Docket No: 17-5714

IN THE SUPREME COURT OF THE UNITED STATES

ABRON SPRAGGINS,

Petitioner,

Vs.

RUSTY WASHBURN,

Respondent.

On Petition for Writ of Certiorari to the Sixth Circuit Court of Appeals
No. 17-5714

PETITION FOR WRIT OF CERTIORARI

PRO-SE PETITIONER:

ABRON SPRAGGINS
348262
T.T.C.C.
140 Macon Way
Hartsville, Tennessee 37074
(No Phone)

Attorney for Petitioner, (None)

QUESTIONS PRESENTED FOR REVIEW

I.

IS THE DECISION OF THE COURT OF APPEALS REGARDING THE PROCEDURAL DEFAULT OF PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN CONFLICT WITH OR INCONSISTENT WITH PRIOR DECISIONS OF THIS COURT?

PARTIES

Petitioner Abron Spraggins is an individual serving a sentence in the Tennessee Department of Corrections as inmate number 348262 at Trousdale Turner Correctional Complex, (a Core Civic Prison), located at 140 Macon Way, Hartsville, Tennessee 37074.

Respondent Rusty Washburn is the Warden at Trousdale Turner Correctional Complex.

No corporation is involved in this cause.

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TABLE OF AUTHORITIES

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IN THE SUPREME COURT OF THE UNITED STATES

ABRON SPRAGGINS

Petitioner

v.

RUSTY WASHBURN

Respondent

On Petition for Writ of Certiorari to the Sixth Circuit Court of Appeals
No. 17-5714

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in the above styled proceedings on February 20, 2018.

OPINIONS BELOW

1. The opinion of the 6th Circuit Court of Appeals to the petition to rehear is unpublished at 17-5714 (6th Cir., filed February 20, 2018). (Appendix A, *infra*).
2. The opinion of the 6th Circuit Court of Appeals is unpublished at No. 17-5714 (6th Cir., filed December 28, 2017). (Appendix B, *Infra*).
3. The opinion of the United States District Court for the Western District of Tennessee is unpublished at No. 2:13-cv-03006 (filed Dec. 30, 2016). (Appendix C, *Infra*).

4. The Rule 59(e) opinion of the United States District Court for the Western District of Tennessee is unpublished at No. 2:13-cv-03006 (filed June 5, 2015). (Appendix D, *Infra*).

JURISDICTION

The date on which the 6th Circuit Court of Appeals decided my case was December 28, 2017. A copy of that decision appears at Appendix "A".

A timely motion for rehearing *en banc* was thereafter denied on the 20th day of February, 2018, and a copy of the order denying rehearing appears at Appendix "B"

Jurisdiction was conferred upon the court of appeals generally by 28 U.S.C. § 1291.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a) and United States Supreme Court Rules 10 and 13.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT 5

Criminal actions-Provisions concerning-Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 6

Rights of the accused. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT 14

Section 1. [Citizens of the United States.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. [Representatives-Power to reduce apportionment.]

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. [Disqualification to hold office.]

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. [Public debt not to be questioned-Debts of the Confederacy and claims not to be paid.]

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. [Power to enforce amendment.]

The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

39-13-102. Aggravated assault.

(a) (1) A person commits aggravated assault who:

(A) Intentionally or knowingly commits an assault as defined in § 39-13-101, and the assault:

(i) Results in serious bodily injury to another;

(ii) Results in the death of another;

(iii) Involved the use or display of a deadly weapon; or

(iv) Involved strangulation or attempted strangulation; or

(B) Recklessly commits an assault as defined in § 39-13-101(a)(1), and the assault:

(i) Results in serious bodily injury to another;

(ii) Results in the death of another; or

(iii) Involved the use or display of a deadly weapon.

(2) For purposes of subdivision (a)(1)(A)(iv), ŧ strangulation ŧ means intentionally or knowingly impeding normal breathing or circulation of the blood by applying pressure to the throat or neck or by blocking the nose and mouth of another person, regardless of whether that conduct results in any visible injury or whether the person has any intent to kill or protractedly injure the victim.

(b) A person commits aggravated assault who, being the parent or custodian of a child or the custodian of an adult, intentionally or knowingly fails or refuses to protect the child or adult from an aggravated assault as defined in subdivision (a)(1) or aggravated child abuse as defined in § 39-15-402.

(c) A person commits aggravated assault who, after having been enjoined or restrained by an order, diversion or probation agreement of a court of competent jurisdiction from in any way causing or attempting to cause bodily injury or in any way committing or attempting to commit an assault against an individual or individuals, intentionally or knowingly attempts to cause or causes bodily injury or commits or attempts to commit an assault against the individual or individuals.

(d) A person commits aggravated assault who, with intent to cause physical injury to any public employee or an employee of a transportation system, public or private, whose operation is authorized by title 7, chapter 56, causes physical injury to the employee while the public employee is performing a

duty within the scope of the public employee's employment or while the transportation system employee is performing an assigned duty on, or directly related to, the operation of a transit vehicle.

