

Appendix "A"

No. 23-5174.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Jan 29, 2024

KELLY L. STEPHENS, Clerk

CEDRIC JONES,

Petitioner-Appellant,

v.

BRIAN ELLER, Warden,

Respondent-Appellee.

ORDER

Before: GRIFFIN, Circuit Judge.

Cedric Jones, a Tennessee prisoner proceeding pro se, appeals the district court's denial of his petition for a writ of habeas corpus. Jones has applied for a certificate of appealability (COA). Jones has also moved to remain in a single cell and to expedite a decision on that motion pending the resolution of his application (and his separate proceedings, which we have since resolved in the Warden's favor. *See Jones v. Eller*, No. 22-5143 (6th Cir. May 9, 2023)). For the following reasons, Jones's application for a COA is denied, and all motions are denied as moot.

A jury convicted Jones of three counts of aggravated rape, one count of aggravated sexual battery, and one count of aggravated kidnapping, and he was sentenced to 37 years in prison. *State v. Jones*, No. M2015-00720-CCA-R3-CD, 2016 WL 3621513 (Tenn. Crim. App. June 29, 2016), *perm. app. denied* (Tenn. Sept. 22, 2016). The Tennessee Court of Criminal Appeals (TCCA) affirmed, and the Tennessee Supreme Court denied leave to appeal. *Id.*

In October 2016, Jones filed a 28 U.S.C. § 2254 petition in the district court. After concluding his state court proceedings, Jones filed an amended petition, which the district court designated as the governing petition. Jones asserted thirteen claims, some of which have subclaims: (1) whether the trial court committed significant judicial errors; (2) whether direct appeal counsel performed ineffectively; (3) whether the TCCA violated Jones's Fifth and

Fourteenth Amendment rights; (4) whether the Supreme Court of Tennessee violated Jones's First, Fifth, and Fourteenth Amendment rights; (5) whether the prosecutor committed misconduct; (6) whether trial counsel performed ineffectively; (7) whether the trial court committed structural errors; (8) whether the trial court and State committed crimes against petitioner; (9) whether the prosecution violated Jones's double-jeopardy rights; (10) whether the trial court violated Jones's speedy-trial rights; (11) whether the trial court's alleged bias violated Jones's due process rights; (12) whether the police violated Jones's Fourth Amendment rights; and (13) whether Jones's indictment is "void." The district court denied Jones's petition, concluding that claims 2, 3, 4, 5, 6, 8, 9, 10, 12, and 13 and parts of claims 1 and 7 were procedurally defaulted and that claim 11 and the properly exhausted subclaims of claims 1 and 7 lacked merit. Jones now applies for a COA.

A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). A petitioner may do so by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El*, 537 U.S. at 336 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). When the district court's denial is based on a procedural ruling, the petitioner must demonstrate that "jurists of reason would find it debatable whether the [motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484. When a state court adjudicates a petitioner's claims on the merits, the district court may not grant habeas relief unless the state court's adjudication 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 "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 *Harrington v. Richter*, 562 U.S. 86, 100 (2011). At the COA stage, where a state court adjudicates a petitioner's claim on the merits, the relevant question

is whether the district court's application of § 2254(d) to that claim is debatable by jurists of reason. *See Miller-El*, 537 U.S. at 336.

Jones's COA application lists 12 claims, seven of which were not included in his § 2254 petition. Generally, we do not consider issues for the first time on appeal, absent extraordinary circumstances. *See, e.g., United States v. Ellison*, 462 F.3d 557, 560 (6th Cir. 2006). In addition, not all of Jones's remaining five claims directly correspond to claims raised in his petition. Jones does, however, generally challenge the district court's ruling as to all claims. Accordingly, this court will address all the claims raised in Jones's amended § 2254 petition.

Claims Dismissed for Procedural Reasons

In Claim 4, Jones alleges that the Tennessee Supreme Court violated his First, Fifth, and Fourteenth Amendment rights under the United States and Tennessee Constitutions. The district court denied relief on this claim because it failed to comply with habeas pleading standards. Those standards are "more demanding" than the Federal Rule of Civil Procedure 8(a) standards. *Mayle v. Felix*, 545 U.S. 644, 655 (2005). Rule 2(c) of the Rules Governing Section 2254 Cases requires that a petition, among other things, "specify all the grounds for relief available to the petitioner." *Id.* "A prime purpose of Rule 2(c)'s demand that habeas petitioners plead with particularity is to assist the district court in determining whether the State should be ordered to 'show cause why the writ should not be granted.'" *Id.* at 656 (quoting 28 U.S.C. § 2243).

Claim 4 does not contain any supporting facts or argument. Instead, it simply quotes the cited Amendments. Thus, reasonable jurists could not argue that dismissal of Claim 4 is inappropriate under Rule 2.

