IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
January 5, 2023 Session

STEVEN SKINNER v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 00-5699, 00-5700 Paula L. Skahan, Judge

No. W2022-00563-CCA-R3-ECN

The Petitioner, Steven Skinner, appeals the summary dismissal of his third untimely petition for writ of error coram nobis. Upon review, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

CAMILLE R. MCMULLEN, J., delivered the opinion of the court, in which JOHN W. CAMPBELL, SR. and J. STEVEN STAFFORD, JJ., joined.[1]

Terrell L. Tooten, Cordova, Tennessee, for the Petitioner, Steven Skinner.

Jonathan Skrmetti, Attorney General and Reporter; Brent C. Cherry, Senior Assistant Attorney General; Amy Weirich, District Attorney General; and Leslie Byrd, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

In 2005, the Petitioner was convicted by a jury of two counts of first-degree premeditated murder for which he received consecutive sentences of life imprisonment with the possibility of parole. The facts underlying his convictions, as fully detailed in his subsequent direct appeal, show that the Petitioner and the two victims were members of the Gangster Disciples. State v. Steve Skinner, No. W2003-00887-CCA-R3-CD, 2005 WL 468322, at *1 (Tenn. Crim. App. Feb. 28, 2005), perm. app. denied (Tenn. June 27, 2005). The victims had taken a large amount of the gang's money to Texas to purchase drugs. The victims were swindled during the exchange, lost the gang's money, and returned to Memphis without drugs. The leadership of the gang then ordered the victims to be killed

[1] The Honorable J. Steven Stafford of the Tennessee Court of Appeals appeared as a special judge for the Tennessee Court of Criminal Appeals.

for their incompetence. The Petitioner's involvement in the killings primarily consisted of providing a signal to other gang members, and the flashing of the truck lights to instruct the other gang members to commence shooting. The convictions were also secured in large part through accomplice testimony of Michael Brown and Carlos Wardlow. Lay witnesses Jason Coleman and Randall Jackson also testified concerning the killing. State v. Skinner, No. W2003-00887-CCA-R3-CD, 2005 WL 468322, at *1. The facts from this court's opinion on direct appeal as pertinent to the issues raised herein are as follows:

> Two witnesses identified by the court as accomplices testified for the prosecution about the events surrounding the murder of Towns and Stokes. The first, Michael Brown, testified that he had shot and killed Towns and Stokes and was currently serving life sentences in federal prison for those murders. He was testifying against the [Petitioner] in exchange for the dismissal of the murder charges pending in state court. According to Brown, he had been a member of Gangster Disciples since age twelve and his rank within the gang was Chief of Security. On March 13, around 3:00 a.m., Brown received a call from Marcus Boyd and the [Petitioner]. During the conversation, Brown was told to get some guns. After meeting with Calvin Boyd, he and Calvin Boyd retrieved two nine-millimeter guns, clips, and ammunition from Boyd's grandfather's house, and waited to be picked up by Marcus Boyd. Later, Calvin Boyd and Brown were picked up by Marcus Boyd who was driving his Lexus truck. Wardlow and the Petitioner were also present in the truck. Marcus Boyd then drove the truck to a house on Modder Street. Upon arrival, Brown got out of the truck, went into the house and woke up Jason Coleman. After arriving at the house, Brown began cleaning and loading the guns. While in the house, Brown overheard Marcus Boyd make the statement "Whack them." Then Brown heard the [Petitioner] respond, stating "[w]hack them ... Make sure don't nobody move. Make sure both of them dead." In agreement, Wardlow reiterated the [Petitioner's] statement to make sure both Towns and Stokes were dead. According to Brown, the plan was to have him and Calvin Boyd do the shooting.
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> Brown testified that after a brief discussion, he, Marcus Boyd, Calvin Boyd, Wardlow, and the [Petitioner], went to find a second car to use in the killing of Towns and Stokes. While driving around, the group came across Kevin Harris and Robert Taylor who had just stolen a white Chrysler Sebring. Marcus Boyd paid for the stolen Sebring, and Wardlow drove it back to the house on Modder Street. Upon arriving at the house, the [Petitioner] told Brown that "he wanted us to kill 'em put 'em in the trunk, and take 'em to the expressway." In response, Brown told the [Petitioner] that the plan would take too much time and be too dangerous. Thereafter,

Wardlow suggested that the group, "get them at the body shop," and this plan was agreed upon.

According to Brown, the group then split up and left the house on Modder Street. The [Petitioner], Marcus Boyd, and Wardlow left in the Lexus truck, driven by Marcus Boyd. Brown, Calvin Boyd, and Coleman left in the stolen Sebring. Previously, Brown had woke Coleman up and told him to "ask no questions. Just get up and come drive the car." Brown then gave Coleman directions to the auto-body shop. After reaching the shop, Brown and Calvin Boyd hid on each side of the building and waited. Coleman drove the car across the street and waited. Once situated, Brown heard a Suburban pull up and then saw the Lexus truck pull up to the front of the body shop. Brown observed Marcus Boyd and Wardlow get out of the truck and go inside the shop while the [Petitioner] remained inside the truck. Once Marcus Boyd and Wardlow entered the building, the [Petitioner] exited the truck. As the [Petitioner] got out of the truck, his designer hat fell off in the parking lot. After approaching Brown and Calvin Boyd, the [Petitioner] instructed them to take action when they were signaled by a flash of the Lexus truck lights. According to Brown, the [Petitioner] gave the instructions and stated "Fuck what Marcus and Wardlow say, I'm asking you-I'm telling you to do this, and when I flash the lights, I want you to do it." Upon making this statement, the [Petitioner] made a gesture indicating to Brown that doing this would get him "a little taste of money." After waiting for about forty-five minutes, Marcus Boyd and Wardlow exited the building. Brown saw Marcus Boyd give a signal which meant "[d]on't worry about it. Leave." However, shortly after Marcus Boyd's signal, Brown saw the lights flash, whereupon he and Calvin Boyd shot both Towns and Stokes about "twenty-five" times. Brown blamed the [Petitioner] for flashing the lights, and stated that if he had not seen the flashing lights, he would not have shot Towns and Stokes. Brown testified that he was arrested by the police later that morning while trying to escape.