(e) (1) (A) Aggravated assault under:

(i) Subsection (d) is a Class A misdemeanor;

(ii) Subdivision (a)(1)(A)(i), (iii), or (iv) is a Class C felony;

(iii) Subdivision (a)(1)(A)(ii) is a Class C felony;

(iv) Subdivision (b) or (c) is a Class C felony;

(v) Subdivision (a)(1)(B)(i) or (iii) is a Class D felony;

(vi) Subdivision (a)(1)(B)(ii) is a Class D felony.

(B) However, the maximum fine shall be fifteen thousand dollars ($15,000) for an offense under subdivision (a)(1)(A), subdivision (a)(1)(B), subsection (c), or subsection (d) committed against any of the following persons who are discharging or attempting to discharge their official duties:

(i) Law enforcement officer;

(ii) Firefighter;

(iii) Medical fire responder;

(iv) Paramedic;

(v) Emergency medical technician;

(vi) Health care provider; or

(vii) Any other first responder.

(2) In addition to any other punishment that may be imposed for a violation of this section, if the relationship between the defendant and the victim of the assault is such that the victim is a domestic abuse victim as defined in § 36-3-601, and if, as determined by the court, the defendant possesses the ability to pay a fine in an amount not in excess of two hundred dollars ($200), then the court shall impose a fine at the level of the defendant's ability to pay, but not in excess of two hundred dollars ($200). The additional fine shall be paid to the clerk of the court imposing sentence, who shall transfer it to the state treasurer, who shall credit the fine to the general fund. All fines so credited to the general fund shall be subject to appropriation by the general assembly for the exclusive purpose of funding family violence shelters and shelter services. Such appropriation shall be in addition to any amount appropriated pursuant to § 67-4-411.

(3) (A) In addition to any other punishment authorized by this section, the court shall order a person convicted of aggravated assault under the circumstances set out in this subdivision (e)(3) to pay restitution to the victim of the offense. Additionally, the judge shall order the warden, chief operating officer, or workhouse administrator to deduct fifty percent (50%) of the restitution ordered from the inmate's commissary account or any other account or fund established by or for the benefit of the inmate while incarcerated. The judge may authorize the deduction of up to one hundred percent (100%) of the restitution ordered.

(B) Subdivision (e)(3)(A) applies if:

(i) The victim of the aggravated assault is a correctional officer, guard, jailer, or other full-time employee of a penal institution, local jail, or workhouse;

(ii) The offense occurred while the victim was in the discharge of official duties and within the victim's scope of employment; and

(iii) The person committing the assault was at the time of the offense, and at the time of the conviction, serving a sentence of incarceration in a public or private penal institution as defined in § 39-16-601.

Acts 1989, ch. 591, § 1; 1990, ch. 980, § 2; 1990, ch. 1030, §§ 12, 13; 1993, ch. 306, § 1; 1995, ch. 452, § 1; 1996, ch. 830, § 1; 1996, ch. 1009, § 19; 1998, ch. 1049, § 9; 2002, ch. 649, § 2; 2005, ch. 353, § 10; 2009, ch. 394, § 1; 2009, ch. 412, § 2; 2010, ch. 981, § 3; 2011, ch. 401, § 1; 2013, ch. 325, § 2; 2013, ch. 407, § 1; 2013, ch. 461, §§ 2, 3; 2015, ch. 283, § 1; 2015, ch. 306, §§ 1, 2.

39-13-103. Reckless endangerment.

(a) A person commits an offense who recklessly engages in conduct that places or may place another person in imminent danger of death or serious bodily injury.

(b) (1) Reckless endangerment is a Class A misdemeanor.

(2) Reckless endangerment committed with a deadly weapon is a Class E felony.

(3) Reckless endangerment by discharging a firearm into a habitation, as defined under § 39-14-401, is a Class C felony, unless the habitation was unoccupied at the time of the offense, in which event it is a Class D felony.

(4) In addition to the penalty authorized by this subsection (b), the court shall assess a fine of fifty dollars ($50.00) to be collected as provided in § 55-10-412(b) and distributed as provided in § 55-10-412(c).

Acts 1989, ch. 591, § 1; 2011, ch. 409, § 1; 2012, ch. 1048, § 2; 2013, ch. 154, §§ 53, 54.

STATEMENT OF THE CASE

A.

1.

On April 8, 2008, the Shelby County Grand Jury returned a four count indictment against Appellant Abron Spraggins based on his use or display of a deadly weapon to cause Charlesetta Patterson, Camia Patterson, Charles Patterson, and Troy Patterson to reasonably fear imminent bodily injury. *State v. Spraggins*, No. W2009-01073-CCA-R3-CD, 2010 Tenn.Crim.App. LEXIS 365, *1 (May 7, 2010).

On April 18, 2008, the Shelby County Public Defender was appointed to represent the appellant at trial. On March 2, 2009, the appellant's jury trial commenced in Division One of the Criminal Court of Shelby County, Judge Paula Skahan presiding. On March 3, 2009, the trial judge granted the appellant's motion for judgment of acquittal on counts two and three of the indictment. The next day, the petit jury returned verdicts finding the appellant guilty of the lesser included offense of reckless endangerment with a deadly weapon on count one and of aggravated assault as charged in the fourth count of the indictment. On April 7, 2009, the judge sentenced the appellant to a three-year sentence for reckless endangerment with a deadly

weapon and ten years for aggravated assault as a Range Two Multiple Offender with sentences to be served consecutively for an aggregate effective sentence of thirteen years to be served in the Tennessee Department of Corrections. A motion for new trial was heard on April 30, 2009. The trial judge overruled the appellant's motion on that same date.

