APPENDICES

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APPENDIX A

NOT RECOMMENDED FOR PUBLICATION
File Name: 22a0360n.06

Case No. 20-5299

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEANGELO MONTEZ MOODY,	)	
	)	ON APPEAL FROM
Petitioner - Appellant,	)	THE UNITED STATES
	)	DISTRICT COURT FOR
v.	)	THE MIDDLE
	)	DISTRICT OF
	)	TENNESSEE
	)	
MIKE PARRIS, Warden,	)	
	)	
Respondent - Appellee.	)	OPINION

Before: SILER, COLE, and NALBANDIAN, Circuit Judges.

NALBANDIAN, J., delivered the opinion of the court in which SILER, J., joined. COLE, J. (pg. 20), delivered a separate concurring opinion.

NALBANDIAN, Circuit Judge. DeAngelo Moody was part of a drive-by shooting that left a 16-year-old girl dead. A Tennessee jury convicted him of first-degree murder, and the court sentenced him to life. After his

direct appeals failed, he filed for post-conviction relief, arguing that his attorney provided ineffective assistance. But the Tennessee courts denied him relief, and he turned to federal court. His federal habeas petition repeated his ineffective-assistance claim and asserted a few defaulted claims that he asked the court to excuse on actual-innocence grounds. The district court denied him relief, and we **AFFIRM**.

I.

A.

In April 2009, Moody went for a drive with four friends in his mother's car. Ortego Thomas and Quontez Caldwell, Moody's half-brothers, sat in the back alongside Moody. An unknown individual drove the car[1] and Martez D. Matthews sat shotgun. At some point, the group spotted two men—Christopher Bridges and Deandre Williams—walking. As the group drove past Bridges, Thomas stated, "There go somebody we beefin' with." (R. 7-4, Caldwell's Test., PageID 254.) But by that point the car had driven past Bridges and Williams. So the driver continued to the end of the block, wheeled the car around, and drove by the two men again. This time, a few men in the car opened fire on the two men walking.

But the bullets missed their targets. They instead penetrated the home of Inez Johnson, striking her 16-year-old daughter, Loren, in the lungs. Inez called for help, but it was too late. By the time the paramedics arrived, Loren was bleeding profusely and was unresponsive. So the paramedics took her to the emergency room where she was pronounced dead.

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[1] Moody was initially driving the car when he and Thomas went to pick up Caldwell. At some point though Moody gave up his driver's seat to the unknown individual, who was driving when the shooting occurred.

B.

The State charged Moody, Matthews, and Thomas with first-degree murder and employment of a firearm in commission of a felony. It tried Moody and Matthews together but severed Thomas's case.

At trial, the State presented two theories to the jury. The first cast Moody and Matthews as the shooters. The second, was that even if they did not fire the weapons, the two men were criminally responsible for the shooting.[2] As proof, the State presented evidence that the car used in the shooting belonged to Moody's mother,[3] that the bullet casings collected from the scene came from two guns, one of which belonged to Matthews, and that a hat collected from the scene had Matthews' DNA.

Caldwell's testimony was the linchpin of the State's case. He testified at length about what happened on the day of the shooting, the seating arrangement in the car, and that it was Thomas who said, "There go somebody we beefin' with." (R. 7-4, Caldwell's Test., PageID 254.) As for who did the shooting, Caldwell pointed the finger at Matthews, Thomas, and Moody.

The court instructed the jury on the elements of first-

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[2] By way of background, under Tennessee criminal responsibility, "presence and companionship with the perpetrator of a felony before and after the commission of the crime are circumstances from which an individual's participation may be inferred." *State v. Dorantes*, 331 S.W.3d 370, 386 (Tenn. 2011) (internal quotation omitted). And "no specific act or deed need be demonstrated," only that "the defendant in some way knowingly and voluntarily shared in the criminal intent of the crime and promoted its commission." *Id*.

[3] In his brief, Moody claims that there was inconsistent testimony about the car at trial. Our review of the record shows otherwise. True, some witnesses gave differing descriptions from memory. But all witnesses who were asked about the car identified it as the car registered to Moody's mother.

degree felony murder and employment of a firearm during the commission of a crime. The court also instructed the jury on the elements of criminal responsibility. After it heard the evidence, the jury convicted Moody of first-degree murder but acquitted him of the employment-of-a-firearm charge. Moody appealed, challenging the sufficiency of the evidence against him. But the Tennessee Court of Criminal Appeals (TCCA) affirmed the judgment, and the Tennessee Supreme Court denied his application to file an appeal. *State v. Moody*, No. M2011-01930-CCA-R3-CD, 2013 WL 1932718, at *9, 14 (Tenn. Crim. App. May 9, 2013).

C.

With a failed direct appeal, Moody petitioned for post-conviction relief in state court. He raised several grounds for relief, including ineffective assistance of counsel. Moody claimed that his attorney, Mark Kovach, rendered ineffective assistance by not interviewing or calling Thomas as a witness.

The trial court found Moody's claims plausible enough to hold a hearing. At the hearing, Thomas testified that Moody was not involved in the shooting and "didn't have nothing to do with the situation." (R. 7-18, Thomas's Test., PageID 1289.) Thomas said that only he and Caldwell shot at the men and emphasized that Moody "wasn't doing no shooting." (*Id.*) What's more, Thomas said that Moody "didn't know what was going on" because "Caldwell was telling [them] to take him home," and so it was Caldwell who "was giving [them] directions." (*Id.*) Finally, Thomas explained that he wanted to testify at Moody's trial but his attorney "wouldn't let [him]." (*Id.* at PageID 1291.)

Kovach testified too. First, he explained why he didn't call Thomas as a witness. Kovach shared offices with

Thomas's attorney, Ashley Preston, and they discussed the case "quite a bit." (R. 7-18, Kovach's Testimony, PageID 1308–09.) From these discussions, he explained that he would have been "shocked" if she let Thomas testify and implicate himself in murder. (*Id.*) Kovach also noted that because Thomas was Moody's co-defendant, he couldn't compel him to testify.

The hearing ended favorably for Moody. The trial court found that Kovach's failure to call Thomas as a witness, among other things, was deficient performance and that Moody was prejudiced. As a result, it granted Moody relief and ordered a new trial. But Moody's victory proved short-lived. When the TCCA considered the case, it reversed, finding that Kovach provided adequate legal representation. *See Moody v. State*, No. M2015-02424-CCA-R3-PC, 2017 WL 829820, at *1 (Tenn. Crim. App. Mar. 2, 2017). So the TCCA overturned Moody's post-conviction relief, *id.* at *11, and the Tennessee Supreme Court again denied Moody's appeal.

D.

With no luck in the state courts, Moody turned to the federal ones. He filed a pro se petition for a writ of habeas corpus under 28 U.S.C. § 2254. He raised several claims but recognized that, except for his ineffective-assistance claim, he had defaulted on all of them.[4] *Moody v. Parris*,

[4] The defaulted claims Moody raised were: (1) that there was insufficient evidence to support his conviction; (2) that his trial counsel was ineffective for failing to move to sever his trial, move to dismiss all charges after the jury acquitted him of the firearm charge, and challenge the constitutionality of his sentence under *Miller v. Alabama*, 567 U.S. 460 (2012) and *Graham v. Florida*, 560 U.S. 48 (2010); (3) that the trial court erred in not acting as a thirteenth juror; (4) that the trial court erred in failing to allow him to retain counsel of his choice; and (5) that the trial court sentenced him unconstitutionally in light of *Miller* and *Graham*.

No. 3:17-cv-01452, 2020 WL 1061950, at *13 (M.D. Tenn. Mar. 5, 2020). Still, he urged the court to excuse his default based on actual innocence.[5] *Id.* at *18.

The district court rejected all of Moody's claims. Relevant here, the court held that the TCCA's decision didn't unreasonably apply federal law. *Id.* at *16–17. Kovach's close contact with Thomas's lawyer made his decision not to interview or call Thomas as a witness reasonable. *Id.* at *17. It also found that Kovach's decision didn't prejudice Moody. *Id.* at *17–18. Finally, the court rejected Moody's actual-innocence claim. *Id.* at *18. As a result, it denied Moody's habeas petition but issued him a certificate of appealability on both questions, which Moody now brings. *Id.* at *19–20.

II.

We review the district court's denial of Moody's habeas petition de novo. *Gerth v. Warden, Allen Oakwood Corr. Inst.*, 938 F.3d 821, 826 (6th Cir. 2019). This review governs Moody's actual innocence claim. *See Moore v. Mitchell*, 708 F.3d 760, 774 (6th Cir. 2013).

A different standard of review, provided by the Antiterrorism and Effective Death Penalty Act (AEDPA), governs Moody's ineffective-assistance claim. *See* 28 U.S.C. § 2254(d). Because the TCCA decided that claim, AEDPA poses a "formidable barrier to federal habeas relief . . . . " *Burt v. Titlow*, 571 U.S. 12, 19 (2013). Under AEDPA, we

[5] In his appellate brief, Moody references an affidavit from Thomas's attorney, Ashley Preston. But, as Moody correctly notes, this evidence was not before the TCCA. So we cannot take it into account when considering Moody's claims. *See Cullen v. Pinholster*, 563 U.S. 170, 184–85 (2011). Moody also presents evidence from his coram nobis hearing where Caldwell testified again, this time favorably. But that evidence, as Moody notes, was not considered by the district court. So this evidence too is not relevant to our discussion.

may only reverse a state court's decision if it "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).

A decision is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or . . . decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 62, 413 (2000); *see also Fitzpatrick v. Robinson*, 723 F.3d 624, 633 (6th Cir. 2013). And a state court unreasonably applies federal law if it "identifies the correct governing legal principle" but "unreasonably applies that principle to the facts of the prisoner's case." *Williams*, 529 U.S. at 413; *Fitzpatrick*, 723 F.3d at 633.

But a decision is not unreasonable just because we would have decided the issue differently. *Wood v. Allen*, 558 U.S. 290, 301 (2010). As the Supreme Court has explained, "an *unreasonable* application of federal law is different from an *incorrect* application." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (internal quotation omitted). AEDPA is "not a substitute for ordinary error correction." *Id.* at 102–03. So if "fairminded jurists could disagree on the correctness of the state court's decision," then the decision was reasonable, and this Court leaves it undisturbed. *Id.* at 101 (internal quotations omitted). This is "meant to be" a "difficult [standard] to meet." *Id.* at 102.

Further, in determining whether a state court's decision is an unreasonable application of clearly established law, we "look only to the holdings of the Supreme Court's decisions as of the time of the relevant state court decision." *Moore*, 708 F.3d at 775. The decisions of the lower courts are only relevant in determining

"whether a legal principle had been clearly established," but they do not by themselves establish federal law. *Id.*

III.

With these standards of review in mind, we turn to the merits. On appeal, Moody makes two claims. First, he argues that his attorney, Kovach, rendered ineffective assistance. And second, he urges us to excuse his procedurally defaulted claims based on actual innocence. We consider each in turn.

A.

We start with the ineffective-assistance-of-counsel claim. To succeed, Moody must show that his attorney's performance was "deficient" in a way that "prejudiced" him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). An attorney's performance is "deficient" if it "fell below an objective standard of reasonableness." *Id.* at 688. And a defendant is prejudiced if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Strickland's standard is a high bar to meet. *Harrington*, 562 U.S. at 105. As the Supreme Court has explained, "*Strickland* does not guarantee perfect representation, only a reasonably competent attorney." *Id.* at 110 (internal quotations omitted). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. So we are "highly deferential" to an attorney's decisions and apply a "strong presumption" that his representation fell within "the wide range of reasonable professional assistance." *Harrington*, 562 U.S. at 104–05 (internal quotations omitted). Indeed, there are "countless ways to provide effective assistance in any given case." *Id.* at 106

(quoting *Strickland*, 466 U.S. at 689). So "surmounting *Strickland*'s high bar is never an easy task." *Id.* at 105 (quoting *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010)).

And because this is an AEDPA case, the bar is even higher. *See Knowles v. Mirzayance*, 556 U.S. 111, 121 (2009). *Strickland* requires deference to counsel and AEDPA requires deference to the state court. And so our review is "doubly deferential." *Id.* at 123. The question is not whether counsel was ineffective, but "whether the state court's application of the *Strickland* standard was unreasonable." *Harrington*, 562 U.S. at 101.

1.

Take the deficient-performance prong. Moody argues that Kovach's representation was deficient by not interviewing Thomas or calling him as a witness. The TCCA rejected both claims. *Moody*, 2017 WL 829820, at *10. For the reasons below, we find that its decision was not an unreasonable application of federal law.

In reviewing the TCCA's decision, we begin "with the premise that under the circumstances, the challenged actions might be considered sound trial strategy." *Cullen v. Pinholster*, 563 U.S. 170, 191 (2011) (cleaned up). In doing so, we "indulge [the] strong presumption" that an attorney "made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 196 (alteration in original) (internal quotations omitted). That is, we must "affirmatively entertain the range of possible reasons [Moody's] counsel may have had for proceeding as [he] did." *Id.* (internal quotations omitted). And an attorney's "strategic choices made after thorough investigation of law and facts" are "virtually unchallengeable." *Strickland*, 466 U.S. at 690.

Consider first Kovach's decision not to call Thomas as a witness. The TCCA found this decision reasonable for

three reasons. *Moody*, 2017 WL 829820, at *10. First, Kovach's decision was based on the conversations he had with Thomas's attorney, Ashley Preston. *Id.* Second, it was reasonable for Kovach to believe that a co-defendant charged with first-degree murder wouldn't incriminate himself. *Id.* And third, Thomas's testimony added little value but was easily impeached. *Id.* Each of these reasons is sufficient to show that Kovach made a reasonable decision not to call Thomas as a witness.

Kovach explained that he shared office spaces with Preston and they talked about the case "quite a bit." As Kovach pointed out, he was going to trial first, and so Preston asked for his opinion on different aspects of the case. From these conversations, Kovach concluded that he would have been "shocked" if Preston let Thomas testify and admit to first-degree murder. Indeed, Thomas's testimony confirmed this. He explained that he wanted to testify at Moody's trial but Preston "wouldn't let [him]." (R. 7-18, Thomas's Test., PageID 1291.) Given the strong reasonableness presumption that we must afford an attorney, we cannot say that Kovach's decision was unreasonable, especially in light of the deference we accord to the TCCA. After all, "[u]nlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge." *Harrington*, 562 U.S. at 105.

Moody claims that Kovach's decision not to call Thomas as a witness wasn't based on any actual communications between him and Preston. But Moody offers little evidence for this claim. All he says is that Kovach's decision was based on silence from Thomas's attorney. Not so. Moody doesn't dispute that Kovach had multiple conversations with Preston about the case. And it is from these conversations that Kovach concluded she

wouldn't have let Thomas testify and incriminate himself. And, again, Thomas himself confirmed this.

And even if Preston never told Kovach about her willingness to have Thomas testify, Kovach could still make that reasonable inference based on their conversations. If, for example, she had discussed her defense strategy or discussed the problem certain evidence posed, then an experienced attorney could conclude she didn't want Thomas to implicate himself in murder. So this wasn't a case in which, as Moody claims, Kovach was a "potted plant" waiting for Thomas's attorney to come to him. Regardless of whether Kovach's decision "deviated from best practices or [the] most common custom," it did not "amount[] to incompetence," and *Strickland* requires us to defer to that decision. *Harrington*, 562 U.S. at 105. So the TCCA's deference was not an unreasonable application of *Strickland*, and Moody hasn't pointed to a Supreme Court case in which an attorney's decision not to call a witness was found unreasonable after multiple conversations with the witness's attorney.[6]

[6] Throughout his brief, Moody cites almost exclusively circuit precedent. But as the Supreme Court has made clear, circuit precedent doesn't establish clearly established law and cannot be used to show that the state court's application of federal law was unreasonable. See *Parker v. Matthews*, 567 U.S. 37, 48 (2012) ("The Sixth Circuit also erred by consulting its own precedents, rather than those of this Court, in assessing the reasonableness of the Kentucky Supreme Court's decision.").

And there's more. The TCCA provided two other reasons why Kovach's decision was reasonable: (1) Kovach couldn't compel Thomas, who was charged as a co-defendant, to testify and (2) Thomas's testimony added little value and he was easily impeached. Reasonable jurists can reach the same conclusion. For instance, in *Davis v. Lafler*, we held that it was reasonable for an attorney not to call a would-be co-defendant based on similar reasons. *See* 658 F.3d 525, 537 (6th Cir. 2011) (en banc).[7]

The only Supreme Court case that Moody cites is *Porter v. McCollum*, 558 U.S. 30 (2009). But in Porter the state court didn't decide the deficiency prong, so the Supreme Court was applying Strickland de novo. See Porter, 558 U.S. at 39. And as the Supreme Court has held, non-AEDPA cases, where the Court was reviewing Strickland de novo, "offer no guidance with respect to whether a state court has unreasonably" applied federal law. See Cullen, 563 U.S. at 202. So even Porter is of no help. And even if Porter could offer guidance, it is distinguishable because the attorney there did not "even take the first step of interviewing witnesses or requesting records." 558 U.S. at 39.

But as explained below, Kovach talked to Thomas's attorney before ruling Thomas out as a witness. *Porter* does not show that this wasn't a reasonable investigation.

So too here. Thomas was a would-be co-defendant, so he could have exercised his right to remain silent. His testimony, as explained below, added little. And his impeachment would have reflected badly on Moody. *See United States v. Staples*, 410 F.3d 484, 489 (8th Cir. 2005) (citing *Lema v. United States* 987 F.2d 48, 54 (1st Cir. 1993)) (explaining that "there is considerable risk inherent in calling any witness because if the witness does not hold up well on cross-examination, the jurors might draw unfavorable inferences against the party who called him"). Thus, Kovach's decision was based on several "strategic choices" and is "virtually unchallengeable." *Strickland*, 466 U.S. at 690. At the very least, "we cannot say that the state court's application of *Strickland*'s attorney-performance standard was objectively unreasonable." *Bell*

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[7] Although not necessary to our holding, we note that with regard to counsel's performance, this case is similar to our decision in *Davis*. There we held that a defense counsel's strategic decision for not calling a co-defendant as a witness was reasonable because the co-defendant (1) could have exercised his right to remain silent, (2) would have added little value with his testimony, and (3)could have reflected badly on the defendant (given that the co-defendant had pleaded guilty). *Davis*, 658 F.3d at 538. We acknowledge, as noted above, that the Supreme Court has clarified that under AEDPA, we cannot use lower-court decisions to determine what is unreasonable under "clearly established" federal law. *Parker*, 567 U.S. at 48–49. The Supreme Court has not held, however, that lower-court decisions are irrelevant to whether the law is not "clearly established." Moreover, albeit in a different circumstance, we have held that lower-court opinions are relevant to show that there is not "clearly established" federal law. *Miller v. Colson*, 694 F.3d 691, 698(6th Cir. 2012) (citing *Baranksi v. Fifteen Unknown Agents of Bureau of ATF*, 452 F.3d 433, 449(6th Cir.2006)) ("[D]is agreement among the circuit courts is evidence that a certain matter of federal law is not clearly established."), *cert. denied*, 569 U.S. 1007 (2013); *see also Evans v. Davis*, 875 F.3d 210, 216 (5th Cir. 2017) ("Divergent approaches among the lower courts can reflect a lack of guidance from the Supreme Court and signal that federal law is not clearly established."), *cert. denied*, 139 S. Ct. 78 (2018).

v. Cone, 535 U.S. 685, 702 (2002).

What about Kovach's failure to interview Thomas? The TCCA held that Kovach's decision was reasonable because Preston never suggested she would let Thomas speak with Kovach. *Moody*, 2017 WL 829820, at *10. The TCCA's conclusion was not an unreasonable application of federal law.

Kovach's decision to keep Thomas off the witness stand meant that he had no duty to interview him. True, *Strickland* requires an attorney "to make reasonable investigations." *Strickland*, 466 U.S. at 691. But counsel isn't required to "investigate lines of defense that he has chosen not to employ at trial." *Id.* at 681. And so if counsel "make[s] a reasonable decision that makes particular investigations unnecessary," he "need not pursue an investigation that would be fruitless." *Harrington*, 562 U.S. at 106, 108. As explained, Kovach made a reasonable decision not to call Thomas as a witness, so he did not have to interview him. *See Kendrick v. Parris*, 989 F.3d 459, 471 (6th Cir. 2021) ("[T]he Sixth Amendment does not require an attorney to interview a witness personally when he reasonably believes that doing so is unnecessary.").

Moody argues that Kovach couldn't have decided not to call Thomas without first interviewing him. If Kovach can do this, Moody continues, then an attorney's decision not to interview a co-defendant would never be deficient. When challenged, the attorney could always say he didn't plan to call the co-defendant as a witness. We disagree.

Moody's argument paints with too broad a brush. As we've explained, *Strickland* held that "counsel need not investigate lines of defense that he has chosen not to employ at trial." *Strickland*, 466 U.S. at 681. And Moody has pointed to no Supreme Court precedent that requires an attorney to first interview a witness before deciding not to

call them to the stand. *See Kendrick*, 989 F.3d at 471 (rejecting a similar argument because "Supreme Court precedent" doesn't "clearly establish[] such a specific investigatory obligation" to interview a witness if doing so is unnecessary). And this rule does not lead to the slippery slope Moody suggests. That's because the attorney's decision not to call a witness must be reasonable. Sometimes, an attorney's decision will be reasonable only if he interviews the witness; other times, it won't. *See Cullen*, 563 U.S. at 195 (explaining that "*Strickland* itself rejected the notion that the same investigation will be required in every case"). Because Kovach's decision not to call Thomas as a witness was reasonable, Moody's case falls in the latter category.

Finally, Moody argues that the TCCA's decision was unreasonable because, without interviewing Thomas, Kovach couldn't have known what he would say. This may be true in some cases, but not here. As explained, Thomas was represented by Preston, and Kovach had multiple conversations with her. Kovach's decision wasn't based on his personal belief but based on these conversations with Preston. The TCCA found these conversations enough to defer to Kovach's judgment. And without Supreme Court cases that say otherwise, we defer to it under AEDPA.

In sum, Moody hasn't met his burden of showing that the TCCA unreasonably applied *Strickland*'s deficiency prong to his case.

2.

Next, we turn to *Strickland*'s prejudice prong. The TCCA determined that even if Kovach's performance were deficient, Moody wasn't prejudiced by the decision not to call Thomas as a witness. *Moody*, 2017 WL 829820, at *10. Again, we find its decision reasonable.

Prejudice requires the petitioner to show "that there

is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. We ask whether it is "reasonably likely the result would have been different" absent counsel's deficiency. *Harrington*, 562 U.S. at 111–12 (internal quotation omitted). And "[t]he likelihood of a different result must be substantial, not just conceivable." *Id.* at 112. In other words, if the evidence "would barely have altered" the outcome, then there is no prejudice. *See Strickland*, 466 U.S. at 700. Here, it was reasonable for the TCCA to find that Moody's "evidence of prejudice," namely Thomas's testimony, "fell short of this standard." *Harrington*, 562 U.S. at 112.

