No. 17-5714

IN THE
SUPREME COURT OF THE UNITED STATES

ABRON SPRAGGINS– PETITIONER

Vs.

RUSTY WASHBURN– RESPONDENT

APPENDIX "A"

Abron Spraggins v. Rusty Washburn
6th Circuit Court of Appeals No. 17-5714
Order on Habeas Petition to Rehear
Feb. 20, 2018

No. 17-5714

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Feb 20, 2018
DEBORAH S. HUNT, Clerk

ABRON SPRAGGINS,

Petitioner-Appellant,

v.

RUSTY WASHBURN, WARDEN,

Respondent-Appellee.

ORDER

Before: GUY, DAUGHTREY, and SUTTON, Circuit Judges.

Abron Spraggins petitions for rehearing en banc of this court's order entered on December 28, 2017, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

A

No. 17-5714

IN THE
SUPREME COURT OF THE UNITED STATES

ABRON SPRAGGINS– PETITIONER

Vs.

RUSTY WASHBURN– RESPONDENT

APPENDIX "B"

Abron Spraggins v. Rusty Washburn
6th Circuit Court of Appeals No. 17-5714
Order on Habeas Petition
Dec. 28, 2017

No. 17-5714

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ABRON SPRAGGINS,

Petitioner-Appellant,

v.

RUSTY WASHBURN, Warden,

Respondent-Appellee.

ORDER

Abron Spraggins, a Tennessee prisoner proceeding pro se, appeals from a district court judgment denying his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. The district court did not grant a certificate of appealability ("COA") for any claims. The court construes Spraggins's notice of appeal as a COA application. *See* Fed. R. App. P. 22(b)(2). Spraggins has filed a motion to proceed in forma pauperis.

In 2009, a Tennessee jury convicted Spraggins of one count of aggravated assault and one count of felony reckless endangerment with a deadly weapon. The trial court sentenced Spraggins to ten years of imprisonment for the aggravated assault conviction and three years of imprisonment for the reckless endangerment conviction, to be served consecutively. The Tennessee Court of Criminal Appeals affirmed Spraggins's convictions and sentence on direct appeal. *State v. Spraggins*, No. W2009-01073-CCA-R3-CD, 2010 WL 1839303 (Tenn. Crim. App. May 7, 2010). In 2011, Spraggins filed a petition for post-conviction relief in the trial court. Following an evidentiary hearing, the court denied the petition. The Tennessee Court of Criminal Appeals affirmed the decision. *Spraggins v. State*, No. W2012-00561-CCA-R3-PC, 2012 WL 5355703 (Tenn. Crim. App. Oct. 31, 2012). In both cases, the Tennessee Supreme Court denied leave to appeal.

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In December 2013, Spraggins filed a petition for a writ of habeas corpus in district court. In March 2014, Spraggins filed an amended petition, asserting the following grounds for relief: (1) whether the trial court's instructions to the jury that reckless endangerment is a lesser-included offense of aggravated assault denied Spraggins a fair trial; (2) whether the prosecution presented sufficient evidence to support the convictions; (3) whether the trial court erred by enhancing Spraggins's sentence and by imposing consecutive sentences; and (4) whether trial counsel was ineffective throughout the trial. The district court denied the first and third claims, concluding that Spraggins did not fairly present either of them to the state court as federal constitutional error. The court determined that sufficient evidence supported Spraggins's convictions and denied the second claim. The court determined that the ineffective assistance of trial counsel claim was procedurally defaulted because Spraggins did not raise it on appeal in state court. The court concluded that Spraggins could not overcome the default because *Martinez v. Ryan*, 566 U.S. 1 (2012) does not apply to claims asserting the ineffective assistance of counsel on post-conviction appeal.

"A COA may not issue unless 'the applicant has made a substantial showing of the denial of a constitutional right.'" *Treesh v. Bagley*, 612 F.3d 424, 439 (6th Cir. 2010) (quoting 28 U.S.C. § 2253(c)(2)). A substantial showing is made where the applicant demonstrates that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003). However, the "threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims." *Id.* at 336.

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This court "may also reject an issue for appeal if the procedural default doctrine applies." *Cooey v. Coyle*, 289 F.3d 882, 887 (6th Cir. 2002) (citing *Slack*, 529 U.S. at 483). If the district court denies a petition on procedural grounds only, however,

> a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack, 529 U.S. at 484.

Spraggins's first claim is procedurally defaulted because it was not raised in a motion for a new trial. *See Sutton v. Carpenter*, 745 F.3d 787, 792-93 (6th Cir. 2014) (collecting cases); *State v. Faulkner*, 154 S.W.3d 48, 58 (Tenn. 2005) ("Therefore, contrary to the State's assertion, Faulkner's failure to object at trial does not result in waiver. We conclude, however, that the issue is waived because Faulkner did not raise it in any of his three motions for a new trial. See Tenn. R. App. P. 3(e)."). Notwithstanding any default, Spraggins has not made a substantial showing of the denial of a constitutional right. Trial counsel sought the instruction about which Spraggins now complains. "When a petitioner invites an error in the trial court, he is precluded from seeking habeas corpus relief for that error." *Fields v. Bagley*, 275 F.3d 478, 486 (6th Cir. 2001). Further, an incorrect jury instruction under state law does not provide a basis for habeas corpus relief. *Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991). This claim does not deserve encouragement to proceed further.