2.

The Shelby County Public Defender was appointed to perfect an appeal. Counsel for the appellant raised the following issues on direct appeal:

> I. Whether the trial court committed plain error by instructing the jury that felony reckless endangerment is a lesser included offense of aggravated assault as charged in the indictment?
> II. Whether there was insufficient evidence to support the verdicts of guilt beyond a reasonable doubt?
> III. Whether the trial court erred by enhancing the defendant's sentence and by imposing consecutive sentences?

The Tennessee Court of Criminal Appeals affirmed the trial court's judgment on May 2, 2010.

The Tennessee Court of Criminal Appeals stated the following underlying facts as follows:

> The State's first witness at the defendant's March 2009 trial was Charlesetta Patterson, who testified on direct examination as

follows. Her daughter, Ashley Battle, had given birth on September 6, 2007, to a son, Isaac, who had presumably been fathered by the defendant. On October 12, 2007, Isaac was living in Patterson's Memphis home with Patterson and some of Patterson's children, including Camia, who was seven at the time, Charles, who was eight, and Troy, who was ten. At some point that day, Patterson was away from home when her daughter, Andria, telephoned and related some information she had learned from Camia, Charles, and Troy. In response, Patterson called the police and returned home to find the defendant parked in his truck behind her apartment.

Hoping to stall the defendant until the police arrived, Patterson walked to the defendant's truck, where the defendant told her that he wanted to see his son. She refused, and an argument between the two ensued in which the defendant insisted that neither she nor the police would be able to stop him from seeing his son, and she repeatedly told him that she would not allow him to see the child. During the course of that verbal altercation, the defendant reached under his seat, pulled out a gun, and pointed it at her. The defendant also said, "Bitch, I am going to kill you," which frightened her. At about that time, however, three police cars pulled up and the defendant "took off and almost ran into the police car."

On cross-examination, Patterson acknowledged having testified at the preliminary hearing that she was inside the house when the defendant came to her home. She explained, however, that the defendant had come to her home on more than one occasion and that she had been referring to a different incident during her preliminary hearing testimony. On redirect examination, she testified that she had custody of Isaac because his mother left "the day after he came home."

Officer Samuel Stewart of the Memphis Police Department, who responded to the October 12 disturbance call, testified that Patterson, who appeared very frightened, informed him that the defendant had threatened her with a gun, telling her that he was going to kill her and her children if she did not give him his child. Officer Stewart stated that he and his partner checked the area but were unable to locate the defendant.

Twelve-year-old Troy Patterson testified that on October 12, 2007, he and his younger brother, Charles, were walking home from school together when the defendant pulled out a black gun, pointed it at him and his brother, told them he wanted his child, and said that he was going to kill him, his brothers, and their mother. The witness testified that he and Charles ran to the Memphis Housing Authority office, where they remained until their mother came to get them. On cross-examination, he testified that the defendant, who had been slowly following them down the street in his truck, never got out of the vehicle.

Ten-year-old Charles Patterson testified that he and Troy were walking home from school together on October 12, 2007, when the defendant began following them. He stated that the defendant said something to Troy, which he did not hear, and that he and Troy reacted by running to the Memphis Housing Authority office to hide because they were afraid of the defendant. The witness testified that the defendant did not say anything to him and did not point a gun at him.

At the conclusion of the State's proof, the trial court granted the defendant's motion for judgment of acquittal with respect to counts two and three of the indictment, which charged the defendant with the aggravated assaults of Camia and Charles Patterson. The defendant then elected not to testify and rested his case without presenting any proof. Following deliberations, the jury convicted him of the lesser-included offense of reckless endangerment of Charlesetta Patterson and of the indicted offense of aggravated assault of Troy Patterson.

The only evidence introduced at the defendant's April 7, 2009 sentencing hearing was the defendant's presentence report, which reflected that the twenty-nine-year-old defendant had a lengthy criminal history consisting of seventeen prior convictions, including two felonies. At the conclusion of the hearing, the trial court found one enhancement factor applicable, that the defendant had a history of criminal convictions in addition to those necessary to establish his range, see Tenn. Code Ann. § 40-35-114(1) (Supp. 2009), and no applicable mitigating factors. The trial court further found that the defendant met three of the criteria for consecutive sentencing, in

> that he was an offender whose record of criminal history was extensive, based on his lengthy criminal record; that he was a professional criminal who had knowingly dedicated his life to crime as a major source of his livelihood, based on his conviction for the sale of cocaine, his limited and unsubstantiated work history, and the fact that he reported no history of drug use; and that he was a dangerous offender whose behavior indicated little or no regard for human life and no hesitation about committing a crime in which the risk to human life was high, based on his "outrageous" actions in pointing a gun at a child and later at his mother. Applying great weight to the sole enhancement factor, the trial court sentenced the defendant as a Range II offender to consecutive terms of three years for the reckless endangerment conviction and ten years for the aggravated assault conviction, for an effective sentence of thirteen years at thirty-five percent in the Department of Correction.

