No. _____

IN THE SUPREME COURT OF THE UNITED STATES

In re LYNDON C. DAVIS

Petitioner

V.

TRENT ALLEN

Respondent

ON PETITION FOR WRIT OF HABEAS CORPUS

APPENDIX OF PETITIONER

Attorney for Petitioner:
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INDEX OF APPENDIX

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IN THE COURT OF APPEALS OF INDIANA

LYNDON C. DAVIS,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

No. 45A04-1304-CR-207

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Clarence D. Murray, Judge
Cause No. 45G02-1107-MR-5

March 5, 2014

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHEPARD, Senior Judge

Lyndon Davis challenges the sufficiency of the evidence supporting his conviction of murder. We affirm.

FACTS AND PROCEDURAL HISTORY

Davis was involved with Terrell Wells and Philip Blake in a drug-dealing operation. Wells was the leader, with Blake under him, followed by Davis. On the side, Blake also worked with Parrish Myles.

Following a disagreement over the whereabouts of some drugs and/or drug money, Wells put a bounty on Myles. Davis met Wells at a park where they discussed the bounty. Davis, who resides in Chicago, then accompanied Wells and some other men to Griffith, Indiana where Myles lived. Wells took Davis to an apartment complex and showed him where Myles resided, all the while stressing that Myles needed to die.

Davis' uncle, Robert Davis ("Robert"), did not know Myles, but Davis informed him of the bounty. Davis then rode with Robert to show him where Myles lived. Once there, Davis pointed out Myles' vehicle, and Robert parked nearby. Robert then retrieved a t-shirt and hat from the trunk of his car, and the two men sat in the car for several minutes. Myles emerged from his apartment with his two children and spoke to Davis and Robert before he began walking to his vehicle. At that point, Robert exited the car and shot Myles.

Davis then moved to the driver's seat, Robert jumped into the passenger seat, and they drove away. Once in the car, Robert changed his shirt and hat, presumably to change his appearance during the getaway. A police pursuit ensued, and Davis exited the

car, taking Robert's discarded shirt and hat with him. Davis called Wells for a ride and was apprehended when Wells came to pick him up.

Myles died from the gunshot wounds. The State charged Davis with murder and a jury found him guilty as an accomplice. *See* Ind. Code §§ 35-42-1-1 (2007), 35-41-2-4 (1977). He now appeals.

ISSUE

Davis contends the evidence is insufficient to prove that he aided, induced, or caused the commission of murder.

DISCUSSION AND DECISION

When reviewing claims of insufficiency of the evidence, we neither weigh the evidence nor judge the credibility of the witnesses. *Caruthers v. State*, 926 N.E.2d 1016 (Ind. 2010). If there is substantial evidence of probative value from which a reasonable trier of fact could find guilt beyond a reasonable doubt, we will affirm the conviction. *Id.*

Indiana Code section 35-42-1-1 provides that a person commits murder when he knowingly or intentionally kills another human being. Pursuant to the theory of accomplice liability, a person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense. Ind. Code § 35-41-2-4.

To determine whether a person aided another in the commission of a crime, we consider four factors: (1) presence at the scene of the crime; (2) companionship with another engaged in the crime; (3) failure to oppose the commission of the crime; and (4) course of conduct before, during, and after the occurrence of the crime. *Blakney v. State*, 819 N.E.2d 542 (Ind. Ct. App. 2004). While the person's presence at the scene or failure

to oppose the crime, by themselves, are insufficient to establish accomplice liability, they may be considered along with other facts and circumstances to determine participation. *Smith v. State*, 809 N.E.2d 938 (Ind. Ct. App. 2004), *trans. denied.* To sustain a conviction as an accomplice, there must be evidence of the person's affirmative conduct or words, from which an inference of common design or purpose to commit the offense may be reasonably drawn. *Berry v. State*, 819 N.E.2d 443 (Ind. Ct. App. 2004), *trans. denied.*

With regard to the four factors set out above, the evidence here demonstrates that Davis was at the scene of the murder and that he arrived and departed with his uncle Robert, the principal actor in Myles' murder. Davis did not oppose the commission of the murder. Rather, he sat in the car and watched Robert approach and shoot Myles. Myles' daughter testified that from her vantage point in Myles' vehicle she could see Myles, Robert, and Davis. She saw Myles talk to both Robert and Davis before he was shot, she saw Robert shoot Myles, and she saw Davis move into the driver's seat of the car before they left the parking lot. Although Davis claims he could not see what Robert was doing from where he sat in the parked car, we think this is a judgment about the credibility of the witnesses that falls within the jury's exclusive province to weigh conflicting evidence. *See Collier v. State*, 846 N.E.2d 340 (Ind. Ct. App. 2006), *trans. denied.*

Concerning the fourth factor, Davis' claim on appeal is that he did not know there would be a shooting until it happened.[1]

Davis relies on *Garland v. State*, 719 N.E.2d 1236 (Ind. 1999), in which our Supreme Court reversed, finding insufficient evidence to prove the defendant knowingly or intentionally aided, induced, or caused another to commit murder. In *Garland*, a young man undergoing substance abuse counseling came to know that the counselor had developed a relationship with his mother and that the counselor planned to kill his father. Asked whether he would assist, Garland said he would not, but neither did he tell his father of the apparent plan.

When the counselor drove up to the family residence on the day of the killing, the mother went out to see him, and the father asked Garland to go outside to see what was transpiring. The counselor told Garland to stay outside unless he wanted to be involved, after which he went into the house and shot the father.

Garland surely allowed the crime to happen, but the evidence in this case was sufficient to allow the jury to conclude that Davis was the person who actually engineered the killing even though Robert fired the fatal shots. The evidence establishes that Robert neither knew Myles nor knew about the bounty. It is Davis who knew Myles, Davis who told Robert about the bounty, Davis who accompanied Robert to Griffith, and Davis who showed him where Myles lived. After driving the getaway car, Davis exited the vehicle with the shirt and hat Robert had been wearing when he shot the victim.

