

Appendix E
Byrd v. Washburn

U.S. District Court

February 26, 2021

Byrd v. Washburn

United States District Court for the Middle District of Tennessee, Nashville Division

February 26, 2021, Filed

Civil Action No. 3:18-cv-00142

Reporter

2021 U.S. Dist. LEXIS 61055 *; 2021 WL 1621998

MAURICE O. BYRD, Petitioner, v. RUSTY WASHBURN, Warden, Respondent.

Counsel: [*1] For Maurice O. Byrd, Petitioner: Gregory Dale Smith, Clarksville, TN.

For Rusty Washburn, Warden, Respondent: Meredith Wood Bowen, T. Austin Watkins, Tennessee Attorney General's Office, Nashville, TN.

Judges: JEFFERY S. FRENSLEY, United States Magistrate Judge.

Opinion by: JEFFERY S. FRENSLEY

Opinion

REPORT AND RECOMMENDATION

In February of 2009, a jury in Montgomery County, Tennessee convicted Maurice Byrd ("Petitioner") of aggravated robbery, felony murder, and first-degree murder. State v. Byrd, No. M2010-02405-CCA-R3CD, 2012 Tenn. Crim. App. LEXIS 968, 2012 WL 5989817, at *1 (Tenn. Crim. App. Nov. 29, 2012); *see also* Docket No. 16-1, p. 1. The state trial court merged the first-degree murder conviction into the felony murder conviction, and the trial court sentenced Petitioner to life imprisonment. State v. Byrd, 2012 Tenn. Crim. App. LEXIS 968, 2012 WL 5989817, at *1. Following

Petitioner's conviction, the state courts denied Petitioner's requests for relief from his conviction on direct appeal and in post-conviction proceedings. *See Id.* at *12; Byrd v. State, No. M201601061CCAR3PC, 2017 Tenn. Crim. App. LEXIS 749, 2017 WL 3641716, at *1 (Tenn. Crim. App. Aug. 24, 2017), *appeal denied* (Nov. 16, 2017). Having exhausted his attempts to seek relief in the state courts, Petitioner now alleges in federal court that several errors committed in those state proceedings violated his rights under the United States Constitution. Specifically, Petitioner requests this Court [*2] to find that (1) his legal representation in state court violated his constitutional right to effective assistance of counsel at trial and on appeal and (2) the errors made by his counsel rendered his court proceedings structurally defective. *See* Docket No. 1, p. 9; *see also* Docket No. 11, pp. 1-3. The Warden ("Respondent") of the prison Petitioner is incarcerated in opposes Petitioner's request for habeas corpus relief.

For the reasons set forth below, the undersigned recommends that habeas corpus relief be DENIED.

I. BACKGROUND

The facts proven at trial in state court showed that Petitioner robbed the victim with a .380 caliber handgun. Byrd v. State, 2017 Tenn. Crim. App. LEXIS 749, 2017 WL 3641716, at *1. Petitioner killed the victim during the robbery by shooting him in the head. *Id.*

In May of 2006, a Montgomery County Grand Jury indicted Petitioner for aggravated robbery, felony murder, and first degree murder. Docket No. 16-1, p. 4. Following his trial, the petit jury found Petitioner guilty on all counts. State v. Byrd, 2012 Tenn. Crim. App. LEXIS 968, 2012 WL 5989817, at *1. Petitioner then filed his Motion for New Trial (Docket No. 16-1, pp. 43-44) and Amended Motion for New Trial (*id.* at 53-54) after his conviction. The trial court denied his request for relief on October 28, 2010. *Id.* at 55. Petitioner filed his Notice [*3] of Appeal on November 16, 2010 to appeal his conviction to the Tennessee Court of Criminal Appeals. *Id.* at 56-57. The Tennessee Court of Criminal Appeals affirmed Petitioner's conviction on direct appeal in an opinion issued on November 29, 2012. Despite failing to initially file an application for permission to appeal to the Tennessee Supreme Court, Petitioner was granted a delayed appeal to request that court to review his case. See Byrd v. State, 2017 Tenn. Crim. App. LEXIS 749, 2017 WL 3641716, at *1; see also Docket No. 16-15, p. 8. The Tennessee Supreme Court declined to review Petitioner's case in an order issued on December 11, 2013. Docket No. 16-14.

After Petitioner's direct appeal process ended, he sought relief from his conviction by mounting collateral attacks in state court.¹ Petitioner filed a Petition for Relief from Conviction or Sentence with the Montgomery County trial court on July 22, 2013. Docket No. 16-15, pp. 4-7. Petitioner also filed an Amended Petition for Relief from Conviction or Sentence on January 14, 2014. Docket No. 16-15, pp. 9-13. The trial court denied Petitioner's request for post-conviction

¹A collateral attack is "[a]n attack on a judgment in a proceeding other than a direct appeal; esp., an attempt to undermine a judgment through a judicial proceeding in which the ground of the proceeding (or a defense in the proceeding) is that the judgment is ineffective." COLLATERAL ATTACK, Black's Law Dictionary (11th ed. 2019).

relief. See Docket No. 16-15, pp. 40-60. Petitioner appealed the trial court's denial of his request for post-conviction relief, [*4] but the Tennessee Court of Criminal Appeals affirmed the trial court's judgment. Byrd v. State, 2017 Tenn. Crim. App. LEXIS 749, 2017 WL 3641716, at *13. The Tennessee Supreme Court also declined to review Petitioner's post-conviction case. Docket No. 16-23.

Now pending before this Court is Petitioner's "Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2241" filed on February 12, 2018. Docket No. 1. On September 28, 2018, Petitioner filed his "Amended § 2254 Habeas Corpus Petition." Docket No. 11 (emphasis original). Respondent filed his Answer on November 28, 2018. Docket No. 17.

