IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

APPENDIX A: UNITED STATES COURT OF APPEALS DECISION.
Larry Reynolds v. Brian Eller, # 22-5972, (6th Cir. 05/12/2023)

No. 22-5972

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LARRY SCOTT REYNOLDS,

Petitioner-Appellant,

v.

BRIAN ELLER, Warden,

Respondent-Appellee.

ORDER

Before: SUHRHEINRICH, Circuit Judge.

Larry Scott Reynolds, a Tennessee prisoner proceeding through counsel, appeals the denial of his 28 U.S.C. § 2254 petition. He has filed an application for a certificate of appealability ("COA").

In March 2008, a grand jury returned an indictment charging Reynolds with first-degree premeditated murder for the killing of Melissa Atkin, his former girlfriend and the mother of his son. Reynolds proceeded to a jury trial and was convicted. The trial court sentenced Reynolds to life in prison. The state court of criminal appeals affirmed, and the state supreme court denied Reynolds's application for permission to appeal. *State v. Reynolds*, No. M2009-00185-CCA-R3-CD, 2010 WL 5343305, at *1 (Tenn. Crim. App. Dec. 16, 2010), *perm. app. denied* (Tenn. May 25, 2011). Reynolds unsuccessfully sought state post-conviction relief. *See Reynolds v. State*, No. M2012-01978-CCA-R3-PC, 2013 WL 1857112 (Tenn. Crim. App. May 1, 2013), *perm. app. denied* (Tenn. Oct. 17, 2013).

In May 2014, with the assistance of counsel, Reynolds filed his § 2254 petition, presenting three grounds for relief: (1) the trial court deprived him of his right to present a complete defense by excluding the testimony of Karla Teutsch, who he claimed was a legitimate suspect in the murder, (2) insufficient evidence, and (3) ineffective assistance of counsel. A magistrate judge

recommended that the district court deny Reynolds's petition. Reynolds received an extension of time to file objections based on his inability to contact his attorney. But he never filed any objections, so the district court adopted the magistrate judge's recommendation and denied the petition. Reynolds appealed, and this court denied his application for a COA, finding that he waived his claims by failing to object to the report and recommendation. *Reynold v. Crowell*, No. 19-5394 (6th Cir. Oct. 31, 2019).

Reynolds then filed a motion for relief from judgment, pursuant to Federal Rule of Civil Procedure 60(b), arguing that his failure to file objections was due to abandonment of counsel. The district court granted the motion and allowed Reynolds to file objections. Through new counsel, Reynolds filed objections only as to his claim that the exclusion of Teutsch's testimony deprived him of his rights to present a defense and to call witnesses on his own behalf. Over Reynolds's objections, the district court adopted the magistrate judge's report and recommendation and denied the petition. The court declined to issue a COA. Reynolds now appeals and asks this court for a COA to appeal the denial of his claim concerning Teutsch's testimony.

To obtain a COA, an applicant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the denial of a motion is based on the merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003). To satisfy this standard, a petitioner must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id.* at 327. When reviewing a district court's application of the standards of review of 28 U.S.C. § 2254(d) after a state has adjudicated a claim on the merits, this court asks whether reasonable jurists could debate whether the district court erred in concluding that the state-court adjudication neither (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"; nor (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); *see Miller-El*, 537 U.S. at 336.

Before trial, Reynolds sought to have Teutsch declared a material witness because she had been interviewed during the investigation as a potential suspect. Teutsch, posing as a man named "Kenny," had communicated with Atkin online via the social media platform MySpace not long before the murder. The court granted Reynolds's request but advised the parties that it would determine whether her testimony was relevant at a later time. The court allowed Reynolds to put on an offer of proof and held a hearing outside the presence of the jury. Teutsch, who lived in Shreveport, Louisiana, testified that she had created a fake account on MySpace using the name "Kenny" in an attempt to "talk to the girl that [her] boyfriend was cheating on [her] with." Teutsch's boyfriend lived in Charlotte, Tennessee. Teutsch testified that, as part of her ploy, she accumulated "friends" on her MySpace page so that her account would not appear to be a "hoax." She eventually became MySpace "friends" with Atkin and began communicating with her on the platform. The first communication involved Atkin's response to a questionnaire that "Kenny" had posted on his page. Most of the questions were benign, but some were darker: "Have you ever seen a corpse?" "What's your philosophy on life and death?" "If you could do anything with me and have no one know what would it be?" Defense counsel probed Teutsch about these questions and why she would ask them, but Teutsch explained that she did not create the questions; she had merely taken the questionnaire from someone else's MySpace page and posted it on her page, along with her own answers to the questions.

Teutsch testified that, in February 2008, Detective Ralph Mayercik contacted her through MySpace and asked that "Kenny" contact him. Teutsch responded to his message and explained that she was only posing as Kenny. She told Mayercik that she and Atkin had never met and that they "mainly exchanged recipes and [Atkin] vented about her ex-husband on a limited basis." She stated that Mayercik asked her if she was in Tennessee on the night of Atkin's murder and she responded that she was and that she had been in Tennessee every weekend that month visiting her boyfriend. Reynolds introduced into evidence the MySpace messages between Atkin and

"Kenny," Teutsch's cell phone records showing that her cell phone connected with a tower in Clarksville, Tennessee, on the night of the murder, and Teutsch's letter to Detective Mayercik explaining her MySpace communications with Atkin.

The trial court found the evidence not relevant and excluded it from trial. The court explained that there was no evidence of any animosity between Teutsch and Atkin that would give rise to a motive and that the defense had offered no proof that Teutsch had any opportunity or was in the location where the murder took place. The court further found that, even if relevant, the probative value of the evidence was "substantially outweighed by the danger of unfair prejudice, confusion of issues or misleading the jury or by a consideration of undue delay, waste of time or a needless presentation of cumulative evidence."

On appeal, the Tennessee Court of Criminal Appeals held that the exclusion of the Teutsch evidence did not violate Reynolds's constitutional right to present a complete defense. Citing *State v. Powers*, 101 S.W.3d 383, 394-95 (Tenn. 2003), the court acknowledged a defendant's right to present evidence implicating others in a crime and explained that the state rules of evidence are "adequate" to determine the admissibility of such evidence. *Reynolds*, 2010 WL 5343305, at *30. The court concluded that the trial court did not abuse its discretion in excluding the Teutsch evidence as not relevant and prejudicial under Tennessee Rules of Evidence 401 and 403 and thus there was no violation of Reynolds's constitutional rights. *Id.* at *31.

In his § 2254 petition, Reynolds argued that the Tennessee Court of Criminal Appeals "utilized a standard of review that was contrary to, or involved an unreasonable application of, clearly established federal law" as set forth in *Holmes v. South Carolina*, 547 U.S. 319 (2006), "and/or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented" at trial. The district court rejected both of Reynolds's arguments. In his COA application, Reynolds focuses on only the district court's conclusion that the state appellate court's ruling did not involve an unreasonable application of clearly established federal law. He contends that the state trial and appellate courts improperly applied a heightened relevancy

standard when determining the admissibility of the Teutsch evidence and that this resulted in an unreasonable application of *Holmes*.

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (citations omitted) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). This right "is not unlimited," however, as "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *United States v. Scheffer*, 523 U.S. 303, 308 (1998). The right to present a defense is compromised "by evidence rules that 'infring[e] upon a weighty interest of the accused' and are 'arbitrary or disproportionate to the purposes they are designed to serve.'" *Holmes*, 547 U.S. at 324 (alteration in original) (quoting *Scheffer*, 523 U.S. at 308). Trial judges are permitted "to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Id.* at 326. Additionally, judges may exclude evidence that is "repetitive [or] only marginally relevant." *Crane*, 476 U.S. at 689 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)).