[1] Davis' early position was even stronger. When originally interviewed by police, Davis told them Robert picked him up "out of the blue" to take a ride with him because he had to go see someone. State's Ex. 92. Davis said he had never been to Griffith before riding there with his uncle.

CONCLUSION

We therefore affirm Davis' conviction of murder as an accomplice.

RILEY, J., and PYLE, J., concur.

MEMORANDUM DECISION

APPELLANT PRO SE

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IN THE COURT OF APPEALS OF INDIANA

Lyndon C. Davis,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Plaintiff.

October 15, 2018

Court of Appeals Case No. 45A03-1708-PC-1912

Appeal from the Lake Superior Court

The Honorable Clarence D. Murray, Judge

The Honorable Kathleen A. Sullivan, Magistrate

Trial Court Cause No. 45G02-1406-PC-4

Brown, Judge.

[1] Lyndon C. Davis appeals the denial of his petition for post-conviction relief. We affirm.

Facts and Procedural History

[2] The relevant facts as discussed in Davis's direct appeal follow:

> Davis was involved with Terrell Wells and Philip Blake in a drug-dealing operation. Wells was the leader, with Blake under him, followed by Davis. On the side, Blake also worked with Parrish Myles.
>
> Following a disagreement over the whereabouts of some drugs and/or drug money, Wells put a bounty on Myles. Davis met Wells at a park where they discussed the bounty. Davis, who resides in Chicago, then accompanied Wells and some other men to Griffith, Indiana where Myles lived. Wells took Davis to an apartment complex and showed him where Myles resided, all the while stressing that Myles needed to die.
>
> Davis' uncle, Robert Davis ("Robert"), did not know Myles, but Davis informed him of the bounty. Davis then rode with Robert to show him where Myles lived. Once there, Davis pointed out Myles' vehicle, and Robert parked nearby. Robert then retrieved a t-shirt and hat from the trunk of his car, and the two men sat in the car for several minutes. Myles emerged from his apartment with his two children and spoke to Davis and Robert before he began walking to his vehicle. At that point, Robert exited the car and shot Myles.
>
> Davis then moved to the driver's seat, Robert jumped into the passenger seat, and they drove away. Once in the car, Robert changed his shirt and hat, presumably to change his appearance during the getaway. A police pursuit ensued, and Davis exited the car, taking Robert's discarded shirt and hat with him. Davis called Wells for a ride and was apprehended when Wells came to pick him up.

Myles died from the gunshot wounds.

Davis v. State, No. 45A04-1304-CR-207, slip op. at 2-3 (Ind. Ct. App. March 5, 2014). The State charged Davis with murder. *Id.* at 3.

[3] At trial, the State presented the testimony of multiple individuals including Aniya Lawson who testified that her father, Parrish Myles, was shot by a man that jumped back into a car, that the person that was in the passenger's seat moved over to the driver's seat, and that they left. She testified that she was not really able to see anything about the person in the car. On cross-examination, Lawson testified that the man who did the shooting was not Davis and that the other person who was in the car did not exit the car. Krystle Gavin testified that she was a witness at the scene. On cross-examination, when asked if the occupants of the car were already in the car by the time you looked over," Gavin answered: "The one in the maroon shirt was getting in the car." Trial Transcript Volume II at 99. When asked if she knew whether Davis was the person she saw with the maroon shirt, she answered: "No, I don't." *Id.* The court also admitted a recorded interview of Davis which was over two hours in length and a subsequent interview of Davis which was over an hour in length.

[4] The trial court instructed the jury on accomplice liability. After the final instructions were given and the jury was removed from the courtroom to deliberate, the court stated: "Counsel, the jury has indicated that it is willing to continue with deliberations, but they are tired, as I'm sure we all are." Trial Transcript Volume IV at 530. The court indicated that it was going to adjourn

for the night and bring them back in the morning and asked counsel if they were "okay with that?" *Id.* The prosecutor indicated that the jury had "been out for roughly slightly over nine hours" and agreed. *Id.* at 531. The court stated: "I think given the circumstances with the weather and the fact that they've been at this for quite a while, that it would be prudent to have them take a fresh approach in the morning." *Id.* Davis's counsel stated: "Judge, I agree with you. May I just ask if they communicated anything specifically to the Court about wanting to go home or was there a note or just your decision?" *Id.* The court responded that the jury indicated they were not close to reaching a verdict and that they wanted to start again in the morning, and Davis's counsel replied: "Sounds good." *Id.* The jury returned to the courtroom, and the court indicated that it was going to adjourn for the evening and return the following morning. The court instructed the jury not to: discuss the case with anyone else; talk to attorneys, parties or witnesses; express any opinion to anyone else about the case; or listen to or read any outside or media accounts of the trial. The following day, the jury found Davis guilty.

[5] On direct appeal, Davis argued the evidence was insufficient to prove that he aided, induced, or caused the commission of murder. *Davis*, slip op. at 3. This Court affirmed. *Id.* at 6.

[6] On June 9, 2014, Davis filed a *pro se* petition for post-conviction relief. In July 2014, a public defender filed an appearance, Davis indicated he elected to proceed *pro se*, and the public defender filed a motion to withdraw. On September 3, 2014, Davis, *pro se*, filed an amended petition.