On cross-examination, Brown admitted that on March 13, 1999, he was highly intoxicated from drinking alcohol, smoking marijuana, and cocaine, but maintained that he was alert as to the events that led up to the murder of Towns and Stokes. Also, Brown indicated that Marcus Boyd was considered high rank in the Gangster Disciples and outranked the [Petitioner]. However, Brown insisted that Marcus Boyd chose not to be in charge the night of the murders. Additional inconsistencies concerning Coleman's involvement were also brought to light during the defense counsel's cross-examination of Brown. Brown stated that he believed that

Coleman was "affiliated with the Gangster Disciples." Moreover, Brown could not explain why he told the police in March of 1999 that Coleman met the group at Vaal Street, but now testified that Coleman was awaken[ed] from sleep at the house on Modder Street.

Responses to cross-examination questions revealed that Brown's testimony regarding the [Petitioner's] involvement in the murder was inconsistent with previous written statements made to police after his arrest. Brown admitted that in his March 13th statement to police, he did not implicate Wardlow in the murders because at the time the information had slipped his mind. Brown also admitted that his March 13th statement implicated Marcus Boyd as the person who asked for the killing of Stokes and Towns not the [Petitioner]. Brown further admitted that his testimony regarding the [Petitioner's] exit of the Lexus truck to give Brown information about the signal, and statement "Fuck what Marcus and Wardlow say, I'm asking you-I'm telling you to do this, and when I flash the lights, I want you to do it" was not indicated in either of his previous statements to the police. Rather, Brown conceded that in his March 13th statement, he told the police that before "[the Petitioner] and Marcus Boyd pulled up, they flashed the lights three times for me and Calvin to come from on this side of the building and kill Omar Stokes and Sid Towns, and that's what we did."

During cross-examination, Brown acknowledged that he did not actually know when the [Petitioner] lost his hat but [] speculated that it fell off as the [Petitioner] was getting out of the truck. Although Brown agreed with the defense counsel that his memory was "a lot clearer on these events three years ago," Brown continued to assert that he simply did not remember every detail of the events surrounding the murders at the time he made those statements, and that some of the facts he swore to in the statements were not true, but told to the police in haste to "get the heat off."

On re-direct Brown insisted that his testimony was not inconsistent but rather he was testifying to certain things not asked during the course of giving the statements to the police. Brown also pointed to his statement on March 15, 1999[,] where he indicated that the [Petitioner] gave the signal. Brown contended that his testimony was truthful and emphasized that had the lights not flashed he would not have killed Towns and Stokes. On re-cross examination, it was emphasized that Brown also admitted that he told the police taking his statement that "Marcus and Carlos [got] into the truck with Steve and gave us the signal." However, Brown asserted that this

> statement was not correct because he saw "the lights [flash] before Marcus [Boyd] got in the driver's seat."

Skinner, 2005 WL 468322, at *2-4 (footnote omitted).

Following his direct appeal proceedings, the Petitioner filed a petition for post-conviction relief, asserting ineffective assistance of trial counsel in failing "to review the transcripts of his co-defendant[s'] trials for purposes of preparing for impeachment on cross-examination." Steven D. Skinner v. State, No. W2009-00307-CCA-R3-PC, 2010 WL 4188314, at *2 (Tenn. Crim. App. Oct. 22, 2010), perm. app. dismissed (Tenn. Feb. 8, 2011). The facts as outlined in this court's opinion concerning the petition for post-conviction relief established as follows:

> [T]he [P]etitioner testified that he was convicted by a jury of multiple counts of first-degree murder and admitted that he was a member of the Gangster Disciples. He said that he entered a guilty plea in federal court to distributing cocaine at the time of the murders. He claimed he was not at the scene when the victims were shot. He said that counsel was appointed to represent him in state court. He also said he admitted to counsel that he was at the scene but denied that he gave the signal to kill the victims. He explained that counsel did not ask for an investigator to be appointed to the case. The [P]etitioner said counsel gave him discovery materials but did not review them with him. He testified that counsel only met with him on one occasion in jail and then only briefly in court. He said they discussed some trial strategy, including that he could not be convicted based on the uncorroborated testimony of an accomplice. The [P]etitioner claimed that counsel was unprepared for cross-examination.
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> The [P]etitioner's trial counsel testified that he represented the [P]etitioner during his trial on the first-degree murder charges. He testified that the [P]etitioner's case turned on a single issue, whether he did or did not give the signal that ordered the shooting of the victims. Trial counsel testified that the [P]etitioner was able to assist him in many aspects of preparing his defense that might not normally be performed by a criminal investigator because he knew the inner workings of the gang and provided information on all the people who accused him of the crimes and those who were testifying against him. Counsel explained that an investigator could not have expanded upon the volume of relevant information the petitioner was able to provide, so he deemed it unnecessary to retain an investigator. Trial counsel met with the [P]etitioner many times to discuss the case and prepare strategy. Counsel testified that he effectively cross-examined the State's witnesses and