In excluding the Teutsch evidence, the state court relied on well-established evidentiary rules and reasonably concluded that the evidence was not relevant and that, even if it were relevant, its probative value was substantially outweighed by the danger of unfair prejudice and the potential to confuse and mislead the jury. Contrary to Reynolds's argument, the state court did not apply a heightened standard of relevancy requiring "some direct connection between the crime and the potential third-party perpetrator." In fact, in *Powers*—the Tennessee Supreme Court case on which the state appellate court relied in assessing the admissibility of the Teutsch evidence—the court expressly rejected the "direct connection" test, finding that "such a standard imposes too high a threshold for the admissibility of evidence concerning third-party culpability." 101 S.W.3d at 395. Thus, here, as the *Powers* court instructed, the state courts considered the relevancy of the

Teutsch evidence and whether the evidence was excludable on grounds of unfair prejudice and confusion under state evidentiary rules. The Tennessee Court of Criminal Appeals reasoned,

> Teutsch clearly explained the reason she created the MySpace page, and her communications with the victim were benign. The two had never met and never agreed to meet. There was no indication that Teutsch, coincidentally visiting Tennessee the weekend of the murder, had any idea where the victim lived or had ever been to her house. Further, there was no indication that Teutsch had any animosity toward the victim or any motive for harming the victim or any opportunity to do so. The fact that Detective Mayercik had an alternative suspect named "Kenny," who he later determined was not the murderer, was presented to the jury. The trial court did not abuse its discretion when it determined that the further details about "Kenny," presented through Teutsch were not relevant to the victim's murder.

Reynolds, 2010 WL 5343305, at *31.

Reynolds maintains that the state court unreasonably applied *Holmes* in excluding the evidence. In *Holmes*, the South Carolina Supreme Court had upheld a trial court's exclusion of defense evidence of third-party guilt based on a rule that "'where there is strong evidence of [a defendant's] guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt' may (or perhaps must) be excluded." 547 U.S. at 329 (alteration in original) (quoting *State v. Holmes*, 605 S.E.3d 19, 24 (S.C. 2004)). The Supreme Court held that the exclusion of the third-party defense evidence violated Holmes's right to present a complete defense because it was based on an arbitrary rule that did not "rationally serve the end that [third-party guilt rules] were designed to promote, *i.e.*, to focus the trial on the central issues by excluding evidence that has only a very weak logical connection to the central issues." *Id.* at 330. The Court explained that South Carolina's rule was problematic because it focused on only the strength of the prosecution's case, which did not allow for any logical conclusion to be drawn about the third-party defense evidence. *Id.* at 330-31. Here, the state court did not exclude the Teutsch evidence based on the strength of the prosecution's case or based on some other arbitrary rule. Instead, the court applied Tennessee Rules of Evidence 401 and 403 and reasonably found that the Teutsch evidence was not relevant and that its admission would cause undue prejudice and

confuse and mislead the jury. No reasonable jurist could disagree with the district court's determination that the state appellate court's ruling was not an unreasonable application of *Holmes*.

For these reasons, Reynolds's application for a COA is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

APPENDIX B: UNITED STATES DISTRICT COURT DECISION.
Larry Reynolds v. Bert Boyd, # 3:14-CV-01249, (M.D.Tenn. 10/05/2022)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

LARRY SCOTT REYNOLDS,

Petitioner,

Civil Action No. 3:14-CV-01249

vs.

HON. BERNARD A. FRIEDMAN

BERT C. BOYD,

Respondent.
_____/

OPINION AND ORDER ACCEPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION AND DENYING PETITIONER'S APPLICATION FOR A WRIT OF HABEAS CORPUS

In this matter, petitioner has filed an application for a writ of habeas corpus. Magistrate Judge Alistair E. Newbern has submitted a Report and Recommendation ("R&R") in which she recommends that the Court deny the application.[1] (ECF No. 30). Petitioner has filed objections to the R&R (ECF No. 66) and defendant has filed a response in opposition to those objections. (ECF No. 69).

Pursuant to Fed. R. Civ. P. 72(b)(3), the Court shall review de novo any part of the R&R to which a proper objection has been made. A party may file "specific written objections to the proposed findings and recommendations" of a magistrate judge. Fed. R. Civ. P. 72(b)(2). Such

[1] On March 14, 2019, the Court accepted this very same R&R, which was issued by Magistrate Judge Newbern on September 28, 2018, and entered judgment in respondent's favor. (ECF Nos. 38, 39). However, defendant subsequently filed a motion for relief from judgment, asking that the Court set aside the 2019 opinion, order, and judgment, on the grounds that he had been abandoned by his attorney of record and therefore had been unable to file any objections to the 2018 R&R. (ECF No. 47). Magistrate Judge Newbern issued a R&R recommending that the Court grant petitioner's motion for relief from judgment. (ECF No. 56). In a January 20, 2022, opinion and order, this Court accepted that R&R and provided petitioner additional time to file any relevant objections to the 2018 R&R. (ECF No. 58). Now that petitioner has had the opportunity to file his objections, the Court shall reevaluate the 2018 R&R.

an objection "must: (A) specify the part of the order, proposed findings, recommendations, or report to which a person objects; and (B) state the basis for the objection." E.D. Mich. LR 72.1(d)(1). "Only those objections that are specific are entitled to a de novo review." Lee v. Money Gram Corp. Off., No. 15-CV-13474, 2017 WL 4161108, at *1 (E.D. Mich. Sept. 20, 2017).

I. Background

The magistrate judge summarized the history of this case and petitioner's habeas claims as follows:

> Reynolds was prosecuted for the murder of Melissa Atkins, who was Reynolds's former romantic partner and the mother of his child. State v. Reynolds, No. M2009-00185-CCA-R3-CD, 2010 WL 5343305, at *1 (Tenn. Crim. App. May 18, 2010) (Reynolds I); (Doc. No. 13-31, PageID# 3650-51). On March 5, 2008, Reynolds was indicted by the Rutherford County (Tennessee) grand jury on one count of first degree premeditated murder. (Doc. No. 13-1, PageID# 100.) After a seven-day trial, a jury found Reynolds guilty as charged and the Circuit Court of Rutherford County (the trial court) sentenced him to life in prison with the possibility of parole. (Doc. No. 13-6, PageID# 695-97.) . . . .
>
> . . . Reynolds filed a motion for a new trial, which the trial court denied. (Doc. No. 13-6, PageID# 715-24.) Reynolds then appealed the judgment of the trial court, arguing that (1) his Sixth Amendment right to present a complete defense was violated when the trial court prevented him from offering testimony from and about an alternative suspect named Karla Teutsch, who had previously been declared a material and necessary witness; (2) the trial court violated his right to an impartial jury by allowing jurors to ask questions; (3) the trial court admitted inadmissible hearsay despite the objection of trial counsel; (4) the trial court erred by failing to give the jury a curative instruction after the jury witnessed members of the victim's family weeping; and (5) the evidence was insufficient to support the jury's verdict. (Doc. No. 13-29, PageID# 3523-24.) The Tennessee Court of Criminal Appeals (TCCA) affirmed the trial court on December 16[,] 2010. Reynolds I, 2010 5343305, at *1. On May 25, 2011, the Tennessee Supreme Court denied Reynolds permission to appeal. (Doc. No. 13-34, PageID# 3753.)
>
> On February 17, 2012, Reynolds filed a petition for post-conviction relief in the Circuit Court of Rutherford County (the post-conviction trial court) raising several claims of ineffective

assistance of counsel. (Doc. No. 14-1, PageID# 3759-61.) After holding an evidentiary on Reynolds's claims, the post-conviction trial court found that Reynolds was not entitled to relief. (Id. at PageID# 3777.) Reynolds appealed that decision arguing that his trial lawyers were constitutionally ineffective because they failed to (1) adequately prepare for his trial; (2) call as a witness Reynolds's custody lawyer, Laurie Young; and (3) file a motion for the trial judge to recuse himself. (Doc. No. 14-4, PageID# 3911-12.) The TCCA affirmed the post-conviction trial court and the Tennessee Supreme Court again denied permission for further review. Reynolds v. State, No. M2012-01978-CCA-R3-PC, 2013 WL 1857112, at *1 (Tenn. Crim. App. May 1, 2013) (Reynolds II); (Doc. No. 14-6); (Doc. No. 14-9).