To begin, Thomas's testimony was cumulative. As the TCCA noted, his testimony boiled down to Moody not firing a weapon. *Moody*, 2017 WL 829820, at *10. But that evidence was already presented to the jury. After all, the jury found Moody not guilty of the firearm charge. *Id.* As Kovach explained in the post-conviction hearing, the fact that Moody wasn't the shooter "was apparent from discovery." (R. 7-18, Kovach's Test., PageID 1308.) And even the post-conviction trial judge said that Thomas's testimony "mirror[ed] the jury's verdict." *Moody*, 2017 WL 829820, at *9. So the TCCA's conclusion that Thomas's testimony would not have changed the verdict was reasonable.

What's more, Thomas's testimony did not "directly challeng[e] other" evidence in the case. *Harrington*, 562 U.S. at 112. The TCCA found that there was enough circumstantial evidence for the jury to convict Moody under a theory of criminal responsibility. *Moody*, 2017 WL 829820, at *10. Recall that under criminal responsibility, "presence and companionship with the perpetrator of a felony before and after the commission of the crime are circumstances from which an individual's participation

may be inferred." *State v. Dorantes*, 331 S.W.3d 370, 386 (Tenn. 2011). And that "no specific act or deed need be demonstrated," only that "the defendant in some way knowingly and voluntarily shared in the criminal intent of the crime and promoted its commission." *Id.* Here, Thomas's testimony does little to contradict the circumstantial evidence of criminal responsibility. For example, Thomas testified that Moody was in the car during the shooting. He confirmed that Moody would have known there were guns in the car before they went out—Thomas had his gun and there were guns under the seat of the car. And Thomas did not contradict the other evidence in the case. He said nothing about the car being registered to Moody's mother nor did he explain why Moody gave up the driver's seat. And he also never said that Moody tried to stop the shooting in the time the car turned around. So Thomas's testimony does nothing to contradict the "sufficient conventional circumstantial evidence pointing to [Moody's] guilt." *Harrington*, 562 U.S. at 113.

Finally, the TCCA reasonably held that Moody wasn't prejudiced because Thomas's testimony was readily impeached. *Moody*, 2017 WL 829820, at *10. Thomas admitted he gave inconsistent testimony to the police. At first, he told the police that he was not there. Later, he confessed that he was involved and fired a gun. Thomas's testimony was thus of questionable value and doesn't show a reasonable probability that the jury's verdict would have changed. *Cf. Cullen*, 563 U.S. at 201 (finding no prejudice where the evidence was of "questionable mitigating value").

Given that Thomas's testimony was cumulative, that he offered little to contradict the circumstantial evidence, and that his testimony would have been discredited, we cannot say that the TCCA unreasonably applied *Strickland*'s prejudice prong.

Moody's counterarguments are unavailing. First, he rejects the conclusion that Thomas's testimony was cumulative. As he tells it, Thomas's testimony does more than show that Moody didn't fire a weapon; it also shows he didn't direct the car or point out Bridges. But this too is cumulative. The evidence at trial made it clear that it was Thomas, not Moody, who pointed out Bridges. And there was also evidence that Moody wasn't driving the car or directing it.[8] So Thomas's testimony added nothing in that respect.

Next, Moody argues that the TCCA unreasonably applied *Strickland* when it assumed that a jury would not credit Thomas. He points to our decision in *Bigelow* and argues that we have held that where the evidence boils down to a credibility contest, the defendant is prejudiced. *See Bigelow v. Haviland*, 576 F.3d 284, 291 (6th Cir. 2009). But *Bigelow* is not Supreme Court precedent, so it cannot show that the TCCA unreasonably applied clearly established federal law.[9] *See Parker v. Matthews*, 567 U.S. 37, 48 (2012). And the TCCA concluded that the jury would

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[8] Moody claims that Thomas would have testified that Moody had no reason to know what's going on. The TCCA held that this aspect of the testimony would have been inadmissible speculation. But Moody rejects that conclusion, claiming it is "not speculation for a witness to testify about the objective, observable circumstances that occurred before, during, or after an event." (Appellant's Br. at 55.)

But even if Moody is right, he isn't entitled to relief. If the TCCA is wrong that Thomas's testimony is inadmissible speculation, that would be an error of state law. And "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991). In any event, the aspects of Thomas's testimony that Moody claims are otherwise admissible—the "observable circumstances"—are, as explained, cumulative.

[9] In any event, *Bigelow* is distinguishable. There, the state had no evidence tying the defendant to the scene and three alibi witnesses would have said he wasn't at the scene. *Bigelow*, 576 F.3d at 291.

have likely not credited Thomas. This was a reasonable decision given his prior inconsistent statements. In any event, this wasn't the only rationale for the TCCA's decision. So we will not disturb the TCCA's conclusion.

At bottom, the jury heard the evidence and found that Moody was guilty of one charge (first-degree murder) but not the other (employment of a firearm). Thomas's testimony would not have changed this outcome. So his testimony was "not so significant" that "it was necessarily unreasonable for the [TCCA] to conclude that [Moody] had failed to show a 'substantial' likelihood of a different sentence." *Cullen*, 563 U.S. at 202.

B.

Finally, we consider Moody's actual innocence claim. Moody wants to bring a number of claims that he concedes are procedurally defaulted. Generally, a habeas petitioner who fails to raise a claim in state post-convictions proceedings can't raise them in the federal counterpart. *See Irick v. Bell*, 565 F.3d 315, 323–24 (6th Cir. 2009). But the Supreme Court has recognized an exception for petitioners who are "actually innocent." *See Lundgren v. Mitchell*, 440 F.3d 754, 764 (6th Cir. 2006) (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)). To show actual innocence, Moody must establish, by "new" and "reliable" evidence, that it is more likely than not that "no reasonable juror would have found [him] guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 324, 327 (1995). When weighing the evidence, our task is to make "a probabilistic determination about what reasonable, properly instructed jurors would do" with it. *House v. Bell*, 547 U.S. 518, 538 (2006) (quoting *Schlup*, 513 U.S. at 329).

Moody argues that he falls into the actual-innocence exception because Thomas's testimony showed he didn't take part in the shooting. In so asserting, he faces an uphill

climb. Successful actual innocence claims are reserved only for "extraordinary case[s]." *Schlup*, 513 U.S. at 321. It is not enough for Moody to challenge the "mere legal insufficiency" of the evidence; he must show "factual innocence." *Bell v. Howes*, 703 F.3d 848, 854 (6th Cir. 2012) (internal quotations omitted). That is, Moody must provide evidence that shows he did not "actually commit[] the underlying conduct." *McKay v. United States*, 657 F.3d 1190, 1199 (11th Cir. 2011) (collecting cases).

Moody failed to meet this standard. Moody contends that Thomas's testimony shows that he was not driving the car, did not have a gun, and directed no one to shoot. As Moody sees it, no reasonable juror who heard this testimony would find him guilty of the underlying crime. This argument fails for two reasons.

First, Thomas's testimony is neither "new" nor "reliable." *Schlup*, 513 U.S. at 324. As explained above, Thomas's testimony is cumulative and doesn't add anything to what the jury heard. So even if the jury had heard it, there is no indication that no reasonable juror would have found him not guilty. And Thomas is not a credible witness. Not only did he lie to the police by saying he wasn't involved in the shooting, but he is also Moody's half-brother. And as the district court explained, he has already pleaded guilty to second-degree murder and so has nothing to lose in testifying for his brother now. *Moody*, 2020 WL 1061950, at *18.

And we aren't alone in thinking that Thomas isn't credible. After hearing Thomas's testimony at Moody's post-conviction hearing, the state trial court noted the "many inconsistencies" in his testimony and characterized it as "fodder for impeachment." *See Moody*, 2017 WL 829820, at *9–10. And at Matthews's post-conviction hearing, a different trial court found Thomas's testimony

not credible. *Matthews v. State*, No. M2014-01663-CCA-R3-ECN, 2015 WL 3814164, at *7 (Tenn. Crim. App. Jun. 19, 2015). Because Thomas's testimony is easily impeachable and unreliable, reasonable jurors could discredit it.

Second, even if Thomas's testimony were reliable, it would still fail to show Moody's actual innocence. That's because, by itself, the testimony does little to establish that no reasonable juror would have found Moody guilty after hearing it. *Schlup*, 513 U.S. at 327. His testimony did not challenge the circumstantial evidence in the case that could have swayed the jury. The car used in the shooting belonged to Moody's mother, there were guns in the car, Moody knew about the guns, and he gave up his driver's seat to another individual. Further, Caldwell's testimony directly implicated Thomas in the shooting, and there is no reason to think that a jury would discredit Caldwell and at the same time credit Thomas. Thus, even with Thomas's testimony, Moody hasn't shown that "no reasonable juror would have found [him] guilty beyond a reasonable doubt." *Id.* And so we refuse to excuse his procedural defaults.

IV.

Moody has failed to show that the TCCA unreasonably applied federal law or that he is actually innocent. For these reasons, we **AFFIRM**.

COLE, Circuit Judge, concurring. Under § 2254(d) of AEDPA, we may only grant habeas if the TCCA unreasonably applied the principles outlined in *Strickland* to the facts of this case *or* made unreasonable factual determinations in light of the evidence presented. *See* 28 U.S.C. § 2254(d)(1); *Williams v. Taylor*, 529 U.S. 362, 413 (2000). If "fairminded jurists could disagree on the correctness of the state court's decision," then the ruling was reasonable, and the panel should not disrupt the TCCA's conclusion. *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (internal quotations omitted) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). Because I agree that the TCCA did not unreasonably apply *Strickland* to the facts of this case, I concur with the majority.

This is a tragic case from every perspective, including Moody's. Moody was just 14 years old at the time of the shooting, no gun was ever recovered from or associated with Moody, and—-unlike the other boys convicted in this case—the prosecution could not identify Moody's motive for the crime. The only eyewitness who testified against Moody changed his version of the story several times before implicating Moody as a shooter. That witness has since recanted his trial testimony, explaining that he was coerced by police to lie and place blame on Moody. And, at the close of trial, the jury found Moody not guilty of firearm possession but convicted him of murder. Considering Moody's young age at the time of the shooting, the scant evidence against him, and the jury's determination that he was not one of the shooters, I believe that Moody is an excellent candidate for clemency.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

DEANGELO MONTEZ MOODY,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 3:17-cv-01452**
	)	**Judge Trauger**
MIKE PARRIS, Warden,[1]	)	
	)	
Respondent.	)	

MEMORANDUM

DeAngelo Moody is currently serving a sentence of life in prison based on his May 12, 2011 conviction by a Davidson County, Tennessee jury of first-degree felony murder. On November 15, 2017, he filed his pro se petition for the writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Doc. No. 1.) The respondent thereafter filed an answer to the petition (Doc. No. 8) and the state court record (Doc. No. 7), and the petitioner filed a reply to the respondent's answer (Doc. No. 15).

This matter is ripe for the court's review, and the court has jurisdiction. The respondent does not dispute

[1] In light of the petitioner's transfer to the Morgan County Correctional Complex, the appropriate respondent to his petition is the warden of that facility, Mike Parris. Rule 2(a), Rules Gov'g Section 2254 Cases.

that the petition is timely, that this is the petitioner's first Section 2254 petition related to this conviction, and that the claims of the petition have been exhausted. (Doc. No. 8 at 1–2.) Having reviewed the petitioner's arguments and the underlying record, the court finds that an evidentiary hearing is not required. As explained below, the petitioner is not entitled to relief under Section 2254, and his petition will therefore be denied.

I. PROCEDURAL HISTORY

The petitioner was indicted on December 3, 2009, along with Martez Matthews and Lorenzo Ortago Thomas, for the killing of Loren Michelle Johnson during the perpetration of or attempt to perpetrate a first-degree murder, and for employing a firearm during the commission of a dangerous felony. (Doc. No. 7-1 at 4–7.) The petitioner, his co-defendants, and the victim were all minor teenagers in 2009. After being tried jointly with Matthews before a jury (Thomas was tried separately), the petitioner was acquitted of the firearm charge but convicted of first-degree felony murder. (Doc. No. 7-7 at 3–4.) The trial court sentenced the petitioner to life in prison. (Doc. No. 7-1 at 48.)

On direct appeal, the petitioner argued that the evidence at trial was insufficient to support a guilty verdict. (Doc. No. 7-10 at 4.) The Tennessee Court of Criminal Appeals (TCCA) rejected this argument and affirmed the judgment of the trial court. *See State v. Moody*, No. M2011-01930- CCA-R3-CD, 2013 WL 1932718 (Tenn. Crim. App. May 9, 2013). The Tennessee Supreme Court denied discretionary review on October 7, 2013. (Doc. No. 7-13.)

Petitioner filed a pro se petition for post-conviction relief on April 21, 2014. (Doc. No. 7- 14 at 29–35.) Following the appointment of counsel and an evidentiary hearing, the post- conviction trial court denied relief on multiple claims

of ineffective assistance of trial counsel, but granted relief and ordered a new trial based on its finding that counsel was constitutionally ineffective in failing to interview and call Ortago Thomas to testify at the petitioner's trial. (*Id.*) The state filed an appeal from the grant of post-conviction relief, arguing that the trial court erred in finding that trial counsel was constitutionally ineffective. (Doc. No. 7-22.) The petitioner responded in defense of the trial court's judgment, but did not appeal its rulings on his unsuccessful ineffective assistance claims. (Doc. No. 7-21.)

On March 2, 2017, the TCCA reversed the trial court's grant of post-conviction relief and reinstated the judgment against the petitioner. *Moody v. State*, No. M2015-02424-CCA-R3-PC, 2017 WL 829820 (Tenn. Crim. App. Mar. 2, 2017). The petitioner filed for permission to appeal to the Tennessee Supreme Court, which was denied on June 9, 2017. He filed his pro se petition under Section 2254 in this court on November 15, 2017.

II. STATEMENT OF FACTS

A. Evidence at Trial

On April 25, 2009, sixteen-year-old Loren Johnson was struck by stray gunfire and killed as she laid in her mother's bedroom inside the family home, located at 3652 Chesapeak Drive. Her mother, Inez Johnson, testified that she was lying on the bed with her daughter when they heard gunshots, and "instead of laying low and rolling from the bed, [the victim] raised her body up" and was struck by a bullet. Although paramedics responded to the scene and took the victim by ambulance to the hospital, she died from her injuries. *State v. Moody*, 2013 WL 1932718, at *1.

Officer Christopher Cote of the Metro Nashville Police Department (MNPD) testified that he arrived at the scene after the paramedics. He testified that, when Officer Brian Eaves arrived at the scene, a witness approached

Eaves and gave him a hat that the witness had found. Officer Cote also testified that he found multiple shell casings of different calibers at the scene. *Id.* at *2. A crime scene investigator, Lynne Mace, testified that her investigation of the scene revealed that there were two .45 caliber automatic casings and six 9mm casings. *Id.*

The state then called Christopher Bridges to testify. He testified that he lived at 3648 Chesapeak Drive, and described the events surrounding the shooting as follows:

> He stated that on April 25, 2009, at approximately 4:00 p.m., he was walking down Chesapeak Drive with Deandre Williams. As they were walking, a car with four or five people inside of it pulled up and began shooting. Christopher began to run, but he heard more than five shots fired. The State showed him a photograph of a vehicle and asked if it was the vehicle he observed on April 25, 2009, to which Christopher responded, "Yes, sir." Christopher stated that he was given the opportunity to speak with the police about what he observed, but he told them that he "really didn't see anybody, didn't see anything." He said that he did not want to speak with the police and that they forced him to go to the precinct. Christopher admitted that in April 2009, he was a member of the 107 Underground Crips but denied that he was still a member.
>
> On cross-examination, Christopher testified that he did not know why someone would want to shoot at him. He stated that the shooting came from the driver's side of the vehicle. He did not know appellants [Moody

> and Matthews] and said that the first time he saw them was on the news. Christopher stated that he had an adequate opportunity to view the car because it passed him and made a u-turn. He said that the vehicle's license plate was in the window and that the vehicle's bumper was not damaged. Christopher later testified that the vehicle that he identified in the photograph had damage on its bumper. Christopher said that he ran between some houses when the people in the vehicle started shooting; however, the victim's house was not one of them.

Id.

The next witness, Deandre Williams, testified that he had lived with Christopher Bridges in April 2009 and was with him on April 25. *Id.* Williams further testified as follows:

> On April 25, 2009, he was walking to a friend's house with Christopher when he heard gunshots. He ran away and was unable to see from where the gunshots originated. He stated that he was sending text messages on his cellular telephone and did not observe any nearby vehicles or people. However, he recalled telling the police that he saw a small blue or green vehicle that looked like a Honda. He explained that he saw the vehicle before he and Christopher began walking. Mr. Williams further testified that he heard more than five gunshots. He estimated that he was three houses away from 3652 Chesapeak Drive when the gunshots began. He ran in the opposite direction from the

> victim's house.
>
> Mr. Williams denied being a member of or affiliated with the 107 Underground Crips. He stated that he did not know whether Christopher was a member of the gang and denied noticing a tattoo of a gun with the numbers "107" on Christopher's hand.
>
> On cross-examination, Mr. Williams testified that he did not know appellants and had never seen them before the day of trial. Mr. Williams did not know why anyone would shoot at him. He stated that he did not know anything about the incident and was only testifying because the State forced him to do so.

Id. at *2–3.

Evan Bridges, Christopher's father, was next to testify. He was in the backyard of his home at 3648 Chesapeak Drive when he heard gunshots and moved toward his front yard. *Id.* at *3. Upon arriving at his front yard, Evan Bridges was able to determine that the gunshots were coming from a small green car that was driving down the street, in which he "observed the heads of three African-Americans" who appeared to be "some young guys." *Id.* "When shown a photograph of a vehicle, Evan stated that the vehicle in the photograph was the same size, but the car he saw on the day of the shooting looked like a Honda." *Id.* He testified that "[a]pproximately fifteen to twenty minutes after the shooting ceased, [he] found a black cap in the middle of the street that was not there before the shooting" and gave it to the police. *Id.* Evan Bridges testified on cross- examination that he did not actually see anyone fire a weapon, and further clarified that the vehicle he saw was green while the vehicle in the

photograph appeared to be blue. *Id.*

The state next called Quontez Caldwell, who provided the following testimony:

> Quontez Caldwell testified that appellant Moody and Ortego Thomas are his halfbrothers through their father, but he only became acquainted with them a short time prior to this incident. Mr. Caldwell stated that on April 25, 2009, appellant Moody and Mr. Thomas picked him up from his grandmother's house in appellant Moody's vehicle. He identified appellant Moody's vehicle from an exhibit photograph. In addition to his half-brothers, two other males whom he did not know were in the vehicle. He identified appellant Matthews in the courtroom as one of the other passengers in the vehicle. Mr. Caldwell stated that as they drove down Chesapeak Drive, the people in the car saw "somebody they had a beef with [sic][,] and they shot at them." He recalled that Mr. Thomas said, "'There go [sic] somebody we beefin' with [sic].'" The driver then turned the vehicle around and drove back up Chesapeak Drive. He said that appellants and Mr. Thomas began shooting at a person he knew as "C. Trigger." Mr. Caldwell did not recall having previously testified that appellant Matthews had a 9mm pistol, that appellant Moody had a ".45 or .40," or that Mr. Thomas had a "38 revolver," but he acknowledged that if he had previously so testified, then it was the truth. He stated that neither he nor the driver had a weapon that day. After the shooting, the men dropped Mr.

Caldwell off in the middle of the street. He said that he did not speak with appellants about the shooting after it happened.

Mr. Caldwell stated that the police attempted to interview him. The first two times they attempted to speak with him, he told them that he did not know anything about what happened because he just "didn't want to tell them nothing [sic]." Mr. Caldwell denied being a member of the Hoover Deuce Crips. He denied testifying to being a member in July 2009 and said that if his being a member of the Crips was reflected in his statement, it was not the truth.

On cross-examination, Mr. Caldwell denied that a detective with MNPD brought him in for questioning because he had received information that Mr. Caldwell had claimed that he killed the victim. He further denied getting a new "teardrop tattoo" on his face. Mr. Caldwell did not recall telling the detective that he was anywhere near Chesapeak Drive, that he was with someone named "T.O.," that he was in a Chevrolet Impala, or that he did not know the color of the Impala. He stated that he did not know appellant Moody's real name and that he only knew his father by the name "Tango."

Mr. Caldwell admitted that he spoke with another detective a few weeks later but denied that he changed his story about being in an Impala with T.O. Mr. Caldwell admitted that appellant Moody picked him up and then proceeded to pick up another person, at which

> time the other person began driving the vehicle. He remembered seeing "C. Trigger" and stated that "guns were pulled[,] and they started shooting." In a subsequent interview with Kathy Morante, an assistant district attorney, Mr. Caldwell denied any knowledge of his brothers' having problems with "C. Trigger" and stated, "I didn't know they had no [sic] beef with him." He testified that his problem with "C. Trigger" was "[s]omething about ... some child issues" and that it was not significant. Mr. Caldwell denied that the "child issues" concerned his child's mother and could not remember stating that there was bad blood between him and "C. Trigger" or indicating that "C. Trigger" had tried to do him harm in the past. He declined the opportunity to review the transcript of his statement.

Id. at *3–4. Mr. Caldwell testified as a cooperating witness pursuant to a "use immunity" agreement. Assistant District Attorney Kathy Morante testified that such agreements precluded the prosecution from using any information provided by the witness unless it is determined that the witness is being untruthful. *Id.* at *4. She testified that "the most serious charge Mr. Caldwell faced in the summer of 2009, when he was fifteen years of age, was an attempted homicide that was unrelated to the instant case," and that he had been in the custody of the Department of Children's Services based on other criminal acts until just before the incident on April 25, 2009. *Id.* at *4–5.

The state proceeded to put on the following proof through lay and expert witnesses:

Detective Gene Davis of the MNPD testified that on May 15, 2009, he conducted a traffic stop in the area of Nolensville Road for a traffic ordinance violation. He observed three people inside the vehicle he stopped, and during a search of the vehicle, he found a loaded 9mm Glock semi-automatic pistol. Detective Davis stated that appellant Matthews claimed ownership of the weapon, at which time he was taken into custody. Detective Davis identified the weapon, which was entered as an exhibit. He also identified appellant Matthews, who was seated in the courtroom.

Detective Cody O'Quinn of the MNPD testified that he was involved in serving a search warrant for a vehicle located at 314 Kern Drive on June 18, 2009. The vehicle was a green 1999 Kia. He determined that the vehicle was registered to appellant Deangelo Moody and his mother. He identified the temporary drive-out tag found inside the automobile and noted that it would have been valid on the date of this incident, April 25, 2009. On cross-examination, Detective O'Quinn stated that the Kia automobile in the exhibit photograph appeared green in color to him.

Detective Lawrence Brown, also from the MNPD, testified that he obtained buccal swabs from both appellants on February 9, 2011, at the prosecutor's request. He explained that a buccal swab is used to obtain liquid evidence, usually saliva, from an individual. The swabs were packaged and

taken to the Tennessee Bureau of Investigation ("TBI") to be analyzed for DNA comparison.