Spraggins next contends that the prosecution did not present sufficient evidence to support his convictions. Reciting *Jackson v. Virginia*, 443 U.S. 307 (1979), the state court denied this claim on the merits. In a challenge to the sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319. The prosecution presented testimony that supported Spraggins's convictions. Significantly, Spraggins's challenge attacks the credibility of the witnesses' testimony rather than the sufficiency of the evidence. "An assessment of the credibility of

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witnesses is generally beyond the scope of federal habeas review of sufficiency of evidence claims." *Matthews v. Abramajtys*, 319 F.3d 780, 788 (6th Cir. 2003). This claim does not deserve encouragement to proceed further.

Spraggins contends that the trial court erred by enhancing his sentence for the aggravated assault conviction to the maximum term and by imposing consecutive sentences. This claim is not cognizable on habeas corpus review because it is based upon a violation of state law. *Austin v. Jackson*, 213 F.3d 298, 300 (6th Cir. 2000). "As long as the sentence remains within the statutory limits, trial courts have historically been given wide discretion in determining 'the type and extent of punishment for convicted defendants.'" *Id.* at 301 (quoting *Williams v. New York*, 337 U.S. 241, 245 (1949)). The state court found that Spraggins was sentenced within the applicable statutory range and that the trial court possessed the statutory authority to impose consecutive sentences. *Spraggins*, 2010 WL 1839303, at *7-8. 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. "[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). State court remedies are no longer available, so this claim is procedurally defaulted. *Hodges v. Colson*, 727 F.3d 517, 532 (6th Cir. 2013). Spraggins cannot overcome the default by asserting the ineffective assistance of post-conviction counsel for failing to present this claim on appeal. *See Martinez*, 566 U.S. at 15. Reasonable jurists would not debate that the district court was correct in its procedural ruling.

Accordingly, Spraggins's application for a COA is **DENIED**, and the motion to proceed in forma pauperis is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ABRON SPRAGGINS, Petitioner, v. BLAIR LEIBACH, Respondent.	)	No. 2:13-3006-SHM-tmp

ORDER TO UPDATE DOCKET WITH CORRECT ADDRESS AND RESPONDENT
ORDER OF DISMISSAL
ORDER DENYING CERTIFICATE OF APPEALABILITY
ORDER CERTIFYING APPEAL NOT TAKEN IN GOOD FAITH
AND
ORDER DENYING LEAVE TO PROCEED *IN FORMA PAUPERIS* ON APPEAL

On December 23, 2013, Petitioner Abron Spraggins, Tennessee Department of Correction ("TDOC") prisoner number 348262, who is currently an inmate at the Trousdale Turner Correctional Center ("TTCC") in Hartsville, Tennessee,[1] filed a petition pursuant to 28 U.S.C. § 2254. (Petition ("Pet."), ECF No. 1.) By order entered February 5, 2014, the Court directed Spraggins to file an amended petition on the official form. (Order, ECF No. 5.) On March 21, 2014, Spraggins filed an amended petition. (Amended ("Am.") Pet., ECF No. 8.) On July 7, 2014, Respondent filed an answer and the state court record. (Answer, ECF No. 13, Record ("R."), ECF No. 14.) On August 11, 2014, Petitioner filed a reply. (Reply, ECF No. 15.)

As more fully discussed below, the issues Petitioner raises fall into three categories: 1) whether the claim presents a question of federal law, 2) whether the state court identified and

[1]Spraggins is now confined at the TTCC. The current respondent is Warden Blair Leibach. The Clerk shall update the docket with Petitioner's current address and respondent.

applied the correct federal legal principles, or 3) whether the claim is procedurally defaulted. For the reasons discussed below, the petition is **DISMISSED**.

I. STATE COURT PROCEDURAL HISTORY

On April 8, 2008, a grand jury sitting in Shelby County, Tennessee, indicted Abron Spraggins on four counts of aggravated assault. (R., Indictments, ECF No. 14-1 at Page ID 138-42.). On March 2, 2009, Abron Spraggins proceeded to trial in Shelby County Criminal Court. (R., Minutes ("Mins."), ECF No. 14-1 at PageID 164.) On March 4, 2009, the jury convicted Abron Spraggins of one count of reckless endangerment with a deadly weapon and one count of aggravated assault. (R., Transcript ("Tr.") of Trial, ECF No. 14-4 at PageID 438-41.) On April 7, 2009, the trial court sentenced Spraggins to an effective term of thirteen years in prison. (R., Judgments, ECF No. 14-1 at PageID 309-12.) Spraggins appealed. (R., Notice of Appeal, ECF No. 14-1 at PageID 317.) The Tennessee Court of Criminal Appeals ("TCCA") affirmed. *State v. Spraggins*, No. W2009-01073-CCA-R3-CD, 2010 WL 1839303 (Tenn. Crim. App. May 7, 2010), *perm. app. denied* (Tenn. Nov. 18, 2010).