State v. Spraggins, No. W2009-01073-CCA-R3-CD, 2010 Tenn.Crim.App. LEXIS 365, *1-5 (May 7, 2010).

The Tennessee Supreme Court denied the appellant's application for discretionary review on November 18, 2010. *State v. Spraggins*, No. W2009-01073-SC-R11-CD, 2010 Tenn. LEXIS 1115 (Nov. 18, 2010).

B.

On February 7, 2011, the appellant filed a timely petition for post-conviction relief and appointed counsel filed an amended petition. *Spraggins v. State*, No. W2012-005610-CCA-R3-PC, 2012 WL 5355703, 2012 Tenn.Crim.App. LEXIS 886 at *1 (Oct. 31, 2012). As part of his claim of ineffective assistance of counsel, appellant raised the following

pertinent issues for review:

2. **Failed to investigate – secure witnesses:**
   Had trial counsel been diligent, she could have found a witness who would have testified that Petitioner was out of town at the time the crime was committed; thus making him actually innocent of these charges.

4. **Failed to ask for proper jury instructions:**
   Trial counsel should not have asked for a jury instruction on a lesser included offense that was not part of the indicted charges.

Post-Conviction counsel procedurally defaulted both of the foregoing ineffective assistance of counsel claims. Post-Conviction counsel failed to locate, interview, or present Mr. Spraggins' alibi witnesses at the post-conviction evidentiary hearing. Moreover, post-conviction counsel did not address or argue trial counsel's error in requesting an erroneous jury charge that resulted in Spraggin's conviction for an offense that is not a lesser included offense of the charge upon which he was indicted.

After the evidentiary hearing the post-conviction court denied relief. *Spraggins*, 2012 WL 5355703 at *2.

The Tennessee Supreme Court denied the petitioner's application for discretionary review on March 19, 2013. *Spraggins v. State*, No. W2012-00561-SC-R11-PC, 2013 Tenn. LEXIS 322 (March 19, 2013).

C.

The appellant timely filed his *pro se* § 2254 petition in December of 2013 and filed his amended petition in March 2014. (Appendix "A" *infra*, page 2). On December 30, 2016, judgment was entered by the Hon. Samuel H. Mays, Jr., United States District Court Judge for the United States District Court for the Western District of Tennessee dismissing the appellant's petition and denying issuance of a certificate of appealability. (Appendix "C" *Infra*). The Court dismissed the appellant's petition as raising issues that were not cognizable, without merit, and barred by procedural default and certified that any appeal would not be taken in good faith. (Appendix "C" *Inra*). The appellant timely filed his motion to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e), seeking adjudication of his "indictment and/or jury instruction claim." The court denied the Rule 59(e) claim on June 5, 2015, paraphrasing its prior opinion that:

> "Petitioner did not 'fairly present' this issue as a federal claim to the state appellate court, as required by *Baldwin*, 541 U.S., at 29. Instead he presented the claim as an error under Tennessee law. The TCCA reviewed Tennessee Rules of Criminal Procedure and applied Tennessee case law in its decision. The TCCA did not rule on the merits of a federal constitutional claim. It relied exclusively on an adequate and independent state ground." (Appendix "D" *Infra*, p. 1-2).

Petitioner Spraggins filed a timely Notice of Appeal and a few months later filed a Brief in Support of a Certificate of Appealability.[1] The Brief in Support of a Certificate of Appealabiltiy crossed in the mail with the Order filed by the Court of Appeals for the 6th Circuit, which was filed on the 28th day of December, 2017. As a result, the 6th Circuit construed Mr. Spraggins notice of appeal as a COA application.

Petitioner Spraggins filed a timely petition for rehearing and requested that the Court of Appeals "conduct a review of the previously filed 'Brief in Support of Motion for Issuance of a Certificate of Appealability.'" (Appendix "F", pg. 3).

On the 20th day of February, 2018, the United States Court of Appeals for the Sixth Circuit denied the petition for rehearing *en banc*. (Appendix "A").

REASONS FOR GRANTING THE PETITION

I. The Decision Of The Court Of Appeals Regarding The Procedural Default Of Petitioner's Ineffective Assistance Of Counsel Claims Conflicts With Or Is Inconsistent With Prior Decisions Of This Court.

The 6th Circuit Court of Appeals decision in the instant case is

1 The Brief in Support of Motion for Issuance of a Certificate of Appealability can be found in Appendix "E".

contrary to and involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States in *Davila v. Davis*, 582 U.S. ___, 137 S.Ct. 2058, 198 L.Ed.2d 603 (2017); *Trevino v. Thaler*, 569 U.S. ___, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013); and, *Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding and therefore has decided an important federal question in a way that conflicts with relevant decisions of this Court so as to call for an exercise of this Court's supervisory power.