II. STANDARD OF REVIEW

State prisoners may petition the federal courts for relief of their state convictions by making an application of a writ for habeas corpus "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

A. Exhaustion Requirement

To be granted relief from a state conviction, it must appear that: "the applicant has exhausted the remedies available in the courts of the State;" "there is an absence of available State corrective process;" or "circumstances exist that render such process ineffective to protect the rights of the applicant." *Id.* § 2254(b)(1)(A)-(B). The exhaustion requirement ensures state courts have "an opportunity to act on [*5] his claims before he presents those claims to a federal court in a habeas petition." O'Sullivan v. Boerckel, 526 U.S. 838, 842, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999). To meet that requirement, the state prisoner seeking

relief must raise the claims in the available state courts,² *Rose v. Lundy*, 455 U.S. 509, 520, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982), and his claims must "be presented to [those] courts under the same theory in which it is later presented in federal court." *Wong v. Money*, 142 F. 3d 313, 322 (6th Cir. 1998) (citing *Pillette v. Foltz*, 824 F. 2d 494, 497 (6th Cir. 1987); *Prather v. Rees*, 822 F. 2d 1418, 1421 (6th Cir. 1987)). "[W]hen the prisoner fails to fully and fairly present his claims to the state courts before the time for him to do so has expired, he procedurally defaults and is foreclosed from federal habeas review of those claims, absent a showing of cause and prejudice or a fundamental miscarriage of justice." *In re Cook*, 215 F. 3d 606, 608 (6th Cir. 2000) (citing *O'Sullivan*, 526 U.S. 838, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999); *Murray v. Carrier*, 477 U.S. 478, 495-96, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986); *Wainwright v. Sykes*, 433 U.S. 72, 90-91, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977)).

B. Standard of Review for Fully Exhausted Claims

Habeas corpus relief shall only be granted to a state prisoner seeking an application for a writ on fully exhausted claims in two circumstances. See 28 U.S.C. § 2254 (d)(1)-(2). The first circumstance is when "the adjudication of the claim . . . 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. *Id.* § 2254(d)(1). "A state court's adjudication of a claim is 'contrary to' clearly established federal law 'if [*6] the state court arrives at a conclusion opposite to that reached by the

Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court on a set of materially indistinguishable facts.'" *Stojetz v. Ishee*, 892 F. 3d 175, 192 (6th Cir. 2018), *cert. denied sub nom. Stojetz v. Shoop*, 138 S.Ct. 1262 (2019) (quoting *Van Tran v. Colson*, 764 F. 3d 594, 604 (6th Cir. 2014)). Also, "a state court's decision involves an 'unreasonable application' of federal law when 'the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the petitioner's case.'" *Id.* (quoting *Henley v. Bell*, 487 F. 3d 379, 384 (6th Cir. 2007)). "'Clearly established federal law' includes only the holdings of the Supreme Court, excluding any dicta; and an application of these holdings is 'unreasonable' only if the petitioner shows that the state court's ruling 'was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement.'" *Id.* (quoting *White v. Woodall*, 572 U.S. 415, 427, 134 S. Ct. 1697, 188 L. Ed. 2d 698 (2014)).

The second circumstance in which habeas corpus relief may be granted is when the state's adjudication of a petitioner's claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the [*7] State court proceeding." 28 U.S.C. § 2254(d)(2). Further, absent a showing by clear and convincing evidence otherwise by a petitioner, determinations of fact "made by a State court shall be presumed to be correct." *Id.* § 2254(e)(1). To obtain relief under § 2254(d)(2), "it is not enough for the petitioner to show some unreasonable determination of fact; rather, the petitioner must show that the resulting state court decision was 'based on' that unreasonable determination." *Rice v. White*, 660 F. 3d 242, 250 (6th Cir. 2011) (quoting 28 U.S.C. § 2254(d)(2)).

²For claims arising from state criminal proceedings in Tennessee, the exhaustion requirement is met when the Tennessee Court of Criminal Appeals has reviewed the asserted claims of error on the merits. *Adams v. Holland*, 330 F. 3d 398, 402 (6th Cir. 2003).

III. LAW AND ANALYSIS

Petitioner asserts that his constitutional right to effective assistance of counsel was violated at trial and on appeal in the state courts, and he contends that his counsel's conduct rendered his proceedings structurally defective. *See* Docket No. 1, p. 9; *see also* Docket No. 11, pp. 1-3.³ Specifically, Petitioner argues first that he received ineffective assistance of trial counsel when his attorney failed to "fully and completely investigat[e] this case" and represented Petitioner in state sentencing despite a conflict of interest that Petitioner alleges he did not waive. Docket No. 1, p. 9; *see also* Docket No. 11, p. 1-2. Petitioner argues second that he received ineffective assistance of appellate counsel when his attorney [*8] continued to represent him on appeal despite the conflict mentioned above and made several errors in handling the appeal. *See* Docket No. 1, p. 9; *see also* Docket No. 11, p. 2-3. Those alleged errors include his original appellate counsel's conduct of passing her duties off to a partner at her law firm, failing to file a reply brief, and citing to a standard of review that had been recently overruled. *See* Docket No. 1, p. 9; *see also* Docket No. 11, p. 2-3. Petitioner also argues his proceedings were structurally defective as a result of these errors. Docket No. 1, p. 9; Docket No. 11, p. 3.

The Tennessee Court of Criminal Appeals found the following facts relevant from the proof offered at Petitioner's post-conviction relief hearing:

1. July 17, 2014 Hearing

Counsel testified that he represented the Petitioner at trial. Following the trial, Counsel learned that the

Petitioner planned to retain someone else. Counsel agreed that there were issues that arose during the trial that, had he remained on the case, he would have pursued in a motion for new trial.

Counsel testified that, in his opinion, it was important to Shepardize cases in order to know whether the law had been overturned or [*9] modified. He confirmed that attorneys are not to cite as precedent case law that has been overturned. Counsel further agreed that he had an "ethical obligation" to address, upon learning of it, a "blatant obvious and fatal defect" in an appellate brief. Counsel opined that it would be a "dangerous proposition for [a] client" if an attorney became aware of overturned case law relied upon in a brief, and the attorney did not address it.