> was able to impeach several of them. He explained that he consulted with the [P]etitioner throughout the trial and that the [P]etitioner provided helpful information. For example, he learned from the [P]etitioner that a State's witness would testify he saw no light signal before the murders. Afterward, he was able to elicit that testimony from the witness.
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> The federal prosecutor who tried the [P]etitioner testified that the [P]etitioner was under a federal indictment during the time he was prosecuted in the Shelby County Criminal Court. The federal indictment charged the [P]etitioner with two counts of conspiracy to possess and distribute controlled substances. He testified that the [P]etitioner had not been charged with the murders in federal court because he had cooperated with the government by providing information about the other conspirators. He eventually entered into a plea agreement with the federal government in which he pleaded guilty to one drug conspiracy charge. Although the [P]etitioner was surprised at facing state charges following his federal conviction, there was no agreement in place barring such prosecution.

Steve D. Skinner v. State, 2010 WL 4188314, at *1-2.

As relevant to the instant coram nobis proceedings, the Petitioner also argued at post-conviction that trial counsel was ineffective in not being fully prepared to proceed to trial because trial counsel could not articulate the status of the co-defendant's cases that were resolved in advance of the Petitioner's case. In rejecting this claim, this court determined as follows:

> [C]ounsel testified that he had access to this material and reviewed all of it prior to trial. He also had conversations with the federal prosecutor about the case and subpoenaed him to court in case he needed his testimony. He ultimately made a strategic decision not to use the prosecutor's testimony because he did not know what additional, harmful information he might testify to in front of the jury. Clearly, the trial court accredited the testimony of trial counsel in concluding that he was properly prepared for trial.

Id. at *4.

Following the denial of his post-conviction appeal, the Petitioner filed a petition seeking federal habeas corpus relief. Skinner v. Johnson, No. 11-2112-SHL-dkv, 1, 29 (W.D. Tenn. Aug. 6, 2014) (Order). As relevant to the claims raised herein, the Petitioner argued he was entitled to habeas relief because (1) "the evidence presented by the State at trial differed substantially from that presented at a previous trial against a different

defendant arising from the same events;"[2] and (2) trial counsel rendered ineffective assistance in failing "to contest the use of factually inconsistent theories' at trial," in allowing perjured testimony to be presented, and in failing "to obtain and present impeachment information from a related trial." Id. at 17-18. The federal trial court's extensive order denying relief provided in relevant part as follows:

> In Claim 1, Skinner argues that his right to due process was violated because the evidence presented by the State in his trial differed substantially from that presented in the federal trials of Marcus Boyd and Brown. Specifically, Skinner asserts that, in federal court, the theory was that Boyd gave the order to kill Stokes and Towns, whereas the theory in state court was that Skinner gave the order.

Significantly, in footnote fourteen, the federal habeas court clarified the Petitioner's characterization of the evidence presented during the federal trial:

> Although Skinner is correct that Count 1 of the federal Superseding Indictment charged that the order to kill Stokes and Towns was given by Marcus Boyd, the Government never attempted to prove that Skinner had nothing to do with the murder plans. Skinner overlooks the following paragraph from the Court of Appeals' summary of the evidence introduced at Marcus Boyd's federal trial:
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> > Anthony Carniglia, an inmate serving time on unrelated charges and under no agreement with the government, testified at Marcus Boyd's trial that he was in a cell next to Skinner. He testified that Skinner said he was the one who ordered the "hit" on Stokes and Towns.
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> United States v. Brown, 54 F. App'x 201, 205 (6th Cir. 2002). Marcus Boyd testified at his own trial that "Skinner was the one who told him to go to the body shop, that Skinner planned the killings, and that he went inside the body shop to tell Towns and Stokes what Skinner had planned."
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> In its Answer, Respondent asserts that Skinner did not exhaust Claim 1 in state court and that, because no means exist to do so, it is barred by

[2] In federal court, Marcus Boyd, Calvin Boyd, and Michael Brown were tried separately, and their appeals were consolidated. The Sixth Circuit explained that, "[a]lthough the defendants were separately tried, substantially the same evidence was presented at each of the trials, except as specifically noted." United States v. Brown, et al., 54 F. App'x at 203.

procedural default. The issue was not presented on direct appeal or on the post-conviction appeal.

In his pro se Response to Respondent[']s Motion for Summary Judgment, Skinner argues that his procedural default was due to the ineffective assistance of post-conviction counsel and could be excused by the Supreme Court's decision in Martinez v. Ryan, 132 S. Ct. at 1315, which provided a limited avenue for prisoners to overcome the procedural default of claims of ineffective assistance by trial counsel. Martinez and its progeny cannot excuse Petitioner's default of Claim 1 because it is not an ineffective-assistance claim.

Claim 1 is without merit and is DISMISSED.

. . . .