Analysis

Procedural default is a defense to federal habeas corpus review. *Davila v. Davis*, 582 U.S. ___, 137 S.Ct. 2058, 2064, 198 L.Ed.2d 603 (2017). A petitioner's claim can be procedurally defaulted if he fails to assert that claim throughout at least one complete round of state-court review. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 119 S. Ct. 1728, 144 L. Ed.2d 1 (1999). Or it can be procedurally defaulted if the state court rejects it on adequate and independent state law grounds, including procedural

grounds. *Coleman v. Thompson*, 501 U.S. 722, 729-30, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991).

A petitioner can overcome a procedural default if he can establish cause for and prejudice from the default. See *Davila*, 582 U.S. at ___, 137 S. Ct. at 2064-65; *Coleman*, 501 U.S. at 750. Constitutionally ineffective assistance of counsel can excuse a procedural default. *Davila*, 582 U.S. at ___, 137 S. Ct. at 2065. But because "a prisoner does not have a constitutional right to counsel in state post-conviction proceedings, ineffective assistance in those proceedings does not qualify as cause to excuse a procedural default." *Id.*, 137 S. Ct. at 2062.

That general rule is subject, however, to "a narrow exception." *Id.* A federal court may hear a procedurally defaulted claim for ineffective assistance of trial counsel if two criteria are met: (1) the state's appeal and post-conviction procedures make it "highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise" the claim on direct appeal; and (2) post-conviction counsel was absent or ineffective. *Trevino v. Thaler*, 569 U.S. ___, 133 S. Ct. 1911, 1921, 185 L. Ed. 2D 1044 (2013), quoting *Martinez v. Ryan*, 566 U.S. 1, 17, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012). That exception does not extend to claims of ineffective assistance of

appellate counsel. *Davila*, 582 U.S. at ___, 137 S. Ct. at 2064, 198 L.Ed.2d at 611.

The Court of Appeals for the 6th Circuit found, in relevant part, that:

> "Spraggin's first claim[2] is procedurally defaulted because it was not raised in a motion for a new trial. Notwithstanding any default, Spraggins has not made a substantial showing of the denial of a constitutinal right. Trial counsel sought the jury instruction about which Spraggin's now complains. Further, an incorrect jury instruction under state law does not provide a basis for habeas corpus relief. This claim does not deserve encouragement to proceed further.
>
> Finally, Spraggins alleges the ineffective assistance of trial counsel. Spraggins raised this claim in his state petition for post-conviction relief. He did not raise the claim on appeal, however. State court remedies are no longer available, so this claim is procedurally defaulted. Spraggins cannot overcome the default by asserting the ineffective assistance of counsel for failing to present this on appeal. Reasonable jurists would not debate that the district court was incorrect in its procedural ruling."

APPENDIX "B", pg. 3 (citations omitted).

In *Davila*, the petitioner asked this Court to extend *Martinez* to allow a federal court to hear a substantial, but procedurally defaulted, claim of ineffective assistance of appellate counsel when a prisoner's state postconviction counsel provides ineffective assistance by failing to raise that claim. *Davila*, 582 U.S at ___, 137 S.Ct at 2065, 198 L.Ed.2d at 613. However, in the case sub-judice, the petitioner asked the habeas court, and

2 Ineffective assistance of counsel on Jury charge.

then the 6th circuit appellate court, to apply *Martinez* and *Thaler* to allow a federal court to hear a substantial, but procedurally defaulted, claim of ineffective assistance of *trial* counsel that was not presented in his initial post-conviction hearing by his appointed post-conviction *trial* attorney. See (Appendix "E", p. 13-15). In other words, petitioner is asking for this Court to apply what has already been applied by this Court in the past through *Martinez* and *Thaler*.

I. Did Petitioner Fairly Present a Federal Claim to the State Appellate Court?

Before seeking a federal writ of habeas corpus, a state prisoner must exhaust available state remedies, 28 U.S.C. § 2254(b)(1), thereby giving the State the "' opportunity to pass upon and correct' alleged violations of its prisoners' federal rights." *Baldwin v. Reese*, 541 U.S. 27, 29, 124 S.Ct. 1347, 158 L.Ed.2d 64 (2004). To provide the State with the necessary "opportunity," the prisoner must "fairly present" his claim in each appropriate state court thereby alerting that court to the federal nature of the claim. *Id.* "'[A] litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief . . . by citing in conjunction with the claim the federal source of law on which he relies *or a case deciding such a claim on federal grounds*'" *Nitro-Lift*

Techs., L.L.C. v. Howard, 568 U.S. 17, 20, 133 S.Ct. 500, 184 L.Ed.2d 328 (2012); quoting, *Howell v. Mississippi*, 543 U.S. 440, 444, 125 S.Ct. 856, 160 L.Ed.2d 873 (2012) (quoting *Baldwin v. Reese*, 541 U.S. 27, 32, 124 S.Ct. 1347, 158 L.Ed.2d 64 (2004) (*emphasis added*).

