22-7252

No. 22-5136

IN THE SUPREME COURT OF THE UNITED STATES

MARLON MCKAY,

Petitioner - Appellant,

v.

KEVIN GENOVESE, Warden,

Respondent - Appellant.

ON PETITION FOR A WRIT OF CERTIORARI TO

SIXTH CIRCUIT COURT OF APPEALS

Marlon McKay, pro se
NWCX – Main
960 State Rte 212
Tiptonville, TN 38079

**This is the petitioner/appellant's second filing of this Petition for Writ of Certiorari to the United States Supreme Court as directed to do so by the clerk of the court, via legal mail correspondence, on March 27th, 2023.

QUESTION(S) PRESENTED

Did the Sixth Circuit Court of Appeals err when it denied the petitioner's petitions for a COA and rehearing despite the petitioner's showing that his issues deserved encouragement to proceed further?

Did the Sixth Circuit Court of Appeals err when it denied the petitioner's petitions for a COA and rehearing without ruling on the merits of the first two claims submitted?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITON FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Sixth Circuit Court of Appeals, rendered in these proceedings on August 8, 2022 and denial of rehearing on December 13, 2022. Citations to the State record are designated S.R. Citations to the record in the federal proceedings are designated R.

OPINIONS BELOW

For cases from federal courts:

The orders denying rehearing and a COA by the United States Court of Appeals for the Sixth Circuit appear at Appendix A to the petition and are unpublished.

The order denying the 28 U.S.C. § 2254 petition by the United States District Court for the Western District of Tennessee appears at Appendix B to the petition and is unpublished.

For cases from state courts:

The opinion of the Tennessee Court of Criminal Appeals, reviewing the merits on post-conviction appeal, appears at Appendix C to the petition and is unpublished.

The opinion of the Tennessee Court of Criminal Appeals, reviewing the merits on direct appeal, appears at Appendix D to the petition and is unpublished.

JURISDICTION

For cases from federal courts:

The date on which the United States Court of Appeals for the Sixth Circuit decided my case was December 13, 2022 (Rehearing) and August 8 2022 (COA).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

For cases from state courts:

The date on which the Tennessee Court of Criminal Appeals decided my case on post-conviction was August 15, 2018.

The date on which the Tennessee Court of Criminal Appeals decided my case on direct appeal was November 4, 2011.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTIONAL AMENDMENT V

UNITED STATES CONSTITUTIONAL AMENDMENT VI

UNITED STATES CONSTITUTIONAL AMENDMENT XIV

STATEMENT OF THE CASE

A statement of the case can be found in the attached opinions and orders up until the point of the denial of the petition for rehearing and the filing of the petition at bar. See Appendices B-D.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit Court of Appeals erred when it denied the petitioner's petitions for a COA and rehearing despite the petitioner's showing that his issues deserved encouragement to proceed further?

The petitioner's issues and arguments clearly warranted review by the Sixth Circuit Court of Appeals. His COA contained proper argument and cited the controlling precedents for each issue. Not only did the petitioner make a "showing of the denial of his constitutional rights" but he also presented supporting facts that "reasonable jurists could debate whether petition should have been resolved in a different manner or that issues presented were adequate to deserve encouragement to proceed further." *Harbison v. Bell, 556 U.S. 180 (2009); Miller-El v. Cockrell, 537 U.S. 322 (2003).*

The petitioner has been convicted and sentenced to life imprisonment. In Tennessee, a life sentence is 51 calendar years for adult offenders with offense dates occurring after 1995. Fifty-one calendar years should deserve at least one review by each and every court in our judicial system. In the case at bar, the petitioner's codefendant had received relief by the Tennessee Court of Criminal Appeals (TCCA) and was given a second-degree murder conviction in place of his first-degree murder conviction although he was the actual shooter. This is the same disparate

treatment that the Tennessee Legislature has directed against in its own statutes.

The petitioner made a showing that his trial and appellate attorney made the fatal mistake of not properly arguing his "48-hour hold" issue in the context of probable cause and/or that a constitutional did occur that demanded relief. The petitioner satisfied both prongs of the *Strickland v. Washington, 466 U.S. 668 (1984)*. The Tennessee U.S. District Court for the Western Division's ruling was contrary to and/or an unreasonable application of the petitioner's *Strickland*, sufficiency of evidence, and erroneous jury instruction claims. The Sixth Circuit Court of Appeals failed to grant the petitioner a COA in order to examine his *Strickland* claims as well as his sufficiency of evidence, and erroneous jury instruction claims. The courts should not have summarily dismissed the petition given the complex procedural questions that he raised.

The petitioner made a substantial showing of a denial of constitutional rights in his request for a certificate of appealability for both of the issues mentioned above and the issues adjudicated in the Court's denial of COA. However, the Court failed to recognize his efforts in doing so.

The Sixth Circuit Court of Appeals erred when it denied the petitioner's petitions for a COA and rehearing without ruling on the merits of the first two claims submitted.

The Court overlooked the petitioner's first and most important issue that: "*The Tennessee Court of Criminal Appeals and the Tennessee Federal District Court's adjudication of the petitioner's challenge of the sufficiency of evidence resulted in a decision that was contrary to or involved an unreasonable application of Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).*" It was unreasonable application because the court never reviewed the issue despite its ability to do so under plain error review and in the interest of justice. 28 U.S.C.A. § 2253(c)(3) "limits the courts review to the issues identified in the certificate of appealability."

Whether there was sufficient evidence to sustain a defendant's conviction of a charged offense is the cornerstone of all issues raised on all appeals in the United States. If one can show that no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" then the defendant would be set free and never to be tried again. *Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)*.

The District Court and Sixth Circuit Court of Appeals overlooked this "most important" issue. The petitioner raised this issue on direct appeal and in his

original pro se petition submitted to District Court. Although the petitioner did raise an ineffective assistance of counsel claim as to appellate counsel's failures, the District Court ignored the claim – as did the Sixth Circuit, by denying his COA.

The petitioner also reminds this Honorable Court to take notice to the recent reversals of felony murder convictions in California. The "natural probable consequence rule" jury instruction has been deemed unconstitutional. In California, "A person convicted of murder, attempted murder, or manslaughter whose conviction is not final may challenge...the validity of that conviction..." See *People v. Hola, 77 Cal.App.5th 362, 369-370 (Cal. 2022); People v. Lewis, 11 Cal.5th 952, 957, 959 (Cal. 2021)*. The natural probable consequence rule jury instruction was given in the petitioner's trial in connection to the alleged theory of criminal responsibility (which was the second claim overlooked by the District and Sixth Circuit courts).

In Tennessee, in order to be found guilty of Felony Murder a "rational trier of fact" must find "a killing of another committed in the perpetration of or attempt to perpetrate any ... robbery." Tenn. Code Ann. § 39-13-202(a) (2). "No culpable mental state is required...except the intent to commit the enumerated offenses or acts." *Id.* § 39-13-202(b).

The Tennessee Court of Criminal Appeals stated in its opinion: "We note, however, that the trial court informed defense counsel that she was free to argue in closing that the defendant had withdrawn from the robbery before the offenses

occurred." *State v. McKay, 2011 WL 5335285, at *7 (Tenn.Crim.App.)*. Obviously, the trial judge, a "rational trier of fact", conceded the fact that the petitioner's intent to commit a robbery was "withdrawn from the robbery before the offenses occurred" – therefore, because the element of intent did not exist, no conviction for felony murder could have occurred. *Id.*

The Court overlooked the petitioner's second most important issue that: "The Tennessee Court of Criminal Appeals and the Tennessee Federal District Court's adjudication of the petitioner's challenge that the trial court's erroneous criminal responsibility jury instructions resulted in a decision that was contrary to or involved an unreasonable application of *Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)*.

In the certificate of appealability (COA) context, where an inmate must make a threshold "substantial showing of the denial of a constitutional right,' § 2253(c)(2), this Court has cautioned that the threshold inquiry is 'not coextensive with a merits analysis' and that any court that 'justifies its denial of a COA based on its adjudication of the actual merits...is in essence deciding an appeal without jurisdiction.'" *Buck v. Davis, 137 S.Ct. 759, 773, 197 L.Ed.2d 1 (2017) (quoting Miller-El v. Cockrell, 537 U.S. 322, 336-337, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003))*.

The petitioner made a substantial showing of a denial of constitutional rights in his petition for habeas corpus relief and in his request for a certificate of

appealability for all of the issues mentioned above and the issues adjudicated in the Court's denial of COA.

CONCLUSION

The petitioner has been denied his right to due process (a full and fair hearing) in addition to the constitutional violations aforementioned. Therefore, petitioner's petition for a writ of certiorari should be granted.

Respectfully submitted,

M. McKay

Marlon McKay

Dated: April 4, 2023

PROOF OF SERVICE

I, Marlon McKay, do swear or declare that on April 4, 2023, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days. The names and addresses of those served are as follows:

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 4, 2023.

M. McKay

Marlon McKay

APPENDIX

APPENDIX A – ORDERS FROM SIXTH CIRCUIT DENYING REHEARING AND COA

APPENDIX B – ORDER FROM FEDERAL DISTRICT COURT DENYING 2254 PETITION

APPENDIX C - TENNESSEE COURT OF CRIMINAL APPEALS OPINION (POST-CONVICTION)

APPENDIX D – TENNESSEE COURT OF CRIMINAL APPEALS OPINION (DIRECT APPEAL)

APPENDIX E - MOTION AND AFFIDAVIT IN SUPPORT OF PAUPER STATUS

A

No. 22-5136

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 8, 2022
DEBORAH S. HUNT, Clerk

MARLON MCKAY,

Petitioner-Appellant,

v.

KEVIN GENOVESE, Warden,

Respondent-Appellee.

ORDER

Before: GRIFFIN, Circuit Judge.

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

In May 2010, a jury convicted McKay of felony murder and attempted aggravated robbery for the August 19, 2008, shooting death of Maurice Taylor, which occurred outside of Taylor's home during a robbery attempt. The trial court sentenced McKay to life imprisonment with the possibility of parole for the felony-murder conviction and to a consecutive term of six years' imprisonment for the attempted-aggravated-robbery conviction. The Tennessee Court of Criminal Appeals affirmed the trial court's judgment, and the Tennessee Supreme Court denied leave to appeal. *State v. McKay*, No. W2010-01785-CCA-MR3C, 2011 WL 5335285, at *1 (Tenn. Crim. App. Nov. 4, 2011), *perm. app. denied,* (Tenn. Apr. 12, 2012).

McKay filed a pro se petition for post-conviction relief in state court. The trial court appointed McKay counsel, who filed an amended petition. After that attorney withdrew, newly appointed counsel filed a second amended petition, which the trial court denied. The Tennessee

Court of Criminal Appeals affirmed, and the Tennessee Supreme Court denied McKay's application for leave to appeal. *McKay v. State*, No. W2017-00202-CCA-R3-PC, 2018 WL 3954149, at *1 (Tenn. Crim. App. Aug. 15, 2018), *perm. app. denied* (Tenn. Dec. 5, 2018).

McKay filed a pro se § 2254 petition in the district court and then, at the direction of the district court, an amended petition. He raised the following grounds for relief in his amended petition: (1) trial counsel was ineffective for failing to challenge his 48-hour hold when his arrest was not supported by probable cause; (2) trial counsel was ineffective for failing to timely file a motion for a new trial or notice of appeal; (3) trial counsel was ineffective for failing to notify him of the State's plea offer; (4) trial counsel was ineffective for moving to sever his trial from his co-defendant's; (5) appellate counsel was ineffective for failing to challenge the denial of his motion to suppress; (6) post-conviction counsel was ineffective "for not presenting proof that trial counsel was ineffective for defaulting" the foregoing issues; (7) "manifest injustice"; and (8) post-conviction counsel was ineffective. McKay filed a motion to stay the proceedings and hold his petition in abeyance so that he could exhaust a claim that trial counsel was ineffective for failing to preserve the issue of whether he was interrogated in the absence of an attorney in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966).

The district court denied McKay's motion for a stay and denied his § 2254 petition, concluding that his claims were either procedurally defaulted or meritless. The court declined to issue a COA.

A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, the applicant must demonstrate that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Where the district court has denied a petition on procedural grounds, the petitioner must demonstrate that reasonable jurists "would find it debatable whether the petition states a valid claim of the denial of

a constitutional right and . . . would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

McKay's claims of ineffective assistance of counsel are governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To establish ineffective assistance of counsel, a petitioner must show both that his attorney's performance was deficient and that his defense was prejudiced by counsel's alleged errors. *Id.* at 687. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

McKay's first claim challenged trial counsel's failure to argue for suppression of his confession on the ground that law enforcement wrongfully detained him for more than 48 hours before he was brought before a magistrate for a judicial determination of probable cause. He asserted that he was arrested on August 21, 2008, that he signed a confession on August 22, 2008, and that he was not brought before a magistrate until August 25, 2008. Essentially, McKay argued that officers did not have probable cause for his arrest and that they detained him for the purpose of gaining evidence to support the detention.

"[I]ndividuals arrested and detained without a warrant are entitled to a 'prompt' judicial determination of probable cause." *Drogosch v. Metcalf*, 557 F.3d 372, 378 (6th Cir. 2009) (quoting *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975)). "'Prompt' generally means within 48 hours of the warrantless arrest." *Id.* (citing *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991)). When law-enforcement officials obtain a statement or evidence within 48 hours of warrantless detention, suppression is not an appropriate remedy, regardless of the length of pre-hearing custody. *See United States v. Fullerton*, 187 F.3d 587, 591 (6th Cir. 1999).

McKay raised this claim in his post-conviction petition. In reviewing this claim, the state appellate court first determined that there was probable cause for McKay's arrest, noting that, before McKay was arrested, police had obtained various pieces of evidence linking him to the

victim and the crime scene and, when confronted with this evidence, McKay had admitted his involvement in the murder. *McKay*, 2018 WL 3954149, at *12. With respect to the 48-hour hold issue, the court held that, even using McKay's date of August 25, 2008, as the date he was brought before a magistrate, which was more than 48 hours after his arrest, his statement would not have been suppressed because it was made within the 48-hour period mandated by *Gerstein* and law enforcement officers had probable cause to arrest McKay "based upon the facts known to them at the time he was taken into custody." *Id.* at *13.

In his habeas petition, McKay challenged the state appellate court's determination that probable cause existed at the time he was taken into custody, noting that the officers did not have the cell phone records to show that his girlfriend's phone was in the vicinity of the crime scene until after he was taken into custody. He argued that he was illegally detained on a 48-hour hold for the purpose of obtaining this evidence and asserted that officers did not obtain a search warrant for his girlfriend's phone until after the 48-hour time period. But as the district court pointed out, there is no evidence in the record to support McKay's assertion that the officers did not obtain the location data until after 48 hours had passed. Thus, even if the state court's probable cause determination hinged on the cell phone location data and officers being in possession of it at the time of his arrest, McKay has failed to overcome the presumption of correctness that applies to that factual determination with clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1). And he has failed to establish that officers continued his detention in order to obtain that evidence in violation of his rights under the Fourth Amendment. Finally, because McKay gave his statement to police less than 48 hours after being taken into custody, suppression of the statement was not required. *See Fullerton*, 187 F.3d at 591. Reasonable jurists would not debate the district court's conclusion that trial counsel was not ineffective for failing to seek suppression of his statement based on an illegal 48-hour hold and that McKay suffered no prejudice. *See Coley v. Bagley*, 706 F.3d 741, 752 (6th Cir. 2013) ("Omitting meritless arguments is neither professionally unreasonable nor prejudicial.").

In his second claim, McKay argued that counsel was ineffective for failing to timely file a motion for a new trial or a notice of appeal. He asserted that he was prejudiced because "he would . . . have been successful on the [48-hour] hold issue, the suppression of his statements based upon *Miranda*, and the lack of probable cause for his arrest." On appeal from the denial of post-conviction relief, the Tennessee Court of Criminal Appeals rejected this claim, explaining that McKay failed to establish that he was prejudiced by counsel's failure to timely file a motion for a new trial because he was permitted to file a delayed appeal and he did not offer any proof that he would have been entitled to appellate relief had such issues been raised. *McKay*, 2018 WL 3954149, at *14. On habeas review, the district court concluded that the state appellate court's ruling was not an unreasonable application of *Strickland* or based on an unreasonable determination of the facts, explaining that McKay offered no proof that trial counsel would have raised the above issues in a motion for a new trial or that, if she had, McKay would have prevailed. Reasonable jurists could not disagree with this conclusion. McKay's petition did not demonstrate that a motion for a new trial would have been successful or that the outcome of his appeal would have been different had trial counsel filed a motion for a new trial.