[In regard to Claim 2] [e]ven if it were assumed that the due process clause is violated when a prosecutor obtains convictions in successive trials under "inconsistent, irreconcilable" theories, Skinner would not be entitled to habeas relief. In Bradshaw v. Stumpf, Justice Thomas issued a concurring opinion, joined by Justice Scalia, that stated:

> As the Court notes, the State has not argued that Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), forecloses Stumpf's claim that the prosecution's presentation of inconsistent theories violated his right to due process. With certain narrow exceptions, Teague precludes federal courts from granting habeas petitioners relief on the basis of "new" rules of constitutional law established after their convictions became final. 489 U.S., at 310, 109 S. Ct. 1060 (plurality opinion). This Court has never hinted, much less held, that the Due Process Clause prevents a State from prosecuting defendants based on inconsistent theories. 545 U.S. at 190 (record citation omitted; emphasis added).

Even now, Skinner's due process claim does not appear to be clearly established federal law.

Moreover, the prosecution theories in the state and federal trials arising from the murders of Stokes and Towns were neither inconsistent nor irreconcilable. Counts 4 and 5 of the federal indictment charged Marcus

Boyd, Wardlow, Brown, and Calvin Boyd with murdering Stokes and Towns through the use of firearms during and in the course of a violation of 18 U.S.C. § 924(c), in violation of 18 U.S.C. § 924(j). Those counts referred to Count 3, which charged those defendants, aided and abetted by each other, with possessing, carrying, using, brandishing, and discharging firearms during and in relation to and in furtherance of the drug conspiracy charged in Count 1. Count 1 charged all defendants, including Skinner, with conspiring to distribute and with distributing cocaine and cocaine base, in violation of 21 U.S.C. § 846. Count 1 also alleged that, as part of the drug conspiracy, Stokes and Towns traveled to Houston to purchase cocaine for conspiracy members and that,

> [p]rior to OMAR STOKES' and SID TOWNS' return to Memphis, Tennessee from Houston, Texas, MARCUS BOYD, a/k/a "Black", CARLOS WARDLOW, a/k/a "Lobo", and STEVE SKINNER, a/k/a "Lil Hot", a/k/a "Little Steve", discussed retaliation against OMAR STOKES and SID TOWNS for stealing conspiracy assets. Acting on directions from MARCUS BOYD, a/k/a "Black", MICHAEL BROWN, a/k/a "Big Hurt", and CALVIN BOYD, a/k/a "Crip" retaliated against and murdered OMAR STOKES and SID TOWNS for stealing conspiracy assets.

Although Skinner was not charged in Counts 4 and 5 as part of the conspiracy to murder Stokes and Towns, the indictment does allege that he participated in the drug conspiracy and discussed with Marcus Boyd and Wardlow the killing of Stokes and Towns. Nothing in the federal indictment precludes a murder charge against Skinner.

The state indictments are not inconsistent with the federal indictment. As previously discussed, see supra p. 2, the indictments charged Calvin Boyd, Wardlow, Marcus Boyd, Brown, and Skinner with the first-degree murder of Stokes and Towns. At the state trial, like the federal trials, there was no dispute that Calvin Boyd and Brown shot Stokes and Towns. Skinner was tried on a theory that he was responsible for the conduct of the other participants in the killings.

The problem with Skinner's presentation of this claim is that he assumes, incorrectly, that only one person can be convicted of ordering the murder of Stokes and Towns. Skinner emphasizes the differences between Brown's statement and his testimony at Skinner's trial. Brown, who

implicated Skinner in the murder plot in the state trial, did not testify at Marcus Boyd's federal trial. In both state and federal court, Wardlow testified to a meeting with Marcus Boyd and Skinner at which a decision was made to kill Stokes and Towns.

Because prosecutors in the federal and state trials did not present inconsistent, irreconcilable theories to convict different defendants, and because there was no clearly established federal law in this circuit at the time of Skinner's trial establishing a due process claim from a prosecutor's use of inconsistent theories, defense counsel was not ineffective in failing to raise the issue at trial and on direct appeal and Skinner suffered no prejudice from its omission.

Claim 2 is without merit and is DISMISSED.

In Claim 4, Skinner argues that his attorney was ineffective in allowing perjured testimony to be presented. The factual basis for this claim is the statement that "the State presented evidence that completely contradicted the previous trials based upon this event. The State used testimony that it knew or should have known was false. Counsel failed to object or even challenge the perjured testimony." Respondent argues that Petitioner failed to exhaust this issue in state court and, therefore, that it is barred by procedural default. This argument is well taken. Skinner's brief on direct appeal did not argue that the State knowingly introduced perjured testimony at trial, and his brief to the TCCA on the post-conviction appeal did not argue that his attorney was ineffective by failing to challenge the introduction of perjured testimony. Therefore, the issue was not properly exhausted in state court.

. . . .

Skinner has not adequately identified the testimony that he contends was perjured and has not established that the State knew it was false. As defense counsel explored at length on cross-examination, Brown's testimony about Skinner's involvement in the murders included many facts that were not included in his statement to the police. Brown explained the inconsistencies by stating that certain details had slipped his mind, id., and that the police had not asked him about other details, id. at *4. Skinner has not established that Brown's testimony at his trial was false, and he presents no argument that the state prosecutors did not actually believe Brown's

explanations for the differences between his trial testimony and his statement to the police.

Claim 4 is without merit and is DISMISSED.

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In Claim 5, Skinner argues that his attorney rendered ineffective assistance by failing to obtain and present impeachment information from the federal trials of Brown and Marcus Boyd. Skinner raised this issue in his post-conviction petition.