The Tennessee Supreme Court held that felony reckless endangerment is not a lesser included offense of an aggravated assault that is committed by intentionally or knowingly causing another to reasonably fear imminent bodily injury by the use or display of a deadly weapon. *State v. Moore*, 77 S.W.3d 132, 135 (Tenn.2002). Despite this prior ruling, at trial Spraggins trial counsel requested that very lesser-included instruction for Spraggins' indicted offense of an aggravated assault. The jury acquitted Spraggins on the offense of an aggravated assault and then convicted him on the erroneous lesser included offense of felony reckless endangerment. The Circuit Court of Appeals contends that Spraggins' appellate counsel procedurally defaulted this issue on appeal; however, despite the Circuit Court's diverse finding, Spraggins' trial counsel failed to raise this error in the motion for new trial and, therefore, procedurally defaulted this issue at trial. This is precisely the type of default that this Court envisioned in the *Martinez* line of cases, as more fully discussed in subsection II, *infra*.

Trial counsel did not raise this in the motion for new trial and tried to cover himself by raising the jury instruction as "plain error" on appeal. Even so, on appeal Spraggins' counsel clearly argued a federal constitutional question to the appellate court in his opening brief as follows:

> "... A jury instruction is considered 'prejudicially erroneous' if it fails to submit the legal issues or if it misleads the jury as to the applicable law. *State v. Hodges,* 944 S.W.2d 346, 352 (Tenn.1997); *(quoting Boyd v. California*, 494 U.S. 370, 380-81 (1990).). Thus, this breech of precedent adversely affected

Consequently, despite the lower court's ruling to the contrary, the federal question regarding the jury instructions was defaulted at the trial court but "fairly present[ed]" to the appropriate state appellate courts. See, *Baldwin*, 541 U.S. At 29.

Moreover, the erroneous jury instruction was also raised at the state post-conviction as an ineffective assistance of counsel claim, (Appendix "G", pg. **), together with trial-counsel's failure to investigate and secure alibi witnesses for trial, (*Spraggins*, 2012 Tenn.Crim.App. LEXIS 886, at *1).

II. Procedural Default / Cause and Prejudice?

If a petitioner has failed to present a particular claim before a state court in the manner prescribed by the state's procedural rules, a federal court

will generally refuse to consider that claim on *habeas* review. *See Wainwright v. Sykes*, 433 U.S. 72, 86-87 (1977) (procedural default occurred because petitioner failed to make timely objection under state contemporaneous objection rule to admissions of inculpatory statements); *See also Dretke v. Haley*, 541 U.S. 386, 388 (2004) (reaffirming procedural default rule and stating that federal courts will not ordinarily "entertain a procedurally defaulted constitutional claim" in *habeas* petitions absent a showing of cause and prejudice to excuse the default). A petitioner can overcome the procedural bar only by demonstrating either (1) cause for the procedural default and actual prejudice as a result of the alleged violation of federal law, (*See Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *see also Murray v. Carrier*, 477 U.S. 478, 485, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986)); or (2) that failure to review the claims will "result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. At 750; *see also Carrier*, 477 U.S. At 495.

The *Coleman* Court established that the cause and prejudice standard will be applied "[i]n all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule." 501 U.S. At 750. The Court applied the cause and

prejudice standard to a petitioner's default in his entire appeal and held the petitioner was precluded from obtaining federal *habeas* relief, despite alleged attorney inadvertence in failing to file a timely notice of appeal. *Id.* At 752. In *Carrier*, the Court applied the cause and prejudice standard to a petitioner's failure to raise a particular claim in his state court appeal and denied the petitioner federal *habeas* review. *Carrier*, 477 U.S. At 492.

Petitioner can satisfy the "cause" requirement by showing, for example, that assistance of counsel was ineffective in violation of the Sixth Amendment. *See Carrier*, 477 U.S. At 486. In *Carrier*, the Court held that attorney error or oversight in criminal proceedings is not sufficient cause for excusing procedural default unless it rises to the level of ineffective assistance of counsel in violation of the Sixth Amendment. *Id.* At 488-89. In *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013), this Court announced a narrow exception to *Coleman's* general rule. That exception treats ineffective assistance by a prisoner's state post-conviction counsel as cause to overcome the default of a single claim- of ineffective assistance assistance of trial counsel- in a single context- where the State effectively requires a defendant to bring that claim in state post-conviction proceedings rather than on direct appeal. *Davila v. Davis*, 582

US ___, 137 S.Ct. ___, 198 L.Ed.2d. 603, 610 (2017).

Just as in *Davila*, the "decision in this case is guided by two fundamental tenets of federal review of state convictions." *Davila*, 198 L.Ed.2d., at 611. First, a state prisoner must exhaust available state remedies before presenting his claim to a federal habeas court. 28 U.S.C. § 2254(b)(1)(A).

Second, a federal court may not review claims that were procedurally defaulted in state court- that is, claims that the state court denied based on an adequate and independent state procedural rule. *Davila*, 582 U.S. ___, 137 S.Ct. at 2064, 198 L.Ed.2d., at 611.

As previously stated, post-conviction counsel procedurally defaulted both of the aforementioned ineffective assistance of counsel claims.

A. Jury Charge

Post-conviction counsel provided ineffective assistance of counsel on a substantial claim of ineffective assistance of trial counsel by not addressing or arguing trial counsel's error in requesting an erroneous jury charge that resulted in Spraggins' conviction for an offense that is not a lesser included offense of the charge upon which he was indicted.