[7] On December 12, 2014, the court held a hearing. Attorney Benjamen Murphy, Davis's appellate counsel, and Attorney Kevin Milner, Davis's trial counsel and appellate co-counsel, testified. On September 19, 2016, the court denied Davis's petition. Discussion

[8] Before addressing Davis's allegations of error, we observe that Davis is proceeding *pro se*. Such litigants are held to the same standard as trained counsel. *Evans v. State*, 809 N.E.2d 338, 344 (Ind. Ct. App. 2004), *trans. denied*. We also note the general standard under which we review a post-conviction court's denial of a petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004); Ind. Post-Conviction Rule 1(5). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Fisher*, 810 N.E.2d at 679. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. *Id.* "A post-conviction court's findings and judgment will be reversed only upon a showing of clear error – that which leaves us with a definite and firm conviction that a mistake has been made." *Id.* In this review, we accept findings of fact unless clearly erroneous, but we accord no deference to conclusions of law. *Id.* The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. *Id.*

[9] Davis argues that his trial counsel and appellate counsel were ineffective on multiple bases. Generally, to prevail on a claim of ineffective assistance of counsel a petitioner must demonstrate both that his counsel's performance was deficient and that the petitioner was prejudiced by the deficient performance. *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), *reh'g denied*). A counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. *Id.* To meet the appropriate test for prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Perez v. State*, 748 N.E.2d 853, 854 (Ind. 2001). Failure to satisfy either prong will cause the claim to fail. *French*, 778 N.E.2d at 824. Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. *Id.*

[10] When considering a claim of ineffective assistance of counsel, a "strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Morgan v. State*, 755 N.E.2d 1070, 1072 (Ind. 2001). "[C]ounsel's performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption." *Williams v. State*, 771 N.E.2d 70, 73 (Ind. 2002). Evidence of isolated poor strategy, inexperience, or bad tactics will not support a claim of ineffective assistance of counsel. *Clark v. State*, 668

N.E.2d 1206, 1211 (Ind. 1996), *reh'g denied, cert. denied*, 520 U.S. 1171, 117 S. Ct. 1438 (1997). "Reasonable strategy is not subject to judicial second guesses." *Burr v. State*, 492 N.E.2d 306, 309 (Ind. 1986). We "will not lightly speculate as to what may or may not have been an advantageous trial strategy as counsel should be given deference in choosing a trial strategy which, at the time and under the circumstances, seems best." *Whitener v. State*, 696 N.E.2d 40, 42 (Ind. 1998). In order to prevail on a claim of ineffective assistance due to the failure to object, the defendant must show a reasonable probability that the objection would have been sustained if made. *Passwater v. State*, 989 N.E.2d 766, 772 (Ind. 2013) (citing *Wrinkles v. State*, 749 N.E.2d 1179, 1192 (Ind. 2001), *cert. denied*, 535 U.S. 1019, 122 S. Ct. 1610 (2002)). We apply the same standard of review to claims of ineffective assistance of appellate counsel as we apply to claims of ineffective assistance of trial counsel. *Williams v. State*, 724 N.E.2d 1070, 1078 (Ind. 2000), *reh'g denied, cert. denied*, 531 U.S. 1128, 121 S. Ct. 886 (2001).

A. *Probable Cause Affidavit*

[11] Davis appears to argue that his trial counsel "could have used the deposition of Krystle Gavin to show evidence that the probable cause affidavit contained some false information that was very critical to the finding of probable cause." Appellant's Brief at 21. He asserts that the "probable cause affidavit/search warrant must be voided, and the fruits of the probable cause affidavit/search warrant excluded to the same extent as if probable cause was lacking on the face of the affidavit." *Id.* at 28.

[12] Davis does not point out any specific inconsistencies between the probable cause affidavit and Gavin's statements.[1] He does not assert that the probable cause affidavit was admitted at trial or develop a cogent argument regarding how he was prejudiced. We cannot say that reversal is warranted on this basis.

B. *Pre-Trial Investigation and Examination of Witnesses*

[13] Davis argues that his trial counsel failed to investigate his case and depose or interview any of the State's witnesses before trial. He asserts that Lawson and Gavin were the State's key witnesses and that the depositions that his trial counsel received from the State contain "a very much inconsistent story to what each witness had testified at the trial." Appellant's Brief at 30. He argues that his trial counsel failed to attack Lawson and Gavin's inconsistent statements at trial.

[14] It is undisputed that effective representation requires adequate pretrial investigation and preparation. *Badelle v. State*, 754 N.E.2d 510, 538 (Ind. Ct. App. 2001), *trans. denied*. However, it is well-settled that we should resist judging an attorney's performance with the benefit of hindsight. *Id.* "When deciding a claim of ineffective assistance of counsel for failure to investigate, we

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[1] Davis cites to "deposition of Krystle Gavin, P.C. App. p. 66" to support his assertion that "Krystle Gavin stated that she had never talked to the detectives and that the statement wasn't true that they say she had made." The page that Davis appears to cite comes from his proposed findings of facts and conclusions of law. *See* Appellant's Appendix Volume II at 66.

apply a great deal of deference to counsel's judgments." *Boesch v. State*, 778 N.E.2d 1276, 1283 (Ind. 2002), *reh'g denied.*

[15] When asked by Davis about the tactics he uses to build a defense before a trial, Davis's trial counsel testified that he gathers all the discovery, performs his own independent investigation, and deposes witnesses that are going to testify for the State. He also stated: "I will certainly discuss the evidence with you to get your input." Post-Conviction Transcript Volume 2 at 50. When asked if he interviewed or deposed any witnesses prior to the case, Davis's trial counsel answered: "I'm certain I did. I have no recollection, but I'd be shocked if I didn't depose all the substantive witnesses. I honestly don't remember." *Id.*

[16] With respect to the testimony of Gavin and Lawson, we observe that Davis's trial counsel stated:

> My recollection is both she and the other witness, as you said a few minutes ago, testified to what they said they saw, and they both said they didn't see you commit any crime. Why would I want to discredit either one of those witnesses? Those are your best witnesses? They came out there, said they saw what happened, and that you didn't do anything wrong that they saw. I don't want to discredit them. To the contrary, I want the jury to think that they're the most truthful people in the trial.

Id. at 62.

[17] He also stated his decisions during trial were based on trial strategy and:

> Those women, as I've said to you a couple of times, I'm certain I could have impeached them if one of them said this happened at

> 3:00 o'clock, when, in fact, on another time she said it was 3:30. Or if she said you were wearing blue pants, when, in fact, they were black. Those are not substantial inconsistencies. And even if they were, again, I am not going to attack the only witnesses who help you.