. . . Reynolds filed this petition on May 27, 2014. (Doc. No. 1, PageID# 17.) Respondent has answered the petition (Doc. No. 12) and filed the state court record. (Doc. Nos. 13, 14.) Reynolds filed a reply. (Doc. No. 22.)

* * *

Reynolds asserts he is entitled to relief on three grounds. First, he claims that the trial court "violated [his] Sixth Amendment right to present a complete defense by refusing testimony from and about an alternative suspect the trial court had already determined to be a material and necessary witness." (Doc. No. 1, PageID# 4.) Second, Reynolds argues that the evidence presented at trial was insufficient to support the jury's verdict. (Id. at PageID# 5.) Finally, Reynolds alleges that he "was denied the effective assistance of counsel at trial and on direct appeal" because trial counsel:

> 1) "failed to adequately conduct any meaningful pre-trial investigation;"
>
> 2) "failed to interview potential witnesses that would have been favorable to the defense;"
>
> 3) "failed to adequately communicate with [Reynolds] in preparation for trial;"
>
> 4) "failed to call, as a trial witness, the attorney who was representing [Reynolds] in certain child support issues" and who "had valuable information that would have supported [Reynolds];"
>
> 5) "failed to allow [Reynolds] to view the video recording of his statement to police prior to his testimony at trial" despite

> Reynolds's "repeated requests to view that evidence before deciding whether or not to testify;"
>
> 6) "never prepared, in any manner, [Reynolds] to testify at trial;"
>
> 7) "never allowed [Reynolds] to view video statements of witnesses that were available to him despite the request of [Reynolds];" and
>
> 8) "failed to file a motion for the [trial judge] to recuse [himself] [despite counsel's awareness] that the wife of the [t]rial [j]udge was a co-employee of members of the victim's family."
>
> (Id. at PageID# 9.)

(Id., PageID.4121-23, 4154-55) (footnotes omitted). Petitioner's objections, however, only challenge Magistrate Judge Newbern's findings and recommendations as to his claim regarding his right to present a complete defense pursuant to the Sixth Amendment of the United States Constitution. (ECF No. 66, PageID.4442-59). The Court shall therefore review de novo only that portion of the magistrate judge's R&R.

II. Standard of Review

As the Supreme Court has stated:

> The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) requires a prisoner who challenges (in a federal habeas court) a matter "adjudicated on the merits in State court" to show that the relevant state-court "decision" (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

Wilson v. Sellers, 138 S. Ct. 1188, 1191 (2018) (quoting § 2254(d)). A decision of a state court is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law," or if the state court "confronts facts that are

materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite" to that reached by the Supreme Court. Williams v. Taylor, 529 U.S. 362, 405 (2000) (O'Connor, J., concurring). An "unreasonable application" occurs when "a state-court decision unreasonably applies the law of [the Supreme Court] to the facts of a prisoner's case." Id. at 409.

Section 2254(d) "does not require a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits.'" Harrington v. Richter, 562 U.S. 86, 100 (2011). Further, it "does not require citation of [Supreme Court] cases–indeed, it does not even require awareness of [Supreme Court] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." Early v. Packer, 537 U.S. 3, 8 (2002) (emphasis in original). "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." Williams, 529 U.S. at 411.

"A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." Harrington, 562 U.S. at 101 (internal quotation marks omitted). The focus of this standard "is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable–a substantially higher threshold." Schriro v. Landrigan, 550 U.S. 465, 473 (2007). "AEDPA thus imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt." Renico v. Lett, 559 U.S. 766, 773 (2010) (internal quotation marks and citations omitted). In addition, factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary. See § 2254(e)(1); Miller-El v. Cockrell, 537 U.S. 322, 340 (2003). The federal habeas court's review is "limited to the record that was before the state court." Cullen v. Pinholster, 563

U.S. 170, 181 (2011).

"[D]etermining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning." Harrington, 562 U.S. at 98. When the state courts' decisions provide no rationale, the burden remains on the habeas petitioner to demonstrate "there was no reasonable basis for the state court to deny relief." Id. However, when a state court has explained its reasoning, that is, "[w]here there has been one reasoned state judgment rejecting a federal claim," federal courts should presume that "later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." Wilson, 138 S. Ct. at 1194. Accordingly, when the last state court to rule provides no basis for its ruling, "the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale." Id. The "look through" rule applies regardless of whether the last reasoned state court opinion based its ruling on procedural default or ruled on the merits. See id. at 1194-95.

III. Analysis

In her R&R, Magistrate Judge Newbern recommended that the Court reject petitioner's application for a writ of habeas corpus. She stated that "[v]iewed through AEDPA's deferential lens, the TCCA's rejection of Reynolds's claims was consistent with clearly established law and based on a reasonable determination of the facts in light of the evidence presented." (ECF No. 30, PageID.4159).

As to petitioner's Sixth Amendment complete defense claim specifically, Magistrate Judge Newbern correctly explained:

> **A. The Right to Present a Complete Defense**
> States have "broad latitude" to "establish rules excluding evidence from criminal trials." Holmes v. South Carolina, 547 U.S. 319, 324

(2006) (quoting United States v. Scheffer, 523 U.S. 303, 308 (1998)). "[W]ell established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." Holmes, 547 U.S. at 326 (internal citations omitted). The Supreme Court, "plainly referring to rules of [that] type," has made clear that the Constitution allows trial judges "to exclude evidence that is 'repetitive . . . , only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.'" Id. at 326-27 (quoting Crane v. Kentucky, 476 U.S. 683, 689-90).

Such exclusions may be found in rules that regulate "the admission of evidence proffered by criminal defendants to show that someone else committed the crime with which they are charged." Id. at 327. When the proffered evidence "does not sufficiently connect the other person to the crime," it may be excluded. Id. (quoting 40A Am. Jur. 2d, Homicide § 286, pp. 136-38 (1999)). Rules allowing exclusions of that nature "are widely accepted." Id.

However, the "broad latitude" that rulemakers enjoy must not usurp the rights of defendants: "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." Id. at 324 (quoting Crane, 476 U.S. at 690). That guarantee encompasses "[t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary," which is "a fundamental element of due process." Washington v. Texas, 388 U.S. 14, 18 (1967). Evidentiary rules that "infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve" violate the accused's right to present a complete defense. Holmes, 547 U.S. at 324 (internal quotations and alterations omitted). However, "[o]nly rarely" has the Supreme Court held "that the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence." Nevada v. Jackson, 569 U.S. 505, 509 (2013).

(ECF No. 30, PageID.4159-60).

The TCCA summarized and resolved Reynold's complete defense claim as follows:

The Defendant contends that the trial court violated his Sixth Amendment right to present a complete defense by refusing to allow him to present testimony from and about an alternative suspect, "Kenny," whom the trial court previously declared a material and necessary witness. The State counters that the trial court properly

applied the Tennessee Rules of Evidence when it excluded this evidence.

In an offer of proof about "Kenny," Karla Teutsch testified she lived in Shreveport, Louisiana, and she communicated with the victim through a MySpace page she created as a man named "Kenny" from Tennessee. Teutsch said she created a false account using the name "Kenny" and a photograph of a male in an attempt to talk to a girl with whom her boyfriend from Dickson, Tennessee, was having an affair. Teutsch added multiple people, including the victim, as "friends" of "Kenny" on the MySpace page to make the page look more realistic, rather than like a hoax website.

Teutsch said she did not, in reality, have her hunting license, but as "Kenny" she told the victim that she had been hunting. Also, the weekend that the victim was murdered, Teutsch was in Dickson, Tennessee, hunting with her boyfriend. She explained that she sat in the stand with him but did not have a gun.

After the victim's murder, Detective Mayercik contacted "Kenny" via MySpace and asked him to contact the police. Teutsch googled the detective and learned about the murder. She then emailed the detective and told him that she had created a false website under the name "Kenny" and gave him her phone number.

The trial court excluded this information as not relevant pursuant to Tennessee Rule of Evidence 401 and as misleading pursuant to Tennessee Rule of Evidence 403.