Although post-conviction counsel incorporated this ineffective assistance of counsel claim within the amended petition for post-conviction relief, he failed to argue or otherwise present this issue before the post-conviction court. As a result, Spraggins claim of ineffective assistance of counsel *infra* was procedurally defaulted due to post-conviction counsel's failure to present or argue trial counsel's inclusion of an erroneous jury charge at trial that resulted in Spraggins' conviction for a charge not brought before a grand jury, a sheer denial of the due process clause. See, *DeJonge v. Oregon*, 299 U.S. 353, 362, 57 S.Ct. 255, 81 L.Ed.2d 278 (1937) ("To allow the prosecution to amend the indictment at trial so as to enable the prosecution to seek a conviction on a charge not brought by the grand jury unquestionably constituted a denial of due process by not giving appellant fair notice of criminal charges to be brought against him.").

B. Alibi Witness

Post-conviction counsel provided ineffective assistance of counsel on a substantial claim of ineffective assistance of trial counsel by failing to present the alibi witness Ebony Wells to testify at the state post-conviction hearing. Post-conviction counsel failed to locate, interview, or present Ms. Wells at the post-conviction hearing. *See, Plyant v. State,* 263 S.W.3d 854,

869 (Tenn.2008) (In order "[t]o succeed on a claim of ineffective assistance of counsel for failure to call a witness at trial, a post-conviction petitioner should present that witness at the post-conviction hearing. As a general rule, this is the only way the petitioner can establish that . . . the failure to have a known witness present or call the witness to the stand resulted in the denial of critical evidence which inured to the prejudice of the petitioner."). Because Ms. Wells did not testify at the post-conviction hearing, the state courts had no way to know how she would have responded had she been called to testify at trial. The Tennessee Supreme Court emphasized "that post-conviction counsel generally risks the denial of a post-conviction claim if he or she fails to call at the post-conviction hearing all witnesses who they claim should have been called at trial." *Id* at 873.

Because Ms. Wells did not testify at the post-conviction hearing, the state appellate court never considered whether trial counsel's failure to call Ms. Davis at trial resulted in prejudice to Petitioner. *Spraggins*, 2012 Tenn.Crim.App. LEXIS 886, at *3.

III. Ineffective Assistance of Counsel?

In *Padilla v. Kentucky*, this Court stated that:

> Under Strickland, we first determine whether counsel's

> representation 'fell below an objective standard of reasonableness.' Then we ask whether 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The first prong-constitutional deficiency-is necessarily linked to the practice and expectations of thelegal community: The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.' We long recognized that 'prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable . . . . ' Although they are 'only guides' and not inexorable commands, these standards may be valuable measures of the prevailing professional norms of effective representation.

Padilla v. Kentucky, 559 U.S. 356, 366-67, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010) (citations deleted).

Defense counsel has "a duty to be well informed regarding the legal options and developments that can effect a client's interests during a criminal representation. *American Bar Association Fourth Edition of the Criminal Justice Standards for the Defense Function* Standard 4-1.3(e).

[T]he Sixth Amendment imposes on counsel a duty to investigate, because reasonably effective assistance must be based on professional decisions and informed legal choices can be made only after investigation of options. *Strickland, v. Washington,* 466 U.S. 668, 680, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Six years prior to Spraggins' trial and conviction, the Tennessee

Supreme Court, in *State v. Moore*, 77 S.W.3d 132 (Tenn.2002), held "that felony reckless endangerment is not a lesser included offense of aggravated assault committed by intentionally or knowingly causing another to reasonably fear imminent bodily injury by use of a deadly weapon." *Moore*, 77 S.W.3d at 136.

> Article I, § 9 of the Tennessee Constitution provides that, in a criminal prosecution, the accused has the right to receive advance notice of the charges that he or she must defend. Tenn. Const. art. I, § 9. Consequently, the accused may be convicted only of an offense enumerated in the indictment, or an offense that qualifies as a lesser-included offense thereof. Hagner v. U.S., 285 U.S. 427, 431, 76 L. Ed. 861, 52 S. Ct. 417 (1932); State v. Rush, 50 S.W.3d 424, 427-28 (Tenn. 2001).
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> - - -
>
> In State v. Burns this Court adopted a test for determining whether an offense is included within a greater offense. The Burns test states that an offense is lesser-included if:
>
> > (a) all of its statutory elements are included within the offense charged; or(b) it fails to meet the definition in part (a) only in the respect that it contains a statutory element or elements establishing:(c) it consists of facilitation, attempt or solicitation of the offense charged.
> >
> > (1)a different mental state indicating a lesser kind of culpability; or
> >
> > (2)a less serious harm or risk of harm to the same person, property or public interest; or Id. at 466-67.
>
> Before applying the Burns test to the offenses at issue in the case under submission, it is necessary to establish the elements of the offenses. Pursuant to Tenn. Code Ann. §§ 39-13-101(a)(2001) and - 102(a)(2001), the offense of aggravated assault consists of the following elements relevant to this analysis:

(1) Intentionally or knowingly:(2) Recklessly:

(a) causing bodily injury to another; or(b) causing another to be in reasonable fear of imminent bodily injury; or(c) causing contact with another that a reasonable person would regard as extremely offensive or provocative; and(d) causing serious bodily injury to another; or(e) using or displaying a deadly weapon; or

(a) causing bodily injury to another, and;(b) serious injury occurs; or

(c) using or displaying a deadly weapon.