The federal habeas court order then detailed the relevant portions of the transcript from the state post-conviction proceedings and this court's rejection of the same issue in our opinion affirming the denial of post-conviction relief. The federal habeas court then provided as follows:

Skinner was asked if he knew whether Michael Brown had testified in federal court, and he replied: "No, sir. The only thing that I was aware of or became aware of was that Michael Brown's statement was admitted into trial against himself stating that he carried out these murders and that Marcus Boyd ordered the murders." Skinner admitted that [state trial counsel] attempted to impeach Brown by "[bringing] forth Michael Brown's statement that he made to the police the first night that he got caught." That statement was "[t]otally contrary" to Brown's testimony at Skinner's trial. Skinner was asked whether he knew what efforts [state trial counsel] had made to prepare for Coleman's testimony, and he responded, "No, sir. None." He also testified that, "[f]rom my recollection, [state trial counsel] made no attempt to do anything for the cross-examination of anyone." Skinner also claimed that he "absolutely had no clue" about what the defense strategy was going to be."

On cross-examination, Skinner admitted that he was a member of the Gangster Disciples. He admitted that he was present when the murders occurred and that he did nothing to stop them. Skinner admitted that he pled guilty in federal court to participating in a drug-trafficking conspiracy. Skinner admitted that it was possible that he was not indicted in federal court for the murders because of his cooperation.

Skinner's § 2254 Petition does not state whether he contends that the decision of the TCCA on Claim 5 was contrary to, or an unreasonable

> application of, Strickland v. Washington, or whether it was based on an unreasonable factual determination. The decision was a run-of-the-mill case applying the correct legal standard from Strickland to the facts of Skinner's case and, therefore, the "contrary to" clause is inapplicable.
>
> Skinner has not satisfied his burden of demonstrating that the state-court decision was an unreasonable application of Strickland or was based on an objectively unreasonable factual determination. The TCCA credited [state trial counsel's] testimony that he had read the federal transcripts prior to Skinner's trial. Skinner also admitted that trial counsel had a copy of the statement Brown had made to the police, which was used to impeach Brown at trial. These conclusions are fully supported by the record. Although not specifically discussed by the TCCA, the Court also notes that Skinner has not identified any specific use of the transcripts he contends trial counsel should have made and has not argued that, if only his attorney had done so, there is a reasonable probability the outcome of his federal trial would have been different.
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> Claim 5 is without merit and is DISMISSED.

Skinner v. Johnson, No. 11-2112-SHL-dkv, at 29-58 (W.D. Tenn. Aug. 6, 2014) (Order) (internal citations omitted).

After the denial of his federal habeas corpus petition, the Petitioner made an Open Records Request ("ORR") to the Shelby County District Attorney's office, and in February 2017, the Petitioner received responsive materials. Steven Skinner v. State, No. W2017-01797-CCA-R3-ECN, 2018 WL 3430339, at *1 (Tenn. Crim. App. July 16, 2018), perm. app. denied (Tenn. November 16, 2018). On April 10, 2017, the Petitioner filed his first petition for writ of error coram nobis asserting that Brown and Wardlow (co-defendants during State court proceedings) had given statements to federal prosecutors stating that Marcus Boyd and not the Petitioner orchestrated the murders. Id. The Petitioner claimed these statements were exculpatory or impeachment evidence that the State should have turned over to him at trial. These statements were given to a federal prosecutor during the federal trials of Petitioner's co-conspirators.

The Petitioner acknowledged that he filed his first error coram nobis petition well beyond the statute of limitations but argued that the statute of limitations should be tolled insisting that this evidence could not have been known at an earlier time. The trial court summarily dismissed the petition for writ of error coram nobis. On appeal, this court concluded that the petition was properly dismissed because it was filed outside the limitations period and the Petitioner had failed to establish due process tolling. Id. at *3.

In affirming denial of relief in the first petition for writ of error coram nobis, this court specifically observed:

> According to the record, it appears that this information was made available to trial counsel before trial because these statements were taken before trial and were in the District Attorney's file. During Petitioner's post-conviction hearing, trial counsel testified that he "had access to all the material and reviewed all of it prior to trial." Trial counsel also testified that he "had conversations with the federal prosecutor about the case and subpoenaed him to court in case he needed his testimony." Petitioner made no allegations that the federal prosecutor withheld these statements or that trial counsel made a specific request for them that was ignored.... From trial counsel's testimony at the post-conviction hearing, it appears that information from the federal prosecutor was available, but strategically not used, at trial. Therefore, the evidence which Petitioner claims is "newly discovered" was not later arising.

Id. at *2. Given the above facts, this court reasoned that the Petitioner had not demonstrated the exercise of reasonable diligence in filing his petition because "trial counsel was already in possession of the [federal] materials before trial." Id. at *3.