Id. at 71-72. Under the circumstances, we cannot say that reversal is warranted.[2]

C. *Davis's Statement to Police*

[18] Davis argues that his trial counsel failed to suppress his voluntary statement to detectives under Evidence Rules 403 and 404.[3] He acknowledges that his

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[2] To the extent Davis asks this Court to "weigh the witness's credibility under the incredible dubiosity rule," Appellant's Brief at 35, we conclude that his claim amounts to a freestanding claim of error, which is not available in post-conviction proceedings. *See Martin v. State*, 760 N.E.2d 597, 599 (Ind. 2002) ("Freestanding claims that the original trial court committed error are available only on direct appeal."); *Lambert v. State*, 743 N.E.2d 719, 726 (Ind. 2001) (holding that post-conviction procedures do not provide a petitioner with a "super-appeal" or opportunity to consider freestanding claims that the original trial court committed error and that such claims are available only on direct appeal), *reh'g denied, cert. denied*, 534 U.S. 1136, 122 S. Ct. 1082 (2002).

[3] At the time of trial, Ind. Evidence Rule 403 provided: "Although 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 consideration of undue delay, or needless presentation of cumulative evidence." (Subsequently amended eff. January 1, 2014). Ind. Evidence Rule 404 provided in part:

> (a) **Character Evidence Generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> (1) *Character of the accused.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;
>
> * * * * *
>
> (b) **Other Crimes, Wrongs, or Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if

statements that he did not plan to commit a crime with Robert, that he was not near the shooting to see what happened, and that he had no knowledge of the shooting before he left the scene of the crime were "not at all incriminating toward himself or Robert." Appellant's Brief at 36. He asserts that his statement cast a shadow over his character because it referenced his criminal lifestyle of selling drugs and associating with drug dealers and Robert's history of being incarcerated for a prior murder.

[19] Davis does not point to any specific portion of his recorded statements to support his assertion that his recorded statement cast a shadow over his character nor does he point to the record to show that he asked his trial counsel why he did not object to or move to suppress his statement. We cannot say that Davis has demonstrated ineffective assistance.

D. *Jury Instruction*

[20] Davis argues that his trial counsel failed to object to the State's tendered jury instructions on accomplice liability and cites *Kane v. State*, 976 N.E.2d 1228 (Ind. 2012).

[21] We initially note that Davis's trial counsel testified:

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the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

(Subsequently amended eff. January 1, 2014).

> I felt the instructions, as a whole, meaning the entire packet of instructions that Judge Murray would be reading to the jury, I felt was an accurate statement of the law. I can't remember which particular instruction say which particular things, but I do believe my recollection was thinking that it was a fair statement of the law, the entire group of instructions.

Post-Conviction Transcript Volume 2 at 98. He stated that he did not think there was an error in the accessory liability instruction.

[22] In *Kane*, the Indiana Supreme Court held that the trial court erred by giving an instruction on accomplice liability which did not include a mental state at all and seemed to impose strict liability on the defendant for the unlawful acts of another. 976 N.E.2d at 1232. Here, the instruction specifically stated in part: "To aid under the law is to *knowingly* aid, support, help or assist in the commission of a crime." Trial Transcript Volume IV at 512 (emphasis added). Thus, *Kane* is distinguishable. To the extent Davis questions how he could have participated in the act of murder and suggests the evidence was insufficient, we note that this raises a freestanding claim, which is not available in post-conviction proceedings. *See Martin*, 760 N.E.2d at 599. Reversal is not warranted on this basis.

E. *Jury Separation*

[23] Davis argues that his trial counsel failed to object to the separation of the jury for a lengthy period of time during the process of the deliberation.

[24] Generally, "[t]he Indiana Code requires the jury to be kept together once deliberations begin." *Bradford v. State*, 675 N.E.2d 296, 304-305 (Ind. 1996) (citing Ind. Code § 35-37-2-6(a)(1)), *reh'g denied*. Ind. Jury Rule 29 provides that the "court shall not permit the jury to separate during deliberation in criminal cases unless all parties consent to the separation" and certain instructions are given.

[25] At the post-conviction hearing, trial counsel testified that he was "very comfortable with letting the jury go home, get some rest, and come back and hopefully rule my way." Post-Conviction Transcript Volume 2 at 73. He indicated that the trial court allowed the jury to separate because the jurors were tired. He explained:

> I believe the word tired is a good basis to allow these people to go home. I don't remember, but often juries have elderly people, you often have people with health issues, you often have people with small children at home. I'm not going to punish this jury any more than they're being punished by having to take time out of their lives to deliberate, unless I think it's going hurt [sic] you. If I think it's going to hurt you even one percent, I will make such an argument to the Court.
>
> I saw nothing in this trial to concern me whatsoever about the jury's behavior. I didn't, for one minute, believe that if they were allowed to go home, that it would somehow compromise the verdict. The Judge instructed them, I'm certain, each day to ignore newspaper reports, and not discuss the case with anybody, et cetera, et cetera. So in the absence of any reason to think that this jury was going to be messed with, correct, I would not have complained about them going home. And I'm certain I didn't.

Post-Conviction Transcript Volume 2 at 73-74. Trial counsel also testified that all of his decisions were based on trial strategy. We cannot say that reversal is warranted on this basis.