On February 7, 2011, Spraggins filed a *pro se* petition in Shelby County Criminal Court pursuant to the Tennessee Post-Conviction Procedure Act, Tenn. Code Ann. §§ 40-30-101-122. (R., Pet. for Post-Conviction Relief, ECF No. 14-12 at PageID 608-16.) On February 11, 2011, counsel was appointed to represent him. (R., Order, ECF No. 14-12 at PageID 655.) Counsel filed two amended petitions. (R., Am. Pet., ECF No. 14-12 at PageID 645-47, Second Am. Pet., ECF No. 14-12 at PageID 649-51.) The post-conviction court conducted an evidentiary hearing and denied relief in an order entered on February 10, 2012. (R., Order, ECF No. 14-12 at PageID 957-63.) The TCCA affirmed. *Spraggins v. State*, No. W2012-00561-CCA-R3-PC, 2012 WL 5355703 (Tenn. Crim. App. Oct. 31, 2012), *perm. app. denied* (Tenn. Mar. 19, 2013).

The TCCA opinion on direct appeal summarized the evidence presented at trial:

> This case arises out of the defendant's actions on October 12, 2007, in which he threatened with a gun the mother and young siblings of his ex-girlfriend, who had recently given birth to his child. He was subsequently indicted by the Shelby County Grand Jury for four counts of aggravated assault based on his use or display of a deadly weapon to cause Charlesetta Patterson,[2] Camia Patterson, Charles Patterson, and Troy Patterson to reasonably fear imminent bodily injury.
>
> 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

[2]The victim's first name is listed as "Charlesett" in the indictment, but a trial she stated and spelled her first name as "Charlesetta," which is the name we have chosen to use in this opinion.

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, 2010 WL 1839303, at *1-*2.

II. LEGAL STANDARDS

Federal courts have authority to issue habeas corpus relief for persons in state custody under 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). A federal court may grant habeas relief to a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

A. Exhaustion and Procedural Default

A federal court may not grant a writ of habeas corpus on behalf of a state prisoner unless, with certain exceptions, the prisoner has exhausted available state remedies by presenting the same claim sought to be redressed in a federal habeas court to the state courts pursuant to 28 U.S.C. § 2254(b) and (c). *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). The petitioner must "fairly present"[3] each claim to all levels of state court review, up to and including the state's highest court on discretionary review, *Baldwin v. Reese*, 541 U.S. 27, 29 (2004), except where the state has explicitly disavowed state supreme court review as an available state remedy, *O'Sullivan v. Boerckel*, 526 U.S. 838, 847-48 (1999). Tennessee Supreme Court Rule 39 eliminated the need to seek review in the Tennessee Supreme Court to "be deemed to have

[3]For a claim to be exhausted, "[i]t is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made." *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam) (internal citation omitted). Nor is it enough to make a general appeal to a broad constitutional guarantee. *Gray v. Netherland*, 518 U.S. 152, 163 (1996).

exhausted all available state remedies." *Adams v. Holland*, 330 F.3d 398, 402 (6th Cir. 2003); *see Smith v. Morgan*, 371 F. App'x 575, 579 (6th Cir. 2010).

There is a procedural default doctrine ancillary to the exhaustion requirement. *See Edwards v. Carpenter*, 529 U.S. 446, 452-53 (2000) (noting the interplay between the exhaustion rule and the procedural default doctrine). If the state court decides a claim on an independent and adequate state ground, such as a procedural rule prohibiting the state court from reaching the merits of the constitutional claim, the procedural default doctrine ordinarily bars a petitioner from seeking federal habeas review. *Wainwright v. Sykes*, 433 U.S. 72, 81-82 (1977); *see Walker v. Martin*, 562 U.S. 307, 315 (2011) ("A federal habeas court will not review a claim rejected by a state court if the decision of the state court rests on a state law ground that is independent of the federal question and adequate to support the judgment") (internal quotation marks and citation omitted)).[4] In general, a federal court "may only treat a state court order as enforcing the procedural default rule when it unambiguously relied on that rule." *Peoples v. Lafler*, 734 F.3d 503, 512 (6th Cir. 2013).

If a petitioner's claim has been procedurally defaulted at the state level, the petitioner must show cause to excuse his failure to present the claim and actual prejudice stemming from the constitutional violation or that a failure to review the claim will result in a fundamental miscarriage of justice. *Schlup v. Delo*, 513 U.S. 298, 320-21 (1995); *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). The latter showing requires a petitioner to establish that a constitutional

[4]The state-law ground may be a substantive rule dispositive of the case, or a procedural barrier to adjudication of the claim on the merits. *Walker*, 562 U.S. at 315. A state rule is an "adequate" procedural ground if it is "firmly established and regularly followed." *Id.* at 316 (quoting *Beard v. Kindler*, 558 U.S. at 60-61 (2009)). "A discretionary state procedural rule . . . can serve as an adequate ground to bar federal habeas review . . . even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others." *Id.* (quoting *Kindler*, 558 U.S. at 54.) (internal quotation marks and citations omitted).

error has probably resulted in the conviction of a person who is actually innocent of the crime. *Schlup*, 513 U.S. at 321; *see also House v. Bell*, 547 U.S. 518, 536-539 (2006) (restating the ways to overcome procedural default and further explaining the actual innocence exception).