Sandra McQueen, the Petitioner's mother, testified that after the Petitioner was convicted at trial, she spoke with several attorneys in Clarksville, Tennessee, before hiring Appellate Counsel to represent the Petitioner. It was Ms. McQueen's understanding that Appellate Counsel was going to file an appeal on the Petitioner's behalf. Ms. McQueen said that she requested a contract but that Appellate Counsel said "just pay [me] the money to start the appeal." Ms. McQueen confirmed that Appellate Counsel had also agreed to handle a post-conviction claim. Appellate Counsel told Ms. McQueen that another attorney would be "help[ing]" Appellate Counsel with the Petitioner's case, but Ms. McQueen never met this other attorney. Ms. McQueen testified that she paid [*10] Appellate Counsel between \$5,000 and \$7,000 for representation.

Ms. McQueen testified that Appellate Counsel never provided her with a copy of the appellate brief nor did Appellate Counsel notify Ms. McQueen when the Court of Criminal Appeals issued its

³ Petitioner does not argue that the state courts unreasonably determined the facts in his case. *See* Docket Nos. 1, 11. Thus, the undersigned's review of Petitioner's claims is limited to 28 U.S.C. § 2254(d)(1).

decision in the direct appeal. Ms. McQueen said that she called Appellate Counsel's office "a bunch of times" and ultimately was referred to a "website" to check for the status of the case. Ms. McQueen recalled that Appellate Counsel never filed an application for permission to appeal to the Tennessee Supreme Court for the direct appeal or a post-conviction petition. Ms. McQueen testified that she never instructed Appellate Counsel not to file an application with the supreme court.

The Petitioner testified that his only encounter with Appellate Counsel was at court when she told him she was his new lawyer. The Petitioner wrote letters to Appellate Counsel about his appeal, but Appellate Counsel never responded. The Petitioner stated that he was never told that there might be another attorney working on his appeal. The Petitioner confirmed that he received the Court of Criminal Appeals opinion in the mail but that Appellate Counsel never [*11] contacted him or asked whether he wanted to pursue an appeal to the supreme court. When asked if he wanted to pursue supreme court review, the Petitioner responded, "if it would help me."

The Petitioner testified that he was unaware of any post-conviction paperwork filed by Appellate Counsel. The Petitioner said that Appellate Counsel never advised him that the post-conviction attorney might have to address issues involving the appellate attorney's representation.

Appellate Counsel testified that she was retained after the trial but before the motion for new trial. She said that normally she would file a "marker motion," order the trial transcripts and, after review of the transcripts, amend the motion. She had no recollection of whether she did this in the Petitioner's case. Appellate Counsel stated that it was her understanding about her representation of

the Petitioner that she was to "either pursue an appeal or we also discussed the possibility of going ahead and pursuing a petition for post-conviction based on the trial."

Appellate Counsel testified that, at the time she accepted this case, she began practicing law with Mr. Long and Mr. Herbison. She said that due to Mr. Herbison [*12] being "a great appellate lawyer" "the appeal was turned over to him." She said that she had sought Mr. Herbison's advice about the Petitioner's case, and Mr. Herbison advised that she should not pursue post-conviction "right away" but instead pursue a direct appeal. When asked about her interaction with the Petitioner, she said, "Just mailing him copies of everything basically." She confirmed that she never discussed the appeal with the Petitioner and then, at some point, the case was "turned over" to Mr. Herbison.

Appellate Counsel testified that she was unaware of what Mr. Herbison did with the case. She explained that in September 2011, the firm split with Mr. Long and Mr. Herbison forming a separate firm. Mr. Herbison took the Petitioner's client file with him. Appellate Counsel recalled that, at the time Mr. Herbison started his own firm, the Court of Criminal Appeals had not issued an opinion, so she was never notified when it was issued. Appellate Counsel said that when Ms. McQueen inquired at her office about the status of the case, she was directed to Mr. Herbison's office. Appellate Counsel agreed that she reviewed and signed the brief filed in this case and that the brief [*13] was filed in May 2011. Counsel agreed that it is important to cite to current law in a brief and also to read the appellee's brief. She further agreed that if a "glaring error" in the appellant's brief was pointed out by the appellee, as appellate counsel she would try to address that issue.

Appellate Counsel testified that she was unfamiliar with *State v. Dorantes*, 331 S. W. 3d 370 (Tenn. 2011). She confirmed that she was unaware that the *Dorantes* case changed "the whole issue on sufficiency and guilt, direct versus circumstantial" evidence. Appellate Counsel stated that she would be surprised if the law relied upon in the Petitioner's brief was incorrect and pointed out by the State because "Mr. Herbison prepared all of that, and I don't believe I ever received the State's response brief." She stated that had she seen the State's brief identifying an error of that nature, she would have addressed it. Counsel conceded that such an error would "probably" provide a reasonable basis for finding ineffective assistance of appellate counsel.

After hearing the evidence, the post-conviction court took the matter under advisement and later issued an order:

The court believes that it is important to set forth a timeline in this case:

1. July [*14] 1, 2005 homicide
2. Trial February 23, 2009; Crawford circumstantial evidence charged to the jury
3. Sentencing April 3, 2009
4. Motion for Transcripts April 3, 2009
5. Substitution of counsel April 16, 2009
6. Motion for New Trial April 27, 2009, alleging ineffective assistance of counsel at trial and insufficiency of the evidence.
7. Order for Transcripts May 21, 2009
8. Amended Motion for New Trial October 28, 2010, alleging insufficiency of the evidence and court to exercise duty as 13th juror.
9. Order denying Motion for New Trial October 28, 2010
10. *State v. Dorantes* filed January 25, 2011.
11. Record filed in Court of Criminal Appeals March

8, 2011.

12. Assigned on briefs on December 7, 2011

13. Opinion entered Court of Criminal Appeals on November 29, 2012.

14. Order granting delayed appeal August 23, 2013.

15. Application for permission to appeal to Supreme Court denied December 11, 2013.

On page 12 of the opinion Judge Thomas wrote:

"However, the State correctly notes that the [Petitioner]'s arguments are based entirely on legal precedents explicitly overruled by our supreme court in *Dorantes*. The [Petitioner]'s assertion that because his conviction was based solely upon circumstantial [*15] evidence the State was required to rule out every reasonable hypothesis except that of guilt is simply no longer the law in Tennessee."

Judge Thomas did not address which law should have been applied law at the time of the event/trial or law at the time of the appeal.