F. *Appellate Counsel*

[26] Davis appears to argue that his appellate counsel was ineffective for failing to raise the issues that he raised in his petition including that his trial counsel was ineffective. The Indiana Supreme Court has held that appellate counsel's failure to raise a claim of ineffective assistance of trial counsel is not deficient representation because the claim may be presented in post-conviction proceedings and appellate counsel is not required to raise this claim on direct appeal. *Conner v. State*, 711 N.E.2d 1238, 1252 (Ind. 1999), *reh'g denied*, *cert. denied*, 531 U.S. 829, 121 S. Ct. 81 (2000). We also note that Davis's trial counsel served as co-counsel for his direct appeal and arguing one's own ineffectiveness is not permissible under the Rules of Professional Conduct. *See Caruthers v. State*, 926 N.E.2d 1016, 1023 (Ind. 2010). Further, in light of the discussion above, we cannot say that Davis has demonstrated that his appellate counsel was deficient or that he was prejudiced.

Conclusion

[27] For the foregoing reasons, we affirm the post-conviction court's denial of Davis's petition for post-conviction relief.

[28] Affirmed.

Bailey, J., and Crone, J., concur.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

LYNDON DAVIS,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 1:19-cv-00088-JPH-MJD
	)	
DUSHAN ZETECKY,	)	
	)	
Respondent.	)	

Order Denying Petition for a Writ of Habeas Corpus

In his petition for a writ of habeas corpus, petitioner Lyndon Davis challenges his 2013 conviction for murder. For the reasons explained in this Order, Mr. Davis's petition for a writ of habeas corpus is **denied**, and the action is dismissed with prejudice. In addition, the Court finds that a certificate of appealability should not issue.

I. Background

The Indiana Court of Appeals summarized Mr. Davis's offense as follows:

> Davis was involved with Terrell Wells and Philip Blake in a drug-dealing operation. Wells was the leader, with Blake under him, followed by Davis. On the side, Blake also worked with Parrish Myles.
>
> Following a disagreement over the whereabouts of some drugs and/or drug money, Wells put a bounty on Myles. Davis met Wells at a park where they discussed the bounty. Davis, who resides in Chicago, then accompanied Wells and some other men to Griffith, Indiana where Myles lived. Wells took Davis to an apartment complex and showed him where Myles resided, all the while stressing that Myles needed to die.
>
> Davis' uncle, Robert Davis ("Robert"), did not know Myles, but Davis informed him of the bounty. Davis then rode with Robert to show him where Myles lived. Once there, Davis pointed out Myles' vehicle, and Robert parked nearby. Robert then retrieved a t-shirt and hat from the trunk of his car, and the two men sat in the car for several minutes. Myles emerged from his apartment with his two children and spoke to Davis and Robert before he began walking to his vehicle. At that point, Robert exited the car and shot Myles.

> Davis then moved to the driver's seat, Robert jumped into the passenger seat, and they drove away. Once in the car, Robert changed his shirt and hat, presumably to change his appearance during the getaway. A police pursuit ensued, and Davis exited the car, taking Robert's discarded shirt and hat with him. Davis called Wells for a ride and was apprehended when Wells came to pick him up.
>
> Myles died from the gunshot wounds.

Davis v. State, 6 N.E.3d 509, 2014 WL 869537, *2-3 (Ind. Ct. App. Mar. 5, 2014) ("*Davis I*").

The defense's theory at trial was that Mr. Davis was present when Robert killed Mr. Myles, but Mr. Davis had no idea that Robert would kill Mr. Myles, never told Robert to kill Mr. Myles, and took no part in the shooting. R. Vol. II at 45-46, 50. According to the defense, Mr. Davis told Robert about Mr. Myles and the bounty because he was afraid for his own life. *Id.* at 51. Trial counsel acknowledged that Mr. Davis drove the car out of the apartment complex parking lot before Robert took over and began the highspeed pursuit. *Id.* at 472-73. Trial counsel argued it was not foreseeable to Mr. Davis that Robert would murder Mr. Myles in the middle of the morning with people around. *Id.* at 474.

The jury convicted Mr. Davis, and the trial court sentenced him to 55 years in prison. Dkt. 7-1 at 8. Mr. Davis appealed, arguing that he was convicted based on insufficient evidence. Dkt. 7-6. The Indiana Court of Appeals affirmed. *Davis I*, 2014 WL 869537, at *4-6. Mr. Davis sought transfer to the Indiana Supreme Court, which was denied. Dkt. 7-3 at 6.

Mr. Davis filed a state post-conviction petition alleging that trial counsel was ineffective for (1) failing to challenge the probable cause affidavit; (2) failing to investigate; (3) failing to impeach the State's witnesses; (4) failing to move to suppress his voluntary statements to police; (5) failing to object to an accomplice liability jury instruction; and (6) failing to object to the separation of the jurors once deliberations began. *See Davis v. State*, 2018 WL 4957199, at *3-5 (Ind. Ct. App. Oct. 15, 2018) ("*Davis II*"). He further alleged that appellate counsel was ineffective

for failing to raise the issues he raised in his post-conviction petition, including trial counsel's ineffectiveness. *Id.* at *6. The trial court denied Mr. Davis's petition following a hearing, and the Indiana Court of Appeals affirmed. *Id.* at *6. The Indiana Supreme Court denied Mr. Davis's petition to transfer. Dkt. 7-4 at 12.

Mr. Davis next filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in this Court, alleging that trial counsel was ineffective for (1) failing to investigate; (2) failing to impeach two of the State's witnesses with inconsistent statements; (3) failing to object to jury instructions on accomplice liability; and (4) failing to object to the separation of the jury once deliberations had begun.

II. Applicable Law

A federal court may grant habeas relief only if the petitioner demonstrates that he is in custody "in violation of the Constitution or laws . . . of the United States." 28 U.S.C. § 2254(a). Where a state court has adjudicated the merits of a petitioner's claim, a federal court cannot grant habeas relief unless the state court's 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). "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 v. Richter*, 562 U.S. 86, 101 (2011). "If this standard is difficult to meet, that is because it was meant to be." *Id.* at 102.