B. Merits Review

Pursuant to Section 2254(d), where a claim has been adjudicated in state courts on the merits, a habeas petition should only be granted if the resolution of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) 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.

28 U.S.C. § 2254(d)(1)-(2). Petitioner carries the burden of proof on this "difficult to meet" and "highly deferential [AEDPA] standard," which "demands that state-court decisions be given the benefit of the doubt." *Cullen*, 563 U.S. at 181 (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011), and *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam)).

Review under § 2254(d)(1) is limited to the record before the state court that adjudicated the claim on the merits. *Cullen*, 563 U.S. at 182. A state court's decision is "contrary" to federal law when it "arrives at a conclusion opposite to that reached" by the Supreme Court on a question of law or "decides a case differently than" the Supreme Court has "on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). An "unreasonable application" of federal law occurs when the state court "identifies the correct governing legal principle from" the Supreme Court's decisions "but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 412-13. The state court's application of clearly established federal law must be "objectively unreasonable" for the writ to issue. *Id.* at

409. The writ may not issue merely because the habeas court, "in its independent judgment," determines that the "state court decision applied clearly established federal law erroneously or incorrectly." *Renico v. Lett*, 559 U.S. 766, 773 (2010) (citing *Williams*, 529 U.S. at 411).

There is minimal case law addressing whether, under § 2254(d)(2), a decision was based on "an unreasonable determination of the facts." In *Wood v. Allen*, 558 U.S. 290, 301 (2010), the Supreme Court stated that a state-court factual determination is not "unreasonable" merely because the federal habeas court would have reached a different conclusion.[5] In *Rice v. Collins*, 546 U.S. 333 (2006), the Court explained that "[r]easonable minds reviewing the record might disagree" about the factual finding in question, "but on habeas review that does not suffice to supersede the trial court's . . . determination." *Rice*, 546 U.S. at 341- 42.

The Sixth Circuit has described the § 2254(d)(2) standard as "demanding but not insatiable" and has emphasized that, pursuant to § 2254(e)(1), the state court factual determination is presumed to be correct absent clear and convincing evidence to the contrary. *Ayers v. Hudson*, 623 F.3d 301, 308 (6th Cir. 2010). A state court adjudication will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented during the state court proceeding. *Id.*; *see also Hudson v. Lafler*, 421 F. App'x 619, 624 (6th Cir. 2011) (same).

C. Ineffective Assistance

[5]In *Wood*, the Supreme Court granted certiorari to resolve whether, to satisfy § 2254(d)(2), "a petitioner must establish only that the state-court factual determination on which the decision was based was 'unreasonable,' or whether § 2254(e)(1) additionally requires a petitioner to rebut a presumption that the determination was correct with clear and convincing evidence." *Wood*, 558 U.S. at 299. The Court found it unnecessary to reach that issue, and left it open "for another day". *Id.* at 300- 01, 303 (citing *Rice v. Collins*, 546 U.S. 333, 339 (2006), in which the Court recognized that it is unsettled whether there are some factual disputes to which § 2254(e)(1) is inapplicable).

A claim that ineffective assistance of counsel has deprived a defendant of his Sixth Amendment right to counsel is controlled by the standards stated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To succeed on this claim, a movant must demonstrate two elements: 1) that counsel's performance was deficient, and 2) "that the deficient performance prejudiced the defense." *Id.* "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

To establish deficient performance, a person challenging a conviction "must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. A court considering a claim of ineffective assistance must apply a "strong presumption" that counsel's representation was within the "wide range of reasonable professional assistance." *Id.* at 689. The challenger's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687.

To demonstrate prejudice, a petitioner must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.[6] "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. "It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.' [*Strickland*,] at 693. Counsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' *Id.*, at 687." *Harrington*, 562 U.S. at 104 (citing *Strickland*, 466 U.S. at 687, 693); *see also Wong v. Belmontes*, 558 U.S. 15, 27 (2009) (per curiam) ("But *Strickland* does not require the State to 'rule out'" a more

[6]If a reviewing court finds a lack of prejudice, it need not determine whether, in fact, counsel's performance was deficient. *Strickland*, 466 U.S. at 697.

favorable outcome to prevail. "Rather, *Strickland* places the burden on the defendant, not the State, to show a 'reasonable probability' that the result would have been different.").

The deference accorded a state-court decision under 28 U.S.C. § 2254(d) is magnified when reviewing an ineffective assistance claim:

> Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both "highly deferential," *id.*, at 689; *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7 (1997), and when the two apply in tandem, review is "doubly" so, *Knowles* [*v. Mirzayance*], 556 U.S., at 123, 129 S. Ct. at 1420 [(2009)]. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. 556 U.S., at 123, 129 S. Ct. at 1420. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.