By contrast, Tenn. Code Ann. § 39-13-103(a)(2001) states that the offense of felony reckless endangerment consists of the following elements:

(a) Recklessly engaging in conduct which places or may place another person in imminent danger of death or serious bodily injury; and(2) Using or displaying a deadly weapon.

Application of the Burns test requires that we first compare the statutory elements of each offense to determine whether all of the statutory elements of felony reckless endangerment are included within the statutory elements of aggravated assault committed by intentionally or knowingly causing another to reasonably fear imminent bodily injury by use or display of a deadly weapon. Our comparison reveals that the risk of danger element required for felony reckless endangerment is not an element necessary to establish aggravated assault committed by intentionally or knowingly causing another to reasonably fear imminent bodily injury by use or display of a deadly weapon. Because all of the elements of felony reckless endangerment cannot be incorporated into the elements of aggravated assault committed by intentionally or knowingly causing another to reasonably fear imminent bodily injury by use or display of a deadly weapon, part (a) of the Burns test is not satisfied.

Next, we must determine whether the disparate element, risk of danger, qualifies as an exception afforded by part (b)(1) or (b)(2) of the Burns test. Looking first to part (b)(1), we find that the element does not qualify for this exception because it pertains to the

presence of danger rather than the relevant mental state. As a result, part (b)(1) of the Burns test is not satisfied.

Application of part (b)(2) to the risk of danger element requires an evaluation of the degree or risk of harm required for each offense at issue. From an analysis of the statutory requirements of aggravated assault, we determine that the presence of danger is not an essential element of aggravated assault committed by placing another person in fear of imminent danger of death or serious bodily injury. Consequently, one can commit the offense of aggravated assault by placing another person in fear of danger even if there is no risk of danger. The same does not hold true for felony reckless endangerment. It logically follows that the danger produced during the commission of felony reckless endangerment produces a more serious harm or risk of harm than the fear of a non-existent danger that may be produced during the commission of aggravated assault; therefore, part (b)(2) of the Burns test is not satisfied.

Finally, part (c) of the Burns test requires us to determine whether felony reckless endangerment consists of facilitation, attempt, or solicitation of aggravated assault. To make this determination, we need only look to the elements of felony reckless endangerment. In doing so, we find that the offense is not: (1) facilitation of aggravated assault as it does not require the aiding of another in committing the crime; (2) attempted aggravated assault because the offense is not inchoate; or (3) solicitation of aggravated assault because it does not require the urging or incitement of another. We therefore find that part (c) of the Burns test is not satisfied.

Because the statutory elements of the offenses at issue do not satisfy the requirements of the Burns test, we hold that felony reckless endangerment is not a lesser-included offense of aggravated assault committed by intentionally or knowingly causing another to reasonably fear imminent bodily injury by use or display of a deadly weapon. We conclude, however, that other offenses may be lesser-included offenses of aggravated assault committed by intentionally or knowingly causing another to reasonably fear imminent bodily injury by use or display of a

> deadly weapon. Thus, on remand, the jury should be instructed on all offenses which qualify under the Burns test as lesser-included offenses of aggravated assault that were not originally charged or were charged but are lesser offenses than felony reckless endangerment.

State v. Moore, 77 S.W.3d at 134-136.

Mr. Spragins was acquited of the aggravated assault charge in count 1 of the indictment and convicted of the requested lesser-included offense of reckless endangerment with a deadly weapon. The following day, the petit jury found Mr. Spraggins not guilty of the indicted charge in count one of the aggravated assault and returned a verdict finding the defendant guilty of the requested lesser-included offense of reckless endangerment with a deadly weapon. But for trial counsel's request of the erroneous lesser-included jury instruction, Mr. Spraggins is likely to have been acquitted of the charge in count one of the indictment.

CONCLUSION

As this Court is aware, the Sixth Circuit Courts have a history of attempting to side-step the *Martinez-Trevino* line of cases. Petitioner contends that the Sixth Circuit has circumvented *Martinez* and *Trevino* once again by altering the petitioner's proffered argument from a procedural default of post-conviction and trial counsel to that of a procedural default by

appellate counsel thereby precluding review under *Martinez* and *Trevino*. Spraggins' argued that trial counsel was ineffective for failing to interview, locate or proffer his alibi witness at trial and for requesting an erroneous jury instruction that allowed him to be convicted for an un-indicted offense. Spraggins also argued that post-conviction counsel was ineffective for procedurally defaulting the ineffective assistance of counsel claim by failing to call the alibi witness to testify at the post-conviction hearing and for failing to argue or even present trial counsel's ineffectiveness for requesting an erroneous jury charge that amounted to a constructive amendment to the indictment that allowed the jury to convict on a charge not made.

For these reasons this Petition for a writ of certiorari should be granted, the Tennessee conviction vacated and the case remanded for a new trial.

Respectfully submitted,

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