"The decision federal courts look to is the last reasoned state-court decision to decide the merits of the case." *Dassey v. Dittmann*, 877 F.3d 297, 302 (7th Cir. 2017) (en banc). If the last

reasoned state court decision did not adjudicate the merits of a claim, or if the adjudication was unreasonable under § 2254(d), federal habeas review of that claim is *de novo*. *Thomas v. Clements*, 789 F.3d 760, 766–68 (7th Cir. 2015). Under § 2254(d) or *de novo* review, "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

III. Discussion

Mr. Davis alleges that trial counsel rendered ineffective assistance of counsel. To succeed on a claim that trial counsel was ineffective, a petitioner must show that counsel's performance was deficient and prejudicial. *Maier v. Smith*, 912 F.3d 1064, 1070 (7th Cir. 2019) (citing *Strickland v. Washington*, 466 U.S. 668, 689–92 (1984)). Deficient performance means that counsel's actions "fell below an objective standard of reasonableness," and prejudice requires "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688, 694.

The last reasoned opinion at issue here is the Indiana Court of Appeals' decision affirming the denial of Mr. Davis's petition for post-conviction relief. The Indiana Court of Appeals correctly articulated the *Strickland* standard in Mr. Davis's post-conviction memorandum decision, *Davis II*, 2018 WL 4957199, at *6-7, but did not explicitly analyze the deficient performance or prejudice prongs of the ineffective assistance of counsel claims. Instead, the court set out each claim and recounted trial counsel's testimony at the post-conviction hearing as it related to that claim. The court noted several times that trial counsel testified that his decisions were based on trial strategy. *Id.* at 9, 14. Then, at the end of each claim, the court stated either that reversal was not warranted or that Mr. Davis had not demonstrated ineffective assistance. *Id.* at 8, 10-12, 14. Because the court

appears to have credited trial counsel's testimony as providing valid strategic reasons, the Court construes the appellate court's decision as resting on the deficient performance prong and applies § 2254(d) deference to the state court's adjudication of that prong. But even if the Court were to apply de novo review, the conclusion would be the same. *See Sussman v. Jenkins*, 636 F.3d 329, 350 (7th Cir. 2011) ("[I]f a state court does not reach either the issue of performance or prejudice on the merits, then federal review of this issue is not circumscribed by a state court conclusion and our review is de novo.").

Mr. Davis complains about four aspects of trial counsel's performance. The Court will address each in turn.

1. Failure to Investigate

Mr. Davis alleges that trial counsel was ineffective for failing to investigate the circumstances of Robert Davis's trial. The State tried Robert first. *Compare Davis v. State*, 2013 WL 244112 at *2 (Ind. Ct. App. Jan. 23, 2013) (noting Robert Davis's trial occurred in January 2012), *with* dkt. 7-1 at 7-8 (showing Mr. Davis's trial occurred in February 2013). Mr. Davis alleges that the State's theory at Robert's trial was that Robert was the shooter, but when none of the eyewitnesses at his trial could identify him as the shooter, the State introduced a jury instruction on accomplice liability. Dkt. 2 at 7; *see also Davis*, 2013 WL 244112 at *2. Mr. Davis alleges that the State convicted Robert as an accomplice, only to subsequently try Mr. Davis as an accomplice with Robert as the shooter. *Id.* He argues that if his attorney "could have or would have presented the facts that Robert was cleared as the shooter and also convicted as a[n] accomplice at his own trial, these facts would have changed the outcome of the case." *Id.* at 7-8. He believes the State engaged in misconduct by trying Robert as an accomplice at his trial, only to subsequently say Robert was the shooter at Mr. Davis's trial. Dkt. 8 at 11-12.

The Indiana Court of Appeals held that Mr. Davis failed to show that his trial attorney was ineffective for his pretrial investigation, but it did not discuss this specific allegation. *Davis II*, 2018 WL 4957199, at *9-10. "When a state court rejects a prisoner's federal claim without discussion, a federal habeas court must presume that the court adjudicated it on the merits unless some state-law procedural principle indicates otherwise." *Lee v. Avila*, 871 F.3d 565, 567-68 (7th Cir. 2017) (citing *Harrington v. Richter*, 562 U.S. 86, 98 (2011)). "The *Richter* presumption applies when the state court's decision expressly addressed some but not all of a prisoner's claims." Applying this standard, the Court finds that the Indiana Court of Appeals reasonably applied federal law with respect to trial counsel's pretrial investigation.

Mr. Davis argues that if Robert was only convicted as an accomplice and not the shooter, and the State conceded at Mr. Davis's trial that Mr. Davis was not the shooter, *see e.g.* R. Vol. II at 26, then it follows that Mr. Davis was not present at the crime and therefore was not the shooter or an accomplice.

Mr. Davis's counsel was not ineffective for failing to present evidence in support of this theory. Mr. Davis's trial counsel's strategy was to admit that while Mr. Davis was at the apartment complex when the shooting occurred, he was not the shooter and lacked the *mens rea* necessary to be convicted as an accomplice. This was a reasonable strategy, as there was ample evidence that Mr. Davis *was* at the scene, including Mr. Davis's taped statements to police in which he admitted to driving Robert out of the parking lot after hearing gun shots.

Moreover, the evidence about Robert's trial was not exonerating. There is no evidence that Robert was "cleared" as the shooter. "A defendant may be charged as the principal but convicted as an accomplice. . . . Generally there is no distinction between the criminal liability of an accomplice and a principal." *Castillo v. State*, 974 N.E.2d 458, 466 (Ind. 2012). As the Indiana

Court of Appeals in Robert's case notes, there was sufficient evidence to convict Robert as the principal or an accomplice. *Davis*, 2013 WL 244112 at *7. The jury's verdict would not indicate whether it convicted Robert as the principal or as the accomplice, because Indiana has abolished special verdict forms that, for example, distinguish between a principal and an accomplice. Ind. Trial Rule 49; *see Batalis v. State*, 887 N.E.2d 106, 109 (Ind. Ct. App. 2008) (finding it was harmless error to use special verdict forms distinguishing between liability as a principal and as an accomplice). There is no reasonable probability of a different outcome if trial counsel had introduced evidence that the jury in Robert's trial received an instruction on accomplice liability, because that does not mean that Robert was necessarily convicted as an accomplice.