Exclusions of evidence may violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution even if the exclusions comply with rules of evidence. State v. Flood, 219 S.W.3d 307, 316-17 (Tenn. 2007). Principles of due process require that a defendant in a criminal trial have the right to present a defense and to offer testimony. See Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L.Ed.2d 297 (1973); State v. Brown, 29 S.W.3d 427, 431 (Tenn. 2000). In Washington v. Texas, 388 U.S. 14, 87 S. Ct. 1920, 18 L.Ed.2d 1019 (1967), the United States Supreme Court stated:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

388 U.S. at 19.

The right to offer testimony, however, is not absolute: "In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence . . . ." Chambers, 410 U.S. at 302. Rules of procedure and evidence are designed to assure fairness and reliability in the criminal trial process. Id. So long as the rules of procedure and evidence are not applied arbitrarily or disproportionately to defeat the purposes they are designed to serve, these rules do not violate a defendant's right to present a defense. Flood, 219 S.W.3d at 317 (citations omitted). Because "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials," Scheffer, 523 U.S. at 308, "[a]n evidentiary ruling ordinarily does not rise to the level of a constitutional violation," State v. Rice, 184 S.W.3d 646, 673 (Tenn. 2006).

It has long been recognized by the courts of this state that an accused is entitled to present evidence implicating others in the crime. State v. Powers, 101 S.W.3d 383, 394 (Tenn. 2003) (citing Sawyers v. State, 83 Tenn. (15 Lea) 694, 695 (1885)). The Powers court instructed that the Rules of Evidence are adequate to determine whether such evidence is admissible. Id. In Tennessee, the determination of whether proffered evidence is relevant in accordance with Tennessee Rule of Evidence 402 is left to the sound discretion of the trial judge, as is the determination of whether the probative value of evidence is substantially outweighed by the possibility of prejudice pursuant to Tennessee Rule of Evidence 403. State v. Kennedy, 7 S.W.3d 58, 68 (Tenn. Crim. App. 1999) (citing State v. Forbes, 918 S.W.2d 431, 449 (Tenn. Crim. App. 1995); State v. Burlison, 868 S.W.2d 713, 720-21 (Tenn. Crim. App. 1993)). In making these decisions, the trial court must consider the questions of fact that the jury will have to consider in determining the accused's guilt as well as other evidence that has been introduced during the course of the trial. State v. Williamson, 919 S.W.2d 69, 78 (Tenn. Crim. App. 1995). We will only disturb an evidentiary ruling on appeal when it appears that the trial court arbitrarily exercised its discretion. State v. Baker, 785 S.W.2d 132, 134 (Tenn. Crim. App. 1989).

Initial questions of admissibility of evidence are governed by Tennessee Rules of Evidence 401 and 403. These rules require that the trial court must first determine whether the proffered evidence is relevant. Pursuant to Rule 401, evidence is deemed relevant if it has "'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." See Forbes, 918 S.W.2d at 449 (quoting Tenn. R. Evid. 401). In other words, "evidence is relevant if it helps the trier of fact resolve an issue of fact." Neil P. Cohen, et al., Tennessee Law of Evidence § 4.01[4], at

4-8 (4th ed. 2000). After the trial court finds that the proffered evidence is relevant, it then weighs the probative value of that evidence against the risk that the evidence will unfairly prejudice the trial. State v. James, 81 S.W.3d 751, 757 (Tenn. 2002). If the court finds that the probative value is substantially outweighed by its prejudicial effect, the evidence may be excluded. Tenn. R. Evid. 403. "'[E]xcluding relevant evidence under [Tenn. R. Evid. 403] is an extraordinary remedy that should be used sparingly and persons seeking to exclude otherwise admissible and relevant evidence have a significant burden of persuasion." James, 81 S.W.3d at 757-58 (quoting White v. Vanderbilt Univ., 21 S.W.3d 215, 227 (Tenn. Ct. App. 1999) (citations omitted)).

A defendant is entitled to present evidence implicating another in the crime only if the evidence is relevant under Tennessee Rule of Evidence 401 and the evidence is not unfairly prejudicial as provided by Rule 403. Id. In a criminal case, evidence that a third party had the motive and opportunity to commit the offense certainly would be relevant. Powers, at 395. Even if the evidence meets the test of relevance, however, Tennessee Rule of Evidence 403 may still justify exclusion of such evidence. Under Rule 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The evidence to establish that someone other than the defendant is the guilty party must be such evidence as would be relevant on the trial of the third party; and the evidence offered by the accused as to the commission of the crime by a third party must be limited to such facts as are inconsistent with the defendant's guilt, and to such facts as raise a reasonable inference or presumption as to the defendant's innocence. Hensley v. State, 28 Tenn. 243 (1848). To be admissible, the evidence must be such proof that directly connects the third party with the substance of the crime, and tends to clearly point out someone besides the accused as the guilty person. State v. Algeron Cross, No. M2004-01930-CCA-R3CD, 2005 WL 1252631, at *9 (Tenn. Crim. App., at Nashville, May 25, 2005), perm. app. denied (Tenn. Dec. 5, 2005). Evidence which can have no other effect than to cast a bare suspicion on another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible. Id. (citing 22A C.J.S. Criminal Law § 729 (1989)).

In the case under submission, we conclude that the trial court did not abuse its discretion when it determined that the evidence that Teutsch communicated with the victim via a hoax MySpace page and was in Dickson on the weekend of the victim's murder was not relevant. Teutsch clearly explained the reason she created the

> MySpace page, and her communications with the victim were benign. The two had never met and never agreed to meet. There was no indication that Teutsch, coincidentally visiting Tennessee the weekend of the murder, had any idea where the victim lived or had ever been to her house. Further, there was no indication that Teutsch had any animosity toward the victim or any motive for harming the victim or any opportunity to do so. The fact that Detective Mayercik had an alternative suspect named "Kenny," who he later determined was not the murderer, was presented to the jury. The trial court did not abuse its discretion when it determined that the further details about "Kenny," presented through Teutsch were not relevant to the victim's murder. The Defendant is not entitled to relief on this issue.

State v. Reynolds, No. M2009-00185-CCA-R3-CD, 2010 WL 53433305, at *28-31 (Tenn. Crim. App. Dec. 16, 2010); see also ECF No. 30, PageID.4161-64 (quoting the same).

In the instant habeas application, petitioner argues that by excluding Teutsch's testimony, "[t]he trial court violated [his] Sixth Amendment right to present a complete defense." (ECF No. 1, PageID.5). Petitioner primarily relies on two cases in support of this argument: Holmes v. South Carolina, 547 U.S. 319 (2006), and Washington v. Texas, 388 U.S. 14 (1967). (ECF No. 22, PageID.4077).

In Holmes, the petitioner "sought to introduce evidence that another man, Jimmy McCaw White, had been in the victim's neighborhood on the morning of the assault and that White had either acknowledged petitioner's innocence or admitted to committing the crimes himself." Holmes, 547 U.S. at 319. The South Carolina Supreme Court upheld the trial court's exclusion of this evidence under the rule that "where there is strong evidence of [a defendant's] guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt may (or perhaps must) be excluded." Id. at 329 (internal quotation marks omitted). The Supreme Court, however, held that "the rule applied by the State Supreme Court [did] not rationally serve the end that [it was] . . . designed to promote, i.e., to focus the trial on the central issues by excluding evidence

that has only a very weak logical connection to the central issues." Id. at 330. The Court explained: "[B]y evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." Id. at 331. The Supreme Court therefore concluded that the South Carolina evidentiary rule applied in Holmes denied the petitioner a fair trial.

In Washington, the Supreme Court addressed a Texas procedural statute "providing that persons charged as principals, accomplices, or accessories in the same crime cannot be introduced as witnesses for each other." Washington, 388 U.S. at 15. The excluded testimony at issue was that of Charles Fuller – a co-participant in the alleged murder – who "would have testified that petitioner pulled at him and tried to persuade him to leave, and that petitioner ran before Fuller fired the fatal shot." Id. at 16. The Supreme Court held that the Texas procedural statute violated the petitioner's Sixth Amendment right to present a complete defense because it "arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense." Id. at 23.