Agent Mark Dunlap of the TBI Crime Laboratory was accepted by the trial court as an expert in forensic chemistry and serology. He testified with regard to his DNA analysis of a black cap. From his testing, he determined that the "DNA profile from the cap was a mixture of genetic material from two individuals." From the standards submitted in February 2011, ten of the thirteen testing sites indicated that the major contributor of DNA on the cap was appellant Matthews.

On cross-examination, Agent Dunlap explained that three of the thirteen testing sites were inconclusive, stating, "[T]here just wasn't enough DNA there to obtain a full profile, so those sites didn't yield results. It doesn't mean that they didn't match, it just means there was no result at those sites." He acknowledged that no DNA belonging to appellant Deangelo Moody was found on the hat.

Agent Robert Daniel Royse of the TBI Crime Laboratory was accepted by the trial court as an expert in firearms and tool mark identification. He explained the operation of the Glock 9mm Luger semiautomatic pistol, the parts of a live cartridge, and the firing cycle process. Agent Royse testified that in his work, he examines the unique set of markings found on every firearm, which can be thought of as a mechanical fingerprint. In making an

> identification, he test fires the weapon and takes the test bullets and cartridge cases and compares them to the evidence. If the unique characteristics are present on both the evidence and the test material, he concludes that they have a common origin and that they were fired from the same weapon. Agent Royse was provided six spent .45 caliber automatic cartridge casings and two 9mm cartridge casings in April 2009, and in January 2011, he was provided a 9mm weapon for analysis. He testified that the two 9mm casings provided to him were fired from the weapon he received in January 2011.

Id. at *5.

After the prosecution rested, the defense called William Jackson, a former MNPD officer who testified that he was the lead detective investigating the victim's death. Detective Jackson testified that he "was present during the victim's autopsy and collected the bullet recovered from the victim's body as evidence." *Id.* at *6. Detective Jackson further testified as follows:

> He recalled testifying at appellants' detention hearing that the recovered bullet was a large fragment and stated, "I didn't know at the time if it was a[.]45 or a[.]40[.] I guessed that it was one of those too big to be a[.]38 or a[.]22."
>
> Detective Jackson testified at length concerning his three interviews with Quontez Caldwell. He recalled that his first interview with Mr. Caldwell was at the end of April and the second interview was on June 12th. He explained that he uses conversation as his

> interviewing technique to get to the truth. He would not make promises of assisting in getting charges dismissed or lowered, but he acknowledged that he would "talk for someone if they cooperate" and admitted that "[he did not] know how the [District Attorney] works."
>
> On cross-examination, Detective Jackson recalled that during the first interview with Mr. Caldwell on April 30, 2009, Mr. Caldwell denied being at the scene or having anything to do with this incident. During the second interview on June 12, 2009, Mr. Caldwell began to cooperate and identified appellant Matthews in a photograph array as one of the individuals involved in this shooting. Detective Jackson testified that ultimately, Mr. Caldwell provided seating positions in the vehicle and stated that appellants were two of the three people involved in shooting at Christopher Bridges and Deandre Williams on April 25, 2009.

Id.

B. Testimony at the Post-Conviction Hearing

The evidence received in the post-conviction trial court pertaining to the sole issue on appeal—trial counsel's ineffectiveness vis-à-vis co-defendant Ortago Thomas—was described by the TCCA as follows:

> Ortago Thomas testified that he was indicted as a co-defendant and that his case was severed from the petitioner's. He pled guilty to a lesser charge of second degree murder in exchange for a sentence of fifteen years. Mr.

> Thomas claimed that the petitioner was not involved in the murder and that "it was just [Mr. Thomas] and [Mr.] Caldwell [who] was doing the shooting." Mr. Thomas elaborated:

[The petitioner] didn't know what was going on because (unintelligible) fact that Caldwell was telling us to take him home, we was taking him home then, he went down—he was giving us directions, we went down the wrong street, and then we seen the two individuals that was shooting at, and then didn't nobody know what was going on because they the only one shootin' at people.

> Asked why the petitioner did not know there was going to be a shooting, Mr. Thomas responded, "Simple fact he didn't have no gun or nothing, because only one had a gun was me, Caldwell and Matthews, was the only one." Mr. Thomas stated that they were taking Mr. Caldwell home, one street over, when the shooting occurred. Asked what happened, Mr. Thomas responded:

Simple fact when the two individuals shooting at, one of them was reaching, I shot in the air to try to get him away and told the driver to go on drive off so we can go on get away, then all of a sudden I see Caldwell reach under the seat, ... driver's seat and grab Matthews' gun and his gun start shooting over the roof, and Matthews done grabbed the gun, tried to grab the gun from him.

> Mr. Thomas claimed that, while the case was pending, he told his lawyer, his family, and the petitioner's family about what had happened. Mr. Thomas stated that he wanted to testify at the petitioner's trial that he was the one responsible for the victim's murder, but no one would let him take

responsibility.

Mr. Thomas acknowledged having initially told the police that he had nothing to do with the crime and that he was not there when it happened. He then eventually told the police that he was in the car, had a .38 caliber gun, and that he fired the gun. Mr. Thomas stated that Mr. Matthews had a nine-millimeter gun, but Mr. Caldwell was shooting it. Mr. Caldwell was also shooting his own .45 caliber gun as well. He recalled that the victim was killed by a .45 caliber bullet. Mr. Thomas agreed that his testimony would have essentially been that the petitioner did not have a gun at the time of the offense.

The petitioner testified regarding counsel's representation of him and his various interactions with counsel. The petitioner stated that he asked counsel to investigate statements made by Quontez Caldwell, but counsel failed to do so. According to the petitioner, Mr. Caldwell was overheard at his high school bragging about the murder, and students at the school could have testified about the statements. However, the petitioner acknowledged that the police investigated the alleged statements and could not find any witnesses who heard Mr. Caldwell bragging about the murder. The petitioner did not provide any testimony concerning Mr. Thomas.

Trial counsel testified that it was clear that the petitioner was not the shooter, but

counsel was not "able to convey with a degree of understanding the concept of criminal responsibility or ... facilitation" to the petitioner. Counsel recalled that Mr. Caldwell, a witness for the State, "changed his story a lot" and at one time said that the petitioner had fired a weapon. However, the petitioner was acquitted on the gun charge, indicating that the jury based the petitioner's murder conviction on a theory of criminal responsibility. Counsel stated that his review of the discovery materials showed that Mr. Caldwell was the only person who stated that the petitioner was shooting. The discovery also indicated that Mr. Caldwell had made self- incriminating statements at his high school. Counsel spoke to people at Mr. Caldwell's school and obtained Mr. Caldwell's interview statements to police.

Counsel testified that he was unsure why Mr. Thomas' case was severed from the petitioner's. However, at one point, he thought Mr. Thomas was going to testify against the petitioner. Counsel said that he discussed the case with the attorney who represented Mr. Thomas, and Mr. Thomas' attorney never told him that Mr. Thomas wanted to testify for the petitioner. Counsel stated that he would have been shocked if Mr. Thomas had testified at the petitioner's trial that Mr. Thomas had committed first degree murder. Counsel also noted that he could not compel Mr. Thomas to testify against himself. He could not say whether Mr. Thomas' testimony would have helped at trial.

Moody v. State, No. M2015-02424-CCA-R3-PC, 2017 WL 829820, at *6–7 (Tenn. Crim. App. Mar. 2, 2017).

III. CLAIMS PRESENTED FOR REVIEW

The petitioner's pro se petition in this court asserts the following claims:

(1) The evidence is insufficient to support his conviction.

(2) Trial counsel was constitutionally ineffective in failing to: (a) prepare for trial; (b) move to sever his trial from that of Mr. Matthews; (c) move for dismissal of all charges after the jury acquitted him of the firearm charge; and (d) challenge the constitutionality of his sentence under *Miller v. Alabama*, 567 U.S. 460 (2012), and *Graham v. Florida*, 560 U.S. 48 (2010).

(3) The trial court erred in failing to act as thirteenth juror.

(4) The trial court erred in failing to allow him to retain counsel of his choice.

(5) The trial court sentenced him unconstitutionally, in light of *Miller* and *Graham*. (Doc. No. 1 at 6–18.)

IV. LEGAL STANDARD

The statutory authority of federal courts to issue habeas corpus relief for persons in state custody is provided by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). A federal court may grant habeas relief to a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Upon finding a constitutional error on habeas corpus review, a federal court may only grant relief if it finds that the error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993); *Peterson v. Warren*,

311 F. App'x 798, 803–04 (6th Cir. 2009).

AEDPA was enacted "to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases . . . and 'to further the principles of comity, finality, and federalism.'" *Woodford v. Garceau*, 538 U.S. 202, 206 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 436 (2000)). AEDPA's requirements "create an independent, high standard to be met before a federal court may issue a writ of habeas corpus to set aside state-court rulings." *Uttecht v. Brown*, 551 U.S. 1, 10 (2007) (citations omitted). As the Supreme Court has explained, AEDPA's requirements reflect "the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 562 U.S. 86, 102–03 (2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979)). Where state courts have ruled on a claim, AEDPA imposes "a substantially higher threshold" for obtaining relief than a de novo review of whether the state court's determination was incorrect. *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) (citing *Williams v. Taylor*, 529 U.S. 362, 410 (2000)).

Specifically, a federal court may not grant habeas relief on a claim rejected on the merits in state court unless the state decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (d)(2). A state court's legal decision is "contrary to" clearly established federal law under Section 2254(d)(1) "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on

a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. at 412–13. An "unreasonable application" occurs when "the state court identifies the correct legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. A state court decision is not unreasonable under this standard simply because the federal court finds it erroneous or incorrect. *Id.* at 411. Rather, the federal court must determine that the state court's decision applies federal law in an objectively unreasonable manner. *Id.* at 410–12.

Similarly, a district court on habeas review may not find a state court factual determination to be unreasonable under Section 2254(d)(2) simply because it disagrees with the determination; rather, the determination must be "'objectively unreasonable' in light of the evidence presented in the state court proceedings." *Young v. Hofbauer*, 52 F. App'x 234, 236 (6th Cir. 2002). "A state court decision involves 'an unreasonable determination of the facts in light of the evidence presented in the State court proceeding' only if it is shown that the state court's presumptively correct factual findings are rebutted by 'clear and convincing evidence' and do not have support in the record." *Matthews v. Ishee*, 486 F.3d 883, 889 (6th Cir. 2007) (quoting Section 2254(d)(2) and (e)(1)); *but see McMullan v. Booker*, 761 F.3d 662, 670 & n.3 (6th Cir. 2014) (observing that the Supreme Court has not clarified the relationship between (d)(2) and (e)(1) and the panel did not read *Matthews* to take a clear position on a circuit split about whether clear and convincing rebutting evidence is required for a petitioner to survive (d)(2)). Moreover, under Section 2254(d)(2), "it is not enough for the petitioner to show some unreasonable determination of fact; rather, the petitioner must show that the resulting state court decision was 'based on' that unreasonable determination." *Rice v.*

White, 660 F.3d 242, 250 (6th Cir. 2011).

The standard set forth in 28 U.S.C. § 2254(d) for granting relief on a claim rejected on the merits by a state court "is a 'difficult to meet' and 'highly deferential standard for evaluating state- court rulings, which demands that state-court decisions be given the benefit of the doubt.'" *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (quoting *Richter*, 562 U.S. at 102, and *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam)). The petitioner bears the burden of proof. *Pinholster*, 563 U.S. at 181.

Even that demanding review, however, is ordinarily only available to state inmates who have fully exhausted their remedies in the state court system. 28 U.S.C. §§ 2254(b) and (c) provide that a federal court may not grant a writ of habeas corpus on behalf of a state prisoner unless, with certain exceptions, the prisoner has presented the same claim sought to be redressed in a federal habeas court to the state courts. *Pinholster*, 563 U.S. at 182; *Kelly v. Lazaroff*, 846 F.3d 819, 828 (6th Cir. 2017) (quoting *Wagner v. Smith*, 581 F.3d 410, 417 (6th Cir. 2009)) (petitioner must present the "same claim under the same theory" to the state court). This rule has been interpreted by the Supreme Court as one of total exhaustion, *Rose v. Lundy*, 455 U.S. 509 (1982), meaning that each and every claim set forth in the federal habeas corpus petition must have been presented to the state appellate court. *Picard v. Connor*, 404 U.S. 270 (1971); *see also Pillette v. Foltz*, 824 F.2d 494, 496 (6th Cir. 1987) (exhaustion "generally entails fairly presenting the legal and factual substance of every claim to all levels of state court review"). Moreover, the substance of the claim must have been presented as a federal constitutional claim. *Gray v. Netherland*, 518 U.S. 152, 162–63 (1996).

The procedural default doctrine is ancillary to the

exhaustion requirement. *See Edwards v. Carpenter*, 529 U.S. 446 (2000) (noting the interplay between the exhaustion rule and the procedural default doctrine). If the state court decides a claim on an independent and adequate state ground, such as a procedural rule prohibiting the state court from reaching the merits of the constitutional claim, a petitioner ordinarily is barred from seeking federal habeas review. *Wainwright v. Sykes*, 433 U.S. 72, 81–82 (1977*); see also Walker v. Martin*, 562 U.S. 307, 315 (2011) ("A federal habeas court 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"); *Coleman v. Thompson*, 501 U.S. 722 (1991) (same). If a claim has never been presented to the state courts, but a state court remedy is no longer available (e.g., when an applicable statute of limitations bars a claim), then the claim is technically exhausted, but procedurally barred. *Coleman*, 501 U.S. at 731–32.

If a claim is procedurally defaulted, "federal habeas review of the claim is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. The burden of showing cause and prejudice to excuse defaulted claims is on the habeas petitioner. *Lucas v. O'Dea*, 179 F.3d 412, 418 (6th Cir. 1999) (citing *Coleman*, 501 U.S. at 754). "'[C]ause' under the cause and prejudice test must be something external to the petitioner, something that cannot fairly be attributed to him[;] . . . some objective factor external to the defense [that] impeded . . . efforts to comply with the State's procedural rule." *Coleman*, 501 U.S. at 753 (emphasis in original). Examples of cause include the unavailability of the factual or legal

basis for a claim or interference by officials that makes compliance "impracticable." *Id.* To establish prejudice, a petitioner must demonstrate that the constitutional error "worked to his actual and substantial disadvantage." *Perkins v. LeCureux*, 58 F.3d 214, 219 (6th Cir. 1995) (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982)); *see also Ambrose v. Booker*, 684 F.3d 638, 649 (6th Cir. 2012) (finding that "having shown cause, petitioners must show actual prejudice to excuse their default"). "When a petitioner fails to establish cause to excuse a procedural default, a court does not need to address the issue of prejudice." *Simpson v. Jones*, 238 F.3d 399, 409 (6th Cir. 2000). Likewise, if a petitioner cannot establish prejudice, the question of cause is immaterial.

Because the cause and prejudice standard is not a perfect safeguard against fundamental miscarriages of justice, the United States Supreme Court has recognized a narrow exception to the cause requirement where a constitutional violation has "probably resulted" in the conviction of one who is "actually innocent" of the substantive offense. *Dretke v. Haley*, 541 U.S. 386, 392 (2004) (citing *Murray v. Carrier*, 477 U.S. 478, 495–96 (1986)); *accord Lundgren v. Mitchell*, 440 F.3d 754, 764 (6th Cir. 2006).

V. ANALYSIS

A. Sufficiency of the Evidence

The petitioner's "first and foremost" challenge is to the sufficiency of the evidence to support his felony murder conviction. (Doc. No. 15 at 2; Doc. No. 1 at 6.) He argues that his conviction rests entirely upon the testimony of Quontez Caldwell, his half-brother and an uncharged accomplice to the crime who testified under a "use immunity" agreement leveraged by unrelated felony charges against Caldwell. (Doc. No. 15 at 10.) The

petitioner contends that "[t]here is not a single piece of reliable, independent evidence that corroborates the so called accomplice's testimony" (Doc. No. 1 at 6), and that this uncorroborated testimony is further weakened by the jury's verdict acquitting the petitioner of employing a firearm during the commission of the crime. (Doc. No. 15 at 19.) This was his lone contention on direct appeal to the TCCA. (Doc. No. 7-10 at 4, 13–16.)

The TCCA properly stated the standard for appellate review of a claim challenging the sufficiency of the state's evidence as "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." *State v. Moody*, No. M2011-01930-CCA-R3-CD, 2013 WL 1932718, at *7 (Tenn. Crim. App. May 9, 2013), *perm. app. denied* (Tenn. Oct. 17, 2013) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In accord with this standard, "a reviewing court 'faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'" *Cavazos v. Smith*, 565 U.S. 1, 6 (2011) (quoting *Jackson*, 443 U.S. at 326)). Thus, a federal habeas court must resist substituting its own opinion for that of the convicting jury, *York v. Tate*, 858 F.2d 322, 329 (6th Cir. 1988), particularly when it comes to matters of witness credibility, which "is an issue to be left solely within the province of the jury." *Knighton v. Mills*, No. 3:07-cv-2, 2011 WL 3843696, at *6 (E.D. Tenn. Aug. 29, 2011) (citing, *e.g.*, *Deel v. Jago*, 967 F.2d 1079, 1086 (6th Cir. 1992)).

In addition to this requirement of deference to the fact-finder's verdict concerning the substantive elements of the crime under state law, this court must defer to the

TCCA's consideration of that verdict under AEDPA. *See Tucker v. Palmer*, 541 F.3d 652, 656 (6th Cir. 2008) (stating that "the law commands deference at two levels" when adjudicating sufficiency-of- the-evidence claim). The TCCA's consideration of the petitioner's sufficiency-of-the-evidence claim is set out below:

> To sustain appellants' convictions, the State must have proven beyond a reasonable doubt that appellants killed the victim "in the perpetration of or attempt to perpetrate ... first degree murder," as charged in the indictment. Tenn. Code Ann. § 39–13–202(a)(2) (2010). First degree premeditated murder, the underlying felony, is defined as "a premeditated and intentional killing of another." *Id.* at § 39– 13–202(a)(1). The jury was instructed that "attempt" meant that one "[a]cts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part." *Id.* at § 39–12–101(a)(2).
>
> Viewed in the light most favorable to the State, a brief synopsis of the facts in this case demonstrates sufficient evidence underlying appellants' convictions. Officer Cote responded to the call at 3652 Chesapeak Drive and was advised by paramedics that a sixteen-year-old female had been shot. After securing the scene, he and Officer Eaves received into evidence a black cap that a witness had found in the street. Officer Cote also retrieved two .45 caliber automatic shell casings and six 9mm shell casings.

Christopher Bridges testified that as he and Mr. Williams were walking down Chesapeak Drive, a car with four or five people inside of it pulled up, and some of the occupants began shooting. He heard more than five shots fired. He identified a photograph of a vehicle and stated that it appeared to be the vehicle from which the shots were fired. Christopher stated that he had an adequate opportunity to view the car because it passed him and made a u-turn. Mr. Williams also recounted that on April 25, 2009, he was walking to a friend's house with Christopher when he heard gunshots. He recalled telling the police that he saw a small blue or green vehicle that looked like a Honda. He explained that he saw that vehicle before he and Christopher began walking.

Evan Bridges heard gunshots around 4:00 p.m. on April 25, 2009, and went toward his front yard. When he arrived at the front yard, Evan determined that the gunshots were coming from a small green car that was driving down the street. Approximately fifteen to twenty minutes after the shooting ceased, Evan found a black cap in the middle of the street that was not there before the shooting. He thought that it might have belonged to one of the shooters, so he gave it to the police.

Quontez Caldwell testified that the vehicle in the picture introduced at trial was appellant Moody's vehicle, and it was the vehicle in which appellant Moody, Mr. Thomas, and some other individuals picked

him up that day. He identified appellant Matthews in the courtroom as one of the other passengers riding in the vehicle. Mr. Caldwell stated that as they drove down Chesapeak Drive, they saw someone with whom they had a disagreement and both appellants and the severed co-defendant began firing shots at him.

On May 15, 2009, Detective Davis conducted a traffic stop in the area of Nolensville Road for a traffic ordinance violation. During a search of the vehicle, he found a loaded 9mm Glock semi-automatic pistol, which appellant Matthews claimed as his own. Detective Cody O'Quinn of the MNPD testified that he was involved in serving a search warrant for a vehicle located at 314 Kern Drive on June 18, 2009. The vehicle was a green 1999 Kia. He determined that the vehicle was registered to appellant Deangelo Moody and his mother.

Detective Brown obtained buccal swabs from both appellants on February 9, 2011. Agent Dunlap analyzed the swabs and compared them to the DNA found on the black cap. From his testing, he determined that ten of the thirteen testing sites indicated that the major contributor of DNA on the cap was appellant Matthews.

Agent Royse received six spent .45 caliber automatic cartridge casings and two 9mm cartridge casings in connection with this case in April 2009. In January 2011, he received a 9mm weapon for comparison and

determined that the two 9mm casings provided to him were fired from the weapon he received in January 2011.

Detective Jackson testified that Mr. Caldwell identified appellant Matthews in a photograph array as one of the individuals involved in this shooting. Detective Jackson stated that ultimately, Mr. Caldwell provided seating positions in the vehicle and stated that appellants were two of the three people involved in shooting at Christopher Bridges and Deandre Williams on April 25, 2009.

Based on this evidence, the jury had sufficient evidence to convict both appellants of felony murder perpetrated during an attempt to commit first degree murder. "'Premeditation' means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time." Tenn.Code Ann. § 39–13–202(d) (2010). The jury could have found that appellants formed the intent to kill after appellants and their cohorts passed "C. Trigger," a person with whom they had a disagreement, walking down the street, at which time they made a u-turn in order to confront "C. Trigger." In shooting at "C. Trigger," appellants performed an act intending to cause an element of first degree murder to occur without further action on their part. *Id.* at § 39–12–101(a)(2). However, they missed their intended target and instead shot through the victim's home. "[A] killing in the course of an attempted first degree

> murder is first degree felony murder. If the prosecution establishes that a defendant attempts to commit the premeditated and deliberate first degree murder of a specific victim but instead kills an unintended victim, the defendant may be guilty of first degree felony murder. This result is plain from the statutory definition of the crime...." *Millen v. State*, 988 S.W.2d 164, 167–68 (Tenn.1999). As such, neither appellant is entitled to relief on this issue.

Moody, 2013 WL 1932718, at *7–9.

This court has reviewed the transcript of the petitioner's trial and finds that the TCCA's decision is supported in the record. The petitioner argues strenuously that no evidence reliably corroborates Mr. Caldwell's testimony that the petitioner was even present at the scene of the crime, much less that he participated in any way as a shooter. (Doc. No. 15 at 16–21.) However, to the extent that Mr. Caldwell was considered an accomplice by the jury, "[t]he rule that a conviction must be supported by more than the uncorroborated evidence of an accomplice is a state-law rule and not one of constitutional dimension." *Beaird v. Parris*, No. 3:14-cv-01970, 2015 WL 3970573, at *13 (M.D. Tenn. June 30, 2015) (citing *United States v. Gallo*, 763 F.2d 1504, 1518 (6th Cir. 1985)).

