

IN THE SUPREME COURT
OF THE UNITED STATES

Kenneth Brown

v.

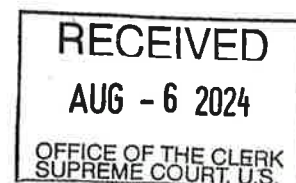
Johnny Fitz, Warden

MOTION FOR EXTENSION OF TIME TO FILE
PETITION FOR WRIT OF CERTIORARI FROM THE
FINAL JUDGEMENT OF THE SIXTH CIRCUIT U.S.
COURT OF APPEAL

Comes Now the Petitioner, Kenneth, pursuant to Rules 21, 30.1 and 30.2 of the Rules of the Supreme Court of the U.S.; petitioner respectfully requests this Honorable Supreme Court to GRANT him an additional 90 day extension to file for his Writ of certiorari from the final judgement of the sixth circuit of the U.S. Court of appeal from May 20, 2024. The grounds and supporting facts are as follows:

A.

PETITIONER RECENTLY UNDERWENT BRAIN
SURGERY AND TUMOR RESECTION WITHIN THE



LAST 30 DAYS

1. On August 31, 2023 of last year, Brown fell into a fatal series of seizures that and had to be immediately transported by the prison facility(Hardeman County Correction Facility(HCCF)) to the nearest hospital emergency room in Jackson Tennessee: Jackson General;
2. From there Petitioner was underwent evaluation and was ultimately diagnosed with “lowgrade glioma of the brain.” Glioma means that doctors discovered a tumor located in the right frontal lobe of the Petitioner's brain; *see Exhbt #1.*
3. Brown was subsequently scheduled an appointment for surgery by expert Nuero Surgeon Gordon William, in Nashville Tennessee at Saint Thomas Hospital and clinic; *see Exhbt #2(proof of consent to surgery)*
4. On June 18th, 2024,(nearly one year later) Petitioner was finally transported and admitted into said clinic and successfully underwent brain surgery by said surgeon. After thirty day process of recovery and some physical therapy—which includes a stay at Deberry Special Needs Facility for hospitalized prisoners—Brown has finally returned HCCF after

only thirty days, as of JULY 18, 2024.

5. Petitioner is not fully recovered and is still lagging in some areas of mental activities and responses; thus, leading to the reason for this motion for extension request.

Although Petitioner has only lost 30 days from the entire surgical process, he is asking for an additional 90 days extension because he am still recoverings, and because his mental functionality—and some physical functionalies have been substantially affected by the brain tumor resection. For example, skills such as typing, reading and comprehension speeds are literally lagging and slower than ordinary.

Stated more specifically, Petitioner's original deadline to file his Writ is calculated to have expired on sunday, August 18, 2024 of next month. Petitioner's extension consists of a request to extend that filing deadline to October or November 18, 2024, respectively.

Wherefore, Petitioner humbly implores this Honorable Supreme Court accordingly GRANT Petitioner's motion for extension of time to file his Writ of Certiorari from the May

20, 2024 final judgement of the sixth circuit U.S. Court of Appeals denying relief on his habeas corpus petition under section 2254. *see Exhbt #4*

EXHIBIT #1

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
May 20, 2024
KELLY L. STEPHENS, Clerk

No. 23-5966

KENNETH BROWN,

Petitioner-Appellant,

v.

JERRY WARDLOW, Warden,

Respondent-Appellee.

Before: GRIFFIN, Circuit Judge.

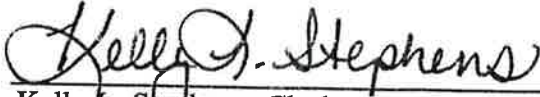
JUDGMENT

THIS MATTER came before the court upon the application by Kenneth Brown 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

RECEIVED
AUG - 6 2024
OFFICE OF THE CLERK
SUPREME COURT, U.S.

23-5966

Kenneth Brown
#512777
Hardeman County Correctional Facility
P.O. Box 549
Whiteville, TN 38075

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
May 20, 2024
KELLY L. STEPHENS, Clerk

KENNETH BROWN,)
)
Petitioner-Appellant,)
)
v.)
)
JERRY WARDLOW, Warden,)
)
Respondent-Appellee.)