In the present case, Magistrate Judge Newbern concluded that "the TCCA's rejection of Reynolds's complete defense claim was not an objectively unreasonable application of either Holmes[,] Washington," or any other clearly established federal law. (ECF No. 30, PageID.4168). Having reviewed petitioner's application and objections, this Court concludes the same.

In his objections, petitioner largely repeats and amplifies the arguments raised in his application – namely, that the trial court violated his Sixth Amendment right to present a complete

defense[2] because its decision to exclude Teutsch's testimony contravened the Supreme Court's decisions in Holmes and Washington. (ECF No. 66, PageID.4448, 4453). Citing no relevant case law in support of his argument, he contends that the magistrate judge and Tennessee courts misinterpreted and misapplied the holdings of these two cases. (Id., PageID.4453). He asserts that defendants possess an unqualified right to present a third-party defense, and that any restriction on this right constitutes reversible error. (Id., PageID.4445).[3] Petitioner's strongest arguments are

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[2] In his objections, petitioner separately argues that the trial court also violated his right to present witnesses on his own behalf. (ECF No. 66, PageID.4457). The right "to offer the testimony of witnesses, and to compel their attendance, if necessary," is contained within the Sixth Amendment right to present a complete defense. Washington, 388 U.S. at 19. Further, petitioner's arguments regarding his right to present witnesses and his right to present a complete defense are grounded, at least in part, in the same legal argument – namely, that the exclusion of Teutsch's testimony violated the Supreme Court's holding in Washington. (ECF No. 66, PageID.4459). Finally, as respondent notes, petitioner's habeas application fails to raise any claim regarding his right to present witnesses distinct from his complete defense claim. (ECF No. 69, PageID.4474). For these reasons, the Court shall only address petitioner's complete defense arguments and objections, although the same analysis does apply to his arguments regarding his right to present witnesses.

[3] The two out-of-circuit cases that petitioner cites in support of this argument are easily distinguishable from the present case. In Scrimo v. Lee, 935 F.3d 103, 120 (2d Cir. 2019), the Second Circuit explained:

> In circumstances in which . . . the marginal evidence pointing to the defendant over another person is flimsy, and the excluded evidence was the only independent source of facts essential to proving the defense's theory that the other person committed the crime, we must conclude that the wrongfully excluded testimony would have introduced reasonable doubt where none otherwise existed.

The court concluded that under such circumstances, the exclusion of third-party defense testimony would violate a defendant's right to present a complete defense. See id. In contrast, here, the evidence pointing to the defendant over Teutsch (or "Kenny") was not "flimsy." While defendant possessed motive and opportunity to murder the victim, Teutsch possessed neither, had engaged in only a few benign online communications with the victim, and did not know where the victim lived. Reynolds, 2010 WL 5343305, at *28-31.

In State v. Hannah, 256 A.3d 1035, 1039 (N.J. 2021), the defendant was accused of the murder of two drug dealers. The Supreme Court of New Jersey concluded that Hannah's right to

drawn from a law review article on the "Direct Connection Doctrine." He refers to this doctrine as an "erroneous methodology," while admitting that "most jurisdictions adhere to" it. (Id., PageID.4446). This doctrine, petitioner argues, asks "'what the evidence proves' when courts should 'instead be asking merely the two basic relevancy questions: whether the evidence (a) is believable in itself and (b) slightly increases the marginal probability that a third party committed the crime.'" (Id., PageID.4447-48) (quoting David S. Schwartz & Chelsey Metcalf, Disfavored Treatment of Third-Party Guilt Evidence, 2016 WISC. L. REV. 337, 384 (2016)). Essentially, petitioner contends that the relevancy standard imposed by the state courts and the magistrate judge was unconstitutionally high and therefore arbitrarily excluded (or affirmed the exclusion of) his third-party defense in violation of the Sixth Amendment. (Id., PageID.4453). He adds that the trial court failed to explain why Teutsch's testimony was excludable under Rule of Evidence 403. (Id., PageID.4454).

While petitioner raises a potentially intriguing academic theory regarding the

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present a complete defense had been violated by the exclusion of his third-party defense when the state's case suffered from various weaknesses and the evidence against the third-party, another drug dealer named Thomas, was substantial. Some of the excluded evidence included, for example, that "Thomas's pager number was on a piece of paper in [one of the victim's] pocket when [he] was killed," "Thomas plotted to 'set up' Hannah and to have him 'take the weight' for one of the murders 'to get him off his back,'" and "Thomas was later distributing the same brand of heroin taken from the drug dealers on the night of their murders." Id. at 1058. In contrast, here, the only evidence implicating Teutsch was that she was "friends" with the victim on MySpace, had occasionally communicated with her online, and happened to be visiting her boyfriend in Tennessee on the weekend of the murder. Reynolds, 2010 WL 5343305, at *28-31. The paltry evidence against Teutsch is easily distinguishable from the evidence excluded in Hannah.

Moreover, neither Scrimo nor Hannah support the categorical statement asserted by petitioner that "the restriction of a defendant's ability to use a third-party defense at trial is reversible error of Constitutional magnitude that warrants relief in the form of a new trial." (ECF No. 66, PageID.4445). Rather, in both cases the courts based their decisions upon the nature of the evidence presented and the analysis conducted by the lower courts.

relevancy standard under Rule of Evidence 401, it is immaterial to the question before this Court. As stated above, under AEDPA, a habeas court must determine whether "the relevant state-court decision (1) was contrary to, or involved an unreasonable application of, clearly established Federal law, or (2) was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Wilson, 138 S. Ct. at 1191 (internal quotation marks omitted). Simply because Teutsch's testimony could have been deemed admissible does not make all other outcomes unreasonable and therefore unconstitutional. Moreover, in petitioner's own words, "most jurisdictions" apply the same standard applied by the Tennessee courts and magistrate judge in this case. (ECF No. 66, PageID.4446). That acknowledgment belies the notion that the state trial court's evidentiary determination was "contrary to, or involved an unreasonable application of, clearly established Federal law."

It was perfectly reasonable for the trial court to exclude evidence regarding a former potential suspect who was deemed to possess no knowledge of where the victim lived, no animosity toward the victim, no motive for harming the victim, no opportunity to harm the victim, and clear explanations regarding the hoax MySpace page and her reason for visiting Tennessee the weekend of the murder. See Reynolds, 2010 WL 53433305, at *31. Further, the state courts' analysis was not in conflict with the Supreme Court's holdings in either Holmes or Washington, as petitioner argues in his application and his objections. The state courts did not exclude Teutsch's testimony solely due to the strength of the prosecution's evidence against petitioner, as was the case in Holmes; nor did they reject it based upon a state rule barring otherwise relevant and material testimony due to the nature of the witness, as was the case in Washington. Rather, applying Tennessee Rules of Evidence 401 and 403, which essentially mirror the corresponding Federal Rules of Evidence, the Tennessee courts carefully weighed Teutsch's testimony and concluded that it did not sufficiently or logically

connect her to the crime or central issues of this case and therefore posed a greater risk of confusing or misleading the jury than helping them decide where the truth lay. It is widely accepted that when, as here, the proffered evidence "does not sufficiently connect the other person to the crime, as, for example, where the evidence is speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant's trial," such evidence may be excluded. Holmes, 547 U.S. at 327.

The facts of this case are also materially distinguishable from those in Holmes and Washington. In those cases, the state courts excluded evidence that was indisputably exculpatory. Here, the evidence only loosely tied Teutsch to the victim and did not tie her to the crime at all. Although third-party defense evidence need not be indisputably exculpatory to be deemed relevant, the compelling nature of the evidence in Holmes and Washington bolstered the Supreme Court's determination that the exclusion of that evidence was unconstitutionally arbitrary and certainly distinguishes those two cases from the facts underlying petitioner's claim.

IV. Conclusions

Given the state courts' detailed analysis of the relevant law and facts, as well as the nature of the testimony at issue in this case, the decision to exclude Teutsch's testimony was neither contrary to clearly established federal law, nor was it based on an unreasonable determination of the facts in light of the evidence presented. The Court concludes that petitioner's complete defense claim cannot overcome AEDPA's highly deferential standard and does not warrant the requested relief.