In claim three, McKay argued that trial counsel was ineffective for failing to convey the State's plea offer to him. And in claim four, he asserted that counsel was ineffective for moving to sever his trial from this co-defendant's. The district court determined that McKay procedurally defaulted these claims. A federal court may not entertain a habeas claim unless the petitioner has first exhausted his state court remedies. 28 U.S.C. § 2254(b)(1)(A). In order to exhaust a claim, the petitioner "must 'fairly present' [the] claim in each appropriate state court . . . thereby alerting that court to the federal nature of the claim." *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (quoting *Duncan v. Henry*, 513 U.S. 364, 365 (1995)). When a petitioner has failed to fairly present his claims to the state courts and no remedy remains, his claims are considered procedurally defaulted. *See Gray v. Netherland*, 518 U.S. 152, 161-62 (1996). To overcome a procedural default, a petitioner must show "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 v. Thompson*, 501 U.S. 722, 750 (1991). A fundamental miscarriage of justice requires a showing of actual innocence. *See Dretke v. Haley*, 541 U.S. 386, 393 (2004).

McKay raised claims three and four in his post-conviction petitions filed in the trial court, but he did not raise the issues in his post-conviction appeal. The district court concluded that, because McKay failed to exhaust these claims and no state court remedies were available, the claims were defaulted. The court also rejected McKay's argument that any default should be excused because post-conviction counsel was ineffective for failing to pursue the issues on appeal. In *Martinez v. Ryan*, 566 U.S. 1, 18 (2012), the Supreme Court held that the ineffective assistance of post-conviction counsel can serve as cause to excuse the procedural default of an ineffective-assistance-of-trial-counsel claim where state law requires that such claims be first raised in a post-conviction collateral proceeding. *See also Trevino v. Thaler*, 569 U.S. 413, 429 (2013). In *Sutton v. Carpenter*, 745 F.3d 787, 795-96 (6th Cir. 2014), this court applied the *Martinez-Trevino* rule to habeas cases out of Tennessee. But as the district court explained, *Martinez* applies only where post-conviction counsel was ineffective in an initial-review collateral proceeding, and not in a post-conviction appellate proceeding. *See Middlebrooks v. Carpenter*, 843 F.3d 1127, 1136 (6th Cir. 2016). In claim seven, McKay argued that failure to consider his procedurally defaulted claims would result in a fundamental miscarriage of justice, but he offered no proof of his actual innocence. Reasonable jurists would not debate the district court's procedural ruling on McKay's third, fourth, and seventh claims for habeas relief.

In his fifth claim, McKay argued that appellate counsel was ineffective for failing to appeal the denial of his motion to suppress and for failing to seek suppression of his confession on the ground that it resulted from an illegal 48-hour hold. The *Strickland* standard set forth above also applies to claims of ineffective assistance of appellate counsel. *See Willis v. Smith*, 351 F.3d 741, 745 (6th Cir. 2003). Appellate counsel is not required "to raise every non-frivolous issue on appeal." *Caver v. Straub*, 349 F.3d 340, 348 (6th Cir. 2003). Indeed, "'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of

incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536 (1986) (quoting *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983)). Where, as here, appellate counsel "presents one argument on appeal rather than another . . . the petitioner must demonstrate that the issue not presented 'was clearly stronger than issues that counsel did present'" to establish ineffective assistance of counsel. *Caver*, 349 F.3d at 348 (quoting *Smith v. Robbins*, 528 U.S. 259, 288 (2000)).

For the reasons explained above, reasonable jurists could not disagree with the district court's determination that McKay could not establish that appellate counsel was ineffective for failing to raise a meritless claim that the confession should have been suppressed because it was obtained during an illegal 48-hour hold. Nor could reasonable jurists debate the district court's conclusion that appellate counsel was not ineffective for failing to appeal the denial of McKay's motion to suppress. McKay moved to suppress his statements on the ground that they were obtained in the absence of counsel after he had exercised his rights to counsel and to remain silent. After a hearing, the trial court denied the motion, finding that McKay knowingly and intelligently waived his right to counsel and freely and voluntarily gave his statements to the police. In his habeas petition, McKay identified no basis on which appellate counsel should have challenged that ruling. This ground for relief does not deserve encouragement to proceed further.

Finally, in claims six and eight, McKay asserted a claim of ineffective assistance of post-conviction counsel. Although he raised this claim in an effort to overcome procedural default of certain claims, to the extent he raised it as an independent claim for relief, reasonable jurists could not disagree with the district court's rejection of the claim. "The ineffectiveness . . . of counsel during . . . State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." 28 U.S.C. § 2254(i).

For these reasons, McKay's application for a COA is **DENIED**, and his motions to proceed in forma pauperis and for the appointment of counsel are **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

A

No. 22-5136

FILED
Dec 13, 2022
DEBORAH S. HUNT, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARLON MCKAY,

Petitioner-Appellant,

v.

KEVIN GENOVESE, Warden,

Respondent-Appellee.

ORDER

Before: COLE, KETHLEDGE, and LARSEN, Circuit Judges.

Marlon McKay, a Tennessee prisoner, petitions for rehearing of our August 8, 2022, order denying his motion for a certificate of appealability. We have reviewed the petition and conclude that this court did not overlook or misapprehend any point of law or fact in denying McKay's motion for a certificate of appealability. *See* Fed. R. App. P. 40(a)(2).

Accordingly, the petition for rehearing is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MARLON McKAY,

Petitioner,

v.

KEVIN GENOVESE,

Respondent.

Case No. 2:19-cv-02087-JTF-atc

ORDER DENYING PENDING MOTIONS (ECF Nos. 19 & 21), DENYING PETITION PURSUANT TO 28 U.S.C. § 2254, DENYING A CERTIFICATE OF APPEALABILITY, CERTIFYING THAT AN APPEAL WOULD NOT BE TAKEN IN GOOD FAITH, AND DENYING LEAVE TO PROCEED *IN FORMA PAUPERIS* ON APPEAL

Before the Court are the amended Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody ("Amended § 2254 Petition"), filed by Petitioner, Marlon McKay, Tennessee Department of Correction prisoner number 472209, who is currently incarcerated at the Northwest Correctional Complex ("NWCX") in Tiptonville, Tennessee (ECF No. 6); Respondent's Answer to Petition for Writ of Habeas Corpus ("Answer"), filed by Kevin Genovese, the NWCX Warden (ECF No. 15); Petitioner's Request for Stay, to be Held in Abeyance ("Motion to Stay") (ECF No. 19); and Petitioner's Motion for Appointment of Counsel Pursuant to 18 U.S.C. § 3006 ("Motion for Appointment of Counsel") (ECF No. 21). For the reasons stated below, the Court **DENIES** the pending motions and **DENIES** the Amended § 2254 Petition.

I. BACKGROUND

A. State Court Procedural History

On December 11, 2008, a grand jury in Shelby County, Tennessee returned a two-count indictment against McKay and Courtney Bishop. (ECF No. 14-1 at PageID 73-75.) Count 1 charged both defendants with killing Maurice Taylor during the perpetration of an attempted robbery, and Count 2 charged both defendants with the attempted aggravated robbery of Taylor. The case was severed and a jury trial on the charges against McKay commenced in the Shelby County Criminal Court on May 17, 2010. (*Id.* at PageID 121.) On May 21, 2010, the jury returned guilty verdicts on both counts of the indictment. (*Id.* at PageID 125; ECF No. 14-6 at PageID 774-75.) That day, the trial judge sentenced McKay to life imprisonment with the possibility of parole on the felony murder. (ECF No. 14-6 at PageID 776.) At a hearing on July 8, 2010, the trial judge sentenced McKay to a consecutive term of six years on the attempted aggravated robbery to be served as a Range I standard offender at 30% release eligibility. Judgments were entered on July 8, 2010. (ECF No. 14-1 at PageID 126-27.) The Tennessee Court of Criminal Appeals ("TCCA") affirmed. *State v. McKay*, No. W2010-01785-CCA-MR3C, 2011 WL 5335285 (Tenn. Crim. App. Nov. 4, 2011), *appeal denied* (Tenn. Apr. 12, 2012).

On February 25, 2013, McKay filed a *pro se* Petition for Post-Conviction Relief in the Shelby County Criminal Court. (ECF No. 14-15 at PageID 1088-91, 1092-1100, 1112-25.) The State filed its response on April 23, 2013. (*Id.* at PageID 1126-27.) After counsel had been appointed to represent McKay (*id.* at PageID 1128, 1143), a First Amended Petition for Post-Conviction Relief was filed on May 22, 2013 (*id.* at PageID 1129-38.) On June 1, 2016, a different attorney filed a second Amended Petition for Post-Conviction Relief. (*Id.* at PageID

1144-53.) Hearings on the post-conviction petition were held on August 12, 2016 and August 16, 2016. (ECF Nos. 14-16, 14-17.) The post-conviction court denied relief on the record on August 16, 2016. (ECF No. 14-17 at PageID 1299-1303.) A written order was entered on March 10, 2017. (ECF No. 14-15 at PageID 1172.) The TCCA affirmed. *McKay v. State*, No. W2017-00202-CCA-R3-PC, 2018 WL 3954149 (Tenn. Crim. App. Aug. 15, 2018), *appeal denied* (Tenn. Dec. 15, 2018).

The TCCA summarized the evidence at trial in its opinion on direct appeal. *State v. McKay*, 2011 WL 5335285, at *1-6. On August 19, 2008, the victim, who sold marijuana to supplement his income, was fatally shot outside his Memphis home during an attempted robbery. Shortly before the shooting, witnesses saw a light-colored Mercury Cougar lingering near Taylor's home. The vehicle was occupied by two African-America men. After the shooting, a witness testified that he saw two African-American men run to the automobile. McKay's former girlfriend, Tracy Taylor, testified that McKay borrowed her silver Mercury Cougar the evening of the shooting. Tracy Taylor also testified that McKay used her cellphone that night. In an initial statement to the police, McKay admitted that he bought marijuana from the victim the evening of the shooting, but he claimed that he was back home by the time of the shooting. However, Tracy Taylor's cellphone records reflected that a call had been placed from her phone to the victim at 11:05 p.m. that evening. That call "had hit off a cell phone tower located only a couple of blocks from the crime scene." *Id.* at *3. Upon being confronted with that information, McKay admitted that he drove Bishop to Maurice Taylor's home in Tracy Taylor's vehicle in order to rob him. McKay also admitted that he supplied the gun used in the robbery. McKay claimed, however, that he had had second thoughts about the robbery and was not present when the victim was shot.

McKay drove himself and Bishop away from the crime scene and disposed of the gun. McKay also told the police where the gun could be found.

B. McKay's § 2254 Petition

On February 4, 2019, McKay filed a *pro se* Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody, accompanied by a legal memorandum. (ECF Nos. 1, 1-1.) The Court issued an order on March 7, 2019 directing McKay to file an amended petition on the official form that included a consecutively numbered list of the claims presented and the factual basis for each claim. (ECF No. 5.) McKay filed his Amended § 2254 Petition on April 8, 2019. (ECF No. 6.) The Amended § 2254 Petition presents the following claims:

1. "The petitioner's trial counsel was ineffective for not challenging his forty-eight hour hold when his arrest was not supported by probable cause" (*id.* at 3; *see also id.* at 3-6);

2. "Petitioner's trial counsel was ineffective for not timely filing a motion for new trial or a notice of appeal" (*id.* at 7; *see also id.* at 7-8);

3. "Petitioner's trial counsel was ineffective for not informing the Petitioner of the negotiated offer from the state made prior to trial" (*id.* at 8; *see also id.* at 8-9);

4. "Trial counsel was ineffective for filing and arguing a Motion to Severe [sic] the petitioner's trial from that of his co defendant" (*id.* at 10; *see also id.* at 10-11);

5. "Petitioner's Appellate counsel rendered ineffective assistant [sic] of counsel during direct appeal" (*id.* at 11; *see also id.* at 11-13);

6. "Petitioner's Post-Conviction counsel was ineffective pursuant to *Martinez v. Ryan*, 132 S. Ct. 1309, U.S., 2012, for not presenting proof that trial counsel was ineffective for defaulting 'each' and 'every' issue listed above" (*id.* at 13; *see also id.* at 13-14);

7. "MANIFEST INJUSTICE" (*id.* at 14; *see also id.* at 14-16); and

8. Petitioner was denied the effective assistance of counsel guaranteed under the Sixth Amendment to the United States Constitution, and Article 1, § 9 of the Tennessee Constitution on post conviction when presenting issues of the ineffective assistance of counsel at trial or on direct appeal at the first tier of review" (*id.* at 16; *see also id.* at 16-17).

The Court issued an order on April 9, 2019 directing Warden Genovese to file the state-court record and a response to the Amended § 2254 Petition. (ECF No. 7.) The Warden filed the state-court record on July 1, 2019 and his Answer on July 3, 2019. (ECF Nos. 14, 15.) McKay did not file a reply.

On March 15, 2021, McKay filed a Motion to Stay. (ECF No. 19.) On April 22, 2021, McKay filed an unsigned Petition for a Writ of Error Coram Nobis bearing the caption of the Shelby County Criminal Court. (ECF No. 20.) On September 15, 2021, McKay filed a Motion for Appointment of Counsel. (ECF No. 21.) The Warden has not responded to these filings.

C. Pending Motions

1. The Motion to Stay (ECF No. 19)

In his Motion to Stay, McKay asks to stay this matter and hold it in abeyance while he attempts to exhaust a claim that "[t]rial counsel failed to act diligently or adequately to pursue the appeal of the denial of [his] motion to suppress statement obtained in violation of [his] 5th and 6th amendment right[s] after a hearing was conducted prior to trial." (ECF No. 19 at 4.) McKay asserts that the police unlawfully interrogated him after he asked for counsel. (*Id.* at 6-7.) Attached to the motion is a copy of a Public Records Request Form, dated January 28, 2021, seeking a copy of the affidavit of complaint and the *Miranda* warning form dated August 21, 2008 or August 22, 2008 (ECF No. 19-1 at PageID 1469) and a copy of the affidavit of complaint and arrest warrant, dated August 22, 2008 (*id.* at PageID 1470).

There are two problems with the Motion to Stay, each of which is dispositive. First, the court challenge that McKay initiated in 2021 has concluded without properly exhausting any claim. The Shelby County Criminal Justice System Portal reflects that a Petition for Writ of Error Coram Nobis was filed on July 14, 2021.[1] The petition was dismissed on August 17, 2021. It does not appear that McKay appealed. *See* https://cjs.shelbycountytn.gov (Indictment No. 08-07886). Because McKay did not appeal the dismissal of his coram nobis petition, he has not properly exhausted any new claim.

Second, Claim 5 of the Amended § 2254 Petition argues that appellate counsel was ineffective in not raising the denial of the motion to suppress on direct appeal. (ECF No. 6 at 11-12.) As will be discussed *infra*, that claim was rejected on the merits. There is nothing further to exhaust.

The Motion to Stay is **DENIED**.

2. The Motion for Appointment of Counsel (ECF No. 21)

McKay has also filed a Motion for Appointment of Counsel. (ECF No. 21.) The Sixth Amendment right to the appointment of counsel in criminal cases extends to the first appeal as of right "and no further." *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). Prisoners do not have a constitutional right to counsel when mounting collateral attacks on their convictions. *Id.* "The decision to appoint counsel for a federal habeas petitioner is within the discretion of the court and is required only where the interests of justice or due process so require." *Mira v. Marshall*, 806 F.2d 636, 638 (6th Cir. 1986); *see also* 18 U.S.C. § 3006A(a)(2)(B) (counsel may be appointed for persons seeking relief under 28 U.S.C. § 2241 who are financially eligible whenever the court

[1] An unsigned copy of that petition was docketed on April 22, 2021. (ECF No. 20.)

determines "that the interests of justice so require"). The appointment of counsel is mandatory only when an evidentiary hearing is required. Rule 8(c), Rules Governing Section 2254 Cases in the United States District Courts. "In exercising its discretion, the district court should consider the legal complexity of the case, the factual complexity of the case, and the petitioner's ability to investigate and present his claims, along with any other relevant factors." *Hoggard v. Purkett*, 29 F.3d 469, 471 (8th Cir. 1994).

McKay has not established that the appointment of counsel in this case would be in the interest of justice. The matter has been fully briefed and is ready for decision. No evidentiary hearing will be required. Nothing in McKay's motion distinguishes this case from the many § 2254 petitions filed by inmates who are not represented by counsel.

The Motion for Appointment of Counsel is **DENIED**.

II. ANALYSIS OF PETITIONER'S CLAIMS

A. Counsel's Failure to Challenge the 48-Hour Hold (Claim 1)

In Claim 1, McKay argues that his trial counsel rendered ineffective assistance by failing to challenge the fact that his confession was the product of an unlawful 48-hour hold when there was not probable cause to arrest him. McKay avers that he was taken into custody on August 21, 2008; he gave a confession on August 22, 2008; and he was not taken before a magistrate until August 25, 2008. (ECF No. 6 at 3-6.) Although defense counsel filed a motion to suppress, the focus of that motion was on whether the police administered *Miranda* warnings and whether they continued to question McKay despite his request for an attorney. (ECF Nos. 14-1 at PageID 106-07, 14-2, 14-16 at PageID 1192.)

In *Gerstein v. Pugh*, 420 U.S. 103, 113-14 (1975), the Supreme Court held that "a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest." Although the Fourth Amendment does not require a pre-arrest judicial determination of probable cause, "the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." *Id.* at 114; *see also id.* at 125 (states must "provide a fair and reliable determination of probable cause as a condition for any significant restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest") (footnotes omitted).