Accordingly, § 2254(d) bars relief on this complaint about counsel's performance.

2. Failure to Impeach Witnesses

Mr. Davis contends that trial counsel was ineffective because he failed to impeach two of the State's witnesses, Parrish's daughter Aniya Lawson and neighbor Krystle Gavin, with inconsistent statements they had made to detectives and at a deposition. The Indiana Court of Appeals on post-conviction review held that counsel made a strategic decision not to impeach them. *Davis II*, 2018 WL 4957199, at *9-10. That holding constitutes a reasonable application of *Strickland*.

Trial counsel testified at the post-conviction hearing that he did not want to impeach Ms. Lawson or Ms. Gavin, explaining

> My recollection is both she and the other witness, as you said a few minutes ago, testified to what they said they saw, and *they both said they didn't see you commit any crime. Why would I want to discredit either of those witnesses? They came out there, said they saw what happened, and that you didn't do anything wrong that they saw.* I don't want to discredit them. To the contrary, I want the jury to think they're the most truthful people in the trial.
> ...

> Those women, as I've said to you a couple of times, I'm certain I could have impeached them if one of them said this happened at 3:00 o'clock, when, in fact, on another time she said it was 3:30. Or if she said you were wearing blue pants when, in fact, they were black. Those are not substantial inconsistencies. And even if they were, again, *I am not going to attack the only witnesses who help you.*

Dkt. 16-2. at 62, 71-72 (emphasis added). Ms. Lawson's testimony did not exonerate Mr. Davis as an accomplice, but it was overall consistent with the defense's theory. She testified that she saw an older man shoot her father, and that Lyndon Davis was not that older man. R. Vol. II at 64. She saw the passenger of a gold sedan slide over to the driver's seat and drive away quickly once the shooter returned to the car. *Id.* at 59, 67. Her testimony was helpful to Mr. Davis to the extent that she could not identify Mr. Davis as the passenger in the car. Her testimony was also consistent with the defense's evidence that Mr. Davis was the driver initially after the shooting before Robert took over and began a high-speed chase. The Indiana Court of Appeals correctly concluded that trial counsel was not ineffective for failing to impeach Ms. Lawson on any minor inconsistencies from her previous statement to police or her deposition.

Krystle Gavin testified that she heard the shooting and thought it was fireworks until she heard a girl cry. *Id.* at 89. She saw a gold sedan leave the lot at a normal speed and could not identify Mr. Davis as the shooter or passenger. *Id.* at 92-94, 99. Again, while not exonerating Mr. Davis of criminal activity, Gavin's testimony was consistent with the defense's theory, and therefore trial counsel was not ineffective for failing to impeach her on any minor inconsistencies.

Accordingly, § 2254(d) bars relief on this ground.

3. Failure to Object to Accomplice Liability Instruction

Mr. Davis argues that trial counsel was ineffective for failing to object to the jury instruction on accomplice liability. He asserts the instruction misstated the law and relieved the State of proving the relevant intent. Dkt. 2 at 13. The jury instruction stated:

> Where two or more persons engage in the commission of an unlawful act, each person may be criminally responsible for the actions of each other person which were the probable and natural consequences of their common plan even though not intended as a part of the original plan.
>
> A person who *knowingly or intentionally* aids, induces or causes another person to commit an offense commits that offense, even if the other person:
>
> 1. has not been prosecuted for the offense;
> 2. has not been convicted of the offense; or
> 3. has been acquitted of the offense.
>
> To aid under the law is to *knowingly* aid, support, help or assist in the commission of a crime. Mere presence at the scene of the crime and knowledge that a crime is being committed are not sufficient to allow an inference of participation. It is being present at the time and place and knowingly doing some act to render aid to the actual perpetrator of the crime.
>
> The presence of a person at the scene of the commission of a crime and a course of conduct before, during, and after the offense are circumstances which may be considered in determining whether such person aided and abetted the commission of such crime.

R. Vol. IV at 511 (emphases added). Mr. Davis cites to *Kane v. State*, 976 N.E.2d 1228, 1232 (Ind. 2012), where the Indiana Supreme Court held that the trial court erred for giving an instruction on accomplice liability that did not include a mental state. Here, the instruction accurately described the required *mens rea*. The Indiana Court of Appeals correctly concluded that trial counsel was not ineffective for not objecting to the instruction.

Accordingly, § 2254(d) bars relief on this complaint about counsel's performance.

4. Failure to Object to Separation of the Jury

Mr. Davis's last complaint is that his trial counsel erred by failing to object to the separation of the jury after they had convened to deliberate. In Indiana, jurors must be kept together once deliberations begin. *Bradford v. State*, 675 N.E.2d 296, 304-05 (Ind. 1996) (citing Ind. Code § 35-37-2-6(a)(1)), *reh'g denied*. However, Indiana Jury Rule 29 permits the separation of the jury during deliberation in a criminal case upon the parties' consent as long as the trial court instructs

the jurors (1) not to discuss the case with anyone, (2) not to speak with the parties, attorneys, or witnesses, (3) not to express any opinion about the case, and (4) not to listen to or read any media or outside sources about the trial.

After deliberating for nine hours, the jury was not close to a verdict and wanted to go home to rest. R. Vol. IV at 530-31. It was around 10:00 p.m., and the court stated, "I think given the circumstances with the weather and the fact that they've been at this for quite a while, that it would be prudent to have them take a fresh approach in the morning." *Id.* at 531. Defense counsel and the State agreed. *Id.* The court provided the Jury Rule 29 instruction to the jury before they left for the evening. *Id.* at 533.