As to petitioner's remaining claims – i.e., insufficient evidence and ineffective assistance of counsel – the Court need not conduct de novo review, as petitioner has not filed specific written objections to the magistrate judge's proposed findings and recommendations regarding those claims. The Court has independently reviewed the relevant portions of the R&R and pertinent underlying documents and finds no error in Magistrate Judge Newbern's September 28, 2018 R&R.

As the Court previously stated, her "exhaustive recitation of the facts and . . . careful analysis of petitioner's claims are thorough and correct." (ECF No. 38). Accordingly,

IT IS ORDERED that petitioner's objections (ECF No. 66) to Magistrate Judge Newbern's R&R are overruled.

IT IS FURTHER ORDERED that Magistrate Judge Newbern's September 28, 2018, R&R (ECF No. 30) is hereby accepted and adopted as the findings and conclusions of the Court.

IT IS FURTHER ORDERED that petitioner's application for a writ of habeas corpus is denied.

s/Bernard A. Friedman
BERNARD A. FRIEDMAN
SENIOR UNITED STATES DISTRICT JUDGE
SITTING BY SPECIAL DESIGNATION

Dated: October 5, 2022
Detroit, Michigan

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

LARRY SCOTT REYNOLDS, Petitioner, v. BERT C. BOYD, Respondent.	Case No. 3:14-cv-01249 Visiting Judge Bernard A. Friedman Magistrate Judge Alistair E. Newbern

To: The Honorable Bernard A. Friedman, Visiting District Judge

REPORT AND RECOMMENDATION

On March 14, 2019, the Court adopted the Magistrate Judge's report and recommendation and denied Petitioner Larry Scott Reynolds's petition for the writ of habeas corpus. (Doc. No. 38.) Reynolds filed a notice of appeal (Doc. No. 40), which the Court and the Sixth Circuit construed as an application for a certificate of appealability and denied (Doc. Nos. 42, 46). Reynolds has now filed a motion for relief from judgment under Federal Rule of Civil Procedure 60(b) (Doc. No. 47) which is opposed by Respondent Bert C. Boyd (Doc. No. 48). For the reasons that follow, the Magistrate Judge will recommend that Reynolds's motion for relief from judgment be granted.

I. Factual and Procedural Background

Reynolds is currently serving a sentence of life in prison with the possibility of parole based on his July 3, 2008 conviction by a Rutherford County, Tennessee jury of first-degree premeditated murder. (Doc. No. 13-6.) Reynolds, represented by attorney Andrew N. Hall, filed a petition for the writ of habeas corpus under 28 U.S.C. § 2254, alleging that that he was entitled to relief on grounds that (1) "the trial court violated [his] Sixth Amendment right to present a complete defense by refusing testimony from and about an alternative suspect . . . ;" (2) the evidence presented at

trial was insufficient to support the jury's verdict; and (3) "he was denied the effective assistance of counsel at trial and on direct appeal . . . ." (Doc. No. 1, PageID# 4, 5, 9.) The Magistrate Judge considered the merits of Reynolds's claims and recommended that his petition be denied on September 28, 2018. (Doc. No. 30.) The report and recommendation stated that Reynolds could file written objections within fourteen days of being served with the report and recommendation and that failure to object within that deadline could "constitute a waiver of further appeal of the matters decided." (*Id.* at PageID# 4197.)

Reynolds sent a letter to the Court dated October 1, 2018, requesting a copy of the docket, which was mailed to him on October 15, 2018. (Doc. No. 32.) On October 26, 2018,[1] Reynolds filed a pro se motion to extend the time to file objections, stating that he had lost contact with his attorney and had not known that the report and recommendation had been entered until he received the requested copy of the docket on October 19, 2018. (Doc. No. 33.) Reynolds obtained a copy of the report and recommendation on Westlaw through the prison library and "immediately tried to reach his attorney that day, but was unable to contact him" and "had family members attempt contact as well. All to no avail." (*Id.* at PageID# 4280, ¶¶ 5–6.) "[Reynolds] and his family continued to try to reach his counsel to consult with him and to make sure that written objections had been filed over a number of issues [Reynolds] identified in the R&R. Again, all attempts at communicating with counsel met with no success." (*Id.* at ¶ 8) Reynolds requested an extension of "time to determine who will file his written objections to the [report and recommendation], either his attorney of record, substitute counsel, or [Reynolds, acting] pro se." (*Id.* at PageID# 4281, ¶ 13.)

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[1] The filing dates reflect the date on which Reynolds delivered his motions to the prison mail system for mailing to the Court. *See Miller v. Collins*, 305 F.3d 491, 497–98 (6th Cir. 2002) (citing *Houston v. Lack*, 487 U.S. 266 (1988)).

The Court granted Reynolds's motion and extended the deadline for filing objections to November 26, 2018. (Doc. No. 34.) Reynolds moved for another extension of time on November 24, 2018, stating that he had "still been unable to contact his attorney about the objections" and planned to file them himself. (Doc. No. 35, PageID# 4290, ¶ 14.) Reynolds filed a third extension request on December 10, 2018, stating that he "believes that his objections are substantially complete, but require some additional work" and requesting "a final extension of time of fourteen additional days to finalize and file his objections." (Doc. No. 36, PageID# 4294, ¶ 2.) The Court granted Reynolds's motions and extended the deadline to file objections to the report and recommendation to December 31, 2018. (Doc. No. 37.) Reynolds did not file any objections by that date, and the Court accepted and adopted the Magistrate Judge's report and recommendation, denied Reynolds's petition, and entered final judgment on March 14, 2019. (Doc. Nos. 38, 39.)

Reynolds filed a notice of appeal (Doc. No. 40), which the Court construed as an application for a certificate of appealability and denied (Doc. No. 42). The Sixth Circuit also construed Reynolds's notice as an application for a certificate of appealability and denied it, noting that Reynolds had waived further review of his claims by failing to object to the Magistrate Judge's report and recommendation. (Doc. No. 46.) Reynolds then filed the present motion for relief from judgment under Federal Rule of Civil Procedure 60(b)(1), (3), and (6).[2] (Doc. No. 47.)

Reynolds argues that he is entitled to relief under Rule 60(b) because Hall "failed to file the numerous objections to the Report and Recommendation, and abandoned [Reynolds] without

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[2] Reynolds's application for a certificate of appealability is no longer pending before the Sixth Circuit and jurisdiction has returned to the district court. This Court may therefore consider Reynolds's Rule 60(b) motion. *See Standard Oil Co. v. United States*, 429 U.S. 17, 18 (1976) (recognizing that "the trial court 'is in a much better position to pass upon the issues presented in a motion pursuant to Rule 60(b)'" and "to recognize frivolous Rule 60(b) motions" (quoting *Wilkin v. Sunbeam Corp.*, 405 F.2d 165, 166 (10th Cir. 1968)).

cause, notice, or reason." (*Id.* at PageID# 4336–37.) Reynolds explains that he did not learn that the Magistrate Judge had entered a report and recommendation on his petition until he received a copy of the docket on October 19, 2018, after the fourteen-day period for objections had passed. (Doc. No. 53.) At that time, Reynolds and members of his family believed that Hall was still acting as Reynolds's attorney, as was reflected in the Court's docket, and they attempted to contact Hall by telephone, text message, mail, email, and by visiting Hall's office in person from October to December 2018, but were unable to make contact with him. (*Id.*) Reynolds argues that Hall's actions constitute attorney fraud or abandonment, which warrant relief under Rules 60(b)(1), (3), and (6). (*Id.*) Reynolds asks the Court "to set aside the judgment in this case and permit [Reynolds] to submit his Objections to the Magistrate [Judge's report and recommendation]."[3] (*Id.* at PageID# 4390.)