Harrington, 562 U.S. at 105.

"There is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." *Coleman*, 501 U.S. at 752 (internal citations omitted). Attorney error cannot constitute "cause" for a procedural default "because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must bear the risk of attorney error." *Id.* at 753 (internal quotation marks omitted). Where the State has no constitutional obligation to ensure that a prisoner is represented by competent counsel, the petitioner bears the risk of attorney error. *Id.* at 754.

In 2012, the Supreme Court decided *Martinez v. Ryan*, 132 S. Ct. 1309, 1320 (2012), which recognized a narrow exception to the rule in *Coleman*, "[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding . . . ." *Martinez*, 132 S. Ct. at 1320. In such cases, "a procedural default will not bar a federal

habeas court from hearing a substantial claim of ineffective assistance [of counsel] at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Id.* The Supreme Court also emphasized that "[t]he rule of *Coleman* governs in all but the limited circumstances recognized here . . . . It does not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial, even though that initial-review collateral proceeding may be deficient for other reasons." *Id.* The requirements that must be satisfied to excuse a procedural default under *Martinez* are:

> (1) the claim of "ineffective assistance of trial counsel" was a "substantial" claim; (2) the "cause" consisted of there being "no counsel" or only "ineffective" counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the "initial" review proceeding in respect to the "ineffective-assistance-of-trial-counsel claim"; and (4) state law *requires* that an "ineffective assistance of trial counsel [claim] . . . be raised in an initial-review collateral proceeding."

Trevino v. Thaler, 133 S. Ct. 1911, 1918 (2013) (emphasis and alterations in original).

Martinez considered an Arizona law that did not permit ineffective assistance claims to be raised on direct appeal. *Martinez*, 132 S. Ct. at 1313. In the Supreme Court's subsequent decision in *Trevino*, 133 S. Ct. at 1921, the Court extended its holding in *Martinez* to states in which a "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal . . . ." *Trevino* modified the fourth *Martinez* requirement for overcoming a procedural default. *Martinez* and *Trevino* apply to Tennessee prisoners. *Sutton v. Carpenter*, 745 F.3d 787, 790 (6th Cir. 2014).

III. PETITIONER'S FEDERAL HABEAS CLAIMS

In the § 2254 petition, Spraggins raises the following issues:

1. The trial court committed plain error by instructing the jury that felony reckless endangerment was a lesser-included offense of aggravated assault (Pet., ECF No. 1 at PageID 67-69);

2. The evidence was insufficient to support Spraggins' convictions (*id.* at PageID 70-73);

3. The trial court erred by enhancing Spraggins' aggravated assault sentence and by ordering that the aggravated assault and reckless endangerment sentences be served consecutively (*id.* at PageID 74-76); and

4. Trial counsel provided ineffective assistance (*id.* at PageID 77-78).

Issues 1, 2 and 3 were presented to the TCCA on direct appeal. (R., Brief ("Br.") of the Appellant, ECF No. 14-7 at PageID 494.) Two issues of ineffective assistance were presented to the TCCA in the post-conviction appeal. (R., Br. of the Appellant, ECF No. 14-15 at PageID 826.)

IV. ANALYSIS OF PETITIONER'S CLAIMS

A. Improper Instruction

Spraggins alleges that the trial court erred by instructing the jury that reckless endangerment is a lesser included offense of aggravated assault. (Pet., ECF No. 8 at PageID 67-69.) Respondent replies that, as the state courts decided, Spraggins fails to allege a violation of federal law. (Answer, ECF No. 13 at PageID 112.)

The TCCA considered the issue on direct appeal:

> As his first issue, the defendant contends that the trial court committed plain error by instructing the jury that reckless endangerment was a lesser-included offense of aggravated assault as charged in the indictment. The defendant concedes that he did not raise the issue in his motion for new trial, but argues that it constituted plain error that affected his substantial rights. In support, he points out that our supreme court held in *State v. Moore*, 77 S.W.3d 132, 135 (Tenn. 2002), 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. The State cites *Demonbreun v. Bell*, 226 S.W.3d 321 (Tenn.

2007), to argue that the defendant is not entitled to plain error review because he requested the lesser-included instruction at trial and thereby effectively consented to an amendment of the indictment. We agree with the State.

The doctrine of plain error provides that an appellate court may take notice of an error affecting a substantial right of the defendant, even if not raised at trial or in the motion for new trial, if the error more probably than not affected the judgment or would result in prejudice to the judicial process. Tenn. R. App. P. 36(b). In order for us to find plain error, "(a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is 'necessary to do substantial justice.'" *State v. Smith*, 24 S.W.3d 274, 282 (Tenn. 2000) (quoting *State v. Adkisson*, 899 S.W.2d 626, 641–42 (Tenn. Crim. App. 1994)). A court's discretion to notice plain error is to be "sparingly exercised." *State v. Bledsoe*, 226 S.W.3d 349, 354 (Tenn. 2007). Furthermore, consideration of all five factors is unnecessary when it is clear from the record that at least one of them cannot be satisfied. *Id.* at 355.