This court assumes based on the Court of Criminal Appeals opinion that no reply brief was filed. The Court of Criminal Appeals did decide the case after *Dorantes*. This court cannot determine that the filing of a reply brief would have benefitted the Petitioner. The Court of Criminal Appeals applied a more lenient standard, but it was the law. There was nothing presented to this court that would make the court determine that any other result would have occurred. No evidence was presented that there were other grounds to appeal.

The court has reviewed *Napoleon Momon vs. State of Tennessee*, 18 S. W. 3d (Tenn. 1999). The Petitioner has asserted that the harmless error criteria should not be used because this is a "structural defect in the constitution of the trial mechanism." ["]These errors have an impact upon

'the entire conduct of the trial from beginning to end.'" This court does not find that there have been any structural [*16] defects whatsoever.

The portion of the Post-conviction Petition that pertains to the appeal in this case is denied. The remaining portions shall be set for hearing.

2. March 30, 2015 Hearing

Sandra McQueen, the Petitioner's mother, testified that she met with the Petitioner's appointed attorney, Counsel, twice. She said that she asked Counsel to contact three or four potential witnesses for the defense. On the day of trial, Counsel conveyed to Ms. McQueen that "he had a witness—witnesses, but nobody showed up." After the trial, Ms. McQueen met and hired Appellate Counsel to handle the Petitioner's direct appeal and post-conviction claims. Ms. McQueen spoke with Appellate Counsel over the telephone because Ms. McQueen was living in Alabama. During Ms. McQueen's conversations with Appellate Counsel, Appellate Counsel never indicated that she had previously been appointed to the Petitioner's case and then recused due to a conflict.

Ms. McQueen testified that she was not familiar with and had never met an attorney named John Herbison. She confirmed that the only attorney she had contact with regarding the Petitioner's appeal was Appellate Counsel. Ms. McQueen recalled that Appellate Counsel [*17] indicated that another attorney would be helping her work on the case but that Appellate Counsel never provided the name of this attorney.

Counsel testified that, initially, another attorney had represented the Petitioner, but Counsel was appointed "early on" and handled the trial on the Petitioner's charges. Following the trial but before

the filing of a motion for new trial, Appellate Counsel was retained. He estimated that Appellate Counsel was retained within forty-five days of the final day of trial. He did not recall whether he filed a motion for new trial but said that his "recollection" was that Appellate Counsel filed the motion for new trial. He agreed that, if he had filed anything, it would have been a "marker motion" to protect the Petitioner's reviewable issues. Counsel said that he and Appellate Counsel did not speak about the motion for new trial other than Appellate Counsel telling him in court that she had been hired to handle the motion for new trial and the appeal. Counsel confirmed that neither Appellate Counsel nor anyone from her office ever contacted him seeking information about the case.

Counsel testified about his preparation for the trial. He recalled that [*18] there was an inmate who was allegedly talking about "some involvement" in the victim's murder. Counsel obtained several continuances to attempt to further investigate but "[n]othing panned out from that information." Counsel testified that he met with the Petitioner between four and eight or nine times. Counsel did not recall having subpoenaed witnesses to trial who failed to appear; however, he noted that there were witnesses he elected not to call at trial for reasons related to trial strategy.

On cross-examination, Counsel testified that the trial was in 2009; thus, the law charged to the jury about circumstantial evidence was State v. Crawford, 225 Tenn. 478, 470 S. W. 2d 610, 612 (Tenn. 1971). He agreed that the *Dorantes* opinion was issued in 2011, and the Petitioner's position would not have been improved under the *Dorantes* standard for circumstantial evidence. 331 S. W. 3d 370 (Tenn. 2011).

Counsel testified that he believed the trial to be "clean" although there "may have been an evidentiary issue or two" that he would have raised on appeal. About witnesses, Counsel said that he discussed with the Petitioner the strengths and weaknesses of various witnesses that the State would not be calling at trial. Ultimately, the Petitioner decided whether to call those witnesses, and [*19] Counsel believed the Petitioner's decisions with regard to the witnesses were in his best interest. Counsel stated that, had Appellate Counsel contacted him, he believed that he could have provided her with some helpful insight into potential appealable issues.

The Petitioner testified that he met with Counsel two but no more than three times prior to trial. The Petitioner was housed in the Montgomery County jail where he and Counsel met on those occasions. The Petitioner confirmed that he had provided Counsel with the names of "a couple" people to interview. The Petitioner did not know whether Counsel spoke with the people he had identified as potential witnesses. The Petitioner was aware that Counsel had employed an investigator, but the Petitioner never spoke with the investigator.

The Petitioner testified that he had questions he had wanted Counsel to ask various witnesses at trial and that Counsel did not ask those questions. The Petitioner testified that he was unaware of whether there were any witnesses at trial to testify on his behalf. He stated that he did not "see anybody." He said that he expected "Shamar Graham" and "Maxine Stinson" to testify on his behalf. The Petitioner [*20] asserted that Shamar Graham could have impeached state witness, Freddie Anderson. Maxine Stinson could have testified that the Petitioner was staying at her home and about the time he arrived and left her home the

day of the murder.

The Petitioner testified that he never met with Appellate Counsel or anyone from her law office. The Petitioner recalled being present at a hearing during which Appellate Counsel "questioned" "somebody [who] came from out-of-state." When making the decision to hire Appellate Counsel, the Petitioner's mother communicated with Appellate Counsel. After Appellate Counsel was hired, the Petitioner sent Appellate Counsel six or seven letters. In response, the Petitioner received notices of court dates but no response to his letters. The Petitioner confirmed that he had various issues he wanted to speak with Appellate Counsel related to his appeal. The Petitioner confirmed that he was asking the court to grant him a new trial or, in the alternative, "go back to the new trial motion."