Next, the district court dismissed claims 2, 3, 5, 6, 8-10, 12, and 13 and parts of claims 1 and 7 because Jones procedurally defaulted them. A petitioner procedurally defaults a claim if the petitioner fails to exhaust the claim in state court and state remedies are no longer available. *Lovins v. Parker*, 712 F.3d 283, 295 (6th Cir. 2013). The exhaustion requirement is deemed satisfied when the "highest court in the state in which the petitioner was convicted has been given a full and fair opportunity to rule on the petitioner's claims." *Manning v. Alexander*, 912 F.2d 878, 881 (6th

Cir. 1990). In Tennessee, petitioners comply with this requirement by presenting their claims on appeal to the TCCA. *Adams v. Holland*, 330 F.3d 398, 402-03 (6th Cir. 2003). Additionally, in order to be deemed exhausted, a habeas claim "must have been 'fairly presented' to the state courts." *Hooks v. Sheets*, 603 F.3d 316, 320 (6th Cir. 2010) (quoting *Wagner v. Smith*, 581 F.3d 410, 414 (6th Cir. 2009)). "A claim may only be considered 'fairly presented' if the petitioner asserted both the factual and legal basis for his claim to the state courts." *McMeans v. Brigano*, 228 F.3d 674, 681 (6th Cir. 2000) (quoting *Franklin v. Rose*, 811 F.2d 322, 325 (6th Cir. 1987)).

In his direct appeal, Jones was first represented by appointed counsel. Appellate counsel filed a brief listing eight issues: (1) the trial court erred in denying recusal requests; (2) the trial court erred in denying the request to proceed pro se; (3) the trial court erred when it revoked Jones's bond; (4) the evidence was insufficient; (5) the prosecutor erred by stating that Jones pointed a gun at the victim; (6) the trial court erred in considering an email from the victim at sentencing; (7) the trial court erred in weighing mitigating factors; and (8) the trial court erred in imposing consecutive sentences. The TCCA affirmed. *Jones*, 2016 WL 3621513, at *12. Jones, then proceeding pro se, applied for discretionary review by the Tennessee Supreme Court and listed six claims. Of those six, four were not raised to the TCCA. *Id.* at *1.

Reasonable jurists would not debate whether Jones exhausted claims 2, 3, 5, 6, 8-10, 12, and 13 and parts of claims 1 and 7 on direct appeal. Jones did not raise these claims to the TCCA.

The Tennessee Supreme Court would not have considered the four claims that Jones raised for the first time in his pro se filing because he did not first present them to the TCCA. *See McClain v. Kelly*, 631 F. App'x 422, 440 n.3 (6th Cir. 2015); *see also Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006) (stating that "a petitioner may procedurally default a claim by failing to comply with state procedural rules in presenting his claim to the appropriate state court").

Nor would reasonable jurists debate whether Jones exhausted these claims and subclaims on post-conviction relief. Jones argues that he exhausted claims by including them in his motions for post-conviction review. The district court correctly noted, however, that Jones did not appeal the denial of his post-conviction motion to the TCCA, and thus he did not exhaust those claims

Argument
And Motion To Recuse Cases

through the post-conviction proceedings. Because there is no record that Jones properly filed an appeal in the post-conviction court, reasonable jurists would not debate the district court's conclusion that Jones did not exhaust any claims on post-conviction review. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) (holding that, to satisfy exhaustion requirement, state prisoners must "invok[e] one complete round of the State's established appellate review process"); *Adams*, 330 F.3d at 402-03.

Because Jones did not properly exhaust these claims, he needs to show cause and prejudice, *Theriot v. Vashaw*, 982 F.3d 999, 1004 (6th Cir. 2020). He fails to establish either element. Accordingly, reasonable jurists would not debate the district court's decision not to excuse the procedural defaults. → But see

Claims Denied on the Merits

The district court addressed claim 11 and parts of claims 1 and 7 on the merits.

Judicial Bias

In claim 11 and claim 1, subclaim 1, Jones alleges that he was denied his right to a fair trial before an impartial judge. During his trial, Jones filed several motions to recuse the trial judge. *Jones*, 2016 WL 3621513, at *7. Jones alleged that the trial court exhibited bias against him, specifically noting that a *different* judge at his preliminary hearing called him "a piece of shit." Jones also filed a lawsuit against the trial judge. The trial court denied each recusal motion. The TCCA reviewed this claim and denied relief. The TCCA concluded: (1) Jones's filing of a lawsuit against the trial judge did not require recusal or establish bias; (2) the fact that the trial judge issued unfavorable rulings did not establish bias; and (3) Jones's failure to include transcripts supporting his claim precluded further review of the issue. *Id.* at *7-8.