Mr. Davis's trial counsel testified at the post-conviction hearing that he consented to the jury going home for the evening because everyone was tired, and the jurors gave him no reason to believe they would not be able to follow instructions to not discuss or read about the case. Dkt. 16-2 at 73-74. In his experience, he has objected to a jury being separated during deliberations only if there was evidence of efforts to tamper with the jurors. *Id.* at 73. He said if he thought the separation would harm Mr. Davis, he would have argued so to the court. *Id.* at 74. The Indiana Court of Appeals found trial counsel's acquiescence to the separation for the evening to be a reasonable strategic decision. Mr. Davis provides no basis to conclude otherwise.

Accordingly, § 2254(d) bars relief on this complaint about counsel's performance.

IV. Certificate of Appealability

"A state prisoner whose petition for a writ of habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Instead, the prisoner must first obtain a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1). "A certificate of appealability may issue . . . only if the applicant has made a substantial showing

of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In deciding whether a certificate of appealability should issue, "the only question is whether the applicant has shown 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." *Buck*, 137 S. Ct. at 773 (citation and quotation marks omitted).

Rule 11(a) of the Rules Governing Section 2254 Proceedings in the United States District Courts requires the district court to "issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Here, no reasonable jurist could disagree that Mr. Davis's claims are barred by 28 U.S.C. § 2254(d) or are otherwise without merit. A certificate of appealability is therefore denied.

V. Conclusion

Mr. Davis's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is **denied**, and a certificate of appealability shall not issue. Final judgment in accordance with this decision shall issue.

SO ORDERED.

Date: 4/20/2020

James Patrick Hanlon

James Patrick Hanlon
United States District Judge
Southern District of Indiana

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted June 14, 2022
Decided June 29, 2022

Before

DAVID F. HAMILTON, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

CANDACE JACKSON-AKIWUMI, *Circuit Judge*

No. 22-2054

LYNDON DAVIS,
Applicant,

v.

DENNIS REAGLE,
Respondent.

On Motion for an Order Authorizing the District Court to Entertain a Second or Successive Petition for Collateral Review.

ORDER

Lyndon Davis applies again for leave to file a successive collateral attack on his Indiana conviction and 55-year sentence for murder as an accomplice. *See* No. 22-1729 (7th Cir. May 17, 2022) (denying previous application). We again deny his request.

One of Davis's associates in a drug operation placed a bounty on the life of the victim. This led Davis's uncle to shoot and kill the man, with Davis accompanying him to the scene and then driving him away from it. Consistent with this theory, the victim's daughter testified to seeing someone other than Davis jump out of the driver's side of a car, shoot the victim, and then trade places with a passenger—whom she could not identify—who then drove the car off.

Davis's defense, both under police questioning and at trial, was that although he was the getaway driver, he did not know his uncle's intent before the shooting happened. But the jury did not credit this theory.

Davis appealed his conviction, challenging the sufficiency of the evidence. The Indiana court of appeals affirmed the conviction. *Davis v. State*, 6 N.E.3d 509, 2014 WL 869537 (Ind. Ct. App. Mar. 5, 2014). In its order, the court perhaps suggested that the victim's daughter had positively identified both Davis and his uncle. *See id.* at *2.

Davis then requested post-conviction relief in state court, which denied the request. *Davis v. State*, 112 N.E.3d 232, 2018 WL 4957199 (Ind. Ct. App. Oct. 15, 2018). Davis subsequently filed a petition under 28 U.S.C. § 2254 in federal court, which also denied relief. *Davis v. Zetecky*, No. 1:19-cv-00088-JPH-MJD, 2020 WL 9936705 (S.D. Ind. Apr. 20, 2020); No. 20-1769 (7th Cir. Dec. 1, 2020) (denying certificate of appealability). Both courts, however, recognized that the victim's daughter did not affirmatively identify Davis as either the shooter or the driver of the getaway vehicle during her testimony. *Davis v. State*, 2018 WL 4957199, at *1; *Davis v. Zetecky*, 2020 WL 9936705, at *4.

This past April, Davis applied under 28 U.S.C. § 2244(b) for our permission to file a second § 2254 petition. He argued that his constitutional rights had been violated because he was being detained despite being innocent. Specifically, Davis claimed that the state post-conviction court and federal habeas court had vindicated him by acknowledging that the victim's daughter was unable to place him at the scene of the crime. We denied the request, concluding that other evidence demonstrated Davis's guilt and so he could not establish his innocence as required to authorize a successive petition. No. 22-1729 (7th Cir. May 17, 2022); *see* 28 U.S.C. § 2244(b)(2)(B)(ii).

That brings us to Davis's second, and current, § 2244(b) application. This time Davis advances a claim of prosecutorial misconduct in misleading the state courts about the daughter's testimony, but he again relies on the same evidence that he had before—his purported vindication at the hands of the state post-conviction and the § 2254 courts. Davis argues that we "misinterpreted" his claim of innocence in his first application. To the extent that the current application is an invitation for us to reconsider our denial of Davis's first § 2244(b) application, such a request is barred by 28 U.S.C. § 2244(b)(3)(E).

Regardless, Davis's current application, like his first, fails because he cites no new rule of constitutional law, nor does he cite new and decisive proof of his innocence. *See* 28 U.S.C. § 2244(b)(2). Davis contends the cited court rulings are evidence of his innocence and they were not available until recently. But the courts were merely interpreting testimony that has always been on the record. The "factual predicate for the claim," —the daughter's inability to identify the other person in the car and the prosecutor's supposed misstatement—was readily available to him. *See* § 2244(b)(2)(B)(i). Further, nothing requires a reasonable juror to find Davis innocent, regardless of what the victim's daughter may have said. Davis's position to police, and throughout his litigation, has been that he was with his uncle when his uncle shot the victim but did not know that the shooting would occur. Considering the evidence established Davis discussed the bounty with his uncle, identified the victim to his uncle, and drove his uncle away from the shooting, nothing required a reasonable juror to believe that Davis was oblivious to his uncle's plan.

We therefore must **DENY** authorization and **DISMISS** Davis's application.