While the jury acquitted the petitioner on the charge of employing a firearm, it is clear that he need not have fired a gun to be guilty of felony murder. The state proceeded against the petitioner on a theory of criminal

responsibility,[2] pursuant to which an accused may be liable if he "in some way associate[s] himself with the venture, act[s] with knowledge that an offense is to be committed, and share[s] in the criminal intent of the principal in the first degree." *Hembree v. State*, 546 S. W. 2d 235, 239 (Tenn. Crim. App. 1976). "The defendant's requisite criminal intent may be inferred from his 'presence, companionship, and conduct before and after the offense.'" *State v. Peebles*, No. 2011-01312-CCA-R3-CD, 2013 WL 2459881, at *5 (Tenn. Crim. App. June 6, 2013) (quoting *State v. McBee*, 644 S. W. 2d 425, 428 (Tenn. Crim. App. 1982)). While the defendant's mere presence during the crime's commission is not sufficient to support a conviction, he need not take a physical part in the crime to be criminally responsible; "encouragement of the principal is sufficient." *State v. Little*, 402 S. W. 3d 202, 217 (Tenn. 2013).

Here, the state produced evidence supporting the finding that the petitioner drove a car resembling the eye witnesses' description of the car from which shots were fired, including the notable feature of a "temporary drive-out tag . . . that . . . would have been valid on the date of th[e] incident." *Moody*, 2013 WL 1932718, at *5. Moreover, "Quontez Caldwell testified that [the petitioner] and Ort[a]go Thomas are his halfbrothers through their father,

[2] In line with this theory, the jury's verdict of guilt established that either the petitioner or a person for whom he was criminally responsible fired the bullet that accidentally killed the victim. The petitioner thus rightly objects (Doc. No. 15 at 14–15) to the respondent's characterization of the evidence in this case as unequivocally establishing that "Petitioner killed [the victim]" after "attempt[ing] to kill a person with whom he had a disagreement," and that "Petitioner had with him a .40 or .45 caliber weapon" when he "turned the car around and . . . began firing." (Doc. No. 8 at 3, 5, 6.) The court agrees with the petitioner that these characterizations are misleading in light of the proof at trial.

. . . [and] on April 25, 2009, [the petitioner] and Mr. Thomas picked him up from his grandmother's house in [the petitioner's] vehicle," which Caldwell identified from an exhibit photograph. *Id.* at 3. Caldwell further testified that the petitioner's co-defendant, Martez Matthews, was in the car. *Id.* A cap containing Mr. Matthews' DNA was found at the scene of the crime, and Mr. Matthews was subsequently found in possession of a gun that was used during the attempt on Mr. Bridges' life. *Id.* at 5.

The record evidence clearly does not fail to support the identification of the petitioner as an occupant of the car, nor does it require the finding that he was simply an innocent passenger. There was room for the jury to conclude, as the state argued in closing, that all occupants of the car set out on April 25, 2009 to do harm to Mr. Bridges when they found him and that the petitioner shared in this intent, even if he did not fire a weapon in furtherance of it. (*See* Doc. No. 7-6 at 90– 93.) There was testimony that the petitioner ceded the driver's seat in his car to an unidentified individual after picking up Caldwell, and the jury could have concluded that this was done so that he could participate in a more active way in searching for Mr. Bridges. It could also be the case that the jury, in finding the petitioner guilty on the felony murder charge, credited Mr. Caldwell's testimony that the petitioner fired a weapon, despite acquitting the petitioner on the gun charge. Though such a verdict would be inconsistent, it would not be unconstitutional. Nor does the acquittal on the gun charge affect the review for sufficiency of the evidence supporting the felony murder conviction. As the Supreme Court has explained,

> [I]nconsistent verdicts—even verdicts that acquit on a predicate offense while convicting on the compound offense—should not

> necessarily be interpreted as a windfall to the Government at the defendant's expense. It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense. … Sufficiency-of-the evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilty beyond a reasonable doubt. This review should be independent of the jury's determination that evidence on another count was insufficient. … Whether presented as an insufficient evidence argument, or as an argument that the acquittal on the predicate offense should collaterally estop the Government on the compound offense, the argument necessarily assumes that the acquittal on the predicate offense was proper—the one the jury "really meant." This, of course, is not necessarily correct[.]

United States v. Powell, 469 U.S. 57, 65 (1984) (internal citations omitted).

In short, despite the petitioner's assertion that the record lacks reliable evidence of his involvement in the crime of conviction, it is the province of the jury to determine the reliability of witness testimony, and Mr. Caldwell's testimony need not be corroborated for purposes of this court's review for sufficiency of the evidence. The court may not rely on its own opinion of the weight due the testimonial and other evidence of the petitioner's involvement, but must defer to the jury's resolution of evidentiary conflicts. Whether the jury's verdict was based

on the theory that the petitioner was criminally responsible for the actions of another (with or without having himself fired a gun), or whether it reflects inconsistent findings with respect to the petitioner's employment of a firearm, the evidence was sufficient for a rational juror to find the elements of felony murder beyond a reasonable doubt. The petitioner's claim to the contrary is without merit.

B. Ineffective Assistance of Counsel

1. Procedurally Defaulted Claims

The petitioner claims that his trial counsel was ineffective in (1) failing to prepare for trial, including by preparing for cross-examination of the state's witnesses and by filing necessary pretrial motions; (2) failing to move to sever the petitioner's trial from that of Mr. Matthews; (3) failing to move for dismissal of all charges in light of the gun charge acquittal; and (4) failing to challenge the constitutionality of his life sentence.[3] (Doc. No. 1 at 8–9.) The respondent asserts that these claims were procedurally defaulted when the petitioner failed to present them to the TCCA on post-conviction appeal. (Doc. No. 8 at 8–9.) The petitioner concedes the procedural default that resulted from his post-conviction counsel ignoring his instructions and failing to present these claims to the TCCA. (*Id.*) As explained in the petition,

The [post-conviction] trial court granted relief

[3] The petitioner recognizes that this claim presents "an issue of the ineffective assistance of counsel for failing to raise the [sentencing] issue on direct appeal." (Doc. No. 1 at 18.) "The right to the effective assistance of counsel includes the right to the effective assistance of appellate counsel." *Burger v. Prelesnik*, 826 F. Supp. 2d 997, 1011 (E.D. Mich. 2011), *aff'd sub nom. Burger v. Woods*, 515 F. App'x 507 (6th Cir. 2013) (citing *Evitts v. Lucey*, 469 U.S. 387, 396 (1985)). The petitioner's trial counsel also represented him on direct appeal, where the only issue raised was the sufficiency of the evidence.

> on an issue that the petitioner did not raise, but which was *sua sponte* raised during the evidentiary hearing. The State appealed the decision to grant relief, and petitioner repeatedly corresponded with appointed counsel and repeatedly requested that all issues that had been raised and argued be preserved in the appellate court. Appointed counsel promised, repeatedly, in writing and over the phone, that he would ensure that all issues were raised and preserved.
>
> Counsel failed to raise any of the issues, other than to argue that the trial court did not err in granting relief. Thus, counsel failed to present or preserve the above issues, even in the face of his specific promises to do so.

(*Id.* at 10.) These assertions are borne out in the correspondence attached to the petition (*id.* at 26–45), which documents the petitioner's justifiable fear that any issue not raised before the TCCA would be defaulted; his insistence that counsel either appeal all claims which were denied at the post-conviction trial level or move to withdraw; and counsel's refusal to comply with these instructions, advising the petitioner that, "[a]s I've told you before, we had to stay on point with the [appellate] brief and stick to why Judge Fishburn was correct in his ruling and argue that he did not abuse his discretion in his ruling." (*Id.* at 39.)

Despite the petitioner's prescience concerning the default of claims not raised before the TCCA, an attorney's error short of constitutional ineffectiveness does not constitute cause excusing a procedural default, whether the error arises from inadvertence, ignorance, or (as here) strategic choice. *Murray v. Carrier*, 477 U.S. 478, 487–88

(1986). The Supreme Court has "explained clearly that 'cause' under the cause and prejudice test must be something external to the petitioner, something that cannot fairly be attributed to him." *Coleman v. Thompson*, 501 U.S. 722, 753 (1991), *holding modified by Martinez v. Ryan*, 566 U.S. 1 (2012). Unless the attorney error asserted as cause was made at a stage when the Sixth Amendment right to counsel attached or at the stage presenting the first meaningful opportunity to raise an ineffective assistance of trial counsel claim[4]—and "the Sixth Amendment itself [therefore] requires that responsibility for the default be imputed to the State" —the error cannot be cause excusing a procedural default. This is "because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must bear the risk of attorney error." *Id.* at 754.

The court is certainly sympathetic to the petitioner's frustration here, in light of his post- conviction appellate counsel's failure to follow his very clear instructions. (*See*, *e.g.*, Doc. No. 1 at 34–35.) However, because the petitioner had no right to counsel during the pursuit of his state post-conviction appeal, and because his post-conviction appeal was not his first meaningful opportunity to raise the claims at issue, *see Sutton v. Carpenter*, 745 F.3d 787, 795–96 (6th Cir. 2014) (holding that under Tennessee procedural law, the *initial* post-conviction proceeding is the first meaningful opportunity to raise ineffective-assistance-of-trial-counsel claim), the "attorney error that led to the default of [these] claims in state court cannot constitute cause to excuse the default in federal habeas." *Coleman*, 501 U.S. at 757.

Even if the court were to find cause excusing the petitioner's procedural default, he has not established

[4] *See Martinez*, 566 U.S. at 10–11.

prejudice resulting from the claimed errors of counsel. To establish prejudice, a petitioner must demonstrate that the constitutional error "worked to his actual and substantial disadvantage." *Perkins v. LeCureux*, 58 F.3d 214, 219 (6th Cir. 1995). Review of the trial transcripts does not reveal any lack of vigor in trial counsel's cross-examination of the state's witnesses, nor does it support the petitioner's assertion that counsel "failed to challenge the total lack of corroboration among the testimony of the accomplices, and failed to vigorously argue for acquittal" (Doc. No. 15 at 29); indeed, the transcripts of counsel's closing argument to the jury (Doc. No. 7-6 at 105–13) and the trial court's hearing on the petitioner's motion for a new trial (Doc. No. 7-9) reveal just the contrary. Moreover, the petitioner does not specify any prejudice resulting from counsel's allegedly deficient pretrial preparation or motion practice. The petitioner argues that prejudice should be presumed from counsel's failure to move to sever his trial from that of "a codefendant who was found in possession of what is arguably the weapon which fired the bullet which killed the victim in this case," (Doc. No. 15 at 32–33) when such evidence would not have been admissible at a severed trial (Doc. No. 1 at 9). But the petitioner does not cite any authority for this proposition, and the court finds none. *See Mayhew v. State*, No. W2013-00973- CCA-R3PC, 2014 WL 1101987, at *8 (Tenn. Crim. App. Mar. 19, 2014) (finding no prejudice from counsel's decision to forego motion to sever, despite introduction of DNA evidence linking co-defendant to the crime scene; "Given the 'close connection' of the 'time, place, and occasion' of the Petitioner and his co-defendant's crimes in this case, 'it would be difficult to separate proof of one charge from proof of the others.'") (quoting Tenn. R. Crim. P. 8(c)(3)); *see also Black v. State*, 794 S.W.2d 752, 758 (Tenn. Crim. App. 1990) (finding that a joint trial "contemplates that evidence may be admitted

against one or more defendants which is not necessarily applicable to other defendants.") (citations omitted).

Finally, any argument for prejudice resulting from counsel's failure to challenge the constitutionality of the petitioner's sentence, based on the claim that it effectively precludes the possibility of parole, is foreclosed because the Supreme Court has only held unconstitutional "a sentencing scheme that *mandates* life in prison without possibility of parole for juvenile offenders," *Miller*, 567 U.S. at 479 (emphasis added), and the Tennessee statutory scheme under which the petitioner was sentenced "permits release eligibility after serving fifty-one years." *State v. Polochak*, No. M2013-02712-CCA-R3CD, 2015 WL 226566, at *34 (Tenn. Crim. App. Jan. 16, 2015); *see Starks v. Easterling*, 659 F. App'x 277, 280 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 819 (2017) (denying habeas relief to petitioner who received life sentence for felony murder, "which in Tennessee requires an individual to serve fifty-one years in prison before eligibility for parole," "[b]ecause the Supreme Court has not yet explicitly held that the Eighth Amendment extends to juvenile sentences that are the functional equivalent of life" without parole). Because the petitioner's life sentence was the minimum sentence mandated by state law, Tenn. Code Ann. § 39-13-202, and federal law does not preclude its imposition upon a juvenile so long as parole is possible, it cannot be said that counsel's failure to challenge the sentence actually prejudiced the petitioner.

In sum, the petitioner's claims of ineffective assistance of counsel were defaulted before the state courts, and he has failed to demonstrate cause and prejudice excusing the default. These claims are therefore barred from federal habeas review.

2. Ineffective Assistance Claim Presented to the TCCA

The only issue of ineffective assistance of counsel considered by the TCCA—"that counsel was ineffective concerning co-defendant Ortago Thomas" "for failing to interview Mr. Thomas or call him as a witness at trial," *Moody v. State*, No. M2015-02424-CCA-R3-PC, 2017 WL 829820, at *5, 7 (Tenn. Crim. App. Mar. 2, 2017)—is not explicitly raised in the petition before this court. However, the court liberally construes the petition as raising this claim as part of the contention that counsel failed "to investigate." (Doc. No. 1 at 8.) The post-conviction trial court awarded relief on this issue, but was reversed by the TCCA.

All federal claims of ineffective assistance of counsel are subject to the highly deferential two-prong standard of *Strickland v. Washington*, 466 U.S. 668 (1984), which asks: (1) whether counsel was deficient in representing the defendant; and (2) whether counsel's alleged deficiency prejudiced the defense so as to deprive the defendant of a fair trial. *Id.* at 687. To meet the first prong, a petitioner must establish that his attorney's representation "fell below an objective standard of reasonableness," and must overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that . . . the challenged action 'might be considered sound trial strategy.'" *Id.* at 688–89. The "prejudice" component of the claim "focuses on the question of whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). Prejudice, under *Strickland*, requires showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A

reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

As discussed above, however, a federal court may not grant habeas relief on a claim that has been rejected on the merits by a state court, unless the petitioner shows that the state court's decision "was contrary to" law clearly established by the United States Supreme Court, or that it "involved an unreasonable application of" such law, or that it "was based on an unreasonable determination of the facts" in light of the record before the state court. 28 U.S.C. §§ 2254(d)(1) and (2); *Williams v. Taylor*, 529 U.S. 362, 412 (2000). Thus, when an exhausted claim of ineffective assistance of counsel is raised in a federal habeas petition, the question to be resolved is not whether the petitioner's counsel was ineffective. Rather, "[t]he pivotal question is whether the state court's application of the *Strickland* standard was unreasonable." *Harrington v. Richter*, 562 U.S. at 101. As the Supreme Court clarified in *Harrington*,

> This is different from asking whether defense counsel's performance fell below *Strickland*'s standard. Were that the inquiry, the analysis would be no different than if, for example, this Court were adjudicating a *Strickland* claim on direct review of a criminal conviction in a United States district court. Under AEDPA, though, it is a necessary premise that the two questions are different. For purposes of § 2254(d)(1), an unreasonable application of federal law is different from an incorrect application of federal law. A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself.

Id. (internal quotation marks and citation omitted).

The TCCA correctly identified and summarized the *Strickland* standard applicable to this claim. *Moody*, 2017 WL 829820, at *8–10. Accordingly, the critical question is whether the state court applied *Strickland* reasonably in reaching the following conclusions:

> After our thorough review, we conclude that the post-conviction court erred in granting the petitioner relief based on ineffective assistance of counsel. In determining that trial counsel's performance was deficient, the post-conviction court found that counsel was aware that Mr. Thomas wanted to testify for the petitioner. However, there is nothing in the record to support this finding. Mr. Thomas testified at the hearing that he told the petitioner that he wanted to testify, but the petitioner never testified that he received this information or conveyed it to counsel. Counsel testified that he would have been "shocked" if Mr. Thomas' attorney told him that Mr. Thomas would testify and admit to murder. Absent a showing that counsel knew that Mr. Thomas was willing to testify for the petitioner, it was reasonable for counsel to believe that Mr. Thomas, a co-defendant charged with first degree murder, would not incriminate himself if called to testify. Any finding that counsel was aware of Mr. Thomas' willingness to testify is pure speculation.
>
> Moreover, it was not unreasonable for trial counsel not to interview Mr. Thomas prior to trial because counsel spoke to Mr. Thomas' attorney and the attorney never mentioned that Mr. Thomas was willing to

testify for the petitioner, and there is nothing in the record to suggest that Mr. Thomas' attorney would have allowed Mr. Thomas to speak to counsel and implicate himself in the murder. Furthermore, even if counsel had been aware that Mr. Thomas wanted to testify, his proposed testimony that the petitioner was unaware of what was going to happen would have likely been inadmissible as speculation. Thus, only Mr. Thomas' proposed testimony that the petitioner did not fire a weapon would have been admissible. Therefore, it would have been reasonable not to call Mr. Thomas as a witness because his testimony would have added little value to the case and been subject to impeachment based on Mr. Thomas' multiple prior statements to police. We conclude that trial counsel did not render deficient performance.

Although we have determined that trial counsel's performance was not deficient, the bigger issue and basis for us to overrule the court below is that the post- conviction court did not make the proper analysis in determining whether the petitioner was prejudiced. In finding prejudice, the court stated that "the point is not whether [Mr. Thomas'] testimony would have been accepted or rejected. Rather, the point is that the jury was never allowed to hear from the witness." The court later discussed whether the jury would have accepted Mr. Thomas' claim that the petitioner did not know a shooting was going to occur and stated "there is no way to know." These statements do not support a

finding of prejudice because the appropriate standard for determining prejudice is whether there is "a reasonable probability . . . that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

Applying the correct standard, we cannot conclude that there is a reasonable probability that the result of the trial would have been different had Mr. Thomas testified. Mr. Thomas testified at the post-conviction hearing that his testimony essentially would have been that the petitioner did not have or fire a weapon, but that evidence was already presented to and apparently accepted by the jury in acquitting the petitioner of the weapon charge. The post-conviction court even noted that Mr. Thomas' testimony "mirror[ed] the jury's verdict that Petitioner was not a shooter."

Even with Mr. Thomas' testimony, the evidence established that the petitioner was in the car at the time the shots were fired and the car was registered to his mother. The evidence also indicates some awareness on the petitioner's part of what was going to happen considering Quontez Caldwell's testimony that, while they were in the car, one of the passengers said, "There go [sic] somebody we beefin' with [sic]," and the driver made a U-turn to go back toward the individuals. In light of Mr. Thomas' limited proposed testimony that the petitioner was not the shooter, the fact that the State prosecuted the petitioner under a theory of criminal

> responsibility and the fact that Mr. Thomas' testimony would have been impeached support a finding that there was no reasonable probability that the result of the trial would have been different had Mr. Thomas testified.

Id. at *10.

The TCCA reasonably analyzed this issue and determined that counsel was not ineffective under *Strickland*. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. Counsel's decision not to interview a co-defendant does not necessarily amount to unreasonable investigation, particularly if that decision is made after speaking with the co-defendant's attorney. *See U.S. v. Gavin*, 77 F. Supp. 3d 525, 529 (S.D. Miss. 2014) (stating that "*Strickland* does not require the interview of every potential witness," and finding that counsel used reasonable professional judgment in declining to interview co-defendant after discussion with co-defendant's counsel). As recited above, the TCCA highlighted the communication between defense attorneys —who "spoke frequently . . . because they shared office space" (Doc. No. 7-15 at 15) and "had quite a bit of discussion about the case" (Doc. No. 7-18 at 23)—and the lack of any evidence that Thomas's attorney informed the petitioner's attorney of Thomas's availability as a witness. The TCCA also properly pointed to the lack of any record evidence that counsel otherwise knew of Thomas's professed desire to testify for the petitioner and, in so doing, incriminate himself. The TCCA's finding that the petitioner's counsel did not render deficient performance in failing to interview Thomas in the presence of his attorney or to call him to testify was thus based on a reasonable application of

Strickland, which requires that a decision not to investigate be "assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." 466 U.S. at 691; *see Stewart v. Wolfenbarger*, 468 F.3d 338, 352 (6th Cir. 2006) (finding no deficiency in failure to call uncharged accomplice to testify, as it is not reasonable to expect that accomplice would forego his Fifth Amendment right against self-incrimination and implicate himself to deflect suspicion from petitioner).

The TCCA also reasonably applied *Strickland* in finding no reasonable probability that the result of the proceeding would have been different if not for counsel's failure to interview or call Thomas to testify, "[i]n light of Mr. Thomas' limited proposed testimony that the petitioner was not the shooter, the fact that the State prosecuted the petitioner under a theory of criminal responsibility and the fact that Mr. Thomas' testimony would have been impeached." *Moody*, 2017 WL 829820, at *10. Because the state court reasonably found that neither prong of the *Strickland* test for ineffective assistance was satisfied, the petitioner is not entitled to habeas relief on this claim.

C. Remaining Claims

The petitioner's remaining claims—that the trial court erred in failing to act as thirteenth juror, in failing to allow him to retain counsel of his choice, and in giving him a sentence that is functionally equivalent to life without the possibility of parole—were not presented to the TCCA and are therefore defaulted. The petitioner does not attempt to demonstrate cause and prejudice excusing the default, aside from citing the failures of his post-conviction appellate attorney which, again, cannot establish cause for the default because they are attributable to the petitioner. These claims are therefore barred from review in this

court.

Although the petitioner concludes his petition by referring to his "actual[] innocen[ce] of the crime he has been convicted of" (Doc. No. 1 at 21), the court finds no grounds for excusing his procedural default on this basis. To establish actual innocence as a gateway to substantive review of a procedurally barred claim, the petitioner must demonstrate that, "in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Bousley v. United States*, 523 U.S. 614, 623 (1998) (quoting *Schlup v. Delo*, 513 U.S. 298, 327–28 (1995) (internal quotation marks omitted). Importantly, "'actual innocence' means factual innocence, not mere legal insufficiency" of the proof against the petitioner. *Id.* Therefore, this narrow exception to the procedural default bar "must be based on reliable evidence not presented at trial." *Calderon v. Thompson*, 523 U.S. 538, 559 (1998). Such evidence "can take the form of 'exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence.'" *Chavis-Tucker v. Hudson*, 348 F. App'x 125, 133 (6th Cir. 2009) (quoting *Schlup v. Delo*, 513 U.S. 298, 324 (1995)). This standard "does not require absolute certainty about the petitioner's guilt or innocence," but it is a demanding standard that "permits review only in the extraordinary case." *House v. Bell*, 547 U.S. 518, 538 (2006). In determining whether the standard is met, "the habeas court may have to make some credibility assessments." *Chavis-Tucker*, 348 F. App'x at 133.