In *Demonbreun*, our supreme court reversed this court's granting of habeas corpus relief to the petitioner, concluding that although the petitioner had been convicted of aggravated assault, which was not a lesser-included offense of the charged offense of attempted first degree murder, he had effectively consented to the amendment of the indictment by actively seeking an instruction on the lesser-included offense. The court wrote:

> We continue to follow the rule set forth in [*State v.*] *Davenport*, 980 S.W.2d [407,] 409 [(Tenn. Crim. App. 1998)], and reaffirmed in [*State v.*] *Stokes*, 24 S.W.3d [303,] 306 [(Tenn. 2000)], that we will not presume consent to an amendment to an indictment merely from the defendant's silent acquiescence to a jury instruction based on an incorrect belief that an offense is a lesser included offense. However, we find nothing in *Stokes* to prevent the court from finding an effective amendment to an indictment where the defendant actively seeks the jury instruction on the uncharged offense. A defendant should not be able to "'complain about convictions on an offense which, without his own counsel's intervention, would not have been charged to the jury.'" [*State v.*] *Ealey*, 959 S.W.2d [605,] 612 [(Tenn. Crim. App. 1997)] (quoting [*State v. Robert W.*] *Bentley*, [No. 02C01–9601–CR–00038,] 1996 WL 594076, at *2 [Tenn. Crim. App. Oct. 17, 1996)].

226 S.W.3d at 326.

> While it is true that felony reckless endangerment was not a lesser-included offense of the aggravated assaults as charged in the indictment, *see Moore*, 77 S.W.3d at 135, the record reveals that it was defense counsel who requested the instruction, expressing the erroneous belief that it was an "optional lesser included." The following exchange between the trial court and defense counsel took place at trial:
>
> THE COURT: Any special instructions request?
>
> [DEFENSE COUNSEL]: I had earlier pulled reckless endangerment.
>
> THE COURT: Which one? Involving a gun?
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: I don't have any problem with that. The "E" felony. That's a lesser included.
>
> [DEFENSE COUNSEL]: I think that it's like an optional lesser included, maybe.
>
> THE COURT: Well, I don't think it's an optional, if there is a gun alleged, but we'll check it.
>
> [DEFENSE COUNSEL]: That is the only thing that just stood out to me that I had glanced at earlier to see.
>
> THE COURT: No, if there's not a gun then it's not supposed to be charged, is my understanding, on aggravated assault. But, I think that it would be appropriate in this situation. But anyway we'll go through what the law requires to do.
>
> Because the erroneous jury instruction resulted from defense counsel's actions, we agree with the State that the defendant cannot show that a clear and unequivocal rule of law was breached. Accordingly, we conclude that he is not entitled to plain error review on this issue.

State v. Spraggins, 2010 WL 1839303, at *3-*4.

Under 28 U.S.C. § 2254(a), the threshold question in any federal habeas petition is whether the petition claims violations of the Constitution or laws or treaties of the United States. *See, e.g., Tillett v. Freeman*, 868 F.2d 106, 108 (3d Cir. 1989); *Martin v. Solem*, 801 F.2d 324,

331 (8th Cir. 1986); *Nelson v. Solem*, 714 F.2d 57, 60 n.2 (8th Cir. 1983); *Hall v. Iowa*, 705 F.2d 283, 287 (8th Cir. 1983). If a petition raises federal claims, the court must also determine whether the state court had the opportunity to review those claims. *Anderson v. Harless*, 459 U.S. at 6) ("It is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made.")

Petitioner did not "fairly present" this issue as a federal claim to the state appellate courts, as required by *Baldwin*, 541 U.S. at 29. Instead, he presented the claim as an error under Tennessee law. (R., Br. of the Appellant, ECF No. 14-7 at PageID 500-03.) 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. This claim is **DENIED**.

B. Sufficiency of the Evidence

Petitioner Spraggins contends that the evidence was insufficient to support his convictions of felony reckless endangerment and aggravated assault. (Pet., ECF No. 8 at PageID 70.) He contends that the victims were not injured and that no proof was presented that the gun was loaded. (*Id.* at PageID 71.) Spraggins argues that the inconsistencies in the witnesses' testimonies undermine their credibility. (*Id.* at PageID 71-73,) Respondent replies that the TCCA relied on the correct federal rule and its decision was based on a reasonable determination of the facts. (Answer, ECF No. 13 at PageID 116-19.)

After reviewing the evidence presented at trial, the TCCA opined:

> The defendant next contends that the evidence was insufficient to sustain his convictions because there was insufficient proof that either victim faced imminent danger or threat of harm. In considering this issue, we apply the rule that where sufficiency of the convicting evidence is challenged, the relevant question of the reviewing court is "whether, after viewing the evidence in the light

most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *see also* Tenn. R. App. P. 13(e) ("Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt."); *State v. Evans*, 838 S.W.2d 185, 190–92 (Tenn. 1992); *State v. Anderson*, 835 S.W.2d 600, 604 (Tenn. Crim. App. 1992).