On cross-examination, the Petitioner agreed that the State investigated the information from the inmate alleging that another inmate was involved in the murder and was unable to substantiate [*21] the information. The Petitioner agreed that Counsel elicited a confession from one of the State's witnesses that he had lied and that the witness had testified at trial in hopes the State would dismiss his charges. About Ms. Stinson's testimony, the Petitioner agreed that Ms. Stinson would have testified that the Petitioner returned to her home at 8:00 or 9:00 a.m. and the victim was killed at around 6:00 a.m. The Petitioner further agreed that Ms. Graham, his girlfriend, would have testified that the Petitioner had been "broke," was unemployed, and "showed up with cash" on the day of the victim's murder to take her shopping. The Petitioner denied that Counsel spoke with him about the possibility of calling Ms. Graham as a witness.

The Petitioner testified that in his letters to Appellate Counsel he provided information that

Appellate Counsel had asked him for. He agreed that there was "[p]robably not" a need for Appellate Counsel to respond since he was providing information at her request.

After hearing the evidence, the post-conviction court denied the Petitioner relief. It is from this judgment that the Petitioner now appeals.

Byrd v. State, 2017 Tenn. Crim. App. LEXIS 749, 2017 WL 3641716, at *7-11. The Tennessee Court of Criminal Appeals analyzed Petitioner's [*22] claims on appeal from the denial of Petitioner's post-conviction relief as follows:

II. ANALYSIS

On appeal, the Petitioner maintains his claim that Appellate Counsel's representation was ineffective. He contends that Appellate Counsel's errors amounted to a constitutional structural defect that entitles him to a renewed motion for a new trial and direct appeal. The State responds that the Petitioner has not met his burden of showing that any alleged deficiency led to his conviction. We agree with the State.

In order to obtain post-conviction relief, a petitioner must show that his or her conviction or sentence is void or voidable because of the abridgment of a constitutional right. T.C.A. § 40-30-103 (2014). The petitioner bears the burden of proving factual allegations in the petition for post-conviction relief by clear and convincing evidence. T.C.A. § 40-30-110(f) (2014). Upon review, this Court will not re-weigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the trial judge, not the appellate

courts. Momon v. State, 18 S. W. 3d 152, 156 (Tenn. 1999) (citing Henley v. State, 960 S. W. 2d 572, 578-79 (Tenn. 1997)). A post-conviction court's factual findings are subject [*23] to a de novo review by this Court; however, we must accord these factual findings a presumption of correctness, which can be overcome only when a preponderance of the evidence is contrary to the post-conviction court's factual findings. Fields v. State, 40 S. W. 3d 450, 456-57 (Tenn. 2001). A post-conviction court's conclusions of law are subject to a purely de novo review by this Court, with no presumption of correctness. Id. at 457.

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

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

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also [*24] State v. Melson, 772 S. W. 2d 417, 419 (Tenn. 1989).

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

When evaluating an ineffective assistance of counsel claim, the reviewing court should judge the attorney's performance within the context of the case as a whole, taking into account all relevant circumstances. Strickland, 466 U.S. at 690; State v. Mitchell, 753 S. W. 2d 148, 149 (Tenn. Crim. App. 1988). The reviewing court should avoid the "distorting effects of hindsight" and "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 689-90. In doing so, the reviewing court must be highly deferential and "should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Burns, 6 S. W. 3d at 462. Finally, we note that a defendant in a criminal case is not entitled to perfect representation, only constitutionally adequate representation. Denton v. State, 945 S. W. 2d 793, 796 (Tenn. Crim. App. 1996). In other words, "in considering [*25] claims of ineffective assistance of counsel, 'we address not what is prudent or appropriate, but only what is

constitutionally compelled.'" Burger v. Kemp, 483 U.S. 776, 794, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987) (quoting United States v. Cronin, 466 U.S. 648, 665 n. 38, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)). Counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. Williams v. State, 599 S. W. 2d 276, 279-80 (Tenn. Crim. App. 1980). "The fact that a particular strategy or tactic failed or hurt the defense, does not, standing alone, establish unreasonable representation. However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation." House, 44 S. W. 3d at 515 (quoting Goad, 938 S. W. 2d at 369).

If the petitioner shows that counsel's representation fell below a reasonable standard, then the petitioner must satisfy the prejudice prong of the Strickland test by demonstrating "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694; Nichols v. State, 90 S. W. 3d 576, 587 (Tenn. 2002). This reasonable probability must be "sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694; Harris v. State, 875 S. W. 2d 662, 665 (Tenn. 1994).

The evidence does not preponderate against the post-conviction court's findings. Appellate Counsel filed a marker motion, amended the motion to preserve the issue of ineffective assistance of [*26] counsel for post-conviction review, and argued the motion for new trial which was denied. Appellate Counsel filed a brief asserting insufficiency of the evidence based on law no longer in effect, and this Court affirmed the trial court. Appellate Counsel explained that, at the time this Court's opinion was

issued, she had separated from her firm and the attorney then handling the Petitioner's appeal was notified of the appeal rather than her; thus, she could not advise Petitioner of his right to seek supreme court review. A delayed appeal was granted, however, allowing the Petitioner to file a Rule 11 application to our supreme court which was denied on December 11, 2013.

The Petitioner correctly identifies deficiencies with Appellate Counsel's performance; however, he has failed to show prejudice. Appellate Counsel relied on old law about circumstantial evidence rather than current law even after the State identified this error in the brief. Nonetheless, the Petitioner does not show that, even had Appellate Counsel filed a reply brief arguing under the new *Dorantes* standard, the outcome would have been different. Further, as the post-conviction court noted, although the Petitioner complains [*27] of Appellate Counsel's singular issue on appeal based upon inapplicable law, he fails to assert what appealable issues were present that Appellate Counsel failed to pursue. As to Appellate Counsel's failure to file an application for supreme court review, the Petitioner cannot prove he was prejudiced because this issue was remedied by the grant of a delayed appeal.

To the extent that the Petitioner argues that Appellate Counsel's deficiencies amounted to a structural defect, we conclude that the deficiencies did not rise to the level of structural defect constituting a complete denial of counsel. See *Wallace v. State*, 121 S. W. 3d 652, 658-59 (Tenn. 2003)

Accordingly, the Petitioner has not shown that he is entitled to relief under the Strickland standard. Therefore, the post-conviction court properly denied relief.

Id. at *11-13.