While the petitioner's conclusory reference to his actual innocence does not justify further consideration of his defaulted claims under this standard, the post-conviction testimony of Ortago Thomas could conceivably fit the bill. Upon scrutiny, however, this eyewitness testimony that the petitioner was an innocent passenger in the vehicle from which the fatal shot was fired cannot be

deemed "reliable" or "trustworthy." Thomas testified that he was the petitioner's brother, that he initially lied to police by denying any involvement in the shooting, and that after the petitioner's conviction he pled guilty to a reduced charge of second-degree murder in exchange for a fifteen-year prison sentence. Thomas further testified that three of the car's passengers were armed, that three guns were fired by two passengers (Thomas with his own gun, and Caldwell with his gun and a gun belonging to Matthews), and that the petitioner was not involved and could not have known that a shooting was going to occur because he did not have a gun. (Doc. No. 7-18 at 3–17.) The credibility of this testimony about the petitioner's innocence is undermined by Thomas's relation to the petitioner, his admission to lying to police, and his criminal conviction; therefore, a reasonable juror could easily conclude that Thomas is an unreliable eyewitness. *See Chavis–Tucker*, 348 F. App'x at 134–35. Furthermore, although Thomas's testimony at the petitioner's post-conviction hearing is the only eyewitness account identifying Caldwell as a shooter, there was ample evidence at the petitioner's trial from which the jury could have drawn this inference in spite of Caldwell's contrary testimony and the lack of other eyewitness accounts. The court finds that the petitioner is not entitled to an exception, based on actual innocence, to the requirement of showing cause excusing his procedural default.

Even if the default could be excused, the petitioner would not be entitled to relief on any of the three remaining grounds of his petition. First, his claim that the trial court erred when it failed to act as thirteenth juror under Tennessee Rule of Criminal Procedure 33 (Doc. No. 15 at 34–35) is explicitly a matter of state law and therefore not cognizable on habeas review. *See Nash v. Eberlin*, 258 F. App'x 761, 764 n.4 (6th Cir. 2007) (unless properly

construed as challenging sufficiency of the evidence, a claim that conviction was against manifest weight of the evidence is a state law claim not subject to federal habeas review); *Williams v. Easterling*, No. 3:09-cv-1002, 2010 WL 3463728, at *8 (M.D. Tenn. July 14, 2010), *report and recommendation adopted sub nom. Williams v. Eastering*, No. 3:09-1002, 2010 WL 3463726 (M.D. Tenn. Sept. 2, 2010) (deferring to state court's interpretation of requirements of Tenn. R. Crim P. 33).

Second, the denial of the petitioner's motion for continuance so that newly retained counsel could prepare for trial—which was filed four days prior to the scheduled beginning of the trial, when his co-defendant, the state, and his appointed counsel were ready to proceed, and after the trial had previously been continued from its original setting—did not amount to an unconstitutional deprivation of chosen counsel. The trial court denied the continuance motion in light of the late date of its filing and the fact that, despite complaining to the trial court about his appointed attorney, the petitioner had not previously informed the court that he or his family was attempting to retain private counsel. (Doc. No. 7-15 at 28); *see Burton v. Renico*, 391 F.3d 764, 772 (6th Cir. 2004) (denial of a continuance rises to the level of a constitutional violation only when circumstances show that denial was "unreasoning and arbitrary" and actually prejudiced the defense). Although the Sixth Amendment guarantee of counsel for an accused's defense carries with it the right to be represented by counsel of one's own choice, which may not be arbitrarily and unreasonably interfered with, this right is not absolute and may not be used to unreasonably delay trial. *Linton v. Perini*, 656 F.2d 207, 208–09 (6th Cir. 1981). There is no indication here that the trial court arbitrarily denied a continuance when the requested continuance would have made previously unavailable witnesses available or

otherwise benefitted the defense in any measurable way. *Burton*, 391 F.3d at 772; *Powell v. Collins*, 332 F.3d 376, 396 (6th Cir. 2003).

Finally, and as previously discussed, federal law does not prohibit the state from sentencing a juvenile such as the petitioner to life with the possibility of parole, even though parole is only possible after service of 51 years in prison. *See Starks v. Easterling*, 659 F. App'x at 280; *see also Ali v. Roy*, ---F.3d----, 2020 WL 812916, at *3 (8th Cir. Feb. 19, 2020) (rejecting claim under *Miller* and denying habeas relief to juvenile petitioner who was not sentenced to life without parole, but to three 30-year sentences).

VI. CONCLUSION

For the foregoing reasons, the habeas corpus petition will be denied and this matter will be dismissed with prejudice.

The court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to a Section 2254 petitioner. Rule 11, Rules Gov'g § 2254 Cases. A petitioner may not take an appeal unless a district or circuit judge issues a COA. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22(b)(1). A COA may issue only if the petitioner "has made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2). A "substantial showing" is made when the petitioner demonstrates that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (citations and internal quotation marks omitted). "[A] COA does not require a showing that the appeal will succeed," but courts should not issue a COA as a matter of course. *Id.* at 337.

Reasonable jurists could debate whether the

petitioner's undefaulted claim of ineffective assistance of counsel has merit, and whether his showing of actual innocence via Ortago Thomas's testimony is sufficient to excuse his procedural default. The court will therefore grant a certificate of appealability on these issues. The court will deny a COA on the rest of the petitioner's claims, but he may seek a COA directly from the Sixth Circuit Court of Appeals. Rule 11(a), Rules Gov'g § 2254 Cases.

An appropriate order is filed herewith.

Aleta A. Trauger
United States District Judge

APPENDIX C

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

November 8, 2016 Session

DEANGELO MOODY v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County

No. 2009-D-3252 Mark J. Fishburn, Judge

No. M2015-02424-CCA-R3-PC

The State appeals the trial court's granting the petitioner, Deangelo Moody, post-conviction relief from his conviction for first degree felony murder after finding that the petitioner received ineffective assistance of counsel. After review, we reverse the post-conviction court's grant of relief and reinstate the judgment against the petitioner.

OPINION

FACTS

A Davidson County grand jury indicted the petitioner and two co-defendants, Martez D. Matthews and Lorenzo Ortago Thomas, II, for first degree felony murder committed during the attempt to perpetrate a first degree murder and employing a firearm during the commission of a dangerous felony. Mr. Thomas' case was severed, and he

pled guilty to a lesser charge. After a trial, the jury convicted the petitioner and Mr. Matthews of first degree felony murder and imposed life sentences. The jury acquitted the petitioner of the employment of a firearm charge.

The petitioner and Mr. Matthews filed a joint appeal. State v. Deangelo M. Moody and Martez D. Matthews, No. M2011-01930-CCA-R3-CD, 2013 WL 1932718 (Tenn. Crim. App. May 9, 2013), perm. app. denied (Tenn. Oct. 17, 2013). This court affirmed the judgments of the trial court, and the Tennessee Supreme Court denied both applications for permission to appeal. Id.

The underlying facts of the case were recited by this court on direct appeal as follows:

> This case involves the shooting death of the victim, a sixteen-year old female, L.J.[1] During a shoot-out that occurred on the street outside her home, the victim was struck by a stray bullet when it entered her home. A Davidson County grand jury indicted appellants and their co-defendant, Lorenzo Ort[a]go Thomas, II, for one count of first degree felony murder and one count of employing a firearm during the commission of a dangerous felony. Codefendant Thomas'[] case was severed from appellants' case, and the trial court conducted their joint trial from May 9-12, 2011.
>
> Inez Johnson, the victim's mother, testified that around 4:00 p.m. on April 25, 2009, she and the victim were at their home

[1] We have used the initials of the minor victim of this crime to protect her identity.

on Chesapeak[2] Drive. They were lying down in Ms. Johnson's bedroom when they heard gunshots. Ms. Johnson stated that she "instinctively . . . dropped and rolled." She further stated that "instead of laying low and rolling from the bed, [the victim] raised her body up" and was struck by a bullet. The victim began bleeding from her mouth. Ms. Johnson called 9-1-1 and rendered aid to the victim in an attempt to stop the bleeding. She said that she could not tell from where the victim was bleeding. She recalled, "[B]lood was just everywhere, . . . and I was right there beside her[,] and I knew [she] wasn't going to make it[,] and I watched her take her last breath. . . ."

Christopher Cote, a detective with the Metro Nashville Police Department ("MNPD"), testified that around 4:00 p.m. on April 25, 2009, he responded to a call at 3652 Chesapeak Drive. The paramedics were already at the scene when he arrived. Officer Cote was advised that a sixteen-year-old female had been shot. He entered the home and observed the victim lying on the floor, bleeding profusely. The paramedics transported the victim to the hospital, and additional police officers arrived at the scene. Officer Cote stated that he secured the scene and advised his superior officers and investigators as to what had occurred.

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[2] The transcript spells the street name as "Chesapeake." However, the street sign shown in one of the crime scene photographs spells the name "Chesapeak."

Officer Cote recalled that Officer Brian Eaves arrived at the scene. He stated that a witness approached Officer Eaves and gave him a hat that the witness had found. He placed the hat, which the witness found in the street to the right of the victim's house, in an evidence bag and gave it to the crime scene investigators. Officer Cote stated that he also found multiple shell casings of different calibers at the scene.

Lynne Mace, a crime scene investigator with the MNPD, testified that she investigated the scene in this case. She drew a diagram of the scene, which she described for the jury. The diagram depicted the locations of bullet cartridge casings. Investigator Mace also photographed and collected the cartridge casings. Investigator Mace recalled that there were two .45 caliber automatic casings and six 9mm casings. She identified photographs that she had taken of the crime scene, including a photograph of the strike mark of the bullet that entered the victim's house.

Christopher Bridges[3] testified that he lived at 3648 Chesapeak Drive. He stated that on April 25, 2009, at approximately 4:00 p.m., he was walking down Chesapeak Drive with Deandre Williams. As they were walking, a car with four or five people inside of it pulled up and began shooting. Christopher began to

[3] Multiple witnesses share the surname Bridges; thus, we will refer to them by their first names to avoid confusion. In doing so, we intend no disrespect.

run, but he heard more than five shots fired. The State showed him a photograph of a vehicle and asked if it was the vehicle he observed on April 25, 2009, to which Christopher responded, "Yes, sir." Christopher stated that he was given the opportunity to speak with the police about what he observed, but he told them that he "really didn't see anybody, didn't see anything." He said that he did not want to speak with the police and that they forced him to go to the precinct. Christopher admitted that in April 2009, he was a member of the 107 Underground Crips but denied that he was still a member.

On cross-examination, Christopher testified that he did not know why someone would want to shoot at him. He stated that the shooting came from the driver's side of the vehicle. He did not know appellants and said that the first time he saw them was on the news. Christopher stated that he had an adequate opportunity to view the car because it passed him and made a u-turn. He said that the vehicle's license plate was in the window and that the vehicle's bumper was not damaged. Christopher later testified that the vehicle that he identified in the photograph had damage on its bumper. Christopher said that he ran between some houses when the people in the vehicle started shooting; however, the victim's house was not one of them.

Deandre Williams testified that he lived with Christopher and Christopher's

family in April 2009. On April 25, 2009, he was walking to a friend's house with Christopher when he heard gunshots. He ran away and was unable to see from where the gunshots originated. He stated that he was sending text messages on his cellular telephone and did not observe any nearby vehicles or people. However, he recalled telling the police that he saw a small blue or green vehicle that looked like a Honda. He explained that he saw the vehicle before he and Christopher began walking. Mr. Williams further testified that he heard more than five gunshots. He estimated that he was three houses away from 3652 Chesapeak Drive when the gunshots began. He ran in the opposite direction from the victim's house.

Mr. Williams denied being a member of or affiliated with the 107 Underground Crips. He stated that he did not know whether Christopher was a member of the gang and denied noticing a tattoo of a gun with the numbers "107" on Christopher's hand.

On cross-examination, Mr. Williams testified that he did not know appellants and had never seen them before the day of trial. Mr. Williams did not know why anyone would shoot at him. He stated that he did not know anything about the incident and was only testifying because the State forced him to do so.

Evan Bridges testified that he is the grandfather of Christopher Bridges and that they lived at 3648 Chesapeak Drive. At

around 4:00 p.m. on April 25, 2009, Evan was outside in the backyard of his home. He heard gunshots and went toward his front yard. When he arrived at the front yard, Evan determined that the gunshots were coming from a small green car that was driving down the street. When shown a photograph of a vehicle, Evan stated that the vehicle in the photograph was the same size, but the car he saw on the day of the shooting looked like a Honda. He observed the heads of three African-Americans in the vehicle and stated that the people in the vehicle were "some young guys."

Evan recalled speaking with three or four police officers, but he denied telling Officer Eaves that he saw two of the three people in the vehicle shooting into 3652 Chesapeak Drive. Approximately fifteen to twenty minutes after the shooting ceased, Evan found a black cap in the middle of the street that was not there before the shooting. He thought that it might have belonged to one of the shooters, so he gave it to the police.

On cross-examination, Evan testified that he did not actually see anyone shoot a weapon. He clarified that the vehicle he saw was green and that the vehicle in the photograph looked like it was blue. Evan stated that he did not see the black cap fall from the vehicle from which the shots were fired.

Quontez Caldwell testified that [the petitioner] and Ort[a]go Thomas are his half[-

]brothers through their father, but he only became acquainted with them a short time prior to this incident. Mr. Caldwell stated that on April 25, 2009, [the petitioner] and Mr. Thomas picked him up from his grandmother's house in [the petitioner's] vehicle. He identified [the petitioner's] vehicle from an exhibit photograph. In addition to his half-brothers, two other males whom he did not know were in the vehicle. He identified appellant Matthews in the courtroom as one of the other passengers in the vehicle. Mr. Caldwell stated that as they drove down Chesapeak Drive, the people in the car saw "somebody they had a beef with [sic][,] and they shot at them." He recalled that Mr. Thomas said, "'There go [sic] somebody we beefin' with [sic].'" The driver then turned the vehicle around and drove back up Chesapeak Drive. He said that appellants and Mr. Thomas began shooting at a person he knew as "C. Trigger." Mr. Caldwell did not recall having previously testified that appellant Matthews had a 9mm pistol, that [the petitioner] had a ".45 or .40," or that Mr. Thomas had a "38 revolver," but he acknowledged that if he had previously so testified, then it was the truth. He stated that neither he nor the driver had a weapon that day. After the shooting, the men dropped Mr. Caldwell off in the middle of the street. He said that he did not speak with appellants about the shooting after it happened.

Mr. Caldwell stated that the police attempted to interview him. The first two

times they attempted to speak with him, he told them that he did not know anything about what happened because he just "didn't want to tell them nothing [sic]." Mr. Caldwell denied being a member of the Hoover Deuce Crips. He denied testifying to being a member in July 2009 and said that if his being a member of the Crips was reflected in his statement, it was not the truth.

On cross-examination, Mr. Caldwell denied that a detective with MNPD brought him in for questioning because he had received information that Mr. Caldwell had claimed that he killed the victim. He further denied getting a new "teardrop tattoo" on his face. Mr. Caldwell did not recall telling the detective that he was anywhere near Chesapeak Drive, that he was with someone named "T.O.," that he was in a Chevrolet Impala, or that he did not know the color of the Impala. He stated that he did not know [the petitioner's] real name and that he only knew his father by the name "Tango."

Mr. Caldwell admitted that he spoke with another detective a few weeks later but denied that he changed his story about being in an Impala with T.O. Mr. Caldwell admitted that [the petitioner] picked him up and then proceeded to pick up another person, at which time the other person began driving the vehicle. He remembered seeing "C. Trigger" and stated that "guns were pulled[,] and they started shooting." In a subsequent interview with Kathy Morante, an assistant district attorney, Mr. Caldwell denied any knowledge

of his brothers' having problems with "C. Trigger" and stated, "I didn't know they had no [sic] beef with him." He testified that his problem with "C. Trigger" was "[s]omething about . . . some child issues" and that it was not significant. Mr. Caldwell denied that the "child issues" concerned his child's mother and could not remember stating that there was bad blood between him and "C. Trigger" or indicating that "C. Trigger" had tried to do him harm in the past. He declined the opportunity to review the transcript of his statement.

Kathy Morante, an assistant district attorney in Nashville, testified that in April 2009, she was assigned to handle juvenile transfers for the office. In the course of her work, Ms. Morante explained that it was fairly common to have witnesses testify for the State who had charges pending against them, as was the case with Quontez Caldwell. She further explained that a cooperating witness in this situation was sometimes given "use immunity." "Use immunity," she testified, was an agreement between the witness, his or her attorney, and the State that provided, "[I]f you sit down and talk with us, we're not going to use anything you say during this period of time that we're talking against you to prosecute you so long as you tell the truth." She added, "[W]e specifically reserve the right to use any other evidence that we can come up with against that person, or as I said earlier, if we determine that [the] person is being untruthful, then we can

prosecute them." Mr. Caldwell's use immunity agreement form was entered as an exhibit at trial. Ms. Morante stated that the most serious charge Mr. Caldwell faced in the summer of 2009, when he was fifteen years of age, was an attempted homicide that was unrelated to the instant case. He was taken into custody on June 12, 2009, and in November 2009, he entered a guilty plea to aggravated assault and vandalism and was committed to a secure facility of the Department of Children's Services ("DCS"). Ms. Morante noted that Mr. Caldwell also had an unresolved robbery charge. She explained that DCS determines the appropriate time to "step him down from one facility to another and . . . to release him back into the community."

On cross-examination, Ms. Morante testified that Mr. Caldwell had just been released from DCS when this incident occurred. She met with Detective Jackson and believed that Mr. Caldwell could have some information pertinent to the case, but she did not know whether he was involved. On redirect examination, Ms. Morante clarified that the attempted homicide charge for Mr. Caldwell was wholly unrelated to this incident.

Detective Gene Davis of the MNPD testified that on May 15, 2009, he conducted a traffic stop in the area of Nolensville Road for a traffic ordinance violation. He observed three people inside the vehicle he stopped, and during a search of the vehicle, he found a

loaded 9mm Glock semi-automatic pistol. Detective Davis stated that appellant Matthews claimed ownership of the weapon, at which time he was taken into custody. Detective Davis identified the weapon, which was entered as an exhibit. He also identified appellant Matthews, who was seated in the courtroom.

Detective Cody O'Quinn of the MNPD testified that he was involved in serving a search warrant for a vehicle located at 314 Kern Drive on June 18, 2009. The vehicle was a green 1999 Kia. He determined that the vehicle was registered to [the petitioner] and his mother. He identified the temporary drive-out tag found inside the automobile and noted that it would have been valid on the date of this incident, April 25, 2009. On cross-examination, Detective O'Quinn stated that the Kia automobile in the exhibit photograph appeared green in color to him.

Detective Lawrence Brown, also from the MNPD, testified that he obtained buccal swabs from both appellants on February 9, 2011, at the prosecutor's request. He explained that a buccal swab is used to obtain liquid evidence, usually saliva, from an individual. The swabs were packaged and taken to the Tennessee Bureau of Investigation ("TBI") to be analyzed for DNA comparison.

Agent Mark Dunlap of the TBI Crime Laboratory was accepted by the trial court as an expert in forensic chemistry and serology.

He testified with regard to his DNA analysis of a black cap. From his testing, he determined that the "DNA profile from the cap was a mixture of genetic material from two individuals." From the standards submitted in February 2011, ten of the thirteen testing sites indicated that the major contributor of DNA on the cap was appellant Matthews.

On cross-examination, Agent Dunlap explained that three of the thirteen testing sites were inconclusive, stating, "[T]here just wasn't enough DNA there to obtain a full profile, so those sites didn't yield results. It doesn't mean that they didn't match, it just means there was no result at those sites." He acknowledged that no DNA belonging to [the petitioner] was found on the hat.

Agent Robert Daniel Royse of the TBI Crime Laboratory was accepted by the trial court as an expert in firearms and tool mark identification. He explained the operation of the Glock 9mm Luger semiautomatic pistol, the parts of a live cartridge, and the firing cycle process. Agent Royse testified that in his work, he examines the unique set of markings found on every firearm, which can be thought of as a mechanical fingerprint. In making an identification, he test fires the weapon and takes the test bullets and cartridge cases and compares them to the evidence. If the unique characteristics are present on both the evidence and the test material, he concludes that they have a common origin and that they were fired from the same weapon. Agent

Royse was provided six spent .45 caliber automatic cartridge casings and two 9mm cartridge casings in April 2009, and in January 2011, he was provided a 9mm weapon for analysis. He testified that the two 9mm casings provided to him were fired from the weapon he received in January 2011.

Chief Medical Examiner Dr. Amy McMaster testified that a former colleague had performed the victim's autopsy but that she had reviewed and agreed with the report that was prepared. She illustrated the bullet entry wound and the path of travel through the victim's body. She identified the projectile recovered from the victim's body and described the procedure in preserving it as evidence. Dr. McMaster stated that the bullet injured the aorta, the trachea, and both lungs and that even immediate medical intervention could not have saved the victim's life. In summary, Dr. McMaster testified that the cause of the victim's death was a gunshot wound to the torso and that the manner of death was a homicide. At the close of Dr. McMaster's testimony, the State rested its case-in-chief.

The defense called William Jackson, a former officer with the MNPD, who testified that he was the lead detective in the investigation of the victim's death. He arrived at the scene approximately five to ten minutes after receiving the call and remained there for approximately three and one-half hours. His duties included making sure the officers secured the crime scene for purposes of

investigating and collecting evidence. Detective Jackson was present during the victim's autopsy and collected the bullet recovered from the victim's body as evidence. He recalled testifying at appellants' detention hearing that the recovered bullet was a large fragment and stated, "I didn't know at the time if it was a [.]45 or a [.]40[.] I guessed that it was one of those too big to be a [.]38 or a [.]22."

Detective Jackson testified at length concerning his three interviews with Quontez Caldwell. He recalled that his first interview with Mr. Caldwell was at the end of April and the second interview was on June 12th. He explained that he uses conversation as his interviewing technique to get to the truth. He would not make promises of assisting in getting charges dismissed or lowered, but he acknowledged that he would "talk for someone if they cooperate" and admitted that "[he did not] know how the [District Attorney] works."

On cross-examination, Detective Jackson recalled that during the first interview with Mr. Caldwell on April 30, 2009, Mr. Caldwell denied being at the scene or having anything to do with this incident. During the second interview on June 12, 2009, Mr. Caldwell began to cooperate and identified appellant Matthews in a photograph array as one of the individuals involved in this shooting. Detective Jackson testified that ultimately, Mr. Caldwell provided seating positions in the vehicle and

> stated that appellants were two of the three people involved in shooting at Christopher Bridges and Deandre Williams on April 25, 2009.

Deangelo M. Moody and Martez D. Matthews, 2013 WL 1932718, at *1-6.

On April 21, 2014, the petitioner filed a pro se petition for post-conviction relief, in which he raised a number of claims, including ineffective assistance of counsel. Following the appointment of counsel, he filed an amended petition incorporating the claims in his pro se petition and including additional allegations of ineffective assistance of counsel. Because the issues on appeal relate solely to the petitioner's allegation that counsel was ineffective concerning co-defendant Ortago Thomas, we will summarize only those portions of the evidentiary hearing that are pertinent to that issue.

At the post-conviction evidentiary hearing, Lavonqua Lee, the petitioner's mother, testified that the petitioner expressed concern to her that his trial counsel had not visited him in jail. She called counsel several times, but he rarely answered. She and counsel "got into it several times on the phone" because she was upset that counsel "wasn't doing his job." She thought that counsel visited the petitioner in jail one time. However, she acknowledged that counsel was also present for court dates and met with the petitioner then. Ms. Lee asked counsel to file a motion for bond, but counsel told her that the bond would be more than she could afford and would not file the motion. She attempted to find another attorney to represent the petitioner.