ORDER

Before: GRIFFIN, Circuit Judge.

Kenneth Brown, a Tennessee prisoner proceeding pro se, appeals the district court’s judgment denying his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. Brown moves this court for a certificate of appealability and for leave to proceed in forma pauperis on appeal. See Fed. R. App. P. 22(b), 24(a)(5). Brown has also filed a motion to remand, which we construe as a motion for a certificate of appealability as to the district court’s denial of his post-judgment motion.

In 2012, a jury in the Shelby County Criminal Court convicted Brown of one count each of first-degree murder, employment of a firearm during a dangerous felony, and reckless endangerment by use of a deadly weapon along with 12 counts each of attempted first-degree murder and aggravated assault. The evidence presented at trial showed that Brown and two others fired weapons at a large gathering of people on Northmeade Avenue in Memphis, killing Kimberly Jamerson. After merging the convictions for attempted murder and aggravated assault, the trial court sentenced Brown to life imprisonment for the murder conviction plus 308 years of imprisonment for the other convictions. The Tennessee Court of Criminal Appeals affirmed. *State v. Brown*, No. W2013-00329-CCA-R3-CD, 2014 WL 5092906 (Tenn. Crim. App. Oct. 9, 2014), *perm. app. denied* (Tenn. Feb. 13, 2015).

Brown then filed a pro se petition for post-conviction relief. The post-conviction court appointed counsel, who filed an amended petition asserting ineffective assistance of trial counsel. After an evidentiary hearing, the post-conviction court denied Brown's petition. The Tennessee Court of Criminal Appeals affirmed. *Brown v. State*, No. W2017-01755-CCA-R3-PC, 2019 WL 931735 (Tenn. Crim. App. Feb. 22, 2019), *perm. app. denied* (Tenn. July 25, 2019).

Through counsel, Brown filed a § 2254 habeas petition raising the following grounds for relief: (1) the trial and post-conviction courts violated his right to compulsory process by refusing to compel the production of Beatrice Vaultx to testify on his behalf, and his trial and post-conviction counsel provided ineffective assistance in failing to secure her testimony; (2) the trial court violated his right against self-incrimination by admitting his involuntary confession; and (3) his trial counsel provided ineffective assistance in failing to seek a jury instruction on the proximate cause of death. The district court dismissed Brown's habeas petition without prejudice for failure to prosecute but later granted his motion for relief from judgment and reinstated the case.

After briefing by the parties, Brown's second retained attorney filed a motion to withdraw, which the district court granted. Proceeding pro se, Brown filed a first amended habeas petition and a motion for leave to file a second amended habeas petition. The district court denied Brown leave to amend. Brown filed a motion for relief from the district court's order denying him leave to amend as well as additional motions for leave to amend and proposed amendments. Brown also moved the district court to hold the habeas proceeding in abeyance to allow him to exhaust additional claims, asserting that he had filed in the state court a hybrid petition for DNA and fingerprint analysis and for a writ of error coram nobis along with a motion for a new trial. The district court denied Brown's motions.

The district court ultimately denied Brown's habeas petition as initially filed, concluding that the claims raised in his first habeas petition lacked merit or were procedurally defaulted, and declined to issue a certificate of appealability. Brown filed a notice of appeal and a motion for relief from the district court's order denying his request to hold the habeas proceeding in abeyance. The district court denied Brown's post-judgment motion.

Brown now moves this court for a certificate of appealability as to the district court's denial of his request to hold the habeas proceeding in abeyance and its denial of his ineffective-assistance claim related to his trial counsel's failure to request a proximate-cause instruction. *See* Fed. R. App. P. 22(b). By failing to address his other habeas claims in his motion for a certificate of appealability, Brown has forfeited review of those claims by this court. *See Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002) (per curiam); *Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000).