A. Ineffective Assistance of Trial Counsel

i. Exhaustion

Petitioner first alleges that he received ineffective assistance of trial counsel. See Docket No. 1, p. 9; see also Docket No. 11, p. 1-2. Despite litigating this issue in the state post-conviction proceedings (Docket No. 16-15, p. 12), Petitioner did not raise this argument on appeal from those proceedings. *Byrd v. State*, 2017 Tenn. Crim. App. LEXIS 749, 2017 WL 3641716, at *11 n. 4. As highlighted by Respondent, Petitioner expressly stated that [*28] he decided not to raise the claim on appeal from post-conviction proceedings for tactical reasons. Docket No. 16-19, p. 7, n. 1. The Tennessee Court of Criminal Appeals did not address this claim on the merits. As a result, Petitioner's claim is procedurally defaulted. See *Adams*, 330 F. 3d at 402; see also *In re Cook*, 215 F. 3d at 608.

Because this claim is procedurally defaulted, Petitioner had the burden of making a showing of cause and prejudice to overcome that procedural default. See *West v. Carpenter*, 790 F. 3d 693, 697 (6th Cir. 2015) (explaining that procedurally defaulted claims "will not be reviewed by federal courts unless the petitioner demonstrates cause and prejudice for his default." Petitioner has not met his burden of overcoming procedural default. Accordingly, the undersigned declines to reach the merits of this claim and denies Petitioner habeas corpus relief on this ground.

B. Ineffective Assistance of Appellate Counsel

i. Exhaustion

Petitioner raised this claim in the state post-conviction proceedings (*see* Docket No. 16-15, p. 12), and appealed the denial of his claim from the trial court to the Tennessee Court of Criminal Appeals. *See* Docket No. 16-19. The Tennessee Court of Criminal Appeals reviewed and denied his claim on the merits. *See Byrd v. State*, 2017 Tenn. Crim. App. LEXIS 749, 2017 WL 3641716, at *11-13. Therefore, Petitioner has [*29] fully exhausted this claim in the available state proceedings.

ii. Merits

Petitioner argues that he received ineffective assistance of appellate counsel when his counsel: (1) "waiv[ed] all appellate issues except sufficiency of evidence[,] basing the appellate argument . . . on an appellate standard of review that" had been recently overruled (Docket No. 1, p. 9); (2) acted under an acknowledged, and unwaived actual conflict of interest while presenting the appeal in this case" (*Id.*); and (3) "farmed out the appeal of Petitioner's case to John Herbison, an attorney with her law firm, who, according to Mrs. Gasaway, was solely responsible for said appeal" without Petitioner's knowledge of that arrangement. Docket No. 11, p. 2.

In support of his first argument, Petitioner states in his Amended Petition that "[t]he brief filed by Mrs. Gasaway cited only sufficiency of evidence as a ground for relief, but used *State v. Crawford*, 225 Tenn. 478, 470 S. W. 2d 610, 612 (Tenn. 1917) as the appellate standard of review." Docket No. 11, p. 2 (emphasis original). Petitioner explains "[t]his was a problem because *Crawford* was overturned by the Tennessee Supreme Court . . . in *State v. Dorantes* 331 S. W. 3d 370 (Tenn. 2011)." *Id.* (emphasis original). Although the State's reply brief pointed this mistake out, "no [*30] reply brief was filed by Mrs. Gasaway in state court," and "Mrs. Gasaway indicated that was unaware of the State's brief." *Id.* Petitioner argues that "the failure to know

current caselaw or not both reading the State's appellee's brief is ineffective assistance of counsel where error should be presumed because an attorney must be an effective advocate, even if unsuccessful." *Id.* at 3 (citing *Avery v. Alabama*, 308 U.S. 444, 446, 60 S. Ct. 321, 84 L. Ed. 377 (1940)). Finally, Petitioner acknowledges that both attorneys handling his appeal have since had serious professional disciplinary actions taken against them for their misconduct in the practice of law. *Id.* It is unclear whether their actions taken in Petitioner's case resulted in such discipline.

Petitioner provides no additional argument for his second contention that he received ineffective assistance of counsel due to his appellate counsel representing him while under a conflict of interest. In relation to his third contention, Petitioner argues "[t]he complete abandoning of an appeal by an attorney, without leave of court or client permission in writing, is a structural error where prejudice is presumed." *Id.* at 3 (citing *Fitts v. Lucey*, 469 U.S. 387, 394-96 (1985)). [*sic*]

Petitioner concludes that his conviction is the product of "a structural defect in the [*31] criminal justice procedure in this case, as discussed in *Arizona v. Fulimane*, 499 U.S. 279, 309 (1991) [*sic*] and *Momon v. State*, 18 S. W. 3d 152 165 (Tenn. 1999)." *Id.* (emphasis original).

Respondent argues that the state court did not unreasonably apply clearly established federal law in Petitioner's case. Docket No. 17, p. 13. In support of this argument, Respondent first claims that Petitioner has not shown the state courts unreasonably applied the *Strickland v. Washington* standard for analyzing ineffective assistance of counsel claims. *Id.* at 13-14; *see Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). According to Respondent, "[t]he state court properly applied the prejudice standard for ineffective assistance claims, and

it concluded that Petitioner could not establish that there was a reasonable probability that, but for the misstatement of law, the outcome of the appeal would have been different." *Id.* at 15 (citing Byrd v. State, 2017 Tenn. Crim. App. LEXIS 749, 2017 WL 3641716 at *11-13). Respondent claims Petitioner has not pursued the sufficiency claim in his habeas corpus pleadings nor has Petitioner shown how "the difference in applicable standards for sufficiency of the evidence would have resulted in a different outcome based on the facts of this case." *Id.* (citing Docket No. 11). Respondent concludes that "the Court of Criminal Appeals did not unreasonably apply clearly-established Supreme Court precedent [*32] when it concluded that Petitioner could not show prejudice from appellate counsel's deficient performance." *Id.*