The attorney who represented the petitioner in juvenile court testified that the petitioner's family contacted her about representing the petitioner in criminal

court. Juvenile court counsel filed a motion to substitute counsel and a motion for a continuance. The court denied her motion for a continuance, so she did not accept the case per her agreement with the petitioner's family.

Eddie Coley, Jr., the petitioner's uncle, testified that, based on his interactions with counsel, he thought that counsel was "clueless," "unprofessional," and "full of it." He said that the district attorney "made a mockery" of counsel during the trial, and he claimed that counsel threatened the petitioner. He thought counsel should have filed a motion to sever the petitioner's case from his co-defendants' cases because the State did not have any evidence against the petitioner. Mr. Coley said that he had "been in the streets" and could have helped with the case if counsel had contacted him. He elaborated that he had talked to individuals who were present at the shooting, and he tried to talk to counsel about the potential witnesses, but counsel did not call him back. However, Mr. Coley refused to name any of the alleged witnesses or provide any additional information about them.

Ortago Thomas testified that he was indicted as a co-defendant and that his case was severed from the petitioner's. He pled guilty to a lesser charge of second degree murder in exchange for a sentence of fifteen years. Mr. Thomas claimed that the petitioner was not involved in the murder and that "it was just [Mr. Thomas] and [Mr.] Caldwell [who] was doing the shooting." Mr. Thomas elaborated:

> [The petitioner] didn't know what was going on because (unintelligible) fact that Caldwell was telling us to take him home, we was taking him home then, he went down – he was giving us directions, we went down the wrong street, and then we seen the two

> individuals that was shooting at, and then didn't nobody know what was going on because they the only one shootin' at people.

Asked why the petitioner did not know there was going to be a shooting, Mr. Thomas responded, "Simple fact he didn't have no gun or nothing, because only one had a gun was me, Caldwell and Matthews, was the only one." Mr. Thomas stated that they were taking Mr. Caldwell home, one street over, when the shooting occurred. Asked what happened, Mr. Thomas responded:

> Simple fact when the two individuals shooting at, one of them was reaching, I shot in the air to try to get him away and told the driver to go on drive off so we can go on get away, then all of a sudden I see Caldwell reach under the seat, . . . driver's seat and grab Matthews' gun and his gun start shooting over the roof, and Matthews done grabbed the gun, tried to grab the gun from him.

Mr. Thomas claimed that, while the case was pending, he told his lawyer, his family, and the petitioner's family about what had happened. Mr. Thomas stated that he wanted to testify at the petitioner's trial that he was the one responsible for the victim's murder, but no one would let him take responsibility.

Mr. Thomas acknowledged having initially told the police that he had nothing to do with the crime and that he was not there when it happened. He then eventually told the police that he was in the car, had a .38 caliber gun, and that he fired the gun. Mr. Thomas stated that Mr. Matthews had a nine-millimeter gun, but Mr. Caldwell was shooting it. Mr. Caldwell was also shooting his own .45 caliber gun as well. He recalled that the victim was killed

by a .45 caliber bullet. Mr. Thomas agreed that his testimony would have essentially been that the petitioner did not have a gun at the time of the offense.

The petitioner testified regarding counsel's representation of him and his various interactions with counsel. The petitioner stated that he asked counsel to investigate statements made by Quontez Caldwell, but counsel failed to do so. According to the petitioner, Mr. Caldwell was overheard at his high school bragging about the murder, and students at the school could have testified about the statements. However, the petitioner acknowledged that the police investigated the alleged statements and could not find any witnesses who heard Mr. Caldwell bragging about the murder. The petitioner did not provide any testimony concerning Mr. Thomas.

Trial counsel testified that it was clear that the petitioner was not the shooter, but counsel was not "able to convey with a degree of understanding the concept of criminal responsibility or . . . facilitation" to the petitioner. Counsel recalled that Mr. Caldwell, a witness for the State, "changed his story a lot" and at one time said that the petitioner had fired a weapon. However, the petitioner was acquitted on the gun charge, indicating that the jury based the petitioner's murder conviction on a theory of criminal responsibility. Counsel stated that his review of the discovery materials showed that Mr. Caldwell was the only person who stated that the petitioner was shooting. The discovery also indicated that Mr. Caldwell had made self-incriminating statements at his high school. Counsel spoke to people at Mr. Caldwell's school and obtained Mr. Caldwell's interview statements to police.

Counsel testified that he was unsure why Mr. Thomas' case was severed from the petitioner's. However, at one point, he thought Mr. Thomas was going to testify

against the petitioner. Counsel said that he discussed the case with the attorney who represented Mr. Thomas, and Mr. Thomas' attorney never told him that Mr. Thomas wanted to testify for the petitioner. Counsel stated that he would have been shocked if Mr. Thomas had testified at the petitioner's trial that Mr. Thomas had committed first degree murder. Counsel also noted that he could not compel Mr. Thomas to testify against himself. He could not say whether Mr. Thomas' testimony would have helped at trial.

Following the conclusion of the hearing, the post-conviction court entered an order granting the petitioner post-conviction relief. The court granted relief based on a finding that trial counsel was ineffective for failing to interview Mr. Thomas or call him as a witness at trial. The court denied relief on all other claims raised by the petitioner. The State filed a motion asking the court to rescind its order and allow additional testimony, and the court denied the State's motion. The State appealed.

ANALYSIS

The post-conviction petitioner bears the burden of proving his allegations by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f). When an evidentiary hearing is held in the post-conviction setting, the findings of fact made by the court are conclusive on appeal unless the evidence preponderates against them. See Tidwell v. State, 922 S.W.2d 497, 500 (Tenn. 1996). Where appellate review involves purely factual issues, the appellate court should not reweigh or reevaluate the evidence. See Henley v. State, 960 S.W.2d 572, 578 (Tenn. 1997). However, review of a trial court's application of the law to the facts of the case is de novo, with no presumption of correctness. See Ruff v. State, 978 S.W.2d 95, 96 (Tenn. 1998). The issue of ineffective assistance of counsel, which presents mixed

questions of fact and law, is reviewed de novo, with a presumption of correctness given only to the post-conviction court's findings of fact. See Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001); Burns v. State, 6 S.W.3d 453, 461 (Tenn. 1999).

To establish a claim of ineffective assistance of counsel, the petitioner has the burden to show both that trial counsel's performance was deficient and that counsel's deficient performance prejudiced the outcome of the proceeding. Strickland v. Washington, 466 U.S. 668, 687 (1984); see State v. Taylor, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (noting that same standard for determining ineffective assistance of counsel that is applied in federal cases also applies in Tennessee). The Strickland standard is a two-prong test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687.

The deficient performance prong of the test is satisfied by showing that "counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996) (citing Strickland, 466 U.S. at 688; Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975)). The prejudice prong of the test is

satisfied by showing a reasonable probability, i.e., a "probability sufficient to undermine confidence in the outcome," that "but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. In the context of a guilty plea, the petitioner must show a reasonable probability that were it not for the deficiencies in counsel's representation, he or she would not have pled guilty but would instead have insisted on proceeding to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985); House v. State, 44 S.W.3d 508, 516 (Tenn. 2001).

Courts need not approach the Strickland test in a specific order or even "address both components of the inquiry if the defendant makes an insufficient showing on one." 466 U.S. at 697; see also Goad, 938 S.W.2d at 370 (stating that "failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim").

In granting the petitioner post-conviction relief based on a finding that counsel was ineffective for failing to interview Mr. Thomas or call him as a witness at trial, the post-conviction court stated:

> The evidence in this case was straightforward in terms of what generally happened that caused the death of the victim and who the occupants of the car were. The disputed testimony centered on who actually fired the weapons at Mr. Bridges and Mr. Jackson and the extent of each part[y's] involvement. There were no independent eyewitnesses or forensic evidence collected that identified Petitioner as a shooter or even placed him at [the] scene. The only witnesses that could place Petitioner at the scene or

> describe the extent of his involvement in the incident were his co-defendants. Therefore, the focus of the discussions with Petitioner and the ensuing investigation would appear to center on any evidence that he might offer that would mitigate his knowledge of or participation in the incident or like independent evidence that could be developed to avoid a conviction under the theory of criminal responsibility. In fact, this is the defense strategy that [counsel] was preparing for and intending to pursue at trial. This then begs the question why [counsel] did not interview or at least attempt to interview Mr. Thomas since Petitioner told him that Mr. Thomas wanted to testify that Petitioner had nothing to do with the shooting.

The post-conviction court recalled that trial counsel said he did not interview Mr. Thomas because he believed Mr. Thomas was going to be a witness for the State, and he was not aware that Mr. Thomas had offered to testify for the petitioner. The court found counsel's explanation to be "puzzling at best" because, "[i]f Petitioner [was] aware that Mr. Thomas [wa]s willing to testify on his behalf, it is illogical that he would not share this information with his attorney." The court further found that because counsel had obtained Mr. Thomas' confession to the police, he would have known that Mr. Thomas' testimony would be favorable to the petitioner. The court stated that, considering trial counsel was aware that the State was planning to call Mr. Thomas as a witness, "it seems logical without the need of hindsight that trial counsel would want him interviewed to reconcile these apparent dichotomous positions." The court acknowledged that it did not know the full text of the statements Mr. Thomas gave to police but

knew "that he gave very contradictory accounts of the event except his exoneration of the Petitioner for any wrongdoing." The court found that counsel's failure to interview Mr. Thomas or call him as a witness at trial was "illogical" and deficient because the evidence was "admissible, material, and favorable to the defense strategy."

The post-conviction court then found that Mr. Thomas' testimony was credible. The court elaborated:

> It is undisputed that Mr. Thomas' statements to police, like Mr. Caldwell's, ran the full gamut of complete denial to being there to his admitted involvement. However, unlike Mr. Caldwell, his story continues to evolve once he admits his involvement, at least as it relates to Mr. Matthews. Nevertheless, his story has remained consistent as it relates to Petitioner. The fact that Mr. Thomas was willing to testify at Petitioner's trial *before* his own case was resolved and effectively admit to felony murder makes his testimony as it relates to Petitioner believable.

However, the post-conviction court noted that it had recently found Mr. Thomas' testimony in a coram nobis proceeding for Mr. Matthews not to be credible.

The court then addressed prejudice and determined that trial counsel's failure to call Mr. Thomas to testify prejudiced the defense. The court stated that Mr. Thomas could have testified that the petitioner did not possess or fire a weapon and did not realize the import of why the car was being turned around. The court found that the testimony would have "provided direct evidence for the jury to weigh as to whether Petitioner was guilty of facilitation or of being a principle in the commission of the offense."

The court additionally stated that Mr. Caldwell's was the only direct testimony that the petitioner possessed or fired a gun and that Mr. Thomas' testimony directly contradicted Mr. Caldwell's testimony about who the shooters were.

The post-conviction court noted that, although Mr. Thomas' testimony "was fodder for impeachment based on his prior inconsistent statements to police, it was no more so than that of Mr. Caldwell." The court surmised that the jury might have found Mr. Thomas' testimony more credible since it was an admission against interest. The court stated, "[T]he point is not whether his testimony would have been accepted or rejected. Rather, the point is that the jury was never allowed to hear from the witness."

The court continued, "Often in cases where the defense strategy is to portray the client as a facilitator who shared no common intent with the principles rather than him being a principle, the smallest piece of evidence can sometimes be significant." The court determined that "[i]n weighing the pros and cons of calling Mr. Thomas, it appears trial counsel had nothing to lose and everything to gain. His testimony is evidence from which a jury could conclude that Petitioner did not share in the common intent of the shooters." The court elaborated:

> Mr. Thomas' testimony, despite its many inconsistencies, mirrors the jury's verdict that Petitioner was not a shooter. The question then becomes whether the jury would have accepted his explanation that Petitioner had no reason to believe that a shooting was about to occur. The answer can only be "there is no way to know". Because of this uncertainty and because [*State v.*] *Zimmerman*[, 823 S.W.2d 220, 227 (Tenn. Crim. App. 1991),] focused on

> the jury not being afforded the opportunity to hear the evidence, not on whether they would accept or reject it, the court finds by clear and convincing evidence that the verdict of the jury has been undermined.

After our thorough review, we conclude that the post-conviction court erred in granting the petitioner relief based on ineffective assistance of counsel. In determining that trial counsel's performance was deficient, the post-conviction court found that counsel was aware that Mr. Thomas wanted to testify for the petitioner. However, there is nothing in the record to support this finding. Mr. Thomas testified at the hearing that he told the petitioner that he wanted to testify, but the petitioner never testified that he received this information or conveyed it to counsel. Counsel testified that he would have been "shocked" if Mr. Thomas' attorney told him that Mr. Thomas would testify and admit to murder. Absent a showing that counsel knew that Mr. Thomas was willing to testify for the petitioner, it was reasonable for counsel to believe that Mr. Thomas, a co-defendant charged with first degree murder, would not incriminate himself if called to testify. Any finding that counsel was aware of Mr. Thomas' willingness to testify is pure speculation.

Moreover, it was not unreasonable for trial counsel not to interview Mr. Thomas prior to trial because counsel spoke to Mr. Thomas' attorney and the attorney never mentioned that Mr. Thomas was willing to testify for the petitioner, and there is nothing in the record to suggest that Mr. Thomas' attorney would have allowed Mr. Thomas to speak to counsel and implicate himself in the murder. Furthermore, even if counsel had been aware that Mr. Thomas wanted to testify, his proposed testimony that the petitioner was unaware of what was going to happen would have likely been inadmissible as speculation. Thus, only

Mr. Thomas' proposed testimony that the petitioner did not fire a weapon would have been admissible. Therefore, it would have been reasonable not to call Mr. Thomas as a witness because his testimony would have added little value to the case and been subject to impeachment based on Mr. Thomas' multiple prior statements to police. We conclude that trial counsel did not render deficient performance.

Although we have determined that trial counsel's performance was not deficient, the bigger issue and basis for us to overrule the court below is that the post-conviction court did not make the proper analysis in determining whether the petitioner was prejudiced. In finding prejudice, the court stated that "the point is not whether [Mr. Thomas'] testimony would have been accepted or rejected. Rather, the point is that the jury was never allowed to hear from the witness." The court later discussed whether the jury would have accepted Mr. Thomas' claim that the petitioner did not know a shooting was going to occur and stated "there is no way to know." These statements do not support a finding of prejudice because the appropriate standard for determining prejudice is whether there is "a reasonable probability . . . that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

Applying the correct standard, we cannot conclude that there is a reasonable probability that the result of the trial would have been different had Mr. Thomas testified. Mr. Thomas testified at the post-conviction hearing that his testimony essentially would have been that the petitioner did not have or fire a weapon, but that evidence was already presented to and apparently accepted by the jury in acquitting the petitioner of the weapon charge. The post-conviction court even noted that Mr. Thomas'

testimony "mirror[ed] the jury's verdict that Petitioner was not a shooter."

Even with Mr. Thomas' testimony, the evidence established that the petitioner was in the car at the time the shots were fired and the car was registered to his mother. The evidence also indicates some awareness on the petitioner's part of what was going to happen considering Quontez Caldwell's testimony that, while they were in the car, one of the passengers said, "There go [sic] somebody we beefin' with [sic]," and the driver made a U-turn to go back toward the individuals. In light of Mr. Thomas' limited proposed testimony that the petitioner was not the shooter, the fact that the State prosecuted the petitioner under a theory of criminal responsibility and the fact that Mr. Thomas' testimony would have been impeached support a finding that there was no reasonable probability that the result of the trial would have been different had Mr. Thomas testified.

CONCLUSION

Based on the foregoing authorities and reasoning, we reverse the post-conviction court's grant of relief and reinstate the judgment against the petitioner.

ALAN E. GLENN, JUDGE

APPENDIX D

IN THE CRIMINAL COURT FOR DAVIDSON COUNTY, TENNESSEE
DIVISION VI

DEANGELO MOODY	)	
	)	
	)	
v.	)	**CASE NO: 2009-D-**
	)	**3252**
	)	
STATE OF TENNESSEE	)	
Respondent	)	

MEMORANDUM OPINION

STATEMENT OF CASE

This matter is before the Court upon Mr. Deangelo Moody's (hereafter "Petitioner") Petition for Post-Conviction Relief. The Petitioner claims that relief should be granted and his conviction be set aside because he received ineffective assistance of counsel from his trial attorney, Mr. Mark Kovach.

STATEMENT OF TRIAL RECORD[1]

This case involves the shooting death of the victim, a sixteen-year old female, L.J. During a shoot-out that occurred on the street outside her home, the victim was struck by a stray bullet when it entered her home. A

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[1] The facts of the case are taken from the record of appeal of S*tate of Tennessee v. Deangelo M. Moody*, 2013 Tenn. Crim. App. LEXIS 396, 2013 WL 1932718 (Tenn. Crim. App. May 9, 2013)

Davidson County grand jury indicted appellants and their co-defendant, Lorenzo Ortego Thomas, II, for one count of first degree felony murder and one count of employing a firearm during the commission of a dangerous felony. Co-defendant Thomas's case was severed from appellants' case, and the trial court conducted their joint trial from May 9-12, 2011.

Inez Johnson, the victim's mother, testified that around 4:00 p.m. on April 25, 2009, she and the victim were at their home on Chesapeak Drive. They were lying down in Ms. Johnson's bedroom when they heard gunshots. Ms. Johnson stated that she "instinctively...dropped and rolled." She further stated that "instead of laying low and rolling from the bed, [the victim] raised her body up" and was struck by a bullet. The victim began bleeding from her mouth. Ms. Johnson called 9-1-1 and rendered aid to the victim in an attempt to stop the bleeding. She recalled, "[B]lood was just everywhere,... and I was right there beside her[,] and I knew [she] wasn't going to make it[,] and I watched her take her last breath...."

Christopher Cote, a detective with the Metro Nashville Police Department ("MNPD"), testified that around 4:00 p.m. on April 25, 2009, he responded to a call at 3652 Chesapeak Drive. The paramedics were already at the scene when he arrived. Officer Cote was advised that a sixteen-year-old female had been shot. He entered the home and observed the victim lying on the floor, bleeding profusely. The paramedics transported the victim to the hospital, and additional police officers arrived at the scene. Officer Cote stated that he secured the scene and advised his superior officers and investigators as to what had occurred.

Officer Cote recalled that Officer Brian Eaves arrived at the scene. He stated that a witness approached Officer

Eaves and gave him a hat that the witness had found. He placed the hat, which the witness found in the street to the right of the victim's house, in an evidence bag and gave it to the crime scene investigators. Officer Cote stated that he also found multiple shell casings of different calibers at the scene.

Lynne Mace, a crime scene investigator with the MNPD, testified that she investigated the scene in this case. She drew a diagram of the scene, which she described for the jury. The diagram depicted the locations of bullet cartridge casings. Investigator Mace also photographed and collected the cartridge casings. Investigator Mace recalled that there were two .45 caliber automatic casings and six 9mm casings. She identified photographs that she had taken of the crime scene, including a photograph of the strike mark of the bullet that entered the victim's house.

Christopher Bridges testified that he lived at 3648 Cheseapeak Drive. He stated that on April 25, 2009, at approximately 4:00 p.m., he was walking down Chesapeak Drive with Deandre Williams. As they were walking, a car with four or five people inside of it pulled up and began shooting. Christopher began to run, but he heard more than five shots fired. The State showed him a photograph of a vehicle and asked if it was the vehicle he observed on April 25, 2009, to which Christopher responded, "Yes, sir." Christopher stated that he was given the opportunity to speak with the police about what he observed, but he told them that he "really didn't see anybody, didn't see anything." He said that he did not want to speak with the police and that they forced him to go to the precinct. Christopher admitted that in April 2009, he was a member of the 107 Underground Crips but denied that he was still a member.

On cross-examination, Christopher testified that he

did not know why someone would want to shoot at him. He stated that the shooting came from the driver's side of the vehicle. He did not know appellants and said that the first time he saw them was on the news. Christopher stated that he had an adequate opportunity to view the car because it passed him and made a u-turn. He said that the vehicle's license plate was in the window and that the vehicle's bumper was not damaged. Christopher later testified that the vehicle that he identified in the photograph had damage on its bumper. Christopher said that he ran between some houses when the people in the vehicle started shooting; however, the victim's house was not one of them.

Deandre Williams testified that he lived with Christopher and Christopher's family in April 2009. On April 25, 2009, he was walking to a friend's house with Christopher when he heard gunshots. He ran away and was unable to see from where the gunshots originated. He stated that he was sending text messages on his cellular telephone and did not observe any nearby vehicles of people. However, he recalled telling the police that he saw a small blue or green vehicle that looked like a Honda. He explained that he saw the vehicle before he and Christopher began walking. Mr. Williams further testified that he heard more than five gunshots. He estimated that he was three houses away from 3652 Chesapeak Drive when the gunshots began. He ran in the opposite direction from the victim's house.

Mr. Williams denied being a member or affiliated with the 107 Underground Crips. He stated that he did not know whether Christopher was a member of the gang and denied noticing a tattoo of a gun with the numbers "107" on Christopher's hand.

On cross-examination, Mr. Williams testified that he did not know appellants and had never seen them before the day of trial. Mr. Williams did not know why anyone would

shoot at him. He stated that he did not know anything about the incident and was only testifying because the State forced him to do so.

Evan Bridges testified that he is the grandfather of Christopher Bridges and that they lived at 3648 Chesapeak Drive. At around 4:00 p.m. on April 25, 2009, Evan was outside in the backyard of his home. He heard gunshots and went toward his front yard. When he arrived at the front yard, Evan determined that the gunshots were coming from a small green car that was driving down the street. When shown a photograph of a vehicle, Evan stated that the vehicle in the photograph was the same size, but the car he saw on the day of the shooting looked like a Honda. He observed the heads of three African-Americans in the vehicle and stated that the people in the vehicle were "some young guys."

Evan recalled speaking with three or four police officers, but he denied telling Officer Eaves that he saw two of the three people in the vehicle shooting into 3652 Chesapeak Drive. Approximately fifteen to twenty minutes after the shooting ceased, Evan found a black cap in the middle of the street that was not there before the shooting. He thought that it might have belonged to one of the shooters, so he gave it to the police.

On cross-examination, Evan testified that he did not actually see anyone shoot a weapon. He clarified that the vehicle he saw was green and that the vehicle in the photograph looked like it was blue. Evan stated that he did not see the black cap fall from the vehicle from which the shots were fired.