To obtain a certificate of appealability, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Where the district court dismisses a claim on procedural grounds, a certificate of appealability should issue if the petitioner "shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

No reasonable jurist could conclude that the district court abused its discretion in denying Brown's request to hold the habeas proceeding in abeyance to allow him to exhaust additional claims. Brown asserted that he had filed a hybrid petition for DNA and fingerprint analysis and for a writ of error coram nobis along with a motion for a new trial in the state court. Brown sought testing of 7.62x39 mm shell casings recovered near Kimberly Jamerson's body, arguing that DNA or fingerprint evidence left on the casings could link her shooting to a person attending the party at the Northmeade location. Brown asked the district court to hold the habeas proceeding in abeyance while he exhausted his constitutional claims related to this "newly available forensic evidence" in the state courts.

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a district court may not grant habeas relief unless the petitioner has exhausted his claims in the state courts. 28 U.S.C. § 2254(b)(1)(A). A district court has discretion to grant a stay and abeyance, allowing “the petitioner to return to state court to fully litigate his unexhausted claims while the district court holds his exhausted claims in abeyance.” *McBride v. Skipper*, 76 F.4th 509, 513 (6th Cir. 2023) (citing *Rhines v. Weber*, 544 U.S. 269, 275-76 (2005)). But “a stay and abeyance has the potential to ‘undermine [AEDPA’s] twin purposes’ of exhaustion and finality, and so ‘should be available only in limited circumstances.’” *Id.* (quoting *Rhines*, 544 U.S. at 277). A district court should grant a stay and abeyance only “if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics.” *Rhines*, 544 U.S. at 278.

As the district court pointed out in denying an abeyance, Brown failed to provide a reasonable explanation for why he waited until July 2023 to exhaust his additional claims. Brown first raised a claim with respect to analysis of the shell casings recovered near Kimberly Jamerson’s body in his pro se petition for post-conviction relief filed in May 2015; his post-conviction counsel did not pursue that claim. Furthermore, the premise of Brown’s unexhausted claims was plainly meritless. Tennessee Bureau of Investigation (TBI) Special Agent Forensic Scientist Steve Scott testified at Brown’s trial that the bullet fragments removed from Kimberly Jamerson’s head matched a .30 carbine caliber bullet and that those fragments were not consistent with the 7.62 cartridge cases. *See Brown*, 2014 WL 5092906, at *9.

In his motion for a certificate of appealability, Brown argues that reasonable jurists could debate the correctness of the district court’s denial of an abeyance because he “is putting forth material evidence in state court of his actual innocence of the murder of Kimberly Jamerson.” But Brown has yet to obtain that “material evidence.” At this time, Brown’s claims about DNA or fingerprint evidence purportedly left on the 7.62x39 mm shell casings are based on speculation. Under these circumstances, no reasonable jurist could conclude that the district court abused its discretion in denying an abeyance.

Nor could reasonable jurists debate the district court's rejection of Brown's ineffective-assistance claim related to his trial counsel's failure to request a proximate-cause instruction. The Tennessee Court of Criminal Appeals reviewed Brown's ineffective-assistance claim under the two-part standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), requiring him to demonstrate (1) "that counsel's performance was deficient" and (2) that counsel's "deficient performance prejudiced the defense." To establish deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. The prejudice prong requires the defendant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. On habeas review under 28 U.S.C. § 2254(d), review of Brown's ineffective-assistance claim is "doubly" deferential: "The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

The Tennessee Court of Criminal Appeals noted that "the proximate cause of death instruction is given when there is evidence that the victim's death was caused by an independent, intervening act or omission that the defendant could not reasonably have anticipated." *Brown*, 2019 WL 931735, at *10. The Tennessee appellate court continued: "Here, the proof showed that either [Brown] or his co-defendants fired the fatal bullet or someone from the Northmeade location fired the fatal bullet, but there was no evidence that Kimberly Jamerson's death was caused by an independent, intervening act or omission that the responsible party could not reasonably have anticipated." *Id.* at *11. The trial evidence showed that Brown and his co-defendants arrived at the Northmeade scene and fired at the Northmeade group first and that members of that group returned fire, an act that could easily have been anticipated. *Id.* at *1-2. Because the proximate-cause instruction did not apply based on the evidence presented at trial, the Tennessee Court of Criminal Appeals concluded, Brown had failed to show that his trial counsel was deficient in failing to request the instruction or that the instruction would have changed the outcome of his trial.

