrenn went to the sheriff's office to inquire about his vehicle. During this visit, Wrenn was interviewed by Investigator Davis. Wrenn told Investigator Davis that he was at the community center when Bell was killed and that he had attempted to leave after Nixon told people to move away from the scene.

After Investigator Davis learned from Nixon that he had seen the suspected shooter arrive with Wrenn, Investigator Davis conducted a second interview with Wrenn on June 17. Wrenn's second statement was similar to the first, but he added that he had arrived at the community center with Collins.[1]

---

[1]Although Wrenn knew Collins well -- Collins dated the sister of Wrenn's girlfriend -- throughout his interviews with law enforcement, Wrenn identified Collins only as "Sherman."

On June 18, Investigator Davis conducted a third interview with Wrenn. In this statement, Wrenn added that when he and Collins arrived at the community center, he identified Bell as someone he did not like because Bell had been involved in a burglary of Wrenn's mother's house. Wrenn then gave Collins a pistol. Wrenn also stated that he had spoken to Collins the day after the shooting about the location of the murder weapon. Wrenn provided to Investigator Davis the alleged location of the weapon; officers, however, were unable to locate the murder weapon at the given location. Notably, Wrenn stated during his third interview that he had "tried to stop" Collins. (R. 871.) Because Wrenn's statement implied that he had foreknowledge of Collins's intent, Wrenn was asked what he was trying to stop Collins from doing. Wrenn, however, would offer no explanation.

On June 20, Wrenn asked to make an additional statement, his fourth, to add further details to his previous statements. Among the additional details, Wrenn stated that he tried to stop Collins from shooting Bell after he saw Collins reaching for his pistol and walking toward Bell.

On June 21, Wrenn made a fifth statement, this time to Agent Bryant Manley of the State Bureau of Investigation. Wrenn's statement was substantially similar to his fourth statement except that he added that he and Collins were armed because they were asked to work as security at the rap concert. However, according to Nixon, who was working as security, and Rodriegez, who organized the rap concert, neither Wrenn nor Collins had been asked to work at the concert as security.

While Wrenn was under investigation for the murder of Bell, Investigator Davis was told by Collins that Wrenn had offered him $2,000 to kill Bell. Upon learning of Wrenn's alleged offer to Collins, the State upgraded its charge of murder against Wrenn to capital murder because the murder was committed "pursuant to a contract or for hire." § 13A-5-40(a)(7), Ala. Code 1975. Wrenn, though, was acquitted of capital murder and instead convicted of the lesser-included

---

Collins's identity was revealed through the course of Investigator Davis's investigation.

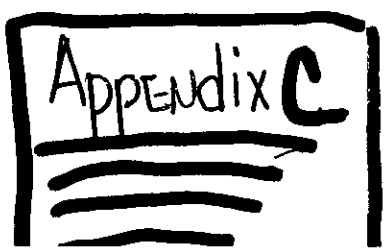
offense of murder.

Wrenn's sole issue on appeal is that the circuit court erred in admitting evidence of Collins's statement to Investigator Davis that Wrenn had offered him $2,000 to kill Bell. Wrenn argues on appeal, as he did at trial, that the testimony was inadmissible because it was hearsay, irrelevant, and prejudicial, and that the testimony violated his rights under the Confrontation Clause. The circuit court admitted the evidence not for the truth of the matter asserted, but rather as evidence of the progression of the investigation. The circuit court instructed the jury accordingly.

The State counters that because Wrenn was acquitted of capital murder and convicted of the lesser-included offense of murder, any error in the admission of the testimony was harmless. This Court agrees.

In Leverett v. State, 462 So. 2d 972 (Ala. Crim. App. 1984), the appellant, who had hired individuals to kill his wife and was facing a charge of capital murder, argued that the trial court had erred in admitting hearsay evidence, evidence that lacked a sufficient predicate, and evidence that went to the ultimate issue. This Court held that any error in the trial court's rulings was not reversible because the jury's verdict -- acquitting the appellant of capital murder and finding him guilty only of murder -- indicated that the jury had disregarded the allegedly inadmissible evidence:

> "Over various objections, the trial court allowed into evidence the following: (1) McLeod's testimony concerning the instructions he received from McEvoy during their attempt to 'rip-off' Leverett of the money he had offered for his wife's murder; (2) the testimony of Prewitt that McEvoy had said that the extra $1,000 of payment for the murder 'was for a job well done;' and (3) the testimony of the forensic pathologist that the body of Mrs. Leverett 'had more injuries than most of the victims that [he had] known or examined in which there was evidence that they had been robbed and then murdered.' These matters were elicited by the prosecution in furtherance of proof of its theory that Mrs. Leverett had been killed pursuant to a



contract for hire which was effectuated by a conspiracy between Leverett, McEvoy, and Prewitt. Leverett contends that (1) McLeod's testimony was hearsay because, at the time the instructions were given, no conspiracy existed; (2) the testimony of Prewitt was also hearsay since the statement was made after the conspiracy had terminated; and (3) the pathologist's testimony was elicited without a proper predicate and contained an opinion of an ultimate fact in issue.