Quontez Caldwell testified that appellant Moody and Ortego Thomas are his half-brothers through their father, but he only became acquainted with them a short time prior to this incident. Mr. Caldwell stated that on

April 25, 2009, appellant Moody and Mr. Thomas picked him up from his grandmother's house in appellant Moody's vehicle. He identified appellant Moody's vehicle from an exhibit photograph. In addition to his half-brothers, two other males whom he did not know were in the vehicle. He identified appellant Matthews in the courtroom as one of the other passengers in the vehicle. Mr. Caldwell stated that as they drove down Chesapeak Drive, the people in the car saw "somebody they had a beef with [sic][,] and they shot at them." He recalled that Mr. Thomas said, ""There go [sic] somebody we beefin' with [sic]."" The driver then turned the vehicle around and drove back up Chesapeak Drive. He said that appellants and Mr. Thomas began shooting at a person he knew as "C. Trigger." Mr. Caldwell did not recall having previously testified that appellant Matthews had a 9mm pistol, that appellant Moody had a ".45 or .40," or that Mr. Thomas had a "38 revolver," but he acknowledged that if he had previously so testified, then it was the truth. He stated that neither he nor the driver had a weapon that day. After the shooting, the men dropped Mr. Caldwell off in the middle of the street. He said that he did not speak with appellants about the shooting after it happened.

Mr. Caldwell stated that the police attempted to interview him. The first two times they attempted to speak with him, he told them that he did not know anything about what happened because he just "didn't want to tell them nothing [sic]." Mr. Caldwell denied being a member of the Hoover Deuce Crips. He denied testifying to being a member in July 2009 and said that if his being a member of the Crips was reflected in his statement, it was not the truth.

On cross-examination, Mr. Caldwell denied that a detective with MNPD brought him in for questioning because he had received information that Mr. Caldwell claimed that he killed the victim. He further denied getting

a new "teardrop tattoo" on his face. Mr. Caldwell did not recall telling the detective that he was anywhere near Chesapeak Drive, that he was with someone named "T.O.," that he was in a Chevrolet Impala, or that he did not know the color of the Impala. He stated that he did not know appellant Moody's real name and that he only knew his father by the name "Tango."

Mr. Caldwell admitted that he spoke with another detective a few weeks later but denied that he changed his story about being in an Impala with T.O. Mr. Caldwell admitted that appellant Moody picked him up and then proceeded to pick up another person, at which time the other person began driving the vehicle. He remembered seeing "C. Trigger" and stated that "guns were pulled[,] and they started shooting." In a subsequent interview with Kathy Morante, an assistant district attorney, Mr. Caldwell denied any knowledge of his brothers' having problems with "C. Trigger" and stated, "I didn't know they had no [sic] beef with him." He testified that his problem with "C. Trigger" was "[s]omething about...some child issues" and that it was not significant. Mr. Caldwell denied that the "child issues" concerned his child's mother and could not remember stating that there was bad blood between him and "C. Trigger" or indicating that "C. Trigger" had tried to do him harm in the past. He declined the opportunity to review the transcript of his statement.

Kathy Morante, an assistant district attorney in Nashville, testified that in April 2009, she was assigned to handle juvenile transfers for the office. In the course of her work, Ms. Morante explained that it was fairly common to have witnesses testify for the State who had charges pending against them, as was the case with Quontez Caldwell. She further explained that a cooperating witness in this situation was sometimes given "use immunity." "Use immunity," she testified, was an agreement between the

witness, his or her attorney, and the State that provided, "[I]f you sit down and talk with use, we're not going to use anything you say during this period of time that we're talking against you to prosecute you so long as you tell the truth." She added, "[W]e specifically reserve the right to use any other evidence that we can come up with against that person, or as I said earlier, if we determine that [the] person is being untruthful, then we can prosecute them." Mr. Caldwell's use immunity agreement form was entered as an exhibit at trial. Ms. Morante stated that the most serious charge Mr. Caldwell faced in the summer of 2009, when he was fifteen years of age, was an attempted homicide that was unrelated to the instant case. He was taken into custody on June 12, 2009, and in November 2009, he entered a guilty plea to aggravated assault and vandalism and was committed to a secure facility of the Department of Children's Services ("DCS"). Ms. Morante noted that Mr. Caldwell also had an unresolved robbery charge. She explained that DCS determines the appropriate time to "step him down from one facility to another and...to release him back into the community."

On cross-examination, Ms. Morante testified that Mr. Caldwell had just been released from DCS when this incident occurred. She met with Detective Jackson and believed that Mr. Caldwell could have some information pertinent to the case, but she did not know whether he was involved. On redirect examination, Ms. Morante clarified that the attempted homicide charge for Mr. Caldwell was wholly unrelated to this incident.

Detective Gene Davis of the MNPD testified that on May 15, 2009, he conducted a traffic stop in the area of Nolensville Road for a traffic ordinance violation. He observed three people inside the vehicle he stopped, and during a search of the vehicle, he found a loaded 9mm Glock

semi-automatic pistol. Detective Davis stated that appellant Matthews claimed ownership of the weapon, at which time he was taken into custody. Detective Davis identified the weapon, which was entered as an exhibit. He also identified appellant Matthews, who was seated in the courtroom.

Detective Cody O'Quinn of the MNPD testified that he was involved in serving a search warrant for a vehicle located at 314 Kern Drive on June 18, 2009. The vehicle was a green 1999 Kia. He determined that the vehicle was registered to appellant Deangelo Moody and his mother. He identified the temporary drive-out tag found inside the automobile and noted it would have been valid on the date of this incident, April 25, 2009. On-cross examination, Detective O'Quinn stated that the Kia automobile in the exhibit photograph appeared green in color to him.

Detective Lawrence Brown, also from the MNPD, testified that he obtain buccal swabs from both appellants on February 9, 2011, at the prosecutor's request. He explained that a buccal swab is used to obtain liquid evidence, usually saliva, from an individual. The swabs were packaged and taken to the Tennessee Bureau of Investigation ("TBI") to be analyzed for DNA comparison.

Agent Mark Dunlap of the TBI Crime Laboratory was accepted by the trial court as an expert in forensic chemistry and serology. He testified with regard to his DNA analysis of a black cap. From his testing, he determined that the "DNA profile from the cap was a mixture of genetic material from two individuals." From the standards submitted in February 2011, ten of the thirteen testing sites indicated that the major contributor of DNA on the cap was appellant Matthews.

On cross-examination, Agent Dunlap explained that three of the thirteen testing sites were inconclusive,

stating, "[T]here just wasn't enough DNA there to obtain a full profile, so those sites didn't yield results. It doesn't mean that they didn't match, it just means there was no result at those sites." He acknowledged that no DNA belonging to appellant Deangelo Moody was found on the hat.

Agent Robert Daniel Royse of the TBI Crime Laboratory was accepted by the trial court as an expert in firearms and tool mark identification. He explained the operation of the Glock 9mm Luger semiautomatic pistol, the parts of a live cartridge, and the firing cycle process. Agent Royse testified that in his work, he examines the unique set of markings found in every firearm, which can be thought of as a mechanical fingerprint. In making an identification, he test fires the weapon and takes the test bullets and cartridge cases and compares them to the evidence. If the unique characteristics are present on both the evidence and the test material, he concludes that they have a common origin and that they were fired from the same weapon. Agent Royse was provided six spent .45 caliber automatic cartridge casings and two 9mm cartridge casings in April 2009, and in January 2011, he was provided a 9mm weapon for analysis. He testified that the two 9mm casing provided to him were fired from the weapon he received in January 2011.

Chief Medical Examiner Dr. Amy McMaster testified that a former colleague had performed the victim's autopsy but that she had reviewed and agreed with the report that was prepared. She illustrated the bullet entry wound and the path of travel through the victim's body. She identified the projectile recovered from the victim's body and described the procedure in preserving it as evidence. Dr. McMaster stated that the bullet injured the aorta, the trachea, and both lungs and that even immediate medical intervention could not have saved the victim's life. In

summary, Dr. McMaster testified that the cause of the victim's death was a gunshot wound to the torso and that the manner of death was a homicide. At the close of Dr. McMaster's testimony, the State rested its case-in-chief.

The defense called William Jackson, a former officer with the MNPD, who testified that he was the lead detective in the investigation of the victim's death. He arrived at the scene approximately five to ten minutes after receiving the call and remained there for approximately three and one-half hours. His duties included making sure the officers secured the crime scene for purposes of investigating and collecting evidence. Detective Jackson was present during the victim's autopsy and collected the bullet recovered from the victim's body as evidence. He recalled testifying at appellants' detention hearing that the recovered bullet was a large fragment and stated, "I didn't know at the time if it was a [.]45 or a [.]40[.] I guessed that it was one of those too big to be a [.]38 or a [.]22."

Detective Jackson testified at length concerning his three interviews with Quontez Caldwell. He recalled that the first interview with Mr. Caldwell was at the end of April and the second interview was on June 12th. He explained that he uses conversation as his interviewing technique to get to the truth. He would not make promises of assisting in getting charges dismissed or lowered, but he acknowledged that he would "talk for someone if they cooperate" and admitted that "[he did not] know how the [District Attorney] works."

On cross-examination, Detective Jackson recalled that during the first interview with Mr. Caldwell on April 30, 2009, Mr. Caldwell denied being at the scene or having anything to do with this incident. During the second interview on June 12, 2009, Mr. Caldwell began to cooperate and identified appellant Matthews in a

photograph array as one of the individuals involved in this shooting. Detective Jackson testified that ultimately, Mr. Caldwell provided seating positions in the vehicle and stated that appellants were two of the three people involved in shooting at Christopher Bridges and Deandre Williams on April 25, 2009.

Upon this evidence, the jury convicted both appellants of first degree felony murder committed during an attempted first degree murder, and the trial court imposed life sentences.

STATEMENT OF EVIDENCE PRESENTED

Petitioner now claims that his defense counsel, Mr. Mark Kovach, was not adequately prepared for trial and that Mr. Kovach's lack of preparation, investigation, and communication prevented Petitioner from having an adequate trial strategy or defense plan.

At the hearing held on Petitioner's instant motion, attorney, Ms. Aimee Seitzman, testified that she represented Petitioner in juvenile court and that Petitioner's family contacted her to represent Petitioner in the instant case; Ms. Seitzman's practice areas are split at approximately ninety percent juvenile cases and ten percent criminal cases. Ms. Seitzman agreed to represent the Petitioner and was retained by the Petitioner's family May 6, 2011. Petitioner's case was set to go to trial on May 9, 2011. The Court allowed Ms. Seitzman to replace Mr. Kovach as trial counsel, however, the Court refused Ms. Seitzman's request for a continuance. In turn, Ms. Seitzman declined to represent the Petitioner for ethical reasons because she felt that she could not be ready for a first degree murder trial with only a weekend's time to prepare. Ms. Seitzman believed that it would take her two to three weeks to be prepared for trial. Consequently, Mr. Kovach remained as trial counsel for the Petitioner in this

case.

Ms. Lavonqua Lee, the Petitioner's mother, also testified at the post-conviction hearing. She testified that the Petitioner expressed his dissatisfaction with Mr. Kovach's representation to her. The Petitioner complained to her on various occasions that Mr. Kovach never came to see him about his case. She personally was aware of only one (1) jail visit by Mr. Kovach to see her son. Both she and her son were frustrated by Mr. Kovach's refusal to file a bond reduction motion despite the fact that the family could have posted a ten thousand dollar bond. Mr. Kovach's only explanation for not filing the motion is that the bond would still be too high for the family to make it.

Additionally, Ms. Lee testified that Mr. Kovach refused to speak with her or any other members of the Petitioner's family until the trial. Ms. Lee did acknowledge, however, that Mr. Kovach was at court on every date that the Petitioner's case was set. Ms. Lee further testified that the Petitioner's family attempted to hire attorney Mr. Michael Colavecchio before retaining Ms. Seitzman.

Mr. Eddie Coley, the Petitioner's uncle, testified at the post-conviction hearing that he offered to help Mr. Kovach with access "to the streets" and that he knew or spoke to some witnesses that would have been beneficial to his nephew's case. However, Mr. Coley was uncertain as to whether he could get the witnesses to testify at trial. At the post-conviction hearing Mr. Coley could not recall any of the alleged witnesses names or any of the alleged witnesses' contact information. At any rate, Mr. Kovach never followed up with Mr. Coley and was generally dismissive of Mr. Coley. As an example, he said he attempted to speak to Mr. Kovach on several occasions about filing a severance motion because there was so little evidence against petitioner as compared to the co-

defendants. He testified that Mr. Kovach ignored those inquiries.

Mr. Kovach did not return the majority of Mr. Coley's phone calls and, on the few occasions that he did, Mr. Kovach told Mr. Coley that it was not his job to speak with the Petitioner's family. Further, Mr. Coley testified that the Petitioner informed him that Mr. Kovach threatened the Petitioner. Overall, Mr. Coley believed Mr. Kovach was unprofessional, incompetent, and unprepared for his nephew's trial.

Mr. Ortago Thomas, the Petitioner's brother and a co-defendant in the instant case, also testified at the post-conviction hearing. Mr. Thomas's case was severed from the Petitioner's case. Mr. Thomas testified that the Petitioner did not have anything to do with the shooting. Mr. Thomas further testified that his case was pending when the Petitioner went to trial. Mr. Thomas claimed that he informed his own attorney that he wanted to testify in the Petitioner's trial but that he was never contacted by Mr. Kovach or the State to do so.

Mr. Thomas's account of the shooting has evolved, and contained inconsistencies, since the outset of this case. When investigators initially confronted Mr. Thomas, he denied knowing anything and claimed he was not present at the shooting. However, after some persistence by investigating officers, Mr. Thomas admitted to being present when the shooting occurred. Then, at the post-conviction hearing, Mr. Thomas claimed that he and another individual, Mr. Caldwell, were the shooters. In this version of the story Mr. Caldwell grabbed Mr. Matthews' gun, also a co-defendant, and began shooting while he fired his own gun. However, on cross-examination, Mr. Thomas claimed that Mr. Caldwell was the only individual firing guns on the day of the shooting. In this account of the

events Mr. Caldwell fired two guns; Mr. Caldwell's own .45 caliber gun and Mr. Matthews' .9mm caliber gun at the same time. Mr. Thomas's only consistencies in the various versions of events pertain to the Petitioner, i.e., the Petitioner was present, the Petitioner did not have a gun, and the Petitioner did not have any knowledge about what was about to take place because he was simply giving Mr. Caldwell a ride home when the shooting occurred.

The Petitioner testified at the post-conviction hearing that Mr. Kovach was appointed as his counsel on May 8, 2010, but that he only saw Mr. Kovach three or four days before his trial that occurred on May 9, 2011. The jail visit logs, which were admitted as an exhibit at the hearing, reflect that Mr. Kovach's first visit at jail was on March 8, 2011, with two subsequent visits on May 3, 2011, and May 4, 2011. The Petitioner testified that during these meetings Mr. Kovach was pessimistic and hostile towards him. According to the Petitioner, Mr. Kovach would call him a liar, would abruptly and angrily leave their meetings, and told the Petitioner that he was "going to be somebody's little girl" in prison and that the Petitioner was "going to lose at trial, be wearing a skirt at the penitentiary."

The Petitioner further testified that he expressed his dissatisfactions with Mr. Kovach in letters he wrote to him and to the Tennessee Board of Professional Responsibility. He asked his mother to contact Mr. Kovach on his behalf since he was having such difficulty communicating with Mr. Kovach.

The Petitioner testified that Mr. Kovach changed his business address without telling him, and most of the letters he wrote to Mr. Kovach were returned to sender. The Petitioner did not save any of the letters that he wrote to Mr. Kovach or the Board of Professional Responsibility.

The Petitioner stated that Mr. Kovach mailed him discovery materials only after he wrote the Board of Professional Responsibility.

The Petitioner had additional complaints about Mr. Kovach's failure to adequately communicate with him. The Petitioner stated that Mr. Kovach never brought him a plea offer from the State or ever discussed with him possible the possibility of negotiating a plea agreement. According to the Petitioner, Mr. Kovach represented to him that the State never made an offer in this case. Additionally, the Petitioner was never informed of the elements of felony murder and, when asked at the post-conviction hearing to give his understanding of "criminal responsibility," he stated that he had never heard of the term. Furthermore, Mr. Kovach did not file a bond reduction motion or a severance motion in this case. The Petitioner testified that he specifically asked Mr. Kovach to file each of these motions but Mr. Kovach refused to do so.

The Petitioner also testified that another individual, Mr. Quontez Caldwell, was bragging about committing the shooting and murder to people at Mr. Caldwell's high school. The Petitioner claimed that the school's resource officer overheard Mr. Caldwell bragging about it. However, he stated that Mr. Kovach did not investigate or follow up on this information about Mr. Caldwell bragging about the incident at school. Mr. Caldwell testified as a State's witness against the Petitioner at Petitioner's trial. The Petitioner testified that it was his decision to not testify at trial.

Mr. Kovach testified at the post-conviction hearing that he has been an attorney since 2003 with his practice being primarily in criminal law estimating roughly eighty-five to ninety percent of it being criminal law. Further, Mr. Kovach stated that he had handled murder trials prior to

being appointed on this case. Mr. Kovach represented the Petitioner at trial and on appeal in this case.

Mr. Kovach testified that he met with the Petitioner on his court dates, in jail, and once with an investigator. From his meetings with the Petitioner it was clear to Mr. Kovach that the Petitioner was not a shooter in the case. Mr. Kovach believed the Petitioner when he said he did not do anything and that he was just driving the vehicle on the day of the shooting. Based on these representations by the Petitioner, Mr. Kovach refused the Petitioner's suggested defense strategy which was to deny that the Petitioner was present on the day of the shooting.

Additionally, Mr. Kovach believed the Petitioner's mindset did not lend itself to viable plea discussions that required him to accept culpability under a theory of criminal responsibility. When Mr. Kovach explained criminal responsibility to the Petitioner, he refused to accept that its legitimacy as a legal principle. Mr. Kovach testified that the Petitioner's belief that he had not done anything caused the Petitioner to be adamant about not accepting any plea agreement. Nevertheless, Mr. Kovach presented Petitioner with an offer from the State that he believed, but was not sure, was thirty to thirty-five years to serve at 100%. Petitioner rejected the offer despite Mr. Kovach informing the Petitioner that he would likely spend the rest of his life in prison if he refused the offer and insisted on going to trial. Mr. Kovach denied telling the Petitioner that he was "going to wear a skirt" if he did not take the plea offer.

Mr. Kovach testified that he spoke to the Petitioner's mother, Ms. Lee, frequently because she was designated as the family's spokesperson by the Petitioner. Mr. Kovach stated that his harshness was likely attributable to the fact that he told the Petitioner and his mother the truth, i.e.,

the Petitioner's case was dire and the facts were largely undisputed. Additionally, Mr. Kovach testified that he spent a lot longer than three hours total speaking with Petitioner at jail, that he visited the Petitioner more than three times at jail, and that he had the benefit of open file discovery which he provided Petitioner. Mr. Kovach conceded that in a case like this one, where the facts are largely undisputed, there are lulls in communication because there is nothing new to report.

With regard to Mr. Kovach's investigation and preparation of the instant case, he testified that he obtained the transcripts of the Petitioner's juvenile proceedings related to this case; met with the prosecuting assistant district attorney on all court dates to discuss the case and relayed to Petitioner the substance of those discussions; interviewed the medical examiner a couple of times; visited the crime scene; and had his investigator interview witnesses but could not recall at the hearing who the investigator interviewed. Mr. Kovach did not interview Ms. Whitehead, Ms. Fletcher, or Ms. Lane. Further, Mr. Kovach did not interview the police officer at Mr. Caldwell's high school to verify whether or not Mr. Caldwell was bragging about the shooting. Additionally, Mr. Kovach did not interview Mr. Thomas and did not call him as a witness at trial because he was led to believe Mr. Thomas was a witness for the State. He was not aware that Mr. Thomas had offered to testify for Petitioner. However, he spoke frequently with attorney Ashley Preston who represented Mr. Thomas because they shared office space. Ultimately Mr. Kovach rejected Petitioner's strategy that he was not there, but didn't explain what strategy he did intend to pursue and whether he discussed it with Petitioner.

Pursuant to discovery, Mr. Kovach learned of the other co-defendants' statements to police; verified that the

Petitioner did not make any statements to police; understood that most of the State's witnesses were police officers; and learned that the DNA evidence collected at the scene of the crime did not implicate the Petitioner. Mr. Kovach did not a motion to reduce bond or a motion to sever requested by the Petitioner because they did not have any legal bases to support filing them. Mr. Kovach was uncertain as to the location of the Petitioner's file at the time of the hearing, but he did admit that the Petitioner wrote numerous letters to him and possibly one to the Board of Professionally Responsibility after the Petitioner's case was appealed. He admits he did not file any pretrial motions, but stated he did not feel any such motions were warranted.

Mr. Kovach stated that Ms. Seitzman did not come into the picture until the last minute. He was given no notice by the Petitioner or Ms. Seitzman that the Petitioner was working to retain her as his trial counsel. Mr. Kovach also represented Petitioner on appeal. Although belatedly, Mr. Kovach did provide the appellate transcript for the Petitioner.

FINDINGS OF FACT

1. Petitioner was represented in Juvenile Court by Ms. Aimee Seitzman.
2. After the case was transferred and the Petitioner indicted, the court appointed Mr. Mark Kovach to represent him.
3. Attorney Aimee Seitzman was retained by Petitioner on May 6, 2011, the Friday before Petitioner's case was scheduled for trial.
4. Ms. Seitzman did not represent the Petitioner at trial because the Court refused her request for a continuance. Ms. Seitzman did not believe that she could be ready to represent the Petitioner in a first

degree murder case with only a weekend to prepare for trial.

5. Ms. Seitzman could have been prepared for trial if given a continuance of two to three weeks to allow her reasonable time to prepare.
6. Mr. Kovach was unaware of the Petitioner's efforts to retain Ms. Seitzman until the Friday before trial was to begin.
7. Petitioner's efforts to retain Ms. Seitzman were prompted by his dissatisfaction with the representation Mr. Kovach was providing.
8. Ms. Lee, Petitioner's mother, was aware of her son's concerns and complaints that Mr. Kovach was not communicating with him or working on the case.
9. Because of the continued concerns expressed by Petitioner, Ms. Lee attempted to retain Mr. Michael Colavecchio before actually retaining Ms. Seitzman.
10. Ms. Lee had little success in communicating with Mr. Kovach despite her efforts to do so.
11. Mr. Kovach refused to file a motion to reduce bond because he thought it would not be set at the $10,000 amount the family indicated they could afford.
12. Ms. Lee attended every scheduled court appearance. She saw Mr. Kovach at each court appearance.
13. Mr. Coley, the Petitioner's uncle, attempted to contact Mr. Kovach on numerous occasions to offer his assistance in investigating the case. Mr. Coley had "connections" on the streets and believed he could locate witnesses to testify. Mr. Kovach ignored his offers to assist him with the investigation.
14. Mr. Coley did not have any specific witness names to present to Mr. Kovach when he contacted Mr.

Kovach and he did not have any witness names to present to the Court at the post-conviction hearing.

15. Mr. Kovach did not discuss with Mr. Coley the need to have Petitioner's case severed.

16. Mr. Kovach did not feel an obligation to speak to the family generally except Ms. Lee, the designated spokesperson. Even then, most of the communications occurred only as the trial neared. Mr. Kovach was generally short and discourteous during these discussions.

17. Mr. Ortago Thomas, the Petitioner's brother and a co-defendant in this case, was willing to testify at trial for the defense. Mr. Thomas' case was pending at the time of the trial and he was represented by counsel.

18. Mr. Thomas was not contacted by Mr. Kovach because Mr. Kovach believed — based on his investigation and preparation of the case — that Mr. Thomas was a State's witness.