In *County of Riverside v. McLaughlin*, 500 U.S. 44, 53-54 (1991), the Supreme Court clarified that the Fourth Amendment does not require that the probable cause determination be made immediately after completion of the administrative steps incident to arrest, noting that "*Gerstein* held that probable cause determinations must be prompt — not immediate." Thus, the Supreme Court stated that "a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*." *Id.* at 56. The Supreme Court further stated as follows:

> This is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours. Such a hearing may nonetheless violate *Gerstein* if the arrested individual can prove that his or her probable cause determination was delayed unreasonably. **Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest**, a delay motivated by ill will against the arrested individual, or delay for delay's sake. In evaluating whether the delay in a particular case is unreasonable, however, courts must allow a substantial degree of flexibility. Courts cannot ignore the often unavoidable delays in transporting arrested persons from one facility to another, handling late-night bookings where no magistrate is readily available, obtaining the presence of an arresting officer who may be busy

processing other suspects or securing the premises of an arrest, and other practical realities.

Id. at 56-57 (emphasis added).

In Claim 1 McKay alleges that a forty-eight (48) hour hold was placed on him while investigators attempt to find sufficient evidence to establish probable cause. In addition, McKay claims that he was held in custody for more than forty-eight hours before being taken before a magistrate, in violation of his constitutional rights. *See State v. Hawkins*, 519 S.W.3d 1, 37 n.11 (Tenn. 2017); *State v. Bishop*, No. W2010-01207-CCA-R3-CD, 2012 WL 938969, at *4 (Tenn. Crim. App. Mar. 14, 2012), *rev'd*, 431 S.W.3d 22 (Tenn. 2014).[2] McKay raised Claim 1 in a post-conviction petition. (ECF No. 14-15 at PageID 1130, 1150; *see also id.* at PageID 1133-35 (substantive Fourth Amendment claim).) The TCCA made the following factual findings concerning McKay's arrest:

> [McKay] testified that he had been arrested after this incident, his arrest being August 21, 2008. He said that he had been in custody since that day. [McKay] said that the police officers were looking for his girlfriend, Tracy Taylor, and that they had gotten a "ping" off of a cell phone tower from her phone. [McKay] was riding as a passenger at the time that law enforcement officers pulled over Ms. Taylor.
>
> The State informed the post-conviction court that officers brought [McKay] in for questioning because he was the last person to see the victim alive, and [McKay] saw him alive within thirty minutes of his death. Officers then read [McKay] his *Miranda* warnings, and [McKay] gave statements. [McKay] was booked into jail just after midnight, on the morning of August 22, 2008. Law enforcement officers placed a forty-eight hour hold on [McKay] on the evening of August 22, 2008, when they realized that he was more than a witness.
>
> [McKay] testified that, after his arrest, he went before a judge "two/three days later" and was appointed an attorney, his initial counsel. Detective Michael

[2] This case involved McKay's co-defendant, Courtney Bishop. Bishop's 48-hour hold claim differs from McKay's in that the only evidence that Bishop was the person who shot the victim was McKay's statement.

> Garner checked him out of jail on August 27, 2008, so [McKay] could locate the murder weapon. He did not have legal representation at that time.
>
> . . . .
>
> Post-conviction counsel informed the post-conviction court that [McKay] was arrested on August 21, 20081 and that he did not appear before a judge until August 25, 2008. Post-conviction counsel said that [McKay] was not represented by any attorney until September 16, 2008. The post-conviction court said the main issue was whether there was probable cause to arrest [McKay].

McKay v. State, 2018 WL 3954149, at *6, 7 (footnote omitted).

The post-conviction court denied relief on the merits. (ECF No. 14-17 at PageID 1299-1302.) McKay raised the issue in his brief to the TCCA on the post-conviction appeal. (ECF No. 14-18 at PageID 1313, 1328, 1332-37.) The TCCA denied relief on the merits. *McKay v. State*, 2018 WL 3954149, at *12-13. The TCCA first held that there was probable cause for McKay's arrest, reasoning as follows:

> The first issue we must address is whether law enforcement officers had probable cause to arrest [McKay]. "Probable cause ... exists if, at the time of the arrest, the facts and circumstances within the knowledge of the officers, and of which they had reasonably trustworthy information, are 'sufficient to warrant a prudent [person] in believing that the [defendant] had committed or was committing an offense.'" *State v. Echols*, 382 S.W.3d 266, 277-78 (Tenn. 2012) (quoting *State v. Bridges*, 963 S.W.2d 487, 491 (Tenn. 1997)).
>
> At the post-conviction evidentiary hearing, the parties presented evidence about what the State knew at the time of [McKay's] arrest. Officers responded to the scene of a shooting murder. The witnesses there identified a light-colored car that had been circling the neighborhood and stopping repeatedly at the victim's house before shots were fired. While the witnesses' statements differed slightly in the make and model of the car, some of them identified the vehicle as a Cougar. The victim's brother told law enforcement officers that [McKay] had been to his home to meet the victim shortly before this shooting. The victim's brother provided law enforcement officers with the victim's phone, which showed that the last phone call that the victim received was from [McKay's] girlfriend's phone. Law enforcement officers learned that [McKay's] girlfriend had recently purchased a vehicle matching the description given by witnesses, and it was a Cougar. They then spoke with [McKay's] girlfriend's father and attempted to locate [McKay's]

girlfriend. When they did so, [McKay] was with her in her car, which matched the description of the vehicle described at the scene of the shooting. Officers asked [McKay's] girlfriend to come to the station for questioning, and [McKay] offered to accompany her. At the station, the law enforcement officers learned that [McKay] had been in possession of his girlfriend's phone and car around the time of the murder, although he denied being near the scene of the crime. Law enforcement officers then confronted him with the fact that the phone was "pinging" off a tower near the crime scene, and [McKay] admitted his involvement in this murder. The officers then arrested [McKay]. The post-conviction court found that [McKay's] arrest was indeed supported by probable cause.

Upon review, we conclude that the record supports the post-conviction court's determination. These aforementioned facts were sufficient to warrant a prudent person in believing that [McKay] was involved in the murder. Therefore, Counsel was not deficient for failing to argue that [McKay's] arrest was not supported by probable cause.

McKay v. State, 2018 WL 3954149, at *12.

The TCCA also concluded that there had not been a violation of the 48-hour rule:

[McKay] contends that Counsel was ineffective for failing to raise the forty-eight-hour hold issue in his motion to suppress. He asserts that law enforcement officers wrongfully held him for longer than forty-eight-hours before he was brought before a magistrate. *See Gerstein v. Pugh*, 420 U.S. 103 (1975). He further contends he was prejudiced in that his statement to the police and other evidence, namely the murder weapon, would have been suppressed had Counsel done so. The State counters that [McKay] was in fact taken before a magistrate within forty-eight hours and further that [McKay] did not prove that his statement or evidence would have been suppressed. We agree with the State.

A judicial determination of probable cause that occurs within forty-eight hours of a defendant's arrest is generally sufficient to satisfy the Fourth Amendment, unless there is evidence that the probable cause determination was unreasonably delayed for the purpose of gathering additional information to justify an arrest, was motivated by ill will toward the defendant, or constituted a "'delay for delay's sake.'" *Huddleston*, 924 S.W.2d at 672 (quoting *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991)). "[I]f the statement was given prior to the time the detention ripened into a constitutional violation, it is not the product of the illegality and should not be suppressed." *Id.* at 675.

. . . .

> The evidence in this case shows that [McKay] was arrested on August 21, 2008. He gave a signed statement implicating himself in the murder on August 22, 2008. While the record is unclear, [McKay] may not have been officially brought before a magistrate until August 25, 2008. Even using [McKay's] August 25th date, his statement would still not have been suppressed because he did not give it beyond the forty-eight hour time period mandated by *Gerstein*. Further, however, [McKay] must prove this allegation by clear and convincing evidence, which he did not do. Finally, as previously stated, law enforcement officers had probable cause to arrest [McKay] based upon the facts known to them at the time he was taken into custody. Accordingly, we conclude that [McKay] is not entitled to relief.

Id. at *12-13.

Claim 1 is controlled by the standards stated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), which require a showing that "counsel's performance was deficient" and that "the deficient performance prejudiced the defense." To establish deficient performance, a person challenging a conviction "must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. A court considering a claim of ineffective assistance must apply a "strong presumption" that counsel's representation was within the "wide range of reasonable professional assistance." *Id.* at 689. The challenger's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quoting *Strickland*, 466 U.S. at 690).

To demonstrate prejudice, a prisoner must establish "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.* "It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding. Counsel's errors must be so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Richter*, 562 U.S. at 104 (internal quotation marks and citation omitted); *see also id.* at 111-12 ("In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. . . . The likelihood of a different result must be substantial, not just conceivable.") (citations omitted); *Wong v. Belmontes*, 558 U.S. 15, 27 (2009) (per curiam) ("But *Strickland* does not require the State to 'rule out' [a more favorable outcome] to prevail. Rather, *Strickland* places the burden on the defendant, not the State, to show a 'reasonable probability' that the result would have been different.").

Where, as here, a state prisoner's claim has been adjudicated on the merits in state court, a federal court can issue a writ only if the adjudication:

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

28 U.S.C. § 2254(d)(1)-(2). The petitioner carries the burden of proof for this "difficult to meet" and "highly deferential standard," which "demands that state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (internal quotation marks and citations omitted). The deference to be accorded a state-court decision under *Strickland* is magnified when reviewing an ineffective assistance of counsel claim under 28 U.S.C. § 2254(d):

> Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both "highly deferential," *id.*, at 689; *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7 (1997), and when the two apply in tandem, review is "doubly" so, *Knowles* [*v. Mirzayance*], 556 U.S., [111,] 123 [(2009)]. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. 556 U.S., at 123. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.

Richter, 562 U.S. at 105 (parallel citations omitted).

The TCCA concluded that counsel was not ineffective because McKay's challenge to his arrest and the 48-hour hold were meritless. McKay cannot establish that the TCCA's decision was contrary to *Strickland* or to any other relevant Supreme Court decision. A state court's decision is "contrary" to federal law when it "arrives at a conclusion opposite to that reached" by the Supreme Court on a question of law or "decides a case differently than" the Supreme Court has "on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). The TCCA cited the correct legal rule from *Strickland* and from Tennessee cases applying *Strickland*. *McKay v. State*, 2018 WL 3954149, at *11-12. The TCCA also cited the correct legal rules from *Gerstein* and *McLaughlin*, as well as Tennessee decisions applying those principles. *Id.* at *12-13. This is "a run-of-the-mill state-court decision applying the correct legal rule . . . to the facts of a prisoner's case" and, therefore, it does not "fit comfortably within § 2254(d)(1)'s 'contrary to' clause." *Williams*, 529 U.S. at 406.

McKay also has failed to demonstrate that the TCCA's decision was an unreasonable application of clearly established federal law or that it was based on an unreasonable factual finding. An "unreasonable application" of federal law occurs when the state court "identifies the

correct governing legal principle from" the Supreme Court's decisions "but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. The state court's application of federal law must be "objectively unreasonable" for the writ to issue. *Id.* at 409. It is not sufficient that the habeas court, in its independent judgment, determines that the state court decision applied clearly established federal law erroneously or incorrectly. *Renico v. Lett*, 559 U.S. 766, 773 (2010) (citing *Williams*, 529 U.S. at 411).

> As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

Richter, 562 U.S. at 103.

"[W]hen a federal habeas petitioner challenges the factual basis for a prior state-court decision rejecting a claim, . . . [t]he prisoner bears the burden of rebutting the state court's factual findings 'by clear and convincing evidence.'" *Burt v. Titlow*, 571 U.S. 12, 18 (2013) (quoting 28 U.S.C. § 2254(e)(1)). A state court factual determination is not "unreasonable" merely because the federal habeas court would have reached a different conclusion. *Wood v. Allen*, 558 U.S. 290, 301 (2010); *see also Rice v. Collins*, 546 U.S. 333, 341-42 (2006) ("Reasonable minds reviewing the record might disagree" about the factual finding in question, "but on habeas review that does not suffice to supersede the trial court's . . . determination.").

The quality of the factual record in this case makes McKay's task of rebutting the state courts' factual determinations formidable. McKay's trial counsel, Tiffani Taylor, was deceased at the time of the post-conviction hearing and, therefore, unable to testify. No officers testified at the post-conviction hearing. Instead, as will be discussed *infra*, one of the prosecutors, Tracy McEndree, testified to the timeline and relevant events based on her review of the investigative

file. Post-conviction counsel also made factual assertions based on his own review of the records. None of those records was received into evidence. The trial testimony and the transcript of the suppression hearing are of limited utility because McKay did not raise a *Gerstein* issue.[3]

McKay appears to take issue with the TCCA's conclusion that there was probable cause for his arrest. Specifically, he argues that the police did not have the cellphone records that showed that the last call to the victim was made in the vicinity of the victim's home until after he was taken into custody. (ECF No. 6 at 4-5.) However, the post-conviction court found that there was probable cause to arrest McKay even without the cellphone records. This finding was based on the witnesses' descriptions of the vehicle, which matched Tracy Taylor's car; the fact that McKay was the last person to see the victim before the shooting; that a call was made to the victim from Tracy Taylor's telephone shortly before the shooting; Tracy Taylor's admission that she lent McKay her car and telephone the evening of the shooting; and that witnesses saw two black males fleeing the scene. (ECF No. 14-17 at PageID 1300-01.) McKay makes no legal argument that this information was not sufficient to constitute probable cause. The fact that the TCCA added in the location data from the cellphone records bolsters the probable cause but the absence of that information does not mean that there was no probable cause when McKay was taken into custody on April 21, 2008.

In addition, McKay has failed to show by clear and convincing evidence that the TCCA's inclusion of the cellphone records as part of the probable cause for his arrest was objectively

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[3] Moreover, the parties agreed that the trial transcript incorrectly reflected that McKay was arrested on August 20, 2008 due to an error by an attorney that was not corrected by the police witness. (*See* ECF Nos. 14-16 at PageID 1199, 1200, 1202-04, 1216-17; 14-17 at PageID 1261-63, 1264-65.)

unreasonable. There is no evidence in the record about when the police received the cellphone location data. Sergeant James Max testified that he examined the cellphone records on August 22, 2008. He reviewed the records after interviewing McKay. (ECF No. 14-4 at PageID 407-09, 412.) Subsequently, Lieutenant Barry Hanks confronted McKay with the records. (*Id.* at PageID 413, 438.)[4] At the post-conviction hearing, McEndree testified that she did not know whether the police had the location data at the time of McKay's arrest. (ECF No. 14-17 at PageID 1285-86.)

McKay also assumes, incorrectly, that information the police obtain after a suspect is taken into custody must be suppressed. Not so. McKay "conflates the type of investigation to establish probable cause that is prohibited according to *McLaughlin* and a continuing, ongoing investigation to prove guilt beyond a reasonable doubt." *State v. McCracken*, No. W2013-01396-CCA-R3-CD, 2014 WL 4459131, at *9 (Tenn. Crim. App. Sept. 10, 2014). If there was probable cause to arrest McKay before the police analyzed the cellphone records, "any additional evidence was not collected to *justify* the arrest." *Id.* Again, McKay has not argued that there was no probable cause to arrest him before the police obtained the cellphone location data.

McKay's task is further complicated by the uncertainty in the record about when he was actually arrested. The TCCA noted that "[t]here is some discrepancy in the record about whether [McKay] was arrested on August 21, August 22, or August 23." *McKay v. State*, 2018 WL 3954149, at *7 n.1. There is evidence, including McKay's trial testimony, that he voluntarily

[4] The records were introduced at trial by stipulation. (ECF Nos. 14-3 at PageID 341-43, 14-4 at PageID 355, 14-8 at PageID 879-85.)

accompanied Tracy Taylor to the police station the evening of August 21, 2008. (ECF No. 14-5 at PageID 596.)[5]

McKay initially came into police custody—with or without an arrest—at 4:00 p.m. or 5:00 p.m. on August 21, 2008. (ECF Nos. 14-16 at PageID 1216 (statement of post-conviction counsel); 14-17 at PageID 1264-65, 1270-71 (further testimony by McEndree on the timing of McKay's apprehension).) Shortly after midnight on the morning of August 22, 2008, McKay was booked into the jail on a 48-hour hold. (ECF No. 14-17 at PageID 1263 (testimony of McEndree).) McKay's statement was transcribed on August 22, 2008 at 4:08 p.m., approximately twenty-four (24) hours after he was taken into custody. (*Id.* at PageID 1264 (testimony of McEndree).) Therefore, even if McKay was "arrested" when he accompanied Tracy Taylor to the police station, he confessed less than 48 hours later, before there would have been a *McLaughlin* violation. Therefore, suppression of McKay's statement, and of the firearm, were not required. *United States v. Fullerton*, 187 F.3d 587, 591 (6th Cir. 1999).