Respondent next contends Petitioner's claim that "prejudice should be presumed because appellate counsel's deficient performance was tantamount to abandonment and amounted to 'a structural error'" lacks merit. *Id.* Respondent argues that the legal authorities cited by Petitioner do not "demand a different outcome in this case because they do not stand for the proposition that appellate counsel's failure to cite controlling precedent constitutes per se ineffective assistance that does not require an affirmative showing of prejudice." *Id.* Respondent argues "appellate counsel did not wholly abandon Petitioner on appeal or cause the forfeiture of direct appeal review entirely." *Id.* at 16 (citing Roe v. Flores-Ortega, 528 U.S. 470, 483-85, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000); Smith v. Robbins 528 U.S. 259, 286, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000)). Respondent contends that Petitioner's appellate brief "was sufficient to present the claim for appellate review in state court" despite failing to "identify the controlling law." *Id.* Respondent argues that "Petitioner cannot show that there is a reasonable probability that the outcome would have been any different, but for

appellate counsel's error." *Id.* "Accordingly," Respondent concludes, [*33] "the state court's decision was not an unreasonable application of clearly established Supreme Court precedent, and Petitioner is not entitled to relief on this claim." *Id.*

Finally, Respondent notes that Petitioner suggested "that appellate counsel . . . fail[ed] to raise claims in addition to that of insufficiency of the evidence." *Id.* (citing Docket No. 11, p. 3). Respondent argues that "Petitioner cannot establish ineffective assistance of appellate counsel on that basis either" because he "has not identified any additional claims that allegedly should have been raised." *Id.*

The Sixth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, guarantees a criminal defendant the right to effective assistance of counsel. See Strickland v. Washington, 466 U.S. 668, 686-87, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see generally Gideon v. Wainwright, 372 U.S. 335, 342, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). The right to effective assistance of counsel extends to representation in a direct appeal as of right. Evitts, 469 U.S. at 398. To substantiate a claim that his counsel was ineffective, a petitioner must prove: (1) that his "counsel's performance was deficient" and (2) that his counsel's "deficient performance prejudiced the defense." Strickland, 466 U.S. at 687. "Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the [*34] result unreliable." *Id.*

In establishing that a petitioner's counsel was deficient, it must be shown that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the [petitioner] by the Sixth Amendment." *Id.* In other words, counsel's performance must have fell "below an objective standard of reasonableness."

Campbell v. Coyle, 260 F. 3d 531, 551 (6th Cir. 2001) (quoting *Strickland*, 466 U.S. at 688). The standard for measuring performance under the deficiency prong is "reasonableness under prevailing professional norms." *Id.* (quoting *Strickland*, 466 U.S. at 688). Measuring counsel's performance requires deference to be given to counsel's decisions, including "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Accordingly, a petitioner "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S. Ct. 158, 100 L. Ed. 83 (1955)).

Further, proving prejudice to the defense "requires showing that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable." *Id.* at 687. In other words, a petitioner must show "by 'a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.'" [*35] *Sylvester v. United States*, 868 F. 3d 503, 511 (6th Cir. 2017) (quoting *Strickland*, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. In making this showing, "[i]t is not enough for the [petitioner] to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. "A court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Id.* at 695.

A petitioner does not have to demonstrate prejudice under *Strickland* in three categories of error in which prejudice is presumed: (1) when the right to counsel is denied; (2) when the state interferes "with counsel's assistance;" and (3) when "counsel is burdened by an actual conflict of interest" so long as the petitioner shows "the conflict adversely affected his counsel's performance." *Smith*, 528 U.S. at 287 (citations

omitted). Under these circumstances, "prejudice . . . is so likely that case-by-case inquiry into prejudice is not worth the cost." *Strickland*, 466 U.S. at 692.

In the present case, Petitioner has not demonstrated that the state courts unreasonably applied or contradicted clearly established federal law in adjudicating his claims. *See* 28 U.S.C. § 2254(d)(1). As discussed above, the Tennessee Court of Criminal Appeals found Petitioner's appellate counsel to have provided [*36] deficient performance under the first *Strickland* prong. *Byrd v. State*, 2017 Tenn. Crim. App. LEXIS 749, 2017 WL 3641716, at *13. Under the second *Strickland* prong, the Tennessee Court of Criminal Appeals found that Petitioner "failed to show prejudice" because he could not demonstrate that: (1) the outcome of his direct appeal would have been different had counsel argued the correct sufficiency standard; (2) any other "appealable issues . . . present that Appellate Counsel failed to pursue;" or (3) his delayed appeal failed to remedy any prejudice caused by his appellate counsel's "failure to file an application for supreme court review." *Id.* In his habeas pleadings, Petitioner does not explain how he experienced prejudice, nor does he argue how the state courts' adjudication of his claim unreasonably applied or contradicted the *Strickland* standard. *See* Docket Nos. 1, 11. Instead, Petitioner argues that prejudice should be presumed in this case and he also argues also that these errors resulted in a structural defect. *See* Docket No. 11, p. 3. Nonetheless, the Tennessee Court of Criminal Appeals' adjudication of Petitioner's claim did not unreasonably apply or contradict clearly established federal law. *See* 28 U.S.C. § 2254(d)(1).

Petitioner's argument that prejudice should [*37] have been presumed in the state courts' analysis of his *Strickland* claim is must fail. First, Petitioner does not explain how his appellate counsel (Mrs. Gasaway) allowing additional appellate counsel and law partner

(Mr. Herbison) to prepare the appellate brief constitutes abandonment such that it denied Petitioner the right to counsel entirely. As shown above, Petitioner was represented by counsel on appeal at all times. Byrd v. State, 2017 Tenn. Crim. App. LEXIS 749, 2017 WL 3641716, at *8. Mrs. Gasaway represented Petitioner initially, allowing Mr. Herbison to prepare the brief as she mailed documents to Petitioner. *Id.* Then, when Mrs. Gasaway's and Mr. Herbison's partnership terminated pending the outcome of the appeal, the case remained with Mr. Herbison. *Id.* As both attorneys were of record for the direct appeal, Petitioner has not shown how such arrangement constituted a complete denial of counsel such that prejudice should be automatically presumed.

Next, Petitioner's assertion that prejudice should be presumed where an attorney does not know current caselaw or where an attorney does not read "the State's appellee's brief" is erroneous. As discussed above, prejudice is presumed in only three categories. Smith, 528 U.S. at 287. Neither of these asserted errors falls [*38] into those categories. Instead, a petitioner alleging these errors must prove prejudice under the typical *Strickland* standard. See *Strickland*, 466 U.S. at 688. Therefore, Petitioner is not entitled to relief on this ground either.