19. Mr. Thomas gave conflicting accounts of the shooting but was consistent in the Petitioner's lack of knowledge and involvement in the events.

20. Mr. Kovach met with the Petitioner at jail three times with the first meeting occurring on March 8, 2011. The next two meetings occurred on May 3, 2011, and May 4, 2011.

21. Mr. Kovach met with the Petitioner on scheduled court dates related to this case. The length and substance of the meetings are unknown.

22. The Petitioner expressed dissatisfaction with Mr. Kovach's representation through letters to Mr. Kovach and the Board of Professional Responsibility.

23. Mr. Kovach provided the Petitioner discovery materials only after the Petitioner wrote letters to the Board of Professional Responsibility.
24. Mr. Kovach's investigation and preparation of this case involved: acquiring the transcript from the Petitioner's juvenile proceedings related to this case; meeting with the prosecuting assistant district attorneys; going to court for all of the Petitioner's courts dates related to this case; interviewing the medical examiner; visiting the crime scene; and hiring an investigator.
25. Mr. Kovach hired an investigator to assist with trial preparation, but did not have the investigator attempt to work with Mr. Coley or interview Mr. Thomas. The actual efforts expended by the investigator are unknown.
26. Mr. Kovach's investigation revealed that the facts in this case were, for the most part, undisputed. Mr. Kovach's obtained co-defendants' statements during discovery. His investigation also revealed that most of the State's witnesses were police officers and that the DNA evidence collected at the scene of the crime did not implicate the Petitioner.
27. Mr. Kovach explained the concepts of "criminal responsibility" and felony murder to the Petitioner. However, the Petitioner's belief that he did not do the actual shooting and, therefore, could not to be guilty of murder, prevented the Petitioner from accepting the legitimacy of these legal concepts.
28. Petitioner's suggested strategy was to argue that he was not there although he admitted in discussions with Mr. Kovach that he was the driver, but that he had no knowledge that a shooting was going to occur. Mr. Kovach believed Petitioner and chose to pursue

a defense that negated the theory of criminal responsibility.

29. Mr. Kovach conveyed a plea offer from the State to the Petitioner. The offer was between 30-35 years to serve at 100%. The Petitioner rejected the plea offer.
30. Mr. Kovach made inappropriate comments to the Petitioner when he explained that rejecting the State's plea offer would likely mean that the Petitioner would spend the rest of his life in jail. Specifically, Mr. Kovach told the Petitioner that he "going to be somebody's little girl" in prison and that the Petitioner was "going to lose at trial, be wearing a skirt at the penitentiary."
31. Mr. Kovach did not investigate the Petitioner's contention that Mr. Quontez Caldwell was known to brag about doing the shooting and committing murder.
32. Mr. Kovach did not file a motion to reduce bond or the motion to sever requested by the Petitioner. Mr. Kovach believed there were no good faith legal bases for filing these motions.
33. Mr. Kovach received letters from the Petitioner after the Petitioner's case was appealed.
34. Mr. Kovach acquired the appellate transcript for the Petitioner.
35. The Petitioner chose not to testify at trial.

ISSUE PRESENTED

1. Whether Petitioner was denied effective assistance of counsel?
2. Did the court commit structural error in denying Petitioner his right to counsel of his choice?

CONCLUSIONS OF LAW

Post-Conviction Relief was established by the

Tennessee State Legislature as a means of relief when a "conviction or sentence is void or voidable because of the abridgment of any right guaranteed by that Constitution of Tennessee or the Constitution of the United States." Tenn.Code.Ann.§40-30-103. When raising such a claim, Petitioner must show that his representation fell below the range of competence required for an attorney in criminal cases. *Strickland v. Washington,* 466 U.S. 668, 678; *Baxter v. Rose,* 523 S.W.2d 930, 936 (Tenn.1975). In addition, it must be demonstrated that such incompetence impacted the end result of the case. *Strickland* at 693. In other words, to be successful in the claim of ineffective assistance of counsel, the petitioner must prove both that the representation was inadequate and that such representation was prejudicial. *Henley v. State,* 960 S.W.2d 572, 580 (Tenn.1997). The deficiency is prejudicial if there is a "reasonable probability...the result of the proceeding would have been different." *Strickland* at 693. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland* at 694. The court is not bound to find that both issues are present. If one issue is lacking then such is sufficient for the claim to be dismissed without reviewing the second. *Strickland* at 697. Importantly, for relief to be granted the Petitioner must prove by clear and convincing evidence the allegations raised in the petition. Tenn. Code.Ann. §40-30-210(f).

An attorney's performance is reviewed within the context of the totality of the relevant circumstances and from the perspective of the attorney at the time. *Strickland,* 466 at 690. Accordingly, our Supreme Court has recognized that the strategy used will be different from lawyer to lawyer no matter what level of skill they have. *State v. Hellard,* 629 S.W.2d 4, 9 (Tenn.1982). Therefore, our courts "indulge a strong presumption that counsel's

conduct falls within the wide range of reasonable professional assistance." *State v. Burns,* 6 S.W.3d 453, 462 (Tenn.1999). The issue is not what - in hindsight - might be considered more prudent or appropriate, but rather what is constitutionally mandated. *United States v. Cronic,* 466 U.S. 648, 665 n. 38 (1984). Counsel's performance will not be deemed ineffective simply because a different strategy might have produced a different result. *Williams v. State,* 599 S.W.2d 276, 279-80 (Tenn.Crim.App.1980). A failed tactic or even a strategy that hurt the defense does not, standing alone, establish unreasonable or ineffective representation. *Goad v. State,* 938 S.W.2d 363,369 (Tenn.1996). However, deference to the strategies and tactics pursued only applies where the choices are informed ones based on adequate preparation. *House,* 44 S.W.3d at 515.

A. Failure to Adequately Communicate and Investigate in Preparation for Trial

One of the cornerstones to providing effective advocacy on behalf of a client is the need for the attorney and client to have open and adequate communication about the case. What is adequate communication will necessarily vary depending on the case, but the Supreme Court Rules of Professional conduct and the A.B.A. Standards for the Defense Function (hereinafter cited as Tenn. Sup. Ct. R. 8, RPC and A.B.A. Standard respectively) certainly give guidance of what the minimum communications entail. For example, "A lawyer shall: (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable requests for information." Tenn. Sup. Ct. R. 8, RPC 1.4(a). Part (b) of the same rule provides that "[a] lawyer shall explain a matter to the extent necessary to permit the client to make informed decisions regarding the

representation." Similar requirements are included in the A.B.A. Standards.[2] The implication of these rules and standards are that lawyers have an obligation not only to talk to a client, but a duty to educate and give guidance to the client on factual and legal matters relevant to the case.

In this case, using the above rules as guides, there is clear and convincing evidence that Mr. Kovach was deficient in his communications with the defendant. Despite his assertions to the contrary, the court finds that the first time Mr. Kovach went to meet Petitioner in jail was on March 8, 2011, which was approximately fourteen (14) months after arraignment and two (2) months before trial. The record further shows that the parties met on two (2) other occasions at the jail before the actual trial on May 9, 2011.

There are a number of aggravating circumstances which makes this inexplicable failure to adequately communicate even more egregious. First, Petitioner was a juvenile who had never been the subject of prosecution in a state trial court. Second, Petitioner was charged with First Degree Murder in a case that was the subject of publicity due to the egregious nature of the facts. Third, Mr. Kovach did not provide Petitioner with the discovery in this case until Petitioner complained to the Board of Professional Responsibility which was eight to ten months after appointment. Fourth, Petitioner was indicted with three (3) co-defendants which brings a separate set of dynamics to the representation. For example you have the legal concepts of criminal responsibility for the conduct of

[2] See 4-3.8: Duty to keep client informed: (a) Defense counsel should keep the client informed of the developments in the case and the progress of preparing the defense and should promptly comply with reasonable requests for information. (b) Defense counsel should explain developments in the case to the extent necessary to permit the client to make informed decisions regarding the representation.

another and facilitation of a felony which has to be explained to the client and the legal implications of which have to be accounted for during trial preparation. There is also the dynamic that one or more charged parties may seek to reduce their exposure by turning State's evidence. This possibility requires prompt discussions with the client to see if that is something the client might wish to pursue and, if not, develop a strategy for countering the testimony at trial.

Mr. Kovach asserts that he met with Petitioner every time there was a court date which was many. Even if the court were to accept this as true, the court was not made aware of the length or substance of any of these conversations.[3] However, based on Mr. Kovach's acknowledgement that there were lulls in the case with nothing to report it is reasonable to conclude that many of these conversations were perfunctory in nature. Although he stated that he conveyed to petitioner the substance of the conversations he had with the assistant district attorney at each court date, it is unclear what of substance was discussed with the prosecutor and, therefore, what was conveyed to Petitioner. Since Mr. Kovach admits that he had the benefit of open file discovery it is doubtful anything new was discussed.

It is also claimed that Mr. Kovach was deficient by failing to communicate with members of Petitioner's family although Mr. Kovach disputes this claim as it relates to communication with Petitioner's mother. The importance of the attorney-client privilege need not be elaborated on here. Suffice it to say that it is a fundamental right to assure the client that he can be open and honest in

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[3] Mr. Kovach had no independent recollection of these meetings and had lost his file which might have assisted him in refreshing his memory.

discussions with counsel. As important as this protection may be, however, sometimes the client may wish or need to at least partially waive the privilege so that the attorney can speak openly with someone in whom the client trusts. Such was the case here. Petitioner was a juvenile incarcerated in the adult criminal justice system, a foreigner to a new world. It is only reasonable that he would waive privilege in order for his attorney to be a conduit for the exchange of information and the sharing of thoughts with the person he presumably most trusted. Although Mr. Kovach accepted this role to a limited extent, he did so grudgingly and ineffectually. For all intents and purposes Petitioner remained isolated from the guidance and lay counsel that his mother might have provided. Unfortunately it appears that Mr. Kovach saw his need to communicate with the mother as a nuisance rather that as an opportunity to build a collaborative effort to best serve Petitioner. Based on the record as a whole, the court finds that trial counsel was deficient in failing to adequately and promptly communicate with Petitioner directly and with his mother as requested by Petitioner.

The question now, as pointed out in *Strickland* above, is whether Petitioner has established by clear and convincing evidence a reasonable probability that the deficient performance undermined the confidence in the outcome of the trial. In the context of this case, the court finds that the absence of adequate and prompt communication with the defendant and his mother did not prejudice the defendant to the extent that it affected the trial result. Petitioner did not present any evidence to suggest that the lack of communication caused trial counsel to pursue an improper defense strategy for example. Petitioner did not show how the lack of

communication prevented him from receiving a better plea offer or that it caused him not to accept the offer made. The deficient communication was not the cause of Petitioner choosing not to testify at trial. The failure to adequately and promptly communicate may have caused Petitioner and his family unnecessary anxiety but it did nothing to prejudice Petitioner at trial.

Petitioner also is aggrieved by trial counsel's failure to adequately prepare for trial by not interviewing and calling witnesses. When a petitioner claims ineffective assistance of counsel for failure to interview and present a witness at trial, the petitioner, when producing the witness at the post-conviction proceeding, must show that the witness's testimony would have been admissible at trial and material to the defense. *Pylant v. State,* 263 S.W.3d 854, 869 (Tenn.2008). If the answer to both prongs is in the affirmative, it is then necessary to assess the credibility of the tendered witness. *Pylant* at 869-70. Second, a petitioner must establish that the failure to produce a witness at trial denied the jury the benefit of hearing critical evidence which inured to the prejudice of the petitioner. *Black v. State*, 794 S.W.2d 752, 757 (Tenn.Crim.App.1980). The prejudice undermining the confidence in the trial outcome is applicable to the probability of a conviction for a lesser included offense, not just acquittal. *State v. Zimmerman*, 823 S.W.2d 220 at 227 (Tenn. Crim. App. 1991).

The evidence in this case was straightforward in terms of what generally happened that caused the death of the victim and who the occupants of the car were. The disputed testimony centered on who actually fired the weapons at Mr. Bridges and Mr. Jackson and the extent of each parties involvement. There were no independent eyewitnesses or forensic evidence collected that identified Petitioner as a shooter or even placed him at scene. The

only witnesses that could place Petitioner at the scene or describe the extent of his involvement in the incident were his co-defendants. Therefore, the focus of the discussions with Petitioner and the ensuing investigation would appear to center on any evidence that he might offer that would mitigate his knowledge of or participation in the incident or like independent evidence that could be developed to avoid a conviction under the theory of criminal responsibility. In fact, this is the defense strategy that Mr. Kovach was preparing for and intending to pursue at trial. This then begs the question why Mr. Kovach did not interview or at least attempt to interview Mr. Thomas since Petitioner told him that Mr. Thomas wanted to testify that Petitioner had nothing to do with the shooting.

Mr. Kovach explained the reasoning for Mr. Thomas not being interviewed is that he had all the co-defendants' statements made to police and that it was his understanding that Mr. Thomas was going to be a witness for the State. He was not aware he had offered to testify for Petitioner. The court finds this explanation to be puzzling at best. If Petitioner aware that Mr. Thomas is willing to testify on his behalf, it is illogical that he would not share this information with his attorney. Even so, Mr. Kovach testified that he had his confession to police so he would have known his testimony would be favorable to Petitioner. Moreover, if he was aware that the State was planning to call him as a witness, it seems logical without the need of hindsight that trial counsel would want him interviewed to reconcile these apparent dichotomous positions. Although the court does not know the full text of the statements made by Mr. Thomas to police, it is known that he gave very contradictory accounts of the event except his exoneration of the Petitioner for any wrongdoing.

"Trial counsel has a duty to use witnesses who may be of assistance to the defense." *Zimmerman* at 227.

Apparently Mr. Thomas was willing and able to provide testimony that was favorable to Petitioner, was of the nature that was consistent with counsel's trial strategy, and did nothing directly to inculpate Petitioner beyond his acknowledged presence in the car. Under these circumstances, trial counsel's reason failure to interview or attempt to have Mr. Thomas interviewed and his failure to call him as a witness is illogical because the evidence is admissible, material, and favorable to the defense strategy. As such, his failure constitutes deficient performance on the part of trial counsel.

Since the evidence is both admissible and material, the next step is to assess the credibility of Mr. Thomas.[4] It is undisputed that Mr. Thomas' statements to police, like Mr. Caldwell's, ran the full gamut of complete denial to being there to his admitted involvement. However, unlike Mr. Caldwell, his story continues to evolve once he admits his involvement, at least as it relates to the Mr. Matthews. Nevertheless, his story has remained consistent as it relates to Petitioner. The fact that Mr. Thomas was willing to testify at Petitioner's trial *before* his own case was resolved and effectively admit to felony murder makes his testimony as it relates to Petitioner believable.

Again the question turns to how Petitioner was prejudiced. Mr. Thomas' testimony could have assisted Petitioner in two ways. First, Mr. Thomas would have offered testimony that Petitioner did not possess or fire a

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[4] The court has previously found Mr. Thomas not to be a credible witness in an Error Coram Nobis proceeding for Mr. Matthews. In part the decision rested on an incredulous story Mr. Thomas told to explain how Mr. Matthews cap and shell casings from his gun were located at the scene of the shooting in an effort to exonerate Mr. Matthews from culpability. The court also questioned Mr. Thomas not coming forward with this information until two years after Mr. Matthews was convicted and more than a year after he pleaded guilty.

weapon and did not realize the import of why the car was being turned around. This testimony provided direct evidence for the jury to weigh as to whether Petitioner was guilty of facilitation or of being a principle in the commission of the offense.

Second, Petitioner's version of who fired the weapons differs from that of Mr. Caldwell. Mr. Caldwell denies he was one of the shooters. He claims instead that Petitioner, Thomas and Matthews were the shooters. His testimony is the only direct testimony that Petitioner possessed or fired a gun. On the other hand, Thomas stated that he and Mr. Caldwell were the shooters. This testimony directly contradicts Mr. Caldwell's testimony about who the shooters were.

For trial counsel to establish that Petitioner was guilty of facilitation as a lesser wrong, he first had to negate in the jury's mind that he was a shooter. Mr. Thomas' testimony provided direct evidence of that fact. Although Mr. Thomas' testimony was fodder for impeachment based on his prior inconsistent statements to police, it was no more so than that of Mr. Caldwell. What might have made Mr. Thomas more credible is his admission against interest that he was one of the shooters which could be used against him by the State since his case was still pending. But the point is not whether his testimony would have been accepted or rejected. Rather, the point is that the jury was never allowed to hear from the witness. See *Zimmerman* at 227.

Often in cases where the defense strategy is to portray the client as a facilitator who shared no common intent with the principles rather than him being a principle, the smallest piece of evidence can sometimes be significant. The fine line differentiating these two legal principles is often difficult to assess even by persons

learned in the law. The distinction in these legal concepts must be even more difficult for lay jurors to apply to evidence presented at trial. Therefore, any evidence that sheds light in favor of the lesser offense of facilitation is evidence that should be presented if not outweighed by the prejudice that might attach in presenting such evidence. In weighing the pros and cons of calling Mr. Thomas, it appears trial counsel had nothing to lose and everything to gain. His testimony is evidence from which a jury could conclude that Petitioner did not share in the common intent of the shooters.

During the trial, counsel was able to develop certain circumstantial evidence that mitigated Petitioner's involvement in the shooting. Based on this mitigating evidence and contrary to Mr. Caldwell consistently identifying Petitioner as a shooter, the jury found petitioner not guilty of employment of a firearm during the commission of a dangerous felony. On the other hand, the same jury found Mr. Matthews guilty of the weapon offense. At least as to Petitioner, the absence of Mr. Thomas' testimony did not prejudice Petitioner. Although this mitigating evidence in favor of Petitioner absolved him of being a shooter, the jury did not accept that it absolved him of criminal responsibility for the conduct of the others. Mr. Thomas' testimony, despite its many inconsistencies, mirrors the jury's verdict that Petitioner was not a shooter. The question then becomes whether the jury would have accepted his explanation that Petitioner had no reason to believe that a shooting was about to occur. The answer can only be "there is no way to know". Because of this uncertainty and because *Zimmerman* focused on the jury not being afforded the opportunity to hear the evidence, not on whether they would accept or reject it, the court finds by clear and convincing evidence that the verdict of the jury has been undermined.

B. Failure to File Bond Motion

The Petitioner has only asserted a conclusory statement that Mr. Kovach was ineffective by failing to file a bond reduction motion. He has presented no evidence to suggest that the bond would have been lowered, if filed; that his family could have made the bond to the extent that it would have been reduced; or that his being on bond would have had any effect on the outcome of the trial. Consequently, the Petitioner has failed to establish either deficient performance or prejudice by Mr. Kovach refusing to file a motion to reduce bond. Therefore, this claim is without merit.

C. Failure to File Severance Motion

Tennessee Rule of Criminal Procedure 8(c), titled "Joinder of Defendants," provides that an indictment, presentment, or information may charge two or more defendants:

> (1) if each of the defendants is charged with accountability for each offense included;
>
> (2) if each of the defendants are also charged with one or more offenses alleged to be in furtherance of the conspiracy; or
>
> (3) even if conspiracy is not charged and all of the defendants are not charged in each count, if the several offenses charged:
>
> > (A) were part of a common scheme or plan; or
> >
> > (B) were so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others.

Tennessee Rule of Criminal Procedure 14 provides that severance of defendants may occur on the basis of an

out-of-court statement of a codefendant that makes reference to the defendant but is not admissible against the defendant, speedy trial considerations, or to insure the fair determination of guilt or innocence.

In the instant case, the Petitioner has presented no evidence to support his contention that Mr. Kovach was ineffective for his failure to file a motion to sever. The facts presented at trial, as well as the facts revealed to Mr. Kovach, through discovery, made clear that Petitioner was in the vehicle from which the fatal shots were fired. Therefore, Petitioner's case was part of the same common scheme or plan as that of his co-defendant, Mr. Martez Matthews. Further, the Petitioner has not established by clear and convincing evidence a basis for permitting severance of the defendants. The Petitioner presented no evidence pertaining to an out-of-court statement made by the Petitioner's co-defendant that made reference to the Petitioner but was not admissible against the Petitioner, nor has the Petitioner presented evidence that establishes a basis for severance because of speedy trial or fair determination of guilt concerns.

For the above stated reasons, this claim is without merit.

D. Failure to Call Other Witnesses

Petitioner also claims he was prejudiced by counsel's failure to call the School Resource Officer from Mr. Caldwell's high school. Generally, a petitioner who claims ineffective assistance of counsel for failure to call a witness to testify must bring in the witnesses complained of, for it is not the prerogative of the court to speculate as to what any such witness might say. *State v. Black,* 794 S.W.2d 752, 758 (Tenn. Crim App. 1990)(Perm. App. denied 7/2/90). If they did exist, then Petitioner has the burden to produce the evidence at the hearing for the court to be able

to assess whether failure to present it at trial constitutes deficient performance. Failure to do so requires the claim be denied since the court cannot speculate as to its contents. See generally *Black v. State,* 794 S.W.2d 752, 757 (Tenn. Crim. App.1990).

E. Cumulative Error of Mr. Kovach's Representation of Petitioner

Based on the conclusion reached by the court as stated above, this claim is moot.

F. Failure to Hold Proper Hearing and Failure to Relieve Counsel for Petitioner

Finally, Petitioner complains that the court denied him his constitutional right to the counsel of his choice. An accused has a right to counsel of his choice under the Sixth Amendment to the U.S. Constitution and Article I, Section 9 of the Tennessee Constitution.[5]

> "Yet, the right to retain counsel of one's own choice is not absolute. The right cannot be insisted upon in a manner that will obstruct an orderly procedure in courts of justice, and deprive such courts of the exercise of their inherent powers to control the same.' The public has strong interest in the prompt, effective, and efficient administration of justice; the public's interest in the dispensation of justice that is not unreasonably delayed has great force."

United States v. Burton, 584 F.2d 485, 489, 490 (D.C.Cir.1978), *cert. denied,* 439 U.S. 1069.

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[5] The Sixth Amendment States in part: "In all criminal prosecutions, the accused shall enjoy the right to...have the assistance of counsel for his defense." Article I, Section 9 states in pertinent part "[t] in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel..."

According to the court file, Petitioner was arraigned on January, 2010, and the trial began on May 9, 2011. It was not until the status date for trial on May 5 that petitioner notified the court that he had retained private counsel. Co-defendant and his counsel were ready to proceed to trial. The State and its witnesses were all ready to proceed to trial. The case had previously been set for trial on November 1**,** 2010, the date having been chosen by agreement of the parties on March 31, 2010. Although the trial was continued at a court appearance on October 14, 2010, Petitioner never mentioned to the court that he was attempting to retain private counsel. To wait sixteen (16) months on the near eve of a trial with a co-defendant to seek to seek to substitute counsel and seek a continuance would have greatly obstructed the prompt and efficient administration of justice and the court's calendar which already has a backlog of jury trials. This issue is without merit. Based on all of the foregoing:

It is hereby **ORDERED** that the Petition for Post-Conviction Relief be granted and a new trial be set.

Entered this 9th day of November, 2015

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Mark J. Fishburn, Judge

Criminal Court, Division VI