McKay emphasizes that he was not taken before a magistrate until "[p]robably about two/three days" after he was first taken into custody. (ECF No. 14-16 at PageID 1205.) Post-conviction counsel represented that McKay "did not appear before a judge or magistrate until a video arraignment on August 25, 2008, four days after his arrest." (*Id.* at PageID 1216-17.) If so, there might have been a *McLaughlin* violation at some point but suppression of McKay's statement was not required because the statement was given prior to any violation. Moreover,

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[5] *See also* ECF Nos. 14-16 at PageID 1265-66 (testimony of McEndree that McKay testified that he voluntarily accompanied Tracy Taylor to the police station), 14-17 at PageID 1299 (post-conviction court notes that "the defendant himself talked about voluntarily coming down"), 1301-02 (same).

post-conviction counsel also represented that "the affidavit of complaint and arrest warrant were signed and time stamped in the general sessions clerk's office on August 22nd at 6:27 P.M., [although] his arrest warrant was not served on him until August 23rd." (*Id.* at PageID 1216; *see also id.* at PageID 1228-29 (similar statement by post-conviction court).)[6] The *ex parte* probable cause determination in the arrest warrant was sufficient to satisfy *Gerstein*. *Gerstein*, 420 U.S. at 120; *State v. Johnson*, No. W2005-00783-CCA-R3-CD, 2016 WL 2609712, at *16-17 (Tenn. Crim. App. May 4, 2016), *appeal denied* (Tenn. May 4, 2016).

In sum, McKay has not satisfied his burden of demonstrating that the TCCA's decision was an objectively unreasonable application of any controlling Supreme Court decision or that it was based on an objectively unreasonable factual determination. McKay has not established that there was no probable cause to take him into custody on August 21, 2008. Even assuming that the police did not receive the cellphone location data until sometime on August 22, 2008, McKay has not established that the investigation continued to establish probable cause and to justify his warrantless arrest. *Johnson*, 2016 WL 2609712, at *16. McKay confessed on August 22, 2008, approximately twenty-four hours of being taken into custody, and the judicial commissioner signed an arrest warrant the evening of August 22, 2008. Therefore, trial counsel was not ineffective in failing to move to suppress on the basis of an illegal 48-hour hold and McKay suffered no prejudice. Claim 1 is without merit and is **DISMISSED**.

B. Counsel's Failure to File a Motion for a New Trial or a Notice of Appeal (Claim 2)

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[6] Although this document does not appear in the record before the TCCA on the post-conviction appeal (*see* ECF No. 14-19 at PageID 1362 n.1), McKay has attached a copy to his Motion to Stay (ECF No. 19-1 at PageID 1470).

In Claim 2, McKay complains that his lawyer failed to file a motion for a new trial or a notice of appeal. (ECF No. 6 at 7-8.) McKay asserts that the issues counsel should have raised pertained to the 48-hour hold, the ruling on the suppression motion, and the lack of probable cause for his arrest. (*Id.* at 7.) McKay is correct that his attorney failed to file a new trial motion. Although counsel was permitted to file a delayed appeal, the issues presented were reviewed under the plain error standard. (ECF Nos. 14-9 at PageID 974 (procedural history in McKay's direct appeal brief; 14-17 at PageID 1244-45.) Notably, however, counsel did not raise the issues presented in Claim 2 on direct appeal. Instead, McKay challenged a jury instruction on criminal responsibility for the conduct of another and the sufficiency of the evidence. (ECF No. 14-9 at PageID 973.)

In his Answer, the Warden says that McKay properly exhausted Claim 2 in state court and it is subject to review on the merits. (ECF No. 15 at 18.) Although Claim 2 was not raised in a post-conviction petition, it was addressed at the evidentiary hearing. McKay raised the issue in his brief to the TCCA on the post-conviction appeal. (ECF No. 14-18 at PageID 1313, 1328, 1337-39.) In that filing, McKay complained that his attorney failed to raise any issue concerning the 48-hour hold, the ruling on the motion to suppress, and the lack of probable cause to support his arrest. (*Id.* at PageID 1338-39.) The TCCA denied relief on the merits, reasoning as follows:

> Finally, [McKay] contends that Counsel was ineffective for not timely filing his motion for new trial. He further contends that he was prejudiced because he would likely have been successful on the forty-eight hour hold issue, the suppression of his statements based on *Miranda*, and the lack of probable cause for his arrest. The State counters that [McKay] did not prove that he was prejudiced by Counsel's failure. We agree with the State.
>
> . . . .

> In this case, Counsel was granted a delayed appeal, appealing the sufficiency of the evidence, and Counsel appealed other issues pursuant to a plain error review. This court found there were no issues having merit on appeal. [McKay's] case differs from *Wallace* [*v. State*, 121 S.W.3d 652, 659 (Tenn. 2003),] because it was subject to adversarial scrutiny. Further, [McKay] cannot prove that he was prejudiced because, as previously stated, he did not offer proof that he would have been entitled to appellate relief, had any of the issues been raised. Relief at this stage in the proceedings necessitates proving by clear and convincing evidence that, but for Counsel's failure, he would have been entitled to appellate relief. He has not met this burden and, as such, he is not entitled to relief.

McKay v. State, 2018 WL 3954149, at *14.

McKay has not established that the TCCA's conclusion that he failed to demonstrate prejudice was contrary to, or an unreasonable application of, *Strickland* or any other Supreme Court decision or that it was based on an objectively unreasonable factual finding. Unlike most cases in which a prisoner complains of the failure to raise an issue in a new trial motion, McKay makes no argument that the decision on direct appeal would have been different if plain error review were not applied. Here, instead, he argues that, if only his attorney would have filed a motion for a new trial, he would have been granted relief on issues that were not presented to the trial court, such as a challenge based on the 48-hour rule, or that were rejected on the merits, such as the trial court's denial of the motion to suppress in the face of proof that McKay had, in fact, received *Miranda* warnings before talking to the police. No proof has been offered that counsel would have raised these issues in a new trial motion or that, if she had, McKay would have prevailed. Claim 2 is without merit and is **DISMISSED**.

C. Counsel's Failure to Convey a Plea Offer (Claim 3)

In Claim 3, McKay complains that his attorney failed to convey a plea offer. (ECF No. 6 at 8-9.) McKay asserts that when he confronted counsel, she told him that she thought the offer was too high and he would not have accepted it. (*Id.* at 8.) In his Answer, the Warden says that

McKay failed to exhaust this claim in state court and it is now barred by procedural default. (ECF No. 15 at 20.) The Court agrees.

A federal court may not grant a writ of habeas corpus on behalf of a state prisoner unless, with certain exceptions, the prisoner has exhausted available state remedies by presenting the same claim sought to be redressed in a federal habeas petition to the state courts pursuant to 28 U.S.C. §§ 2254(b) and (c). *Pinholster*, 563 U.S. at 181. The petitioner must "fairly present" each claim to each appropriate state court. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004). To fairly present a federal claim, a prisoner must present the same facts and legal theory to the state courts as is raised in his federal habeas petition. *See Anderson v. Harless*, 459 U.S. 4, 6-7 (1982); *Picard v. Connor*, 404 U.S. 270, 276-77 (1971); *Hodges v. Colson*, 727 F.3d 517, 529 (6th Cir. 2013). In evaluating whether a prisoner has "fairly presented" a claim to a state appellate court, the controlling document is the inmate's brief. *See Baldwin*, 541 U.S. at 32. 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), the claim is technically exhausted, but procedurally barred. *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991). To avoid procedural default, a habeas petitioner in Tennessee must present his federal claims to the trial court and, on appeal, to the TCCA. *Covington v. Mills*, 110 F. App'x 663, 665 (6th Cir. 2004).

McKay raised Claim 3 in his second amended post-conviction petition. (ECF No. 14-15 at PageID 1149.) At the post-conviction hearing, McKay testified that, as they were waiting for the jury's verdict, he asked whether there had been an offer and his attorney replied that he would not have taken it. (ECF No. 14-16 at PageID 1210-11.) Trial counsel did not reveal the terms of the offer. (*Id.* at PageID 1211.) The prosecutor, Stacy McEndree, testified that trial counsel had

repeatedly asked the State to make an offer but the State was unwilling to do so. (ECF No. 14-17 at PageID 1240.) McEndree explained:

> Mr. Bishop was in fact the shooter but it was our intention both because of Mr. Bishop's attorney Mr. Parris and what he had argued at trial, as well as our understanding of the facts and the age difference and the size difference of the two defendants, it was always our belief that Mr. McKay although not the shooter was the one that had actually set it up and was older, knew the victim, had sort of planned this robbery that resulted in his unfortunate demise. And so we were not willing to offer him anything other than murder first.
>
> She had asked me repeatedly to consider giving him a murder second or facilitation or anything other than as charged. And once we had convicted Mr. Bishop about a month prior, she was hopeful that we might reconsider that. We had talked about that a number of times.

(*Id.*; *see also id.* at PageID 1253 (further explanation of the State's refusal to extend an offer).) McEndree elaborated that, "because he was charged with murder one, it was a no-deals case. Although . . . we could have done a reduction if he had sought approval. After speaking with the family, it was clear in I think our minds as prosecutors and having discussed it with them that they also wanted to hold Mr. McKay fully responsible . . . ." (*Id.* at PageID 1253.) The post-conviction court denied relief. (*Id.* at PageID 1303.) In his brief to the TCCA on the post-conviction appeal, McKay set forth the testimony concerning a plea offer (*see* ECF No. 14-18 at PageID 1325) but did not argue that counsel was ineffective in failing to convey a plea offer (*id.* at PageID 1328). McKay is barred from filing another post-conviction petition because of Tennessee's one-year statute of limitations and its "one petition" rule. Tenn. Code Ann. §§ 40-30-102(a), (c). Because there is no longer any means of exhausting Claim 3, it is barred by procedural default.

In his Claim 6, McKay argues that any procedural default can be excused because it was caused by the ineffective assistance of post-conviction counsel. (ECF No. 6 at 13-14.) There is

no Sixth Amendment right to counsel in post-conviction proceedings and, therefore, an inmate ordinarily cannot obtain relief for the ineffective assistance of counsel in such proceedings. *Coleman*, 501 U.S. at 752. However, in *Martinez v. Ryan*, 566 U.S. 1, 17 (2012), the Supreme Court held that a prisoner could overcome his procedural default of a claim of ineffective assistance of trial counsel ("IATC") if, "under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding . . . ." In Arizona, where *Martinez* arose, IATC claims could not be raised on direct appeal. In its subsequent decision in *Trevino v. Thaler*, 569 U.S. 413, 429 (2013), the Supreme Court extended its holding in *Martinez* to states in which a "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal . . . ." The decisions in *Martinez* and *Trevino* apply to Tennessee prisoners. *Sutton v. Carpenter*, 745 F.3d 787 (6th Cir. 2014).

Martinez does not apply to claims that post-conviction appellate counsel was ineffective. *Middlebrooks v. Carpenter*, 843 F.3d 1127, 1136 (6th Cir. 2016); *West v. Carpenter*, 790 F.3d 693, 698-99 (6th Cir. 2015); *see also Martinez*, 566 U.S. at 11 ("While counsel's errors in [other levels of post-conviction] proceedings preclude any further review of the prisoner's claim, the claim will have been addressed by one court, whether it be the trial court, the appellate court on direct review, or the trial court in an initial-review collateral proceeding."). Because Claim 3 was addressed by the post-conviction court but was not raised in the post-conviction appeal, *Martinez* is inapplicable.

In Claim 7, McKay argues that a failure to consider this claim would result in manifest injustice. (ECF No. 6 at 14-16.) A fundamental miscarriage of justice occurs "where a

constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. 478, 496 (1986). "[A]ctual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar . . . , or . . . expiration of the statute of limitations." *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). "'[A]ctual innocence means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998). "[P]risoners asserting innocence as a gateway to defaulted claims must establish that, in light of new evidence, it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *House v. Bell*, 547 U.S. 518, 536-37 (2006) (internal quotation marks omitted). "The habeas court must make its determination concerning the petitioner's innocence in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial." *Schlup v. Delo*, 513 U.S. 298, 324, 328 (1995) (internal quotation marks admitted).

Here, McKay has come forward with no newly discovered evidence that he is actually innocent. Therefore, the failure to consider Claim 3 does not represent a manifest injustice.

Claim 3 is **DISMISSED** because it has been procedurally defaulted.

D. Trial Counsel's Filing of a Motion to Sever (Claim 4)

In Claim 4, McKay complains that his attorney filed a motion to sever his trial from that of his co-defendant, Bishop. According to McKay, a joint trial would have benefited him because it would have highlighted the fact that it was Bishop who shot the victim. (ECF No. 6 at 10-11.) McKay's attorney filed a motion to sever based on the fact that Bishop had given a confession that implicated McKay. (ECF No. 14-1 at PageID 103-04.) The Warden seems to argue, as an initial

matter, that McKay did not properly exhaust this claim in state court. (ECF No. 15 at 20.) The Court agrees.

McKay raised Claim 4 in his *pro se* and second amended post-conviction petitions. (ECF No. 14-15 at PageID 1094, 1115-16, 1150.) At the post-conviction hearing, McKay testified that his attorney "said she think it would be a good idea [to sever the trials] because [Bishop's] been getting in trouble, and his court might be—he keep pushing you off and stuff like that, but I still ended up going to trial behind him—after him." (ECF No. 14-16 at PageID 1212-13.) McKay testified that he "really didn't understand the law of the nature of how it would affect me in a negative or positive way." (*Id.* at PageID 1213.) The prosecutor, Stacy McEndree, testified that Bishop and McKay were tried "about a month apart." (ECF No. 14-17 at PageID 1237.) McEndree explained that the cases were severed because "we did have statements in both of those—from both of those defendants. We had intended to use the statements of each of those defendants and so we had always intended to try these separately." (*Id.* at PageID 1238.) The post-conviction court denied relief without specifically addressing the severance issue. (ECF Nos. 14-17 at PageID 1299-1303, 14-15 at PageID 1172.) That ruling counts as an adjudication on the merits. *Pinholster*, 563 U.S. at 187. The decision also is not surprising, because the law is clear that a defendant's statement cannot be used against a co-defendant in a joint trial and that the error cannot be cured by use of a limiting instruction. *Bruton v. United States*, 391 U.S. 123, 126, 137 (1968). McKay did not raise the severance issue in his brief to the TCCA on the post-conviction appeal. (ECF No. 14-18 at PageID 1313, 1328.) Therefore, for the same reasons addressed with respect to Claim 3, Claim 4 is barred by procedural default. *Martinez* does not

excuse the default because it does not apply to claims that post-conviction appellate counsel was ineffective.

Claim 4 is **DISMISSED** as barred by procedural default.

E. Ineffective Assistance of Appellate Counsel (Claim 5)

In Claim 5, McKay complains that his appellate counsel rendered ineffective assistance by failing to appeal the denial of the motion to suppress or to argue that his confession resulted from an illegal 48-hour hold. (ECF No. 6 at 11-12.) The Warden argues that McKay failed to raise Claim 5 in the post-conviction appeal and that it is now barred by procedural default. (ECF No. 15 at 28.) The Court does not agree. In his brief to the TCCA on the post-conviction appeal, McKay complained that his appellate counsel failed to litigate the denial of the motion to suppress and the 48-hour hold. (ECF No. 14-18 at PageID 1313.) The TCCA denied relief, although the only discussion of the issue pertained to counsel's failure to file a motion for a new trial. *McKay v. State*, 2018 WL 3954149, at *14. As previously stated, *see supra* p. 26, this constitutes a decision on the merits that is entitled to review under 28 U.S.C. § 2254(d).

McKay has not established that the TCCA's rejection of Claim 5 was contrary to or an unreasonable application of Supreme Court precedent or that it rested on an objectively unreasonable factual finding. The Court has found, in connection with Claim 1, that McKay is not entitled to relief on his claim that his confession should have been suppressed as the result of an illegal 48-hour hold. In addition, McKay has presented no evidence that the trial court's denial of his motion to suppress was erroneous. After a hearing on the merits, the trial court concluded that McKay executed valid waivers of his *Miranda* rights and gave voluntary statements to the police. (ECF No. 14-2 at PageID 173.) Therefore, McKay has not established that his appellate

counsel was ineffective in failing to raise these issues or that he suffered any prejudice. Claim 5 is without merit and is **DISMISSED**.

F. Ineffective Assistance of Post-Conviction Counsel (Claims 6 & 8)

In Claim 6, McKay argues that his post-conviction counsel rendered ineffective assistance to the extent that he did not properly exhaust each of his substantive claims. (ECF No. 6 at 13-14.) McKay makes a similar argument in Claim 8. (*Id.* at PageID 16-17.) However, the law is clear that "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." The Court has considered, where appropriate, whether the procedural default of any of McKay's claims might be excused under *Martinez v. Ryan*, 566 U.S. 1 (2012). Claims 6 and 8 are **DISMISSED** as not cognizable in a federal habeas petition.

G. Manifest Injustice (Claim 7)

In Claim 7, McKay argues that the failure to address his substantive claims on the merits would result in manifest injustice. (ECF No. 6 at 14-16.) As previously discussed, *see supra* pp. 24-25, Claim 7 is not a substantive ground for relief but, instead, a vehicle for overcoming a procedural default. For the reasons discussed, no manifest injustice has occurred here because McKay has come forward with no new evidence that he is actually innocent. Claim 7 is **DISMISSED**.