In his motion for a certificate of appealability, Brown contends that, if a person attending the party at the Northmeade location had discharged the round that killed Kimberly Jamerson, that would have been “an independent, intervening act or omission that [he] could not reasonably have anticipated.” But in concluding that a proximate-cause instruction would not have been warranted, the Tennessee Court of Criminal Appeals considered the possibility that someone from the Northmeade location had fired the fatal shot. Brown and his co-defendants could reasonably have anticipated that persons attending the party at the Northmeade location would return fire.

To the extent that Brown challenges the Tennessee appellate court’s interpretation of state law on proximate cause, “it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.” *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). And because the Tennessee Court of Criminal Appeals reasonably applied *Strickland* in analyzing Brown’s ineffective-assistance claim, reasonable jurists would agree that he was not entitled to habeas relief on this claim.

Brown also moves this court to remand to the district court “for correction and modification of the record.” Because Brown contends that the district court failed to review his post-judgment motion under the appropriate standard, we construe his motion as seeking a certificate of appealability with respect to the district court’s denial of his post-judgment motion.

Citing Federal Rule of Civil Procedure 60(b)(1), Brown moved for relief from the district court’s order denying his request to hold the habeas proceeding in abeyance. The district court therefore construed Brown’s motion as seeking relief under Rule 60(b)(1), which authorizes the district court to relieve a party from an order for “mistake, inadvertence, surprise, or excusable neglect.” Brown now argues that the district court erred in treating his motion as filed under Rule 60(b) rather than Rule 59(e) because he mailed it within 28 days of the district court’s judgment. Brown certified that he mailed his motion on September 26, 2023, the same day that the district court entered its judgment, but the motion was not received by the district court until October 30, 2023. A district court “may grant a Rule 59(e) motion to alter or amend if there is: (1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling

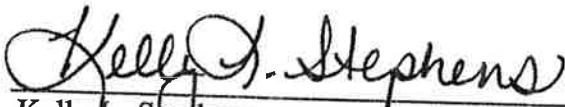
law; or (4) a need to prevent manifest injustice.” *Intera Corp. v. Henderson*, 428 F.3d 605, 620 (6th Cir. 2005). Regardless of the standard of review, no reasonable jurist could conclude that the issues raised in Brown’s post-judgment motion deserve encouragement to proceed further.

Brown argues that the district court ignored his newly discovery evidence that TBI Special Agent Scott’s ballistics analysis lacked sufficient indicia of reliability because it was not subject to a blind peer review as required by law. Brown relied on a letter from the Shelby County District Attorney General about another forensic scientist employed by the TBI who was disciplined for discrepancies involving travel reimbursements and overtime claims. The letter stated: “In the Firearms Unit, all cases requiring microscopic comparison must be verified by a second examiner. The second examiner handles the same evidence and must reach the same conclusion before a report is issued.” But Brown failed to present any newly discovered evidence that TBI Special Agent Scott himself was involved in any misconduct or failed to follow the proper procedures in Brown’s case.

Brown also challenges the district court’s statement that “[i]t is extremely unlikely that DNA will be found on a spent shell casing, both because of the small size of the casing and the fact ‘that the act of firing a shell destroys the DNA so that the chance of it being on the fired shell is slim to none.’” Brown attaches articles to his motion to remand indicating that fingerprints and DNA can be recovered from shell casings. Regardless, at this time, whether any DNA or fingerprint evidence would be recovered from the 7.62x39 mm shell casings found near Kimberly Jamerson’s body remains speculative.

For these reasons, we **DENY** Brown’s motion for a certificate of appealability and his motion to remand and **DENY AS MOOT** his motion for leave to proceed in forma pauperis.

ENTERED BY ORDER OF THE COURT


Kelly L. Stephens, Clerk

Certificate of Service

I, Kenneth Brown, do swear or declare that on this date, July 24, 2024, as required by Supreme Court Rule 29, I have served the enclosed MOTION FOR EXTENSION OF

TIME TO FILE PETITION FOR WRIT OF CERTIORARI
on each party to the above proceeding an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Court Clerk Scott S. Harris

1 First St., N.E., U.S. Supreme Court Bldg.,

Washington, DC 20543

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