All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. *See State v. Pappas*, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). Our supreme court stated the rationale for this rule:

> This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 219 Tenn. 4, 11, 405 S.W.2d 768, 771 (1966) (citing *Carroll v. State*, 212 Tenn. 464, 370 S.W.2d 523 (1963)).

A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal, a convicted defendant has the burden of demonstrating that the evidence is insufficient. *See State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982).

A. Aggravated Assault Conviction

For the purposes of this case, an aggravated assault is committed when a person intentionally or knowingly commits an assault as defined in section 39–13–101 and uses or displays a deadly weapon. Tenn. Code Ann. § 39–13–102(a)(1)(B) (2006). A person commits an assault who intentionally or knowingly causes another to reasonably fear imminent bodily injury. *Id.* §§ 39–13–101(a)(2); –102(a)(1)(B). A deadly weapon includes "[a] firearm or anything manifestly designed, made or adapted for the purpose of inflicting death or serious bodily injury." *Id.* § 39–11–106(a)(5)(A). Thus, to sustain the conviction for aggravated assault, the State had to prove beyond a reasonable doubt that the

defendant intentionally or knowingly caused Troy Patterson to reasonably fear imminent bodily injury by his display of his gun.

The defendant asserts that his threats should be viewed as "conditional threats of possible future harm rather than imminent harm" because they "were linked to a continuation of the defendant not being allowed to see his purported son." He also characterizes Troy Patterson's testimony that the defendant displayed a gun as "problematic" given Charles Patterson's testimony to the contrary. As such, the defendant argues that the fear that Troy Patterson experienced as a result of "the alleged encounter with the defendant was not caused by a reasonably imminent threat of bodily injury."

We respectfully disagree. Viewed in the light most favorable to the State, the evidence established that the defendant, who was obviously in a volatile emotional state, drove slowly down the street beside the victim and his brother, pointed a gun at him, and said that he was going to kill the victim, his brothers, and the victim's mother. These actions were certainly sufficient for the victim to reasonably fear imminent bodily injury or death at the hands of the defendant. We conclude, therefore, that the evidence was more than sufficient to sustain the defendant's conviction for aggravated assault.

B. Felony Reckless Endangerment Conviction

The defendant contends that the evidence was insufficient to sustain his reckless endangerment conviction because there was no proof that he "did anything that actually placed [Charlesetta Patterson] in imminent danger of death or serious bodily injury." In support, he points out that there was no testimony that his weapon was fired, loaded, or even operational. He also argues that Charlesetta Patterson's conflicting preliminary hearing testimony casts doubt on whether the incident she described at trial occurred on the date alleged in the indictment. The State argues that the evidence was sufficient to sustain the conviction, and we agree.

A person commits the offense of reckless endangerment "who recklessly engages in conduct that places or may place another person in imminent danger of death or serious bodily injury." Tenn. Code. Ann. § 39–13–103(a) (2006). Reckless endangerment committed with a deadly weapon is a Class E felony. *Id.* § 39–13–103(b). To demonstrate an imminent danger of death or serious bodily injury, the State must show that the victim was "placed in reasonable probability of danger as opposed to a mere possibility of danger." *State v. Payne*, 7 S.W.3d 25, 28 (Tenn. 1999).

Viewed in the light most favorable to the State, the evidence established that in the course of a heated argument with the victim, the defendant pulled a gun

> out from under the seat of his vehicle, pointed it directly at the victim, and announced that he was going to kill her. Although there was no evidence that the gun was loaded or operational, there was also no evidence that it was not. Thus, a rational jury could reasonably conclude that the victim was placed in imminent danger of death or serious bodily injury by the defendant's actions in pointing a gun at her during the heated exchange. We conclude, therefore, that the evidence was sufficient to sustain the defendant's felony reckless endangerment conviction.

State v. Spraggins, 2010 WL 1839303, at *4-*7.

In *Jackson v. Virginia*, 443 U.S. 307 (1979), the Supreme Court held that, "in a challenge to a state criminal conviction brought under 28 U.S.C. § 2254 - if the settled procedural prerequisites for such a claim have otherwise been satisfied - the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof beyond a reasonable doubt." This standard requires a federal district court to examine the evidence in the light most favorable to the State. *Id.* at 326 ("a federal habeas corpus court faced with a record of conflicting facts that supports conflicting inferences must presume - even if it does not affirmatively appear in the record - that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution").

Spraggins presents this Court with the same argument that he made on direct appeal. (Pet., ECF No. 8 at PageID 70-73, Br. of the Appellant, ECF No. 14-7 at PageID 504-08.) Repeating the appellate argument does not satisfy Spraggins' burden of demonstrating that the state court's resolution of this issue was based on an unreasonable determination of the facts. Spraggins' argument establishes, at most, that the jury had to determine the credibility of the witnesses and the weight and value of the evidence. Despite minor inconsistencies in the testimony, the jury credited the testimony of the witnesses.