* * * *

Because each of the claims presented is without merit, the Court **DENIES** the Amended § 2254 Petition. The Amended § 2254 Petition is **DISMISSED WITH PREJUDICE**. Judgment shall be entered for Respondent.

III. APPEAL ISSUES

Twenty-eight U.S.C. § 2253(a) requires the district court to evaluate the appealability of its decision denying a § 2254 petition and to issue a certificate of appealability ("COA") "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also* Fed. R. App. P. 22(b). The COA must indicate the specific issue or issues that satisfy the required showing. 28 U.S.C. §§ 2253(c)(2) & (3). No § 2254 petitioner may appeal without this certificate. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22(b)(1).

A "substantial showing" is made when the movant 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) (internal quotation marks omitted).

> Where a district court has rejected a constitutional claim on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. . . . When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. . . .

Slack v. McDaniel, 529 U.S. 473, 484 (2000). "In short, a court should not grant a certificate without some substantial reason to think that the denial of relief might be incorrect." *Moody v. United States*, 958 F.3d 485, 488 (6th Cir. 2020). "To put it simply, a claim does not merit a certificate unless *every independent reason to deny the claim is reasonably debatable*." *Id.*; *see also id.* ("Again, a certificate is improper if *any* outcome-determinative issue is not reasonably debatable.").

In this case, there can be no question that the § 2254 Petition is meritless for the reasons previously stated. Because any appeal by Petitioner on the issues raised in his § 2254 Petition does not deserve attention, the Court **DENIES** a certificate of appealability.

Rule 24(a)(1) of the Federal Rules of Appellate Procedure provides that a party seeking pauper status on appeal must first file a motion in the district court, along with a supporting affidavit. However, if the district court certifies that an appeal would not be taken in good faith, or otherwise denies leave to appeal *in forma pauperis*, the prisoner must file his motion to proceed *in forma pauperis* in the appellate court. *See* Fed. R. App. P. 24(a) (4)-(5). In this case, for the same reasons the Court denies a certificate of appealability, the Court determines that any appeal would not be taken in good faith. It is therefore **CERTIFIED**, pursuant to Federal Rule of Appellate Procedure 24(a), that any appeal in this matter would not be taken in good faith. Leave to appeal *in forma pauperis* is **DENIED**.[7]

IT IS SO ORDERED, this the 31st day of January, 2022.

s/John T. Fowlkes, Jr.
JOHN T. FOWLKES, JR.
United States District Judge

[7] If Petitioner files a notice of appeal, he must pay the full $505 appellate filing fee or file a motion to proceed *in forma pauperis* and supporting affidavit in the Sixth Circuit Court of Appeals within 30 days of the date of entry of this order. *See* Fed. R. App. P. 24(a)(5).

McKay v. State
Court of Criminal Appeals of Tennessee, AT JACKSON. August 15, 2018 Not Reported in S.W. Rptr. 2018 WL 3954149 (Approx. 10 pages)

2018 WL 3954149
Only the Westlaw citation is currently available.

SEE RULE 19 OF THE RULES OF THE COURT OF CRIMINAL APPEALS RELATING TO PUBLICATION OF OPINIONS AND CITATION OF UNPUBLISHED OPINIONS.

Court of Criminal Appeals of Tennessee,
AT JACKSON.

Marlon MCKAY

v.

STATE of Tennessee

No. W2017-00202-CCA-R3-PC
Assigned on Briefs June 5, 2018
FILED 08/15/2018
Application for Permission to Appeal Denied by Supreme Court December 5, 2018

Appeal from the Criminal Court for Shelby County, No. 08-07886, James M. Lammey, Jr., Judge

Attorneys and Law Firms

Charles S. Mitchell, Memphis, Tennessee, for the appellant, **Marlon McKay**.

Herbert H. Slatery III, Attorney General and Reporter; Zachary T. Hinkle, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Gavin Smith and Stacy M. McEndree, Assistant District Attorneys General, for the appellee, State of Tennessee.

Robert W. Wedemeyer, J., delivered the opinion of the Court, in which Thomas T. Woodall and Norma McGee Ogle, JJ., joined.

OPINION

Robert W. Wedemeyer, J.

*1 A Shelby County jury convicted the Petitioner, **Marlon McKay**, of felony murder and attempted aggravated robbery. The trial court sentenced the Petitioner to an effective sentence of life plus six years. This Court affirmed the trial court's judgments on appeal. *State v. **Marlon McKay***, No. W2010-01785-CCA-MR3C, 2011 WL 5335285 (Tenn. Crim. App., at Jackson, Nov. 4, 2011), *perm. app. denied* (Tenn. Apr. 12, 2012). The Petitioner filed a petition for post-conviction relief in which he alleged, as relevant on appeal, that his trial counsel was ineffective for: (1) not challenging his forty-eight hour hold when his arrest was not supported by probable cause; and (2) not timely filing a motion for new trial or a notice of appeal. The post-conviction court denied relief, and the Petitioner appeals. After review, we affirm the post-conviction court's judgment.

I. Facts

A. Trial

This case arises from the Petitioner's participation in the attempted robbery of and killing of the victim, Maurice Taylor, in August 2008. For these offenses, the Petitioner and his co-defendant were charged with attempted aggravated robbery and first degree felony murder, but their cases were severed before trial. In our opinion affirming the Petitioner's convictions, we summarized the facts presented at trial as follows:

State's Proof

The victim's mother, Robin Taylor, testified that at the time of his death the victim was twenty-four years old and had been sharing a home on Cella Street with his older brother, Mareo Taylor.

Calvin McKissack, a resident of Cella Street, testified that he was outside his home on the evening of August 19, 2008, watching a friend repair a lawnmower when he became aware of a Mercury Cougar automobile that kept stopping under the streetlight in front of the house across the street, pulling off again, and then returning four or five minutes later to stop in the same spot. The windows were tinted but cracked open, and he was able to see two African-American men inside who kept looking back over their shoulders each time they pulled in front of the house. After having seen the men circle the block in the same fashion four or five different times, McKissack and his friend decided to go inside. Approximately five minutes later, McKissack heard gunshots, went back outside, and learned that the victim, who lived several doors down, had been shot in his yard.

Brooke Howard, who also resided on Cella Street at the time of the shooting, testified that she was returning home from work at about 10:30 p.m. on August 19, 2008, when her suspicions were aroused by the sight of an unfamiliar white car that traveled slowly down the street two or three different times. About twenty or thirty minutes later, she was in her bedroom when she heard gunshots.

The victim's brother, Mareo Taylor, testified that he and the victim were sharing a home on Cella at the time of the shooting and that the victim, who had only a part-time job, sold marijuana to supplement his income. Several hours before the shooting occurred, he asked the victim to give him $10, but the victim told him he had to buy some marijuana first. At about 8:30 or 9:00 p.m. that night, the [Petitioner] stopped by the home to see the victim, stayed a few minutes, and then left. As the [Petitioner] walked through the kitchen, Taylor saw that he was carrying a large plastic bag, but he was unable to see its contents.

Approximately two hours later, Taylor was watching television with his girlfriend when the victim received a telephone call and then walked out the kitchen door to the driveway. Almost immediately after the victim shut and locked the door behind him, Taylor heard the victim say his name followed by the sound of a gunshot. He looked out the window, saw the victim staggering beside the kitchen door, and tried to reach him by exiting the kitchen door. He did not have his door key on him, however, so he then ran out the living room door and around the house to the kitchen door. By the time he reached the victim approximately thirty to forty-five seconds later, the victim was lying on the ground gasping for air. Taylor testified that the victim was not armed and that there were no weapons in the home.

*2 Marvin Riley, who was living with a friend on Cella at the time of the shooting, testified that he heard a single gunshot at about 11:00 p.m. on August 19, 2008, looked out the front door of his friend's home, and saw what appeared to be the victim lying on the ground and two African-American men running side by side down the sidewalk to a light-colored car parked on the street. He said that the men got into the vehicle and drove off, turning right onto Hamilton Street toward Lamar Avenue.

Antonio Archie testified that sometime between 10:00 and 11:00 p.m. on August 19, 2008, he had just started his turn off Hamilton Street en route to his home on Cella when a light-colored, two-door car with two African-American men inside pulled off rapidly from where it had been stopped on Cella, accelerated down the street, and turned onto Hamilton headed toward Lamar. When Archie arrived home, he heard a commotion and saw the victim's brother's girlfriend calling 9-1-1 while the victim's brother held the victim in his arms.

The [Petitioner's] former live-in girlfriend, Tracy Taylor, testified that the defendant borrowed her 1997 silver Mercury Cougar at about 8:45 p.m. on August 19, 2008. The [Petitioner] also used her cell phone that night. The witness identified a photograph of a revolver that she said she had seen around her home during the time that the [Petitioner] lived with her. On cross-examination, she testified that during the time the [Petitioner] lived with her, he smoked marijuana and occasionally took Xanax bars mixed with a prescription cough syrup containing Promethazine, otherwise known by its street name of "syrup." She said that the [Petitioner] smoked marijuana with her on August 19, 2008, before he borrowed her car. She conceded it was possible that the [Petitioner] also used Xanax and Promethazine that day.

Officer Lesley Jones of the Memphis Police Department, who responded to the reported shooting at approximately 11:20 p.m., testified that he and several fellow police officers

attempted CPR on the victim for approximately seven to nine minutes until fire department officers arrived and pronounced him dead.

Walter Spencer, another resident of Cella Street, testified that on the night of August 19, 2008, he heard a gunshot followed by the sound of car doors shutting and a vehicle "speeding off." When he looked out the window, he saw a light-colored car turning right at the stop sign onto Hamilton.

Susan Acerra, an investigator with the Shelby County Medical Examiner's Office, testified that when she responded to the scene of the shooting, she found the victim lying on his back on the ground with a gunshot wound in his chest. Her inventory of his person uncovered $1,163.75 in cash, a cell phone, a tube of chapstick, and a butane lighter.

Cell phone records of the [Petitioner's] ex-girlfriend, Tracy Taylor, were introduced as an exhibit by stipulation of the parties.

Officer David Payment of the Memphis Police Department's Crime Scene Investigation Unit identified various photographs he took of the crime scene, including ones that showed an empty clear plastic bag that was found beside the victim's foot and another clear plastic bag containing .41 grams of marijuana, which was found on the ground beside the victim's shoulder. He said he found no weapons or bullet casings at the scene.

Detective Samuel McMinn of the Memphis Police Department's Investigative Support Unit testified that, as part of his investigation, he transported Tracy Taylor and the [Petitioner] to the Homicide Office on August 20, 2008.

*3 Sergeant James Max of the Memphis Police Department's Homicide Unit testified that he interviewed the [Petitioner] in two separate sessions on August 22, 2008. He said that the [Petitioner] denied any involvement in the homicide, telling him that he had bought marijuana from the victim on August 19, 2008, but by 9:15 p.m. was back home and in for the night. The [Petitioner] also denied owning a gun. Later, Sergeant Max received Tracy Taylor's cell phone records, which revealed that a call had been placed from her phone to the victim at 11:05 p.m. on August 19, 2008, which had hit off a cell phone tower located only a couple of blocks from the crime scene.

On cross-examination, Sergeant Max acknowledged that there were several calls back and forth that night between the victim's phone and Tracy Taylor's phone, including two short duration calls from Tracy Taylor's phone to the victim's phone that were placed after the shooting. On redirect examination, he said that the call history of Ms. Taylor's phone did not reflect those calls and that the [Petitioner] later told him that he had deleted the victim's number from the phone.

Detective Michael Garner of the Memphis Police Department's Investigative Support Unit testified that on August 27, 2008, he and his partner were instructed to escort the [Petitioner] to a lot near Hamilton Street where, according to the [Petitioner], Courtney Bishop had thrown the gun used in the homicide out of their car window. The officers were unable to locate the weapon in that lot, however, and as they continued to drive about the area, the [Petitioner] asked him to pull over, telling him that he knew where the gun was and wanted to talk to Detective Ragland about it.

Lieutenant Barry Hanks of the Memphis Police Department testified that he used Tracy Taylor's cell phone records during a third interview with the [Petitioner] on August 22, 2008, to show him that he had to have been in the vicinity of the victim's home, rather than at his own home, when he telephoned the victim shortly before the shooting. He said that the [Petitioner] responded by looking down and saying, "[Y]ou got me, don't you[?]" The [Petitioner] then gave a statement detailing his participation in the crime. In the statement, the [Petitioner] said that he drove Courtney Bishop to the victim's home, using Tracy Taylor's vehicle, with the intention to rob the victim. The [Petitioner] also admitted that he supplied the gun used in the robbery. He claimed, however, that he began to have second thoughts about the robbery once they reached the victim's home and was not present when Bishop shot the victim. The [Petitioner's] statement reads in pertinent part:

> I was riding down Brower and I seen Courtney [Bishop]. He was standing outside and I had stopped to pick him up. We was tripping about some money and he got in the car.

That's when [the victim] called about 30 minutes after [Bishop] got in the car. That's when we decided to try and take [the victim's] money. I rode around for a minute thinking this is wrong. This ain't it. But it was more like I guess we need to do because we both needed some money. As I drove around, I parked the car for a minute. We jumped out and walked up Cella Street for a minute. I was really contemplating on should we do it, should I not 'cause I know him and I've never did anything like that before, never. Really, I got cold feet and I left the phone in the car to go back to the car to buy some time to think. Walking back to the car, that's when I decided it wasn't worth it. That's when I guess [the victim] come out of the house and I heard a shot. [Bishop] came running towards me and I said what the fuck did you do—what the fuck you do? And he said he shot him in the leg. I said you didn't kill him, did you? And he said naw, man, 'cause he reached for his leg. While we were in the car, we driving off by this time. The next day I seen the news and they said [the victim] was dead.

*4 The [Petitioner] said that he drove both to and from the victim's house and that he knew the victim had money because the victim had been trying to buy some marijuana.

Dr. Lisa Funte, a medical examiner with the Shelby County Regional Forensic Center who reviewed the autopsy report of the victim's body, testified that the cause of death was a single gunshot wound to the chest.

Lieutenant Bart Ragland of the Memphis Police Department testified that on August 27, 2008, he checked the [Petitioner] and Bishop out of jail in order for them to direct him and other officers to the location of the murder weapon. He said that when the officers were unable to locate the weapon at the place indicated, Bishop was driven back to jail. In the meantime, the [Petitioner], who had asked to speak to him, divulged that he had given the weapon to a third individual. Lieutenant Ragland then contacted that person, who dropped off the weapon in the bushes outside a restaurant down the street from a police station. Lieutenant Ragland identified a photograph of the weapon, which had previously been identified by Tracy Taylor as one with which she was familiar, as the .357 revolver that he had recovered from the bushes outside the restaurant. He said that both the weapon and the bullet that had been recovered from the victim's body were transported to the Tennessee Bureau of Investigation ("TBI") laboratory for testing.

TBI Special Agent Cervinia Braswell, an expert in firearms identification who conducted the testing of the bullet and gun, testified that the bullet recovered from the victim's body was fired through the barrel of the gun.

Sergeant Joe Stark of the Memphis Police Department's Homicide Unit, who participated in the [Petitioner's] August 22, 2008 statement, testified that the [Petitioner] never indicated during that interview that he was under the influence of marijuana, codeine/cough syrup, or any other mind- or mood-altering substance at the time of the shooting. He acknowledged on cross-examination, however, that he never asked the defendant whether he had been under the influence of any drugs on August 19.

Defendant's Proof

Lieutenant Ragland, recalled as a witness for the defense, testified that Tracy Taylor's cell phone records indicated that the victim had made an outgoing call to Tracy Taylor's phone at 11:05 p.m. on August 19, 2008, which was not reflected in the caller identification section of the victim's cell phone.

The [Petitioner] testified that on the day of the shooting he smoked marijuana and consumed some Promethazine with codeine, which he mixed in juice with two Xanax bars. Sometime in the afternoon, he went to the victim's house, where he purchased a quarter-ounce of marijuana that he took home and smoked with his girlfriend, Tracy Taylor, before she had to leave for a 4:00 p.m. appointment. In addition to the marijuana, he consumed more Promethazine and Xanax that afternoon. His girlfriend returned home at about 8:00 p.m. and he smoked another marijuana cigarette with her before he, in turn, left home again, taking her car and cell phone because his own phone had been disconnected for nonpayment.

The [Petitioner] testified that as he was driving around the Orange Mound neighborhood, Courtney Bishop flagged him down and the two shared a marijuana cigarette while riding around together. He then dropped Bishop off on the street and met one of his marijuana

suppliers, who provided him with a pound of marijuana on consignment, which he took to the victim at the victim's home. The victim was unhappy with the quality, however, so he left with the marijuana. As he was driving around trying to find a different buyer, he spotted and picked up Bishop again. Neither he nor Bishop had any money, but both needed some, and at some point as they were sitting in the car together smoking yet more marijuana, Bishop suggested they could take money from the victim. The [Petitioner] said that he rejected the idea because it was not the right thing to do. As Bishop continued to talk about it, the [Petitioner] pointed out that Bishop did not even have a gun. In response, Bishop picked up the [Petitioner's] loaded gun, which the [Petitioner] kept by his console for protection, and told the [Petitioner] that he was going to use it to commit the robbery. The [Petitioner] said that he told Bishop "no" and that he could not do that to the victim, whom he had known since the victim was a child.