In an effort to introduce contrary proof on the subject of whether the ORR documents had previously been disclosed, were accessible to trial counsel, or were in the possession of trial counsel, the Petitioner filed a second petition for writ of error coram nobis on May 2, 2019. Steven Skinner v. State, No. W2020-00385-CCA-R3-ECN, 2021 WL 1157849, at *3 (Tenn. Crim. App. Mar. 25, 2021). In the pro se petition, he asserted that he had found newly discovered evidence which would have affected the outcome of his trial. The Petitioner noted that his prior petition for writ of error coram nobis based on the ORR evidence was dismissed and that the dismissal was affirmed on the basis that trial counsel was, at the time of trial, already in possession of the evidence. In the second petition, the Petitioner summarized the newly discovered evidence as a telephone call with trial counsel on August 16, 2018, during which trial counsel allegedly informed him that trial counsel was not in possession of the ORR documents at the time of trial, that trial counsel would have used the documents during trial had he had access to them, and that the documents showed that the Petitioner was innocent. Neither the pro se petition nor the "Amended and Supplemental" petition was accompanied by affidavits or other proof. Id. The ORR documents that were the subject of the petitions were also not appended to the petitions. The petitions likewise failed to detail the alleged inconsistencies between witness statements and witness testimony. Id. at *3.

In affirming denial of relief in the Petitioner's second petition for writ of error coram nobis, this court noted that the Petitioner never submitted affidavits to support the claims, and as such, there was no affidavit from the Petitioner's trial counsel regarding whether the ORR documents were available to him at the time of trial. Without such documents, the trial court could not have concluded that the evidence was newly discovered, that it was later arising, that the Petitioner was without fault in timely presenting the evidence, or that the Petitioner was entitled to due process tolling. This court further explained that the Petitioner "had already filed a coram nobis petition based on the same claims, that the previous petition was fully litigated and provided him with a meaningful opportunity to present his claims, and that he has now 'merely re-package[d] th[e] same claim in a new form.'" Id. at 7.

On September 22, 2021, the Petitioner filed his third petition for writ of error coram nobis, the petition at bar. The petition did not address its untimeliness or equitable tolling of the one-year statute of limitations. The Petitioner argued that he was entitled to relief based on newly discovered evidence of actual innocence, which the Petitioner alleged, in relevant part, was the statement of Michael Brown, who "initially told the State the truth about what happened, but was pressured into changing his testimony, which he did. After changing his testimony, he stated that Defendant ordered the killings of [the two victims], and Defendant was convicted under this theory, even though Michael Brown was convicted for the killings based on the fact that Marcus Boyd ordered the killings." The Petitioner claimed to have attached the affidavits of LaTrice Stone and Demarcus Boyd attesting in substance to the same information, and the affidavits were signed by the notary on September 3, 2021, and September 1, 2021, respectively. In the State's responsive motion moving the coram nobis court to dismiss, the State disputed whether the affidavits were attached to the petition for writ of error coram nobis. We note that the affidavits were not originally included in the record on appeal, and on August 1, 2022, this court granted the Petitioner's motion to supplement the appellate record with the aforesaid affidavits. On April 1, 2022, the coram nobis court entered a comprehensive order summarily denying the petition. This matter is now properly before this court for review.

ANALYSIS

The Petitioner argues the coram nobis court erred in dismissing his third petition seeking error coram nobis relief without a hearing. He insists the matter should be remanded to the coram nobis court "as it is clear … [it] had not reviewed the writ of error along with the affidavits that were attached to it." He claims the affidavits were originally attached to the petition, but he acknowledges "for some unexplained reason, the State for the first time, on February 25, 2022," asserted that there were no affidavits attached. The Petitioner exerts portions of the affidavit from Michael Brown and argues that it

"completely exonerates" the Petitioner. Specifically, the portion of the Brown affidavit relied on by the Petitioner provides as follows:

> 8. At the time I made the statement that Steven Skinner was involved, I felt tremendous pressure from the prosecutors from the State of Tennessee to suggest that Steven Skinner was involved.
> 9. I initially informed the State of the truth, that Marcus Boyd gave the order to kill Omar Stokes and Sid Towns, and myself along with Calvin Boyd, carried out the order. I was ultimately convicted based on this version of events, which again, is the truth.
> 10. However, I was pressured into changing my testimony, and I did change my testimony, and stated that Steven Skinner ordered the killing of Omar Stokes and Sid Towns at the trial of Steven Skinner.

The Petitioner further urges this court without specificity to "see attached federal court appeal regarding the conviction of Michael Brown" because it "corroborates" "that Brown was charged and convicted based on the fact that Petitioner was not involved in the killings, but that they were ordered by Boyd." While not entirely clear from the Petitioner's brief, the Petitioner seemingly argues, as he did in his federal habeas petition, that he is entitled to relief because the evidence presented by the State in his trial differed substantially from that presented in the federal trials of Marcus Boyd and Brown. The Petitioner specifically argues that Michael Brown's federal drug conspiracy conviction was based on testimony that the Petitioner was not involved. In his reply brief, the Petitioner argues the petition is not untimely because he did not become aware of the information contained in the affidavits of Wood and Brown attesting that the Petitioner was not involved in the killings until August 30, 2021. He argues further that Brown's "confession" was not in his possession prior to August 30, 2021. In response, the State contends the coram nobis court properly dismissed the petition as it was untimely, the Petitioner failed to establish equitable tolling, the affidavits attached to the petition on appeal were not considered by the coram nobis court because they were not attached below, and that, in any case, the affidavits are insufficient to establish the Petitioner's actual innocence. We agree with the State.