Finally, Petitioner's claim that prejudice should be presumed because his attorney acted under a conflict of interest also fails. Unlike the other grounds for presuming prejudice in ineffective assistance claims, those involving conflicts of interest require a petitioner to make a greater showing. See Smith, 528 U.S. at 287. The petitioner must show that his counsel conducted the representation under "an actual conflict of interest" and that such conflict "adversely affected his counsel's performance." *Id.* In his habeas pleadings, Petitioner fails to explain whether the same conflict of interest affecting Mrs. Gasaway during the trial proceedings

continued to affect her ability to represent him on appeal. Additionally, Petitioner fails to show that, even if such conflict existed, it adversely affected his counsel's performance on appeal. For those reasons, Petitioner's claim on this ground is without merit.

The Tennessee Court of Criminal Appeals did not specifically address Petitioner's argument that prejudice [*39] should be presumed. See Byrd v. State, 2017 Tenn. Crim. App. LEXIS 749, 2017 WL 3641716 at *11-13. Since Petitioner has not shown that prejudice should have been presumed in his case, the state courts' adjudication of Petitioner's claim cannot be construed as contrary to or an unreasonable application of clearly established federal law. See 28 U.S.C. § 2254(d)(1).

Therefore, Petitioner cannot meet his burden under 28 U.S.C. § 2254(d)(1). As a result, Petitioner is not entitled to relief on this claim.

C. Structural Defect Claim

As mentioned above, Petitioner also argued that he experienced a structural defect. Generally speaking, constitutional error is divided into two types: (1) trial error and (2) structural defects. United States v. Gonzalez-Lopez, 548 U.S. 140, 148, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006). The most common errors are trial errors. See *Id.* at 148 (2006) (citing *Fulminante*, 499 U.S. at 306). These errors "'occur[] during presentation of the case to the jury' and their effect may 'be quantitatively assessed in the context of other evidence presented in order to determine whether they were harmless beyond a reasonable doubt.'" *Id.* (quoting *Fulminante*, 499 U.S. at 307-08).

Petitioner contends he experienced the second type of constitutional error, a structural defect. These "structural defects" defy analysis by "harmless error" standards'

because they 'affect the framework within which the trial proceeds,' and are not 'simply an error in the trial [*40] process itself.'" *Id.* (quoting *Fulminante*, 499 U.S. at 309-10). The Supreme Court has identified several errors that amount to structural defects, including: (1) "the denial of counsel;" (2) "the denial of the right of self-representation;" (3) "the denial of the right to public trial;" and (4) "the denial of the right to trial by jury by giving of a defective reasonable doubt instruction." *Id.* at 149; see also *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908, 198 L. Ed. 2d 420 (2017).

Assuming the structural defect doctrine applies to errors made by counsel on appeal,⁴ Petitioner has not shown that the state courts unreasonably applied or contradicted clearly established federal law in adjudicating his claims. Petitioner first claims his attorney abandoned his appeal, invoking one of the established categories of structural defects. See *Gonzalez-Lopez*, 548 U.S. at 149 (citing *Gideon*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799). As discussed above, Petitioner received representation on appeal from the filing of his direct appeal to its adjudication on

the merits. *Byrd v. State*, 2017 Tenn. Crim. App. LEXIS 749, 2017 WL 3641716, at *8. Additionally, the state court remedied any error created by his appellate counsel failing to file a request for the state supreme court to review Petitioner's case since it granted Petitioner a delayed appeal. *Id.* at *13. Therefore, the undersigned finds that the state courts' adjudication of his structural error claim was [*41] not contrary to or an unreasonable application of clearly established federal law.

Petitioner also appears to claim that he experienced a structural defect when his appellate attorney argued overruled law or when she allegedly continued to represent him under a conflict of interest. See Docket No. 11, p. 3. The Supreme Court's precedent does not identify these errors as those being analyzed under the structural defect analysis. See *Gonzalez-Lopez*, 548 U.S. at 149. Instead, the error raised by these claims are analyzed under *Strickland*'s two-prong analysis. See *Strickland*, 466 U.S. at 692. As explained above, the state court appropriately analyzed these claims under *Strickland* in a manner consistent with clearly established federal law.

⁴ The clearly established Supreme Court precedent identifies structural errors as those occurring at trial as opposed to those occurring on appeal. See *Weaver*, 137 S. Ct. at 1907 ("The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial.") (emphasis added). Though, the right to counsel on appeal where appeal is provided as of right is interpreted as being co-extensive with the right to counsel at trial. See *Evitts*, 469 U.S. at 398 (holding the right to counsel on appeal established in *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963) includes the right to effective assistance of such counsel). Despite this issue being unclear, the undersigned reviews Petitioner's claim as if the structural defect doctrine applied to appellate proceedings to demonstrate that Petitioner would not be entitled to habeas relief either way.

For the reasons explained above, Petitioner's claim on this ground fails because he has not shown that the state courts unreasonably applied or contradicted clearly established federal law in adjudicating his structural defect claim. See 28 U.S.C. § 2254(d)(1).

In sum, Petitioner is not entitled to habeas corpus relief because he has not met his burden under 28 U.S.C. § 2254(d)(1).

IV. RECOMMENDATION

For the reasons discussed above, the undersigned recommends that habeas corpus relief be DENIED.

Under Rule 72(b) of the Federal Rules of Civil Procedure, any party has fourteen (14) days after service [*42] of this Report and Recommendation in which to file any written objections to this Recommendation with the District Court. Any party opposing said objections shall have fourteen (14) days after service of any objections filed to this Report in which to file any response to said objections. Failure to file specific objections within fourteen (14) days of service of this Report and Recommendation can constitute waiver of further appeal of this Recommendation. *See Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985), *reh'g denied*, 474 U.S. 1111 (1986); 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72.

/s/ Jeffery S. Frensley

JEFFERY S. FRENSLEY

United States Magistrate Judge

End of Document