*5 The [Petitioner] testified that he later called the victim to see if he could sell him another quarter-ounce of marijuana on credit. He said he parked down the street from the victim's house and was trying to reach him on the cell phone when Bishop suddenly jumped out of the vehicle and began walking toward the victim's home. He followed after him, calling him back to the car and asking what he was doing. He then heard a gunshot and saw Bishop running back toward the car. He panicked, ran back to the car with Bishop, and drove both of them from the scene. He asked Bishop what he had done, and Bishop told him that he had shot the victim in the leg.

The [Petitioner] testified that he dropped Bishop off and went home, where he twice called the victim to check on his welfare. No one answered, and the next morning he heard on the television news that there had been a shooting death on Cella. The [Petitioner] testified that he did not call the police or seek help for the victim because he was frightened. The [Petitioner] described his feelings of anguish and remorse at the death of the victim and said that he never intended for him to be robbed, much less shot. He also said that he was so upset about the shooting that he vomited in the car upon reaching his home that night, and again after he went inside the home.

On cross-examination, the [Petitioner] acknowledged he told police, in his statement, that he had planned to rob the victim but then got "cold feet." He further acknowledged that he never said anything about having been under the influence of drugs at the time of the shooting.

State's Rebuttal Proof

Mareo Taylor testified that he saw the [Petitioner] at his home at about 8:00 p.m. on the night of the shooting but did not see him earlier in the afternoon, despite having been home for almost the entire day.

Tracy Taylor testified that she noticed no unusual smells or signs of recent cleaning in her vehicle when she drove it to work on the morning of August 20, 2008.

Sergeant Joe Stark and Lieutenant Bart Ragland each testified that the [Petitioner] never told them that Bishop had taken his gun out of his console, as opposed to his having given it to him, or that he had tried to stop Bishop from committing the robbery.

McKay, 2011 WL 5335285 *1-6.

Based upon this evidence, the jury convicted the Petitioner of first degree felony murder and attempted aggravated robbery. The trial court ordered that the Petitioner serve life in prison for the felony murder conviction and six years for the attempted aggravated robbery conviction. The court ordered that the sentences be served consecutively.

B. Post-Conviction Facts

The Petitioner filed a petition for post-conviction relief in which he alleged his trial counsel was ineffective for: (1) not challenging his forty-eight hour hold when his arrest was not supported by probable cause; and (2) not timely filing a motion for new trial or notice of appeal. At a hearing on the petition, the parties acknowledged that the Petitioner's trial counsel had suddenly and unexpectedly died between the time of the Petitioner's trial and his post-conviction proceeding. The parties then presented the following evidence: The Petitioner testified that the trial court appointed Counsel to represent him on April 20, 2010, a few weeks before his May 17 trial, because his prior attorney had to leave the case due to personal issues.

The Petitioner said that he met with Counsel a few times, maybe once before trial. He said that Counsel only met him in court, and he did not think that she ever came to the jail. The Petitioner said that Counsel did not discuss with him the details of his case, and she did not discuss with him his defense. He said that she was "focused" on intoxication as a defense and did not discuss with him anything about his abandoning the plan to rob the victim. The Petitioner said that Counsel did not review discovery with him.

*6 The Petitioner recalled that Counsel argued a motion to suppress evidence against him the morning before trial. The Petitioner said he told Counsel that he had asked officers if he could speak with an attorney, specifically Craig Morton, at the time that they interviewed him. Counsel, however, did not raise this fact during the suppression hearing. Neither did she mention that he had been interviewed multiple times while held in jail before his arrest.

The Petitioner testified that he had been arrested after this incident, his arrest being August 21, 2008. He said that he had been in custody since that day. The Petitioner said that the police officers were looking for his girlfriend, Tracy Taylor, and that they had gotten a "ping" off of a cell phone tower from her phone. The Petitioner was riding as a passenger at the time that law enforcement officers pulled over Ms. Taylor.

The State informed the post-conviction court that officers brought the Petitioner in for questioning because he was the last person to see the victim alive, and the Petitioner saw him alive within thirty minutes of his death. Officers then read the Petitioner his *Miranda* warnings, and the Petitioner gave statements. The Petitioner was booked into jail just after midnight, on the morning of August 22, 2008. Law enforcement officers placed a forty-eight hour hold on the Petitioner on the evening of August 22, 2008, when they realized that he was more than a witness.

The Petitioner testified that, after his arrest, he went before a judge "two/three days later" and was appointed an attorney, his initial counsel. Detective Michael Garner checked him out of jail on August 27, 2008, so the Petitioner could locate the murder weapon. He did not have legal representation at that time.

The Petitioner said that, at his motion to suppress, Counsel did not argue the forty-eight hour hold or his lack of representation when locating the murder weapon. The motion to suppress was based on his contention that he asked for, but was denied, access to an attorney. The Petitioner recalled that while he was incarcerated, a detective came to talk to him, and he told the detective that he did not want to speak with him but that he wanted an attorney. He ended up in the detective's office on August 22, and this was the basis for the motion to suppress.

The Petitioner said that he did not recall Counsel speaking with any of the witnesses, but he agreed that she had hired an investigator. The Petitioner complained that Counsel did not rebut the insinuation at trial that he was a menacing person by calling any character witnesses on his behalf. He said that she did not properly investigate the case or prepare for trial. He explained that she did not talk to any of the witnesses or obtain any pretrial statements that were taken the night of the crime.

The Petitioner said that Counsel did not engage in any plea negotiations with the State. The Petitioner recalled that, while the jury was deliberating, he asked Counsel if the State had ever offered him a plea deal. She said that the State had made an offer but that it was "too high" and that he would not have taken it. He said that she never conveyed any offer to him.

The Petitioner said that Counsel did not assert that he had withdrawn from the conspiracy. The two discussed that he, as he told police, had gotten "cold feet" and gone to the car to call someone. The Petitioner said that Counsel did file a motion to sever his case from co-defendant Bishop's case.

*7 The Petitioner testified that Counsel did not timely file his motion for new trial. The Petitioner said that he was, therefore, only able to seek plain error review on appeal. The Petitioner said that he was granted the right to seek a late appeal. In the appeal, however, Counsel did not raise the forty-eight-hour hold or that he was arrested without probable cause. She focused the appeal only on an issue about jury instructions and the sufficiency of the evidence.

Post-conviction counsel informed the post-conviction court that the Petitioner was arrested on August 21, 2008 [1] and that he did not appear before a judge until August 25, 2008. Post-conviction counsel said that the Petitioner was not represented by any attorney until September 16, 2008. The post-conviction court said the main issue was whether there was probable cause to arrest the Petitioner.

During cross-examination, the Petitioner testified that the trial court had originally appointed Counsel's boss, ("Previous Counsel"), to represent him. He was unaware at that time that Counsel worked with Previous Counsel. He agreed that Counsel had an investigator whom she presumably spoke with. The Petitioner said that he and Counsel first discussed the trial on the morning of trial. The Petitioner agreed that he did not know whether Counsel attempted to talk to any of the witnesses. He further agreed that he did not offer Counsel the name of any factual witnesses that could testify on his behalf.

The Petitioner agreed that Counsel gave him a full copy of the discovery in his case. He further conceded that he was unsure whether Counsel talked to any witnesses or visited the crime scene.

During redirect examination, the Petitioner testified that Counsel never said that she interviewed any witnesses. He clarified that it may have been Previous Counsel who sent him the discovery.

Upon questioning by the post-conviction court, the Petitioner testified that he was unsure of the date that Counsel took over his case from Previous Counsel. The Petitioner said he was arrested on August 21, 2008, and that he gave a statement the next day that should have been suppressed. The statement, he agreed, was given on August 22, 2008, at 6:27 p.m., which was twenty-five hours after he was taken into custody.

Stacy McEndree, with the District Attorney's Office, testified that she had been a prosecutor for over seventeen years and that she had been the prosecutor in this case. She recalled that she prosecuted both the Petitioner and his co-defendant, Mr. Bishop, but at separate trials about a month apart. Ms. McEndree explained that both defendants had given a statement to police, so the State intended to try the cases separately.

Ms. McEndree explained that Previous Counsel had originally been assigned the Petitioner's case. Counsel worked for Previous Counsel and had worked on this case. Previous Counsel had worked with Counsel on the Petitioner's case and had intended for her to sit with him and try the case at trial. Twenty-seven days before trial, Previous Counsel asked to be relieved and for Counsel to be assigned to the case. The trial court offered to give Counsel more time, but she said such was unnecessary because she had been working on the case.

Ms. McEndree said that Counsel frequently asked her if the State had an offer for a plea agreement. Ms. McEndree said that the State did not because, while Mr. Bishop was the shooter, the State's theory was that the Petitioner set up the robbery. She explained that the Petitioner was older and larger than Mr. Bishop and that he was the one who knew the victim. Ms. McEndree said that the State never offered the Petitioner a plea agreement.

*8 Ms. McEndree addressed the forty-eight-hour hold/probable cause issue saying that there was probable cause for the Petitioner's arrest. She explained that the victim was shot and killed on August 19, 2008. When officers arrived at the scene, they spoke with multiple witnesses who said that there had been a car circling the area. The witnesses said that it was not a car that was supposed to be in that area. The witnesses described the vehicle in detail, giving the color, make, model, and information that the vehicle had a spoiler. Witnesses said that there were two black men in the car at the time and that it circled the block repeatedly, each time stopping near the victim's house, which the victim's neighbors found suspicious. The car circled the block between five and seven times. Witnesses said that the same vehicle sped away from the scene at a high rate of speed and turned right after the shots were fired.

Ms. McEndree said that law enforcement officers had also spoken with the victim's brother, who told them that the Petitioner was the last person to see the victim alive. The victim's brother told the officers that the Petitioner had been by the victim's house less than a half an hour before the victim was shot and killed, having come to purchase marijuana from the victim. Law enforcement officers also discovered that the description of the vehicle seen

speeding away from the murder scene matched the Petitioner's girlfriend's vehicle. When officers spoke with the Petitioner and his girlfriend, they learned that the Petitioner had been in possession of his girlfriend's vehicle and cell phone at the time of the murder. The officers also discovered that the Petitioner's girlfriend's cell phone was the last number that had called the victim's phone shortly before his death. Officers then used records from the Petitioner's girlfriend's cell phone, which the Petitioner was in possession of at the time of the murder, to determine that the Petitioner was on the victim's block at the time of the murder. The Petitioner's first statement was that he was nowhere near the crime scene until he was confronted with the phone records. Ms. McEndree said that the Petitioner was originally brought in to give a statement but, after officers spoke with him and looked at the evidence, they arrested him.

Ms. McEndree addressed the motion for new trial, saying that Counsel had missed the thirty day time limit. Counsel was still, however, allowed to file an appeal. Ms. McEndree said that Counsel fought "hard" for the Petitioner. Ms. McEndree said that Mr. Bishop also appealed and his conviction was ultimately affirmed. Ms. McEndree opined that, had the motion for new trial been timely filed, it would not have changed the result.

Ms. McEndree said that Counsel believed in the Petitioner and that the two had become close. She said that they worked well together and that Counsel only had positive things to say about the Petitioner. Counsel was upset when she thought that Mr. Bishop may have his sentence reduced on appeal, which ultimately did not happen. Ms. McEndree said that Counsel had been a prosecutor before practicing criminal defense. She said that Counsel could not have fought harder on the Petitioner's behalf and that she did not leave a "stone unturned."

Ms. McEndree recalled that when the Petitioner testified at trial, he admitted that he had repeatedly lied to police. He said that he did so hoping it would get him a lower charge. The Petitioner, she said, understood the trial proceedings and the consequences of his actions.

Ms. McEndree testified that the proof against the Petitioner was overwhelming. He gave a statement to police that included that he was at the victim's house and planned to rob the victim. He had sold the victim marijuana, and the victim had said it was not any good, which upset the Petitioner. The Petitioner said that he returned to rob the victim and that he took a gun for protection. While the Petitioner said he tried to back away from the murder, this evidence was not supported by eye witness testimony, and the Petitioner admitted he never conveyed this fact to Mr. Bishop. Ms. McEndree said that she could not imagine what Counsel could have done differently to change the outcome of this case.

*9 During cross-examination, Ms. McEndree testified that Counsel accompanied Previous Counsel during some of their earlier meetings on this case, and that it was Ms. McEndree's original understanding that Counsel would be sitting second chair on the case.

Ms. McEndree reiterated that she did not make any plea offers to the Petitioner. She expounded that the Petitioner was eleven years older than Mr. Bishop, and Mr. Bishop was "a little slow" and "a lot smaller" than the Petitioner. Further, Mr. Bishop did not know the victim previously, and the Petitioner did.

Ms. McEndree said that Counsel had a multi-pronged defense. She attempted to mitigate his culpability to anything less than first degree murder by highlighting that the Petitioner was not the shooter, that he backed away from the murder, and that he was intoxicated. Ms. McEndree also said that Counsel came to her office to review the State's file on the case. Ms. McEndree also gave Counsel the statements of any witness involved in the case.

Ms. McEndree agreed that Counsel filed a motion to suppress. She said that the motion alleged that the Petitioner had attempted to, or had in fact, spoken with an attorney, Mr. Morton, before he gave his statement. Ms. McEndree spoke with Mr. Morton who denied that he had spoken with the Petitioner. Ms. McEndree was unsure whether Counsel raised probable cause, but Counsel did not raise the forty-eight-hour hold issue. Ms. McEndree said that, at the time of this case, that was a "non-issue," the seminal case on the issue not having yet been released. Ms. McEndree agreed that the forty-eight hour hold issue was raised in co-defendant Bishop's case, but she said that most attorneys thought that this argument was likely unsuccessful, so it was not a frequently raised issue. Ms. McEndree acknowledged that the Court of Criminal Appeals reversed co-defendant Bishop's case

based on the forty-eight-hour hold issue, but she said that the facts surrounding the issue were different. Mr. Bishop was "picked up" by law enforcement officers later and based solely on the Petitioner's statements. The Petitioner, however, was brought in for questioning based upon the facts that led police to suspect him as being involved in the murder.

Ms. McEndree detailed facts known to police before the Petitioner's arrest: witnesses had seen a light colored car circling with two black men in the vehicle and leaving quickly after shots were fired; witnesses offered a make of the vehicle; the victim's brother said that the Petitioner saw the victim thirty minutes before his death; the victim's brother gave law enforcement officers the victim's cell phone, which showed incoming and outgoing calls, and officers learned that the last phone call was between the victim's phone and the Petitioner's girlfriend's phone. Officers then learned that the Petitioner's girlfriend owned a vehicle matching the description of the car given by witnesses.

On August 21, 2008, officers saw the Petitioner with his girlfriend in the vehicle matching the description of the vehicle at the crime scene. The victim's girlfriend, Ms. Teller, drove to work, and the Petitioner accompanied her. Officers asked them to come to the police station to give statements and be interviewed. The Petitioner was not placed on a forty-eight-hour hold until the early morning hours of August 22, 2008.

**10* The Petitioner signed a waiver of *Miranda* rights at 11:17 a.m. on August 22, 2008, and then he gave a statement at 4:08 p.m. that same day. The Petitioner gave another statement, the one used as evidence at trial, at 8:00 p.m. that same day.

Ms. McEndree identified portions of the transcript in which Officer McMinn testified that he located the Petitioner on August 20, 2008, and that he contacted the Petitioner's girlfriend through her father. Ms. McEndree identified where Officer McMinn testified that he met the Petitioner's girlfriend in a parking lot and that the Petitioner was with her. He said he detained them both on that date.

Ms. McEndree agreed that the victim's brother's testimony included that the Petitioner had been to his and the victim's home between 8:30 and 9:30 p.m. on the day of the shooting. She further acknowledged that the 911 call did not come in until 11:09 p.m. Ms. McEndree said that law enforcement officers knew before they interviewed the Petitioner on August 21 that his girlfriend's cell phone had pinged off a tower in the vicinity of the victim's house, and they confronted him with this information during the interview.

Based upon this evidence, the post-conviction court dismissed the Petitioner's petition, finding that the Petitioner failed to prove that Counsel was ineffective in her representation of the Petitioner. The post-conviction court did find that Counsel was deficient for failing to timely file a motion for new trial but that the Petitioner was not prejudiced in this regard because there was "sufficient probable cause to arrest [the] Petitioner." It is from this judgment that the Petitioner now appeals.

II. Analysis

On appeal, the Petitioner contends that the post-conviction court erred when it denied his petition for post-conviction relief because his trial counsel was ineffective for: (1) not challenging his forty-eight hour hold when his arrest was not supported by probable cause; and (2) not timely filing a motion for new trial or notice of appeal. The State counters that the Petitioner failed to establish his claim of ineffectiveness with adequate proof, that he did not prove that there was not probable cause for his arrest, and that he did not prove that his statement or evidence would have been suppressed had counsel filed a motion based on the forty-eight-hour hold. The State further contends that the Petitioner did not prove he was prejudiced by Counsel's failure to timely file a motion for new trial.