A writ of error coram nobis is available to convicted defendants. T.C.A. § 40-26-105(a). However, a writ of error coram nobis is an "extraordinary procedural remedy" that "fills only a slight gap into which few cases fall." State v. Mixon, 983 S.W.2d 661, 672 (Tenn. 1999) (citing Penn v. State, 670 S.W.2d 426, 428 (Ark. 1984)). "The purpose of this remedy 'is to bring to the attention of the [trial] court some fact unknown to the court, which if known would have resulted in a different judgment.'" State v. Hart, 911 S.W.2d 371, 374 (Tenn. Crim. App. 1995) (quoting State ex rel. Carlson v. State, 407 S.W.2d 165,

167 (Tenn. 1966)). Relief by petition for writ of error coram nobis is provided for in Tennessee Code Annotated section 40-26-105. The statute provides, in pertinent part:

> (b) The relief obtainable by this proceeding shall be confined to errors dehors the record and to matters that were not or could not have been litigated on the trial of the case, on a motion for new trial, on appeal in the nature of a writ of error, on writ of error, or, in a habeas corpus proceeding. Upon a showing by the defendant that the defendant was without fault in failing to present certain evidence at the proper time, a writ of error coram nobis will lie for subsequently or newly discovered evidence relating to matters which were litigated at the trial if the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial.
>
> (c) The issue shall be tried by the court without the intervention of a jury, and if the decision be in favor of the petitioner, the judgment complained of shall be set aside and the defendant shall be granted a new trial in that cause....

T.C.A. § 40-26-105(b), (c).

The decision to deny a petition for writ of error coram nobis on the grounds of subsequently or newly discovered evidence rests within the sound discretion of trial court, which this court will not disturb absent an abuse of discretion. T.C.A. § 40-26-105. In order to qualify as "newly discovered evidence" for the purposes of a writ of error coram nobis, the proffered evidence must be (1) evidence of facts existing, but not yet ascertained, at the time of the original trial, (2) admissible, and (3) credible. Nunley v. State, 552 S.W.3d 800 (Tenn. 2018). A motion seeking a new trial based on newly discovered evidence "must also be supported by affidavits." Harris v. State, 301 S.W.3d 141, 152 (Tenn. 2010) (Koch and Clark, JJ., concurring). These affidavits "should be filed in support of the petition or at some point in time prior to the hearing." State v. Hart, 911 S.W.2d 371, 375 (Tenn. Crim. App. 1995). The affidavits must be relevant, material, germane to the grounds raised in the petition, and based on personal knowledge. Id. "Affidavits which fail to meet these criteria will not justify the granting of an evidentiary hearing since the information contained in the affidavits, taken as true, would not entitle the petitioner to relief." Id.

A petition for a writ of error coram nobis based on newly discovered evidence need only show that the newly discovered evidence, had it been admitted at trial, may have resulted in a different judgment, and does not need to show that the result of the proceeding would have been different had the evidence been available at trial. A criminal trial "may have resulted in different judgment," so as to warrant coram nobis relief based on newly

discovered recantation testimony, if the trial court is reasonably well satisfied that trial testimony was false, that recanted testimony was truthful, and that a jury might have reached a different conclusion had truth been told. State v. Workman, 111 S.W.3d 10 (Tenn. 2002); Johnson v. State, 370 S.W.3d 694, 700 (Tenn. Crim. App. 2011) (citing State v. Ratliff, 71 S.W.3d 291, 298 (Tenn. Crim. App. 2001)). The assessment of witness credibility is entrusted to the sound discretion of the trial court. Id. (citing Hart, 911 S.W.2d at 375; Roland Bennett v. State, No. E2004-01416-CCA-R3-PC, 2005 WL 1661721 (Tenn. Crim. App. July 14, 2005) (holding that the trial court did not abuse its discretion in denying error coram nobis relief after determining that a witness who recanted previous testimony was not credible), app. denied (Tenn. Dec. 5, 2005)).

A petition for a writ of error coram nobis must be filed within one year after the challenged judgment becomes final. T. C. A. § 27-7-103. The petition is subject to being summarily dismissed if it does not show on its face that it has complied with the one-year statute of limitations, and such compliance is an essential element of a coram nobis claim. Nunley, 552 S.W.3d at 828. To accommodate due process concerns, the one-year statute of limitations may be tolled if a petition for a writ of error coram nobis seeks relief based upon new evidence of actual innocence discovered after expiration of the limitations period. Id. 828-829. If the coram nobis petition does not show on its face that it has been filed within the one-year statute of limitations, the petition must set forth with particularity facts demonstrating that the prisoner is entitled to equitable tolling of the statute of limitations:

> To be entitled to equitable tolling, a prisoner must demonstrate with particularity in the petition: (1) that the ground or grounds upon which the prisoner is seeking relief are "later arising" grounds, that is grounds that arose after the point in time when the applicable statute of limitations normally would have started to run; [and] (2) that, based on the facts of the case, the strict application of the statute of limitations would effectively deny the prisoner a reasonable opportunity to present his or her claims.... A prisoner is not entitled to equitable tolling to pursue a patently non-meritorious ground for relief.

Id. at 829. "Whether due process considerations require tolling of a statute of limitations is a mixed question of law and fact, which we review de novo with no presumption of correctness." Id. at 830. Upon review of a petition for a writ of error coram nobis for timeliness, an appellate court must first determine whether the petitioner "asserted the claim in a timely manner and, if not, whether he has demonstrated that he is entitled to equitable tolling of the statute of limitations as provided in [Tennessee Code Annotated Section 27-7-103]. The inquiry ends if his petition is not timely and if he has failed to demonstrate that he is entitled to relief from the statute of limitations." Id.