A reasonable jurist could not argue that the state court unreasonably applied clearly established federal law in rejecting Jones's judicial bias claim as presented. "[D]ue process demands that the judge be unbiased." *Railey v. Webb*, 540 F.3d 393, 399 (6th Cir. 2008). Recusal is required when "the probability of actual bias rises to an unconstitutional level." *Coley v. Bagley*, 706 F.3d 741, 750 (6th Cir. 2013) (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 887

(2009)). Jones cannot force recusal merely by filing a lawsuit against the trial judge. *United States v. Martin-Trigona*, 759 F.2d 1017, 1020-21 (2d Cir. 1985). Nor do the trial court's adverse rulings require recusal. *See Liteky v. United States*, 510 U.S. 540, 555-56 (1994). Additionally, the TCCA noted that Jones did not move to recuse the trial judge until the eve of trial. Jones does not give reasons for his delay and more importantly does not provide transcripts to establish the judge's bias. Finally, the judge who made the alleged "piece of shit" statement was not the trial judge.

In sum, Jones provides nothing from the record that shows why the trial judge should have been recused or that she was biased. Accordingly, reasonable jurists would not debate the district court's rejection of this claim.

Self-representation

In claim 1, subclaim 3, Jones alleges that the trial court denied him his Sixth Amendment right to self-representation. Jones alleges that he asked to represent himself on the day before the trial, but the trial judge determined that the request was a delay tactic and denied it. *Jones*, 2016 WL 3621513, at *9. On appeal, Jones argued that the record did not support the trial court's finding that his request was a delay tactic. *Id.* The TCCA reviewed the claim and determined that Jones failed to provide an adequate appellate record and that, with no record, it had to presume that the trial court correctly determined that Jones's request was made for the purpose of delay. *Id.*

When reviewing a COA application, a court must consider the merits of the underlying claim and any procedural barrier to relief. *Moody v. United States*, 958 F.3d 485, 488 (6th Cir. 2020). Thus, even if a claim has arguable merit, the claim should not receive a COA if it is plainly barred by a procedural defect. *Id.*

In Tennessee, an appellant bears the burden of preparing an adequate record for appellate review. *State v. Ballard*, 855 S.W.2d 557, 560 (Tenn. 1993). When the record is incomplete and does not contain materials on which a party relies, an appellate court is precluded from considering the issue. *Id.* at 560-61. Thus, the reviewing court presumes the trial court's ruling to be correct. *State v. Richardson*, 875 S.W.2d 671, 674 (Tenn. Crim. App. 1993). Further, Tennessee law

requires a defendant to waive his right to counsel in writing and for that writing to be included in the record. *State v. Hester*, 324 S.W.3d 1, 31 (Tenn. 2010); Tenn. R. Crim. P. 44(b)(2) & (3).

Because Jones did not provide an adequate appellate record of his request to self-represent, he failed to fairly present the claim to the state court and has procedurally defaulted it. Thus, no reasonable jurist would debate the district court's denial of the claim.

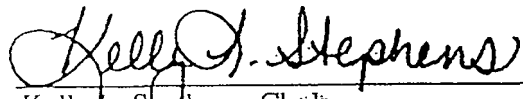
Sentencing Error

Finally, in claim 7, subclaim 8, Jones alleges that the trial court committed "structural errors" in his case, specifically by considering at sentencing an email supposedly written by the victim. Jones alleges that the email was written by the victim's mother, his ex-wife. The TCCA concluded that Jones waived the issue by failing to object in the trial court and that Jones had not shown prejudice from the trial court's consideration of the email. *Jones*, 2016 WL 3621513, at *11.

Again, even if a claim may have merit, it can still be barred by a procedural defect. *Moody*, 958 F.3d at 488. Because Jones did not object to the admission of the email, under Tennessee law, he waived the issue on appeal. Tenn. R. App. P. 36(a). Thus, no reasonable jurist would debate the district court's denial of the claim.

Accordingly, Jones's COA application is DENIED, and all pending motions are DENIED as moot.

ENTERED BY ORDER OF THE COURT


Kelly L. Stephens, Clerk

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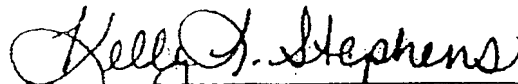
JUDGMENT

THIS MATTER came before the court upon the application by Cedric Jones for a certificate of appealability.

UPON FULL REVIEW of the record and any submissions by the parties,

IT IS ORDERED that the application for a certificate of appealability is DENIED.

ENTERED BY ORDER OF THE COURT


Kelly L. Stephens, Clerk

United States Court of Appeals for the Sixth Circuit

U.S. Mail Notice of Docket Activity

The following transaction was filed on 01/29/2024.

Case Name: Cedric Jones, Sr. v. Brian Eller

Case Number: 23-5174

Docket Text:

ORDER filed: Jones's COA application is DENIED, and all pending motions are DENIED as moot. Richard Allen Griffin, Circuit Judge.

The following documents(s) are associated with this transaction:

Document Description: Order

Notice will be sent to:

Mr. Cedric Jones
Northeast Correctional Complex
P.O. Box 5000
Mountain City, TN 37683

A copy of this notice will be issued to:

Mr. Nicholas Bolduc
Ms. Lynda M. Hill

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