In order to obtain post-conviction relief, a petitioner must show that his or her conviction or sentence is void or voidable because of the abridgment of a constitutional right. T.C.A. § 40-30-103 (2014). The petitioner bears the burden of proving factual allegations in the petition for post-conviction relief by clear and convincing evidence. T.C.A. § 40-30-110(f) (2014). Upon review, this Court will not re-weigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the trial judge, not the appellate courts. *Momon v. State*, 18 S.W.3d 152, 156 (Tenn. 1999) (citing *Henley v. State*, 960 S.W.2d 572, 578-79 (Tenn. 1997)). A post-conviction court's factual

findings are subject to a de novo review by this Court; however, we must accord these factual findings a presumption of correctness, which can be overcome only when a preponderance of the evidence is contrary to the post-conviction court's factual findings. *Fields v. State*, 40 S.W.3d 450, 456-57 (Tenn. 2001). A post-conviction court's conclusions of law are subject to a purely de novo review by this Court, with no presumption of correctness. *Id.* at 457.

*11 The right of a criminally accused to representation is guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution. *State v. White*, 114 S.W.3d 469, 475 (Tenn. 2003); *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999); *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). The following two-prong test directs a court's evaluation of a claim for ineffectiveness:

> First, the [petitioner] 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 [petitioner] by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. Unless a [petitioner] makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984); *see also State v. Melson*, 772 S.W.2d 417, 419 (Tenn. 1989).

In reviewing a claim of ineffective assistance of counsel, this Court must determine whether the advice given or services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases. *Baxter*, 523 S.W.2d at 936. To prevail on a claim of ineffective assistance of counsel, "a petitioner must show that counsel's representation fell below an objective standard of reasonableness." *House v. State*, 44 S.W.3d 508, 515 (Tenn. 2001) (citing *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996)).

When evaluating an ineffective assistance of counsel claim, the reviewing court should judge the attorney's performance within the context of the case as a whole, taking into account all relevant circumstances. *Strickland*, 466 U.S. at 690; *State v. Mitchell*, 753 S.W.2d 148, 149 (Tenn. Crim. App. 1988). The reviewing court should avoid the "distorting effects of hindsight" and "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 689-90. In doing so, the reviewing court must be highly deferential and "should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Burns*, 6 S.W.3d at 462. Finally, we note that a defendant in a criminal case is not entitled to perfect representation, only constitutionally adequate representation. *Denton v. State*, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). In other words, "in considering claims of ineffective assistance of counsel, 'we address not what is prudent or appropriate, but only what is constitutionally compelled.' " *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (quoting *United States v. Cronic*, 466 U.S. 648, 665 n.38 (1984)). Counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. *Williams v. State*, 599 S.W.2d 276, 279-80 (Tenn. Crim. App. 1980). " 'The fact that a particular strategy or tactic failed or hurt the defense, does not, standing alone, establish unreasonable representation. However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation.' " *House*, 44 S.W.3d at 515 (quoting *Goad*, 938 S.W.2d at 369).

*12 If the petitioner shows that counsel's representation fell below a reasonable standard, then the petitioner must satisfy the prejudice prong of the *Strickland* test by demonstrating "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; *Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). This reasonable probability must be "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S.

A. Probable Cause

The first issue we must address is whether law enforcement officers had probable cause to arrest the Petitioner. "Probable cause ... exists if, at the time of the arrest, the facts and circumstances within the knowledge of the officers, and of which they had reasonably trustworthy information, are 'sufficient to warrant a prudent [person] in believing that the [defendant] had committed or was committing an offense.' " *State v. Echols*, 382 S.W.3d 266, 277-78 (Tenn. 2012) (quoting *State v. Bridges*, 963 S.W.2d 487, 491 (Tenn. 1997)).

At the post-conviction evidentiary hearing, the parties presented evidence about what the State knew at the time of the Petitioner's arrest. Officers responded to the scene of a shooting murder. The witnesses there identified a light-colored car that had been circling the neighborhood and stopping repeatedly at the victim's house before shots were fired. While the witnesses' statements differed slightly in the make and model of the car, some of them identified the vehicle as a Cougar. The victim's brother told law enforcement officers that the Petitioner had been to his home to meet the victim shortly before this shooting. The victim's brother provided law enforcement officers with the victim's phone, which showed that the last phone call that the victim received was from the Petitioner's girlfriend's phone. Law enforcement officers learned that the Petitioner's girlfriend had recently purchased a vehicle matching the description given by witnesses, and it was a Cougar. They then spoke with the Petitioner's girlfriend's father and attempted to locate the Petitioner's girlfriend. When they did so, the Petitioner was with her in her car, which matched the description of the vehicle described at the scene of the shooting. Officers asked the Petitioner's girlfriend to come to the station for questioning, and the Petitioner offered to accompany her. At the station, the law enforcement officers learned that the Petitioner had been in possession of his girlfriend's phone and car around the time of the murder, although he denied being near the scene of the crime. Law enforcement officers then confronted him with the fact that the phone was "pinging" off a tower near the crime scene, and the Petitioner admitted his involvement in this murder. The officers then arrested the Petitioner. The post-conviction court found that the Petitioner's arrest was indeed supported by probable cause.

Upon review, we conclude that the record supports the post-conviction court's determination. These aforementioned facts were sufficient to warrant a prudent person in believing that the Petitioner was involved in the murder. Therefore, Counsel was not deficient for failing to argue that the Petitioner's arrest was not supported by probable cause.

B. Forty-Eight-Hour Hold

The Petitioner contends that Counsel was ineffective for failing to raise the forty-eight-hour hold issue in his motion to suppress. He asserts that law enforcement officers wrongfully held him for longer than forty-eight-hours before he was brought before a magistrate. *See Gerstein v. Pugh*, 420 U.S. 103 (1975). He further contends he was prejudiced in that his statement to the police and other evidence, namely the murder weapon, would have been suppressed had Counsel done so. The State counters that the Petitioner was in fact taken before a magistrate within forty-eight hours and further that the Petitioner did not prove that his statement or evidence would have been suppressed. We agree with the State.

***13** A judicial determination of probable cause that occurs within forty-eight hours of a defendant's arrest is generally sufficient to satisfy the Fourth Amendment, unless there is evidence that the probable cause determination was unreasonably delayed for the purpose of gathering additional information to justify an arrest, was motivated by ill will toward the defendant, or constituted a " 'delay for delay's sake.' " *Huddleston*, 924 S.W.2d at 672 (quoting *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991)). "[I]f the statement was given prior to the time the detention ripened into a constitutional violation, it is not the product of the illegality and should not be suppressed." *Id.* at 675.

The Tennessee Supreme Court heard and decided this issue on similar facts in the Petitioner's co-defendant's case, the case of Courtney Bishop. *State v. Bishop*, 431 S.W.3d 22 (Tenn. 2014). In *Bishop*, the defendant argued that his arrest was illegal. On appeal, this Court *sua sponte* found that the State had violated *Gerstein* because the arrest was for the basis of gathering more information. Reviewing the issue, our supreme court reversed, finding:

> Our reading of the record leads us to conclude that Mr. Bishop's lawyer was focused chiefly on his argument that the police lacked probable cause to arrest Mr. Bishop, rather than on whether the "48-hour hold" was obtained to enable the police to gather additional

evidence to justify the arrest. Because Mr. Bishop did not raise the latter issue at trial, neither party presented the sorts of evidence that one would have expected to be introduced on this issue. Accordingly, the record is quite equivocal on this point.

Had Mr. Bishop asserted plain error with regard to his claim that the police improperly detained him following his arrest for the purpose of gathering additional evidence, he would have had the burden of demonstrating that he was entitled to relief. *State v. Jordan*, 325 S.W.3d at 58. Based on this record, we have concluded that a plain error argument would have run aground because Mr. Bishop would not have been able to demonstrate that considering the error was necessary to do substantial justice.

Mr. Bishop was arrested with probable cause. He subsequently confessed three times to shooting Maurice Taylor. On one of those occasions he was testifying under oath before a jury. Under these circumstances, it is difficult to perceive how substantial justice requires the reversal of his conviction for first-degree felony murder in perpetration of an attempted aggravated robbery.

Based on this record, we have determined that the Court of Criminal Appeals erred by overlooking Mr. Bishop's waiver of the *Gerstein* issue and by failing to employ the plain error analysis when it addressed this issue. Had the Court of Criminal Appeals employed the plain error analysis, it would have concluded, as we have, that Mr. Bishop is not entitled to relief based on this issue.

Bishop, 431 S.W.3d at 44-46.

The evidence in this case shows that the Petitioner was arrested on August 21, 2008. He gave a signed statement implicating himself in the murder on August 22, 2008. While the record is unclear, the Petitioner may not have been officially brought before a magistrate until August 25, 2008. Even using the Petitioner's August 25th date, his statement would still not have been suppressed because he did not give it beyond the forty-eight hour time period mandated by *Gerstein*. Further, however, the Petitioner must prove this allegation by clear and convincing evidence, which he did not do. Finally, as previously stated, law enforcement officers had probable cause to arrest the Petitioner based upon the facts known to them at the time he was taken into custody. Accordingly, we conclude that the Petitioner is not entitled to relief.

C. Motion for New Trial

***14** Finally, the Petitioner contends that Counsel was ineffective for not timely filing his motion for new trial. He further contends that he was prejudiced because he would likely have been successful on the forty-eight hour hold issue, the suppression of his statements based on *Miranda*, and the lack of probable cause for his arrest. The State counters that the Petitioner did not prove that he was prejudiced by Counsel's failure. We agree with the State.

The most applicable case on this issue is *Wallace v. State*, which supports the Petitioner's contention that Counsel's deficiency in failing to timely file his motion for new trial was ineffective and resulted in his case not being subjected to "the adversarial appellate process." 121 S.W.3d 652, 659 (Tenn. 2003). In *Wallace*, as a result of the untimely filing, the petitioner did not receive appellate review of specific issues raised in the motion for new trial regarding alleged errors at trial as to evidentiary issues and comments the trial judge made in front of the jury. In determining whether *Wallace* was entitled to post-conviction relief as a result of trial counsel's untimely filing of the motion for new trial, our supreme court held "a petitioner in a post-conviction proceeding must establish that he or she intended to file a motion for new trial and that but for the deficient representation of counsel, a motion for new trial would have been filed raising issues in addition to sufficiency of the evidence." *Id.* Further, the court held, "[a]s a direct result of counsel's ineffective assistance, the defendant was procedurally barred from pursuing issues on appeal, and the State's case was not subjected to adversarial scrutiny upon appeal." *Id.* at 660.

In this case, Counsel was granted a delayed appeal, appealing the sufficiency of the evidence, and Counsel appealed other issues pursuant to a plain error review. This court found there were no issues having merit on appeal. The Petitioner's case differs from *Wallace* because it was subject to adversarial scrutiny. Further, the Petitioner cannot prove that he was prejudiced because, as previously stated, he did not offer proof that he would

have been entitled to appellate relief, had any of the issues been raised. Relief at this stage in the proceedings necessitates proving by clear and convincing evidence that, but for Counsel's failure, he would have been entitled to appellate relief. He has not met this burden and, as such, he is not entitled to relief.

III. Conclusion

In accordance with the foregoing reasoning and authorities, we affirm the post-conviction court's judgment.

All Citations

Not Reported in S.W. Rptr., 2018 WL 3954149

Footnotes

1 There is some discrepancy in the record about whether the Petitioner was arrested on August 21, August 22, or August 23.

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2011 WL 5335285
Only the Westlaw citation is currently available.

SEE RULE 19 OF THE RULES OF THE COURT OF CRIMINAL APPEALS RELATING TO PUBLICATION OF OPINIONS AND CITATION OF UNPUBLISHED OPINIONS.

Court of Criminal Appeals of Tennessee,
at Jackson.

STATE of Tennessee
v.
Marlon McKAY.

No. W2010-01785-CCA-MR3C.
Assigned on Briefs Sept. 7, 2011.
Nov. 4, 2011.
Application for Permission to Appeal
Denied by Supreme Court
April 12, 2012.

Direct Appeal from the Criminal Court for Shelby County, No. 08-07886; James M. Lammey, Jr., Judge.

Attorneys and Law Firms

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Robert E. Cooper, Jr., Attorney General and Reporter; David H. Findley, Senior Counsel; General; William L. Gibbons, District Attorney General; and Stacy M. McEndree and Kevin R. Rardin, Assistant District Attorneys General, for the appellee, State of Tennessee.

ALAN E. GLENN, J., delivered the opinion of the Court, in which THOMAS T. WOODALL and JEFFREY S. BIVINS, JJ., joined.

OPINION

ALAN E. GLENN, J.

*1 The defendant, **Marlon McKay**, was convicted by a Shelby County Criminal Court jury of first degree felony murder and attempted aggravated robbery and was sentenced by the trial court to consecutive terms of life plus six years in the Department of Correction. On appeal, he challenges the sufficiency of the convicting evidence and contends that the trial court committed plain error by granting the State's request to omit a portion of the pattern jury instruction on criminal responsibility. Following our review, we affirm the judgments of the trial court.

FACTS

This case arises out of the August 19, 2008 shooting death of Maurice Taylor, which occurred outside his Memphis home during the course of an attempted robbery. On December 11, 2008, the Shelby County Grand Jury returned a two-count indictment charging the defendant and Courtney Bishop with the felony murder and attempted aggravated robbery of the victim. The court subsequently granted the defendant's motion to sever his case from Bishop's, and the defendant proceeded to trial alone before a Shelby County jury on May 17, 2010.

State's Proof

The victim's mother, Robin Taylor, testified that at the time of his death the victim was twenty-four years old and had been sharing a home on Cella Street with his older brother, Mareo Taylor.

Calvin McKissack, a resident of Cella Street, testified that he was outside his home on the evening of August 19, 2008, watching a friend repair a lawnmower when he became aware

of a Mercury Cougar automobile that kept stopping under the streetlight in front of the house across the street, pulling off again, and then returning four or five minutes later to stop in the same spot. The windows were tinted but cracked open, and he was able to see two African–American men inside who kept looking back over their shoulders each time they pulled in front of the house. After having seen the men circle the block in the same fashion four or five different times, McKissack and his friend decided to go inside. Approximately five minutes later, McKissack heard gunshots, went back outside, and learned that the victim, who lived several doors down, had been shot in his yard.

Brooke Howard, who also resided on Cella Street at the time of the shooting, testified that she was returning home from work at about10:30 p.m. on August 19, 2008, when her suspicions were aroused by the sight of an unfamiliar white car that traveled slowly down the street two or three different times. About twenty or thirty minutes later, she was in her bedroom when she heard gunshots.

The victim's brother, Mareo Taylor, testified that he and the victim were sharing a home on Cella at the time of the shooting and that the victim, who had only a part-time job, sold marijuana to supplement his income. Several hours before the shooting occurred, he asked the victim to give him $10, but the victim told him he had to buy some marijuana first. At about 8:30 or 9:00 p.m. that night, the defendant stopped by the home to see the victim, stayed a few minutes, and then left. As the defendant walked through the kitchen, Taylor saw that he was carrying a large plastic bag, but he was unable to see its contents.

*2 Approximately two hours later, Taylor was watching television with his girlfriend when the victim received a telephone call and then walked out the kitchen door to the driveway. Almost immediately after the victim shut and locked the door behind him, Taylor heard the victim say his name followed by the sound of a gunshot. He looked out the window, saw the victim staggering beside the kitchen door, and tried to reach him by exiting the kitchen door. He did not have his door key on him, however, so he then ran out the living room door and around the house to the kitchen door. By the time he reached the victim approximately thirty to forty-five seconds later, the victim was lying on the ground gasping for air. Taylor testified that the victim was not armed and that there were no weapons in the home.

Marvin Riley, who was living with a friend on Cella at the time of the shooting, testified that he heard a single gunshot at about 11:00 p.m. on August 19, 2008, looked out the front door of his friend's home, and saw what appeared to be the victim lying on the ground and two African–American men running side by side down the sidewalk to a light-colored car parked on the street. He said that the men got into the vehicle and drove off, turning right onto Hamilton Street toward Lamar Avenue.

Antonio Archie testified that sometime between 10:00 and 11:00 p.m. on August 19, 2008, he had just started his turn off Hamilton Street en route to his home on Cella when a light-colored, two-door car with two African–American men inside pulled off rapidly from where it had been stopped on Cella, accelerated down the street, and turned onto Hamilton headed toward Lamar. When Archie arrived home, he heard a commotion and saw the victim's brother's girlfriend calling 9–1–1 while the victim's brother held the victim in his arms.

The defendant's former live-in girlfriend, Tracy Taylor, testified that the defendant borrowed her 1997 silver Mercury Cougar at about 8:45 p.m. on August 19, 2008. The defendant also used her cell phone that night. The witness identified a photograph of a revolver that she said she had seen around her home during the time that the defendant lived with her. On cross-examination, she testified that during the time the defendant lived with her, he smoked marijuana and occasionally took Xanax bars mixed with a prescription cough syrup containing Promethazine, otherwise known by its street name of "syrup." She said that the defendant smoked marijuana with her on August 19, 2008, before he borrowed her car. She conceded it was possible that the defendant also used Xanax and Promethazine that day.