The TCCA applied the correct legal rule and cited both *Jackson v. Virginia* and state cases applying the *Jackson* standard. The TCCA considered Spraggins' argument, but found the

evidence of his guilt "sufficient to sustain" his convictions. *State v. Spraggins*, 2010 WL 1839303, at *5-*6.

Based on this Court's review of the transcript of Spraggins' trial (R., Tr. of Trial, ECF No 14-4, ECF No. 14-5), the testimony and evidence were more than sufficient to permit the jury to find that Spraggins was guilty of felony reckless endangerment and aggravated assault. This claim is without merit and is **DENIED**.

C. Trial Court Error: Enhancement of Defendant's Sentence and Imposition of Consecutive Sentences

Spraggins contends that the trial court erred in enhancing his sentence for aggravated assault from six to ten years as a multiple offender and by directing that his sentences for aggravated assault and reckless endangerment be served consecutively. (Pet., ECF No. 8 at PageID 75-76.) Respondent replies that Spraggins' allegations of violations of Tennessee state sentencing law fail to provide any cognizable basis for federal habeas relief. (Answer, ECF No. 13 at PageID 119-20.)

The TCCA considered the issue on direct appeal:

> As his final issue, the defendant contends that the trial court erred by enhancing his aggravated assault sentence to the maximum sentence in the range and ordering that the aggravated assault and reckless endangerment sentences be served consecutively. When an accused challenges the length and manner of service of a sentence, it is the duty of this court to conduct a *de novo* review on the record "with a presumption that the determinations made by the court from which the appeal is taken are correct." Tenn. Code Ann. § 40–35–401(d) (2006). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The presumption does not apply to the legal conclusions reached by the trial court in sentencing the accused or to the determinations made by the trial court which are predicated upon uncontroverted facts. *State v. Butler*, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); *State v. Smith*, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994); *State v. Bonestel*, 871 S.W.2d 163, 166 (Tenn. Crim. App. 1993), *overruled on other grounds* by *State v. Hooper*, 29 S.W.3d 1, 9 (Tenn. 2000).

In conducting a *de novo* review of a sentence, this court must consider (a) any evidence received at the trial and/or sentencing hearing, (b) the presentence report, (c) the principles of sentencing, (d) the arguments of counsel relative to sentencing alternatives, (e) the nature and characteristics of the offense, (f) any mitigating or enhancement factors, (g) any statistical information provided by the administrative office of the courts as to Tennessee sentencing practices for similar offenses; (h) any statements made by the accused in his own behalf; and (i) the accused's potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40–35–103, –210 (2006); *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001). The party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40–35–401 (2006), Sentencing Commission Cmts.; *Ashby*, 823 S.W.2d at 169.

A. Enhancement of Aggravated Assault Sentence

The defendant contends that the trial court erroneously sentenced him to the maximum sentence in the range for his aggravated assault conviction, arguing that the sole enhancement factor found applicable by the trial court did not justify the four-year enhancement of his sentence. In support, he notes that the trial court enhanced his reckless endangerment sentence, based on the same enhancement factor, by only one year. We respectfully disagree.

In imposing a specific sentence within the appropriate range of punishment:

> [T]he court shall consider, but is not bound by, the following advisory sentencing guidelines:
>
> (1) The minimum sentence within the range of punishment is the sentence that should be imposed, because the general assembly set the minimum length of sentence for each felony class to reflect the relative seriousness of each criminal offense in the felony classifications; and
>
> (2) The sentence length within the range should be adjusted, as appropriate, by the presence or absence of mitigating and enhancement factors set out in §§ 40–35–113 and 40–35–114.

Tenn. Code Ann. § 40–35–210(c). Furthermore, the weighing of the various mitigating and enhancement factors is "left to the trial court's sound discretion." *State v. Carter*, 254 S.W.3d 335, 345 (Tenn. 2008).

As the State points out, the trial court properly considered the relevant sentencing principles, stated its reasons for enhancing the sentence, and imposed a sentence that was within the applicable range for a Range II offender sentenced

for a Class C felony. We conclude, therefore, that the defendant is not entitled to relief on the basis of this issue.

B. Consecutive Sentencing

Lastly, the defendant contends that the trial court erred by ordering that his sentences be served consecutively. We respectfully disagree.

Tennessee Code Annotated section 40–35–115(b) provides that a trial court may, in its discretion, order sentences to run consecutively if it finds any one of number of criteria by a preponderance of the evidence, including the following three found by the trial court in this case:

> (1) The defendant is a professional criminal who has knowingly devoted the defendant's life to criminal acts as a major source of livelihood;
>
> (2) The defendant is an offender whose record of criminal activity is extensive;
>
> . . . .
>
> (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high[.]

Tenn. Code Ann. § 40–35–115(b) (2006). These criteria are stated in the alternative; therefore, only one need exist to support the appropriateness of consecutive sentencing. When a trial court bases consecutive sentencing upon its classification of the defendant as a dangerous offender, it is required to make further findings that the aggregate length of the defendant's sentence reasonably