Upon our de novo review, we conclude that the petition, filed eighteen years after the Petitioner's conviction became final, is barred by the one-year statute of limitations and that the Petitioner has failed to establish that he is entitled to equitable tolling. First, the Petitioner failed to address the untimeliness of the petition in the petition for error coram nobis. This alone is grounds for dismissal, and our inquiry may end here. We additionally note, as outlined above, that this court dismissed the Petitioner's first petition for writ of error coram nobis as untimely after determining that the information relied on by the Petitioner, that is Brown and Wardlow's statements to federal prosecutors stating that Marcus Boyd and not the Petitioner had orchestrated the murders, was made available to trial counsel prior to the Petitioner's trial. We previously concluded that since the alleged "newly discovered evidence" was not later arising, the statute of limitations could not be tolled, and the Petitioner did not have a valid error coram nobis claim. In our view, the Petitioner appears to rely on the same alleged exculpatory information, Brown's recantation of his testimony at the Petitioner's state trial, as grounds for relief in the instant petition. For the same reasons articulated in our opinion denying the first petition for writ of error coram nobis, we conclude that the Petitioner is not entitled to relief.

Even if we were to review the petition on the merits, the Petitioner would not be entitled to relief. The Petitioner asserted in the petition that the "new" statements by Brown absolved the Petitioner from involvement in the killing and that had they been presented at trial it may have resulted in a different outcome. As an initial matter, the statements relied upon by the Petitioner in the Stone and Woods affidavits would have been deemed hearsay and thus inadmissible at trial. Moreover, even though none of the affidavits were originally attached to the petition, the coram nobis court considered the substance of the Brown's recantation and rejected a finding that Brown's previous trial testimony was false and that his present recantation was true. The coram nobis court reasoned that "there were other witnesses who testified about the [P]etitioner's involvement with the crime at trial, and physical evidence was recovered at the scene placing the petitioner there." The coram nobis court determined that "the remainder of Mr. Brown's un-recanted portion of his testimony shows Petitioner's guilt as well because Mr. Brown also testified that Petitioner participated in the planning of the murders, indicated his intent that the victims be killed, and assisted in recruiting personnel and gathering what was necessary to carry out the offense." Because all of this evidence was presented to the jury during the Petitioner's trial, the coram nobis court determined that Brown's recanted testimony was not "new evidence" that may have changed the outcome of the case.

The record supports the determination of the coram nobis court. As outlined above, Michael Brown testified at trial and was cross-examined extensively about his inconsistent statements regarding the Petitioner's involvement in the killings. Brown also admitted at trial that his March 13th statement implicated Marcus Boyd as the person who asked for

the killing of the victims, not the Petitioner. Brown further admitted at trial that his testimony regarding the Petitioner's exit of the Lexus truck to give Brown information about the signal, and statement "F*** what Marcus and Wardlow say, I'm asking you-I'm telling you to do this, and when I flash the lights, I want you to do it" was not indicated in either of his previous statements to the police. Carlos Wardlow testified as an accomplice at trial that the Petitioner was an "Assistant Governor" in the Gangster Disciples and supervised part of South Memphis. State v. Skinner, 2005 WL 468322, at *4. Wardlow testified that all three partners, Boyd, Wardlow, and the Petitioner, were angry with the victims for losing their money. Consequently, all three partners "came to the conclusion that [the victims] would have to be killed for the money that was missing." According to Wardlow, the Petitioner was the only individual that did not appear upset about the "hit" following the murders. Rather, the Petitioner was "very hyperactive," and Wardlow heard the Petitioner say "[t]hem n****** ... got what they had coming to them." Wardlow testified that after watching Boyd demonstrate how he shot the victims; the Petitioner made the statement "[w]e whacked them-we whacked them. We killed them mother-f******. They got what they deserved. We whacked them. We're gonna hurt the town with this." Randall Jackson also testified that he was a friend of the Petitioner's and that sometime in March of 1999, the Petitioner offered him $10,000 to take care of some business. According to Jackson, the Petitioner wanted Jackson to take care of some business because a Gangster Disciple took money from him. However, the Petitioner was not specific as to what business he wanted taken care of. Based on this evidence, the Petitioner has failed to establish that had Brown's alleged recantation been admitted at trial, it may have resulted in a different judgment.

Finally, to the extent that the Petitioner is claiming relief based on alleged inconsistent theories relied upon by the State in securing his state murder conviction and the federal drug conspiracy convictions of his co-defendant/co-conspirators, this is not a cognizable claim for coram nobis relief. See Nunley, 552 S.W.3d at 800 (allegations involving due process based on Brady violations are appropriate for post-conviction petitions, not coram nobis relief). Moreover, the federal habeas court determined, and we agree, that more than one person can be convicted of ordering the murder of the victim's in this case, there was no effort to preclude the Petitioner's involvement in the murder in the federal drug conspiracy trial, and the Petitioner was convicted in the state murder proceedings under a theory of criminal responsibility for the action of another. Accordingly, prosecutors in the federal and state trials did not present inconsistent, irreconcilable theories to convict different defendants based on the same facts. The Petitioner is not entitled to relief.

CONCLUSION

Based upon the foregoing authorities and reasoning, the judgment of the coram nobis court is affirmed.

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CAMILLE R. MCMULLEN, JUDGE