"It is not necessary for this court to determine the propriety of the trial court's rulings on Leverett's objections or the merit of Leverett's contentions on appeal. If the questioned evidence had been accepted by the jury, the jury would have been authorized to find Leverett guilty of the capital offense. The jury, in determining its verdict, and acquitting Leverett of capital murder, disregarded this evidence; the verdict clearly indicates that the jury was not in any manner inflamed or influenced by these bits of evidence. See Morgan v. State, 35 Ala. App. 269, 45 So. 2d 802 (1950). Error in the admission of evidence which is shown by the verdict to have had no effect on it or to have caused the defendant no prejudice is not reversible. 24B C.J.S. Criminal Law § 1915 (13) (1962). Thus, there is no reversible error where the defendant was acquitted of the offense with respect to which the improper evidence was admitted, although he was convicted of another offense. Id. See also Middleton v. State, 27 Ala. App. 564, 176 So. 613, 614 (1937); Hanson v. State, 27 Ala. App. 147, 168 So. 698, 700, cert. denied, 232 Ala. 585, 168 So. 700 (1936); Lee v. State, 16 Ala. App. 53, 75 So. 282, 283 (1917). Because the evidence in question went solely to the proof of the element of aggravation distinguishing the capital offense, which the jury deemed unsubstantiated by the evidence presented, any error, if any, in the introduction of this evidence was not injurious to Leverett; the verdict of the jury cured any possible injury."

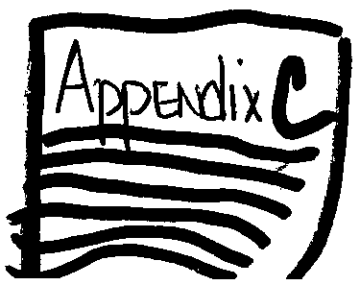
Leverett, 462 So. 2d at 977.

As in Leverett, the verdict of the jury cured any possible error. "If the questioned evidence had been accepted by the jury, the jury would have been authorized to find [Wrenn] guilty of the capital offense." Id. The jury's acquitting Wrenn of capital murder indicated that it disregarded Investigator Davis's testimony about Collins's statement, which was in keeping with the circuit court's instruction that the jury not consider the evidence for the truth of the matter asserted. Id. As such, this issue does not entitle Wrenn to any relief. See Rule 45, Ala. R. App. P.

Accordingly, the judgment of the circuit court is affirmed.

AFFIRMED.

Welch, Kellum, and Burke, JJ., concur. Joiner, J., concurs in the result.



COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

D. Scott Mitchell
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September 2, 2016

CR-14-1535

Kevin Wrenn v. State of Alabama (Appeal from Sumter Circuit Court: CC12-110)

NOTICE

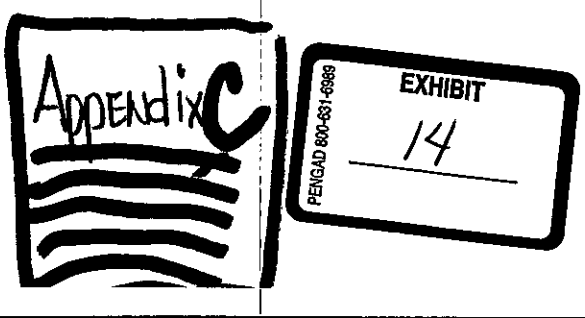
You are hereby notified that on September 2, 2016, the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

D. Scott Mitchell

D. Scott Mitchell, Clerk
Court of Criminal Appeals

cc: Hon. Eddie Hardaway, Jr., Circuit Judge
Hon. DeVon James Jackson, Circuit Clerk
Talitha Powers Bailey, Attorney
J Thomas Leverette, Asst. Atty. Gen.



IN THE SUPREME COURT OF ALABAMA

November 10, 2016

1151270

Ex parte Kevin Wrenn. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Kevin Wrenn v. State of Alabama) (Sumter Circuit Court: CC-12-110; Criminal Appeals : CR-14-1535).

CERTIFICATE OF JUDGMENT

WHEREAS, the petition for writ of certiorari in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on November 10, 2016:

Writ Denied. No Opinion. Main, J. - Stuart, Bolin, Wise, and Bryan, JJ., concur.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Julia J. Weller, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 10th day of November, 2016.

Julia Jordan Weller

Clerk, Supreme Court of Alabama

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