Officer Lesley Jones of the Memphis Police Department, who responded to the reported shooting at approximately 11:20 p.m., testified that he and several fellow police officers attempted CPR on the victim for approximately seven to nine minutes until fire department officers arrived and pronounced him dead.

Walter Spencer, another resident of Cella Street, testified that on the night of August 19, 2008, he heard a gunshot followed by the sound of car doors shutting and a vehicle "speeding off." When he looked out the window, he saw a light-colored car turning right at the stop sign onto Hamilton.

*3 Susan Acerra, an investigator with the Shelby County Medical Examiner's Office, testified that when she responded to the scene of the shooting, she found the victim lying on his back on the ground with a gunshot wound in his chest. Her inventory of his person uncovered $1,163.75 in cash, a cell phone, a tube of chapstick, and a butane lighter.

Cell phone records of the defendant's ex-girlfriend, Tracy Taylor, were introduced as an exhibit by stipulation of the parties.

Officer David Payment of the Memphis Police Department's Crime Scene Investigation Unit identified various photographs he took of the crime scene, including ones that showed an empty clear plastic bag that was found beside the victim's foot and another clear plastic bag containing .41 grams of marijuana, which was found on the ground beside the victim's shoulder. He said he found no weapons or bullet casings at the scene.

Detective Samuel McMinn of the Memphis Police Department's Investigative Support Unit testified that, as part of his investigation, he transported Tracy Taylor and the defendant to the Homicide Office on August 20, 2008.

Sergeant James Max of the Memphis Police Department's Homicide Unit testified that he interviewed the defendant in two separate sessions on August 22, 2008. He said that the defendant denied any involvement in the homicide, telling him that he had bought marijuana from the victim on August 19, 2008, but by 9:15 p.m. was back home and in for the night. The defendant also denied owning a gun. Later, Sergeant Max received Tracy Taylor's cell phone records, which revealed that a call had been placed from her phone to the victim at 11:05 p.m. on August 19, 2008, which had hit off a cell phone tower located only a couple of blocks from the crime scene.

On cross-examination, Sergeant Max acknowledged that there were several calls back and forth that night between the victim's phone and Tracy Taylor's phone, including two short duration calls from Tracy Taylor's phone to the victim's phone that were placed after the shooting. On redirect examination, he said that the call history of Ms. Taylor's phone did not reflect those calls and that the defendant later told him that he had deleted the victim's number from the phone.

Detective Michael Garner of the Memphis Police Department's Investigative Support Unit testified that on August 27, 2008, he and his partner were instructed to escort the defendant to a lot near Hamilton Street where, according to the defendant, Courtney Bishop had thrown the gun used in the homicide out of their car window. The officers were unable to locate the weapon in that lot, however, and as they continued to drive about the area, the defendant asked him to pull over, telling him that he knew where the gun was and wanted to talk to Detective Ragland about it.

Lieutenant Barry Hanks of the Memphis Police Department testified that he used Tracy Taylor's cell phone records during a third interview with the defendant on August 22, 2008, to show him that he had to have been in the vicinity of the victim's home, rather than at his own home, when he telephoned the victim shortly before the shooting. He said that the defendant responded by looking down and saying, "[Y]ou got me, don't you[?]" The defendant then gave a statement detailing his participation in the crime. In the statement, the defendant said that he drove Courtney Bishop to the victim's home, using Tracy Taylor's vehicle, with the intention to rob the victim. The defendant also admitted that he supplied the gun used in the robbery. He claimed, however, that he began to have second thoughts about the robbery once they reached the victim's home and was not present when Bishop shot the victim. The defendant's statement reads in pertinent part:

> *4 I was riding down Brower and I seen Courtney [Bishop]. He was standing outside and I had stopped to pick him up. We was tripping about some money and he got in the car. That's when [the victim] called about 30 minutes after [Bishop] got in the car. That's when we decided to try and take [the victim's] money. I rode around for a minute thinking this is wrong. This ain't it. But it was more like I guess we need to do because we both needed some money. As I drove around, I parked the car for a minute. We jumped out and

> walked up Cella Street for a minute. I was really contemplating on should we do it, should I not 'cause I know him and I've never did anything like that before, never. Really, I got cold feet and I left the phone in the car to go back to the car to buy some time to think. Walking back to the car, that's when I decided it wasn't worth it. That's when I guess [the victim] come out of the house and I heard a shot. [Bishop] came running towards me and I said what the fuck did you do—what the fuck you do? And he said he shot him in the leg. I said you didn't kill him, did you? And he said naw, man, 'cause he reached for his leg. While we were in the car, we driving off by this time. The next day I seen the news and they said [the victim] was dead.

The defendant said that he drove both to and from the victim's house and that he knew the victim had money because the victim had been trying to buy some marijuana.

Dr. Lisa Funte, a medical examiner with the Shelby County Regional Forensic Center who reviewed the autopsy report of the victim's body, testified that the cause of death was a single gunshot wound to the chest.

Lieutenant Bart Ragland of the Memphis Police Department testified that on August 27, 2008, he checked the defendant and Bishop out of jail in order for them to direct him and other officers to the location of the murder weapon. He said that when the officers were unable to locate the weapon at the place indicated, Bishop was driven back to jail. In the meantime, the defendant, who had asked to speak to him, divulged that he had given the weapon to a third individual. Lieutenant Ragland then contacted that person, who dropped off the weapon in the bushes outside a restaurant down the street from a police station. Lieutenant Ragland identified a photograph of the weapon, which had previously been identified by Tracy Taylor as one with which she was familiar, as the .357 revolver that he had recovered from the bushes outside the restaurant. He said that both the weapon and the bullet that had been recovered from the victim's body were transported to the Tennessee Bureau of Investigation ("TBI") laboratory for testing.

TBI Special Agent Cervinia Braswell, an expert in firearms identification who conducted the testing of the bullet and gun, testified that the bullet recovered from the victim's body was fired through the barrel of the gun.

Sergeant Joe Stark of the Memphis Police Department's Homicide Unit, who participated in the defendant's August 22, 2008 statement, testified that the defendant never indicated during that interview that he was under the influence of marijuana, codeine/cough syrup, or any other mind- or mood-altering substance at the time of the shooting. He acknowledged on cross-examination, however, that he never asked the defendant whether he had been under the influence of any drugs on August 19.

Defendant's Proof

***5** Lieutenant Ragland, recalled as a witness for the defense, testified that Tracy Taylor's cell phone records indicated that the victim had made an outgoing call to Tracy Taylor's phone at 11:05 p.m. on August 19, 2008, which was not reflected in the caller identification section of the victim's cell phone.

The defendant testified that on the day of the shooting he smoked marijuana and consumed some Promethazine with codeine, which he mixed in juice with two Xanax bars. Sometime in the afternoon, he went to the victim's house, where he purchased a quarter-ounce of marijuana that he took home and smoked with his girlfriend, Tracy Taylor, before she had to leave for a 4:00 p.m. appointment. In addition to the marijuana, he consumed more Promethazine and Xanax that afternoon. His girlfriend returned home at about 8:00 p.m. and he smoked another marijuana cigarette with her before he, in turn, left home again, taking her car and cell phone because his own phone had been disconnected for nonpayment.

The defendant testified that as he was driving around the Orange Mound neighborhood, Courtney Bishop flagged him down and the two shared a marijuana cigarette while riding around together. He then dropped Bishop off on the street and met one of his marijuana suppliers, who provided him with a pound of marijuana on consignment, which he took to the victim at the victim's home. The victim was unhappy with the quality, however, so he left with the marijuana. As he was driving around trying to find a different buyer, he spotted and picked up Bishop again. Neither he nor Bishop had any money, but both needed some, and at some point as they were sitting in the car together smoking yet more marijuana, Bishop

suggested they could take money from the victim. The defendant said that he rejected the idea because it was not the right thing to do. As Bishop continued to talk about it, the defendant pointed out that Bishop did not even have a gun. In response, Bishop picked up the defendant's loaded gun, which the defendant kept by his console for protection, and told the defendant that he was going to use it to commit the robbery. The defendant said that he told Bishop "no" and that he could not do that to the victim, whom he had known since the victim was a child.

The defendant testified that he later called the victim to see if he could sell him another quarter-ounce of marijuana on credit. He said he parked down the street from the victim's house and was trying to reach him on the cell phone when Bishop suddenly jumped out of the vehicle and began walking toward the victim's home. He followed after him, calling him back to the car and asking what he was doing. He then heard a gunshot and saw Bishop running back toward the car. He panicked, ran back to the car with Bishop, and drove both of them from the scene. He asked Bishop what he had done, and Bishop told him that he had shot the victim in the leg.

The defendant testified that he dropped Bishop off and went home, where he twice called the victim to check on his welfare. No one answered, and the next morning he heard on the television news that there had been a shooting death on Cella. The defendant testified that he did not call the police or seek help for the victim because he was frightened. The defendant described his feelings of anguish and remorse at the death of the victim and said that he never intended for him to be robbed, much less shot. He also said that he was so upset about the shooting that he vomited in the car upon reaching his home that night, and again after he went inside the home.

*6 On cross-examination, the defendant acknowledged he told police, in his statement, that he had planned to rob the victim but then got "cold feet." He further acknowledged that he never said anything about having been under the influence of drugs at the time of the shooting.

State's Rebuttal Proof

Mareo Taylor testified that he saw the defendant at his home at about 8:00 p.m. on the night of the shooting but did not see him earlier in the afternoon, despite having been home for almost the entire day.

Tracy Taylor testified that she noticed no unusual smells or signs of recent cleaning in her vehicle when she drove it to work on the morning of August 20, 2008.

Sergeant Joe Stark and Lieutenant Bart Ragland each testified that the defendant never told them that Bishop had taken his gun out of his console, as opposed to his having given it to him, or that he had tried to stop Bishop from committing the robbery.

ANALYSIS

I. Criminal Responsibility Jury Instruction

The defendant first contends that it was plain error for the trial court to grant the State's motion to omit a portion of the pattern jury instruction on criminal responsibility. The State responds by arguing that the defendant cannot show that the omitted portion of the charge resulted in plain error. We agree with the State.

In order for us to find plain error:

(a) the record must clearly establish what occurred in the trial court;

(b) a clear and unequivocal rule of law must have been breached;

(c) a substantial right of the accused must have been adversely affected;

(d) the accused did not waive the issue for tactical reasons; and

(e) consideration of the error is "necessary to do substantial justice."

State v. Smith, 24 S.W.3d 274, 282 (Tenn.2000) (quoting *State v. Adkisson*, 899 S.W.2d 626, 641–42 (Tenn.Crim.App.1994)). The presence of all five factors must be established by the record before we will recognize the existence of plain error, and complete

consideration of all the factors is not necessary when it is clear from the record that at least one factor cannot be established. *Id.* at 283.

The trial court granted the State's request to omit the following paragraph of the pattern jury instruction on criminal responsibility: "In deciding criminal responsibility of the defendant, the jury may also take into consideration any evidence offered that the defendant attempted to thwart or withdraw from any of the offenses that followed from the original offense." T.P.I.Crim. 3.01. In granting the State's request, the court concluded that the above portion of the criminal responsibility instruction was irrelevant to the case because there was no evidence of any other offense that followed from the original, concurrent offenses of attempted aggravated robbery and felony murder. The trial court compared the case at bar to a hypothetical case involving a pair of bank robbers charged with robbery, evading arrest, aggravated assault, and fleeing the scene of an accident. The court reasoned as follows:

> *7 This jury charge of criminal responsibility talks about everyone involved if they have agreed to be involved in a criminal action, everyone is responsible for the actions of each other. Now this particular paragraph talks about things that occurred after the original offense....
>
> Now if coming out of the bank ... one of these two robbers ... decides I don't want anymore of this, I'm not getting in the car with you, should he be held responsible for the actions of the driver that drove away, rammed the police car, shot at the police officers? Now he had clearly abandoned. He withdrew from the offenses that followed from the original offense. That seems like it makes sense to me. There's only one offense here [in the case at bar]. There's only one really. I mean, we have an attempted aggravated robbery coinciding or concurring with the homicide.... So there wasn't ... any other offenses that followed from that original offense.

Based on the record, we agree with the State that the requirements for a finding of plain error are not met in this case, as the defendant cannot show that a clear and unequivocal rule of law was breached by the trial court's omission of the paragraph, that a substantial right of his was affected, or that consideration of the alleged error is necessary to do substantial justice. The closing arguments are not included in the record. We note, however, that the trial court informed defense counsel that she was free to argue in closing that the defendant had withdrawn from the robbery before the offenses occurred. Moreover, as the State points out, the court instructed the jury on the lesser-included offenses of facilitation of the indicted offenses, giving the jury an opportunity to find the defendant guilty of a lesser role in the crimes. Accordingly, we conclude that the defendant is not entitled to plain error review on this issue.

II. Sufficiency of the Evidence

The defendant also challenges the sufficiency of the evidence in support of his convictions. Specifically, he argues that there was insufficient proof of his intent to participate in the underlying felony of attempted aggravated robbery. In support, he asserts that "[t]here was no evidence put forth which would constitute a substantial step on the defendant's part towards the commission of an [a]ggravated [r]obbery or [r]obbery." He also cites evidence of his extensive drug use on the day of the shooting to argue that he was incapable of forming the requisite intent for the crimes. The State argues that there was sufficient evidence from which the jury could have found him guilty of the offenses beyond a reasonable doubt. We, again, agree with the State.

When the sufficiency of the convicting evidence is challenged on appeal, the relevant question of the reviewing court is "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." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *see also* Tenn. R.App. P. 13(e) ("Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt."); *State v. Evans*, 838 S.W.2d 185, 190–92 (Tenn.1992); *State v. Anderson*, 835 S.W.2d 600, 604 (Tenn.Crim.App.1992).

*8 All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. *See State v. Pappas*, 754 S.W.2d 620, 623 (Tenn.Crim.App.1987). "A guilty verdict by the jury, approved by the trial

judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." *State v. Grace*, 493 S.W.2d 474, 476 (Tenn.1973). Our supreme court stated the rationale for this rule:

> This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 219 Tenn. 4, 11, 405 S.W.2d 768, 771 (1966) (citing *Carroll v. State*, 212 Tenn. 464, 370 S.W.2d 523 (1963)).

"A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal a convicted defendant has the burden of demonstrating that the evidence is insufficient." *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn.1982).

For the purposes of this case, felony murder is defined as "[a] killing of another committed in the perpetration of or attempt to perpetrate any ... robbery." Tenn.Code Ann. § 39–13–202(a)(2) (2010). "No culpable mental state is required ... except the intent to commit the enumerated offenses or acts." *Id.* § 39–13–202(b). Proof of the intention to commit the underlying felony and at what point it existed is a question of fact to be decided by the jury after consideration of all the facts and circumstances. *State v. Buggs*, 995 S.W.2d 102, 107 (Tenn.1999).

Aggravated robbery is defined as the intentional or knowing theft of property from the person of another by violence or putting the person in fear that is accomplished with a deadly weapon or where the victim suffers serious bodily injury. Tenn.Code Ann. §§ 39–13–401(a), –402(a). "A person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense ... [a]cts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense." *Id.* § 39–12–101(a)(3). "Conduct does not constitute a substantial step under subdivision (a)(3), unless the person's entire course of action is corroborative of the intent to commit the offense." *Id.* § 39–12–101(b).

Finally, a person is criminally responsible for the conduct of another if, "[a]cting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense." *Id.* § 39–11–402(2). Under a theory of criminal responsibility, an individual's presence and companionship with the perpetrator of a felony before and after the commission of an offense are circumstances from which his or her participation in the crime may be inferred. *State v. Caldwell*, 80 S.W.3d 31, 38 (Tenn.Crim.App.2002).

***9** The defendant argues that he did not take any substantial steps toward the commission of the offense. However, when viewed in the light most favorable to the State, the evidence shows the following: that the defendant discussed with Bishop the possibility of robbing the victim for the cash he knew the victim, a marijuana dealer, had on his person; provided Bishop with a revolver to use in the robbery; drove himself and Bishop to the victim's neighborhood, circling the block several times before finally stopping his car down the street from the victim's home; lured the victim outside under the pretense of either buying more marijuana for his personal use or selling him a large bag to supply his business; fled with Bishop following the attempted robbery and shooting; and later disposed of the murder weapon. By convicting the defendant of the indicted offenses, the jury obviously credited his statement to police, in which he admitted his intent to participate in the robbery, over his trial testimony in which he disavowed any knowledge of Bishop's intentions to rob the victim. We conclude, therefore, that the evidence was sufficient to sustain the defendant's convictions for felony murder and attempted aggravated robbery.

CONCLUSION

Based on the foregoing authorities and reasoning, we affirm the judgments of the trial court.

All Citations

Not Reported in S.W.3d, 2011 WL 5335285

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