Boyd opposes Reynolds's motion and argues that Reynolds is not entitled to relief under Rule 60(b) because Reynolds "suspected [that] counsel was no longer working on his case" and obtained extensions of time by filing pro se motions. (Doc. No. 48, PageID# 4345.) Boyd argues that Reynolds's failure to file objections to the report and recommendation on his own behalf shows "an acquiescence to the Magistrate Judge's recommendation" rather than "unforeseen abandonment by counsel . . . ." (*Id.* at PageID# 4346.) Boyd also argues that Reynolds is not prejudiced by any loss of an opportunity to object to the report and recommendation because "each

[3] Reynolds filed a motion for relief from judgment and for leave to file a supporting memorandum of law (Doc. No. 47). Boyd responded in opposition to Reynolds's motion (Doc. No. 48) before the Court considered Reynolds's motion for leave to file additional briefing. The Court granted Reynolds leave to file a memorandum and afforded Boyd twenty-eight days to file any supplemental response (Doc. No. 49). Reynolds filed a supporting memorandum (Doc. No. 53). Boyd did not make any other filings.

of [his] claims was properly denied by this court" and Reynolds has not shown that special circumstances warrant relief from judgment. (*Id.* at PageID# 4347.)

II. Legal Standard

Federal Rule of Civil Procedure 60(b) provides in relevant part that "[o]n motion and just terms, the court may relieve a party . . . from a final judgment, order, or proceeding for . . . (1) mistake, inadvertence, surprise, or excusable neglect; . . . (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; . . . or (6) any other reason that justifies relief." Fed. R. Civ. P. 60(b)(1), (3), (6). Rule 60(b) applies in a federal habeas corpus action under 28 U.S.C. § 2254 as long as "'[it is] not inconsistent with' applicable federal statutory provisions and rules." *Gonzalez v. Crosby*, 545 U.S. 524, 529 (2005) (alteration in original) (citation omitted). "[T]he party seeking relief under Rule 60(b) bears the burden of establishing the grounds for such relief by clear and convincing evidence." *Info-Hold, Inc. v. Sound Merch., Inc.*, 538 F.3d 448, 454 (6th Cir. 2008).

III. Analysis

When a Rule 60(b) motion is filed in response to the denial of an application for habeas relief, the district court must first determine whether the petitioner is properly seeking relief under Rule 60(b) or is instead seeking relief that can only be provided through a petition for habeas corpus. *Tyler v. Anderson*, 749 F.3d 499, 506 (6th Cir. 2014) (citing *Gonzalez*, 545 U.S. at 531–32). The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) limits the circumstances under which an incarcerated person may file a second or successive application for habeas relief and requires that the applicant first "move in the appropriate court of appeals for an order authorizing the district court to consider" a second or successive habeas petition. 28 U.S.C. § 2244(b)(3)(A). "A motion under Rule 60(b) may be treated as a second or successive habeas petition" "if it asserts a 'federal basis for relief from the state court's judgment of conviction,' by

'seek[ing] to add a new ground for relief' or 'attack[ing] the federal court's previous resolution of a claim *on the merits*.'" *Tyler*, 749 F.3d at 506–07 (alterations in original) (quoting *Gonzalez*, 545 U.S. at 530, 532). A Rule 60(b) motion "is not . . . a successive habeas petition if it does not assert, or reassert, claims of error in the movant's state conviction." *Gonzalez*, 545 U.S. at 538.

Reynolds does not assert new grounds for relief under § 2254 or identify errors in how the Court analyzed the merits of his habeas petition. Instead, he asserts that his lawyer abandoned him and did not file objections to the Magistrate Judge's report and recommendation as Reynolds wanted him to do and that this circumstance warrants reopening the judgment to allow Reynolds to file his objections pro se. The motion is not a second or successive petition for habeas relief and is properly brought under Rule 60(b).

A. Federal Rule of Civil Procedure 60(b)(1)

The Sixth Circuit has held that "Rule 60(b)(1) should be applied 'equitably and liberally . . . to achieve substantial justice.'" *Williams v. Meyer*, 346 F.3d 607, 613 (6th Cir. 2003) (alteration in original) (quoting *United Coin Meter v. Seaboard Coastline R.R.*, 705 F.2d 839, 844–45 (6th Cir. 1983)). Courts consider three factors to determine if relief is warranted under Rule 60(b)(1): "(1) whether the party seeking relief is culpable; (2) whether the party opposing relief will be prejudiced; and (3) whether the party seeking relief has a meritorious claim or defense." *Id.* (citing *United Coin Meter*, 705 F.2d at 845). The language of Rule 60(b)(1) "mandates" that a party demonstrate his lack of culpability through a showing of "mistake, inadvertence, surprise, or excusable neglect." *Id.* (quoting *Waifersong, Ltd. v. Classic Music Vending*, 976 F.2d 290, 292 (6th Cir. 1992)). Only after a movant has shown that he was not culpable "will [he] be permitted to demonstrate that he also can satisfy the other two factors: the existence of a meritorious defense and the absence of substantial prejudice to the [other party] should relief be granted." *Waifersong, Ltd.*, 976 F.2d at 292.

Reynolds argues that his failure to file objections was the result of attorney abandonment and therefore constitutes excusable neglect. (Doc. No. 53.) This Court has held that "Rule 60(b)(1) cannot serve as a basis for relief" when "[t]here is no indication that [the movant's] counsel committed a mere mistake or that his failures . . . arose from inadvertence" and therefore "do[ ] not qualify as *excusable* neglect." *Gregson v. Metro. Life Ins. Co.*, No. 3:13-cv-00678, 2018 WL 3655388, at *3 (M.D. Tenn. Aug. 2, 2018) (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 398–99 (1993)). In such cases—where the alleged neglect exceeds what can be termed a mere mistake—it is more appropriate to determine whether the attorney's conduct is "'sufficiently egregious to warrant relief under Rule 60(b)(6).'" *Id.* at *4 (quoting *Doyle v. Mut. of Omaha Ins. Co.*, 504 F. App'x 380, 383 (6th Cir. 2012)). For that reason, Rule 60(b)(1) does not provide a basis for relief here.

B. Federal Rule of Civil Procedure 60(b)(3)

A party seeking relief from judgment under Rule 60(b)(3) must demonstrate "fraud . . . , misrepresentation, or misconduct by an opposing party[.]" Fed. R. Civ. P. 60(b)(3). The Sixth Circuit has held that, for the purpose of motions under Rule 60(b)(3), "[f]raud is the knowing misrepresentation of a material fact, or concealment of the same when there is a duty to disclose, done to induce another to act to his or her detriment." *Info-Hold, Inc.*, 538 F.3d at 456.

Reynolds argues that relief is warranted under Rule 60(b)(3) because "he was the victim of intrinsic fraud by his Counsel . . . ." (Doc. No. 53, PageID# 4363.) However, relief is only available under Rule 60(b)(3) when fraud, misrepresentation, or misconduct has been perpetrated by an opposing party, not by the movant's own counsel. *See, e.g.*, *Varden v. Danek Med., Inc.*, 58 F. App'x 137, 139 (6th Cir. 2003) (affirming district court's denial of Rule 60(b)(3) motion and noting that relief under Rule 60(b)(3) is not available to party alleging "fraud, misrepresentation, or other misconduct on the part of his attorneys" "because his attorneys were not adverse parties

to the action"); *Marbly v. Rubin*, No. 98-2039, 1999 WL 775904, at *2 (6th Cir. Sept. 24, 1999) (noting that Rule 60(b)(3) "is applied in cases of misconduct by an *adverse* party"). Because Reynolds has not alleged that he was the victim of fraud, misrepresentation, or misconduct by an opposing party, he is not entitled to relief under Rule 60(b)(3).

C. Federal Rule of Civil Procedure 60(b)(6)

Rule 60(b)(6) "is a 'catchall provision' providing relief from a final judgment for any reason not otherwise captured in Rule 60(b)." *Miller v. Mays*, 879 F.3d 691, 698 (6th Cir. 2018) (quoting *West v. Carpenter*, 790 F.3d 693, 696 (6th Cir. 2015)). When deciding a Rule 60(b)(6) motion, "the district court 'intensively balance[s] numerous factors, including the competing policies of the finality of judgments and the incessant command of the court's conscience that justice be done in light of all the facts.'" *Id.* (alteration in original) (quoting *West*, 790 F.3d at 697). "These factors can include 'the risk of injustice to the parties' as well as 'the risk of undermining the public's confidence in the judicial process.'" *Id.* (quoting *Buck v. Davis*, 137 S. Ct. 759, 778 (2017)). A district court's discretion to grant a motion under Rule 60(b)(6) "is 'especially broad' given the underlying equitable principles involved." *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 294 (6th Cir. 1989) (quoting *In re Emergency Beacon Corp.*, 666 F.2d 754, 760 (2d Cir. 1981)).

"Courts . . . must apply subsection (b)(6) only as a means to achieve substantial justice when something more than one of the grounds contained in Rule 60(b)'s first five clauses is present." *Ford Motor Co. v. Mustangs Unlimited, Inc.*, 487 F.3d 465, 468 (6th Cir. 2007) (alteration in original) (quoting *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990)). "The 'something more' . . . must include unusual and extreme situations where principles of equity *mandate* relief." *Id.* (alteration in original) (quoting *Olle*, 910 F.2d at 365). "[S]uch circumstances

'rarely occur' in the *habeas* context." *Miller*, 879 F.3d at 698 (quoting *Sheppard v. Robinson*, 807 F.3d 815, 820 (6th Cir. 2015)).

Here, however, Reynolds's abandonment by counsel is the kind of egregious conduct that warrants relief under Rule 60(b)(6). Although parties are generally bound by the acts of their chosen counsel, a movant may demonstrate that extraordinary circumstances warranting Rule 60(b)(6) relief exist where his lawyer's failures are "so egregious and profound that they amount to the abandonment of the client's case altogether, either through physical disappearance . . . or constructive disappearance . . . ." *Harris v. United States*, 367 F.3d 74, 81 (2d Cir. 2004) (internal citations omitted). Reynolds has made that showing here.

The docket reflects that Hall has not taken any action in this case since filing a reply in support of Reynolds's habeas petition on January 5, 2015. (Doc. No. 22.) Reynolds has shown by the unrebutted affidavit of his sister, Patricia A. Lee, that Hall charged Reynolds and Lee five thousand dollars to represent Reynolds "for the entire course of the case[,]" but stopped responding to their communications while Reynolds's petition was still pending, despite Reynolds's and Lee's extensive efforts to contact him by telephone, text message, email, and in person at Hall's office. (Doc. No. 53, PageID# 4394, ¶ 6.) Hall did not file objections to the report and recommendation on Reynolds's behalf, even though Reynolds and Lee "sent Mr. Hall a written response and objection to the Magistrate's report and told Mr. Hall that [they] would assume he would review it and modify it and submit it to the Court, since he was fully paid and [ ] still listed on the Court records as [Reynolds's] attorney." (*Id.* at PageID# 4395, ¶ 15.) This Court has found that this type of "'gross neglect and abandonment by counsel is qualitatively different than mere inadvertence or mistake' . . . and amounts to 'extraordinary circumstances' warranting relief under

Rule 60(b)(6)." *Gregson*, 2018 WL 3655388, at *4 (quoting *Reno v. Int'l Harvester Co.*, 115 F.R.D. 6, 8 (S.D. Ohio 1986)).

Reynolds asks the Court for the opportunity to "submit his objections . . . to the Magistrate's Report and Recommendation" on his own behalf. (Doc. No. 53, PageID# 4391.) Boyd argues that Reynolds should have done so during the extensions of time he moved for and received, given that he had ample reason to suspect that Hall was no longer acting as his lawyer. But Hall remains Reynolds's counsel of record. He has not filed a motion to withdraw from representation or otherwise notified Reynolds that he was no longer acting on his behalf. Although the Court accepted Reynolds's pro se motions for extensions of time, it did not change or clarify the status of his representation in doing so by, for example, ordering Reynolds to discharge Hall if he intended to appear pro se. *Cf. Taylor v. Wainwright*, No. 17-3269, 2017 WL 4182068, at *1 (6th Cir. Sept. 8, 2017) (noting that magistrate judge denied pro se motion for extension of time arguing attorney abandonment and ordered petitioner to discharge counsel if he intended to proceed pro se). Although the Court has an interest in preserving the finality of its judgments, granting Reynolds's Rule 60(b)(6) motion in these circumstances serves to protect "'the public's confidence in the judicial process'" and allows the Court to ensure "'that justice be done in light of all the facts.'" *See Miller*, 879 F.3d at 698 (first quoting *Buck*, 137 S. Ct. at 778; then quoting *West*, 790 F.3d at 697); *see also Hopper*, 867 F.2d at 294; *Matarese v. LeFevre*, 801 F.2d 98, 106 (2d Cir. 1986) (holding that Rule 60(b) "confers broad discretion on the trial court to grant relief when appropriate to accomplish justice; it constitutes a grand reservoir of equitable power to do justice in a particular case . . . and should be liberally construed when substantial justice will thus be served") (citations omitted). Allowing Reynolds the opportunity to file objections to the report and recommendation on his own behalf after having been abandoned by his lawyer is appropriate

relief under Rule 60(b)(6). *See, e.g.*, *Nechovski v. United States*, No. 2:11-cv-862, 2014 WL 12799796, at *1 (S.D. Ohio June 3, 2014) (granting Rule 60(b)(6) motion by habeas petitioner who had been abandoned by counsel and reopening final judgment to consider petitioner's objections to report and recommendation).

This Court's Local Rule 83.01(c)(3) provides that "[a]ny attorney who is disbarred or suspended as a disciplinary sanction by the Tennessee Supreme [Court] . . . must immediately notify this Court, independent of any disciplinary rules or orders that might otherwise apply to the attorney's suspension or disbarment." M.D. Tenn. R. 83.01(c)(3) (disbarment and discipline). Although Hall has not done so, the Court takes judicial notice that Hall's license to practice law has been suspended by the Tennessee Supreme Court. Attorney Details for Andrew Nathan Hall, Bd. of Pro. Resp. of the Sup. Ct. of Tenn., https://www.tbpr.org/attorneys/013481 (last visited July 19, 2021).[4] Any attorney who has been suspended from practice by the Tennessee Supreme Court is reciprocally suspended from practice in this Court. M.D. Tenn. R. 83.01(c). Accordingly, the Magistrate Judge will further recommend that, absent Reynolds's objection, Hall be terminated as Reynolds's counsel of record in the Court's docket.

IV. Recommendation

For the foregoing reasons, the Magistrate Judge RECOMMENDS that Reynolds's motion for relief from judgment (Doc. No. 47) be GRANTED, that the Court's March 14, 2019 order be REOPENED, and that Reynolds be given fourteen days from the Court's ruling on this Report and Recommendation to file objections to the September 28, 2018 report and recommendation on his

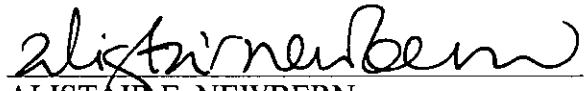
[4] It appears that Hall's disciplinary proceedings before the Tennessee Board of Professional Responsibility are ongoing. Reynolds may elect to raise any complaints regarding Hall's representation in that forum.

own behalf. The Magistrate Judge also RECOMMENDS that the Court direct the Clerk's Office to terminate Hall as Reynolds's counsel of record in the Court's docket.

The Clerk of Court is DIRECTED to send a copy of this Report and Recommendation by mail to Reynolds and to Hall at their respective addresses on file with the Court.

Any party has fourteen days after being served with this Report and Recommendation to file specific written objections. Failure to file specific objections within fourteen days of receipt of this report and recommendation can constitute a waiver of appeal of the matters decided. *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Cowherd v. Million*, 380 F.3d 909, 912 (6th Cir. 2004). A party who opposes any objections that are filed may file a response within fourteen days after being served with the objections. Fed. R. Civ. P. 72(b)(2).

Entered this 20th day of July, 2021.



ALISTAIR E. NEWBERN
United States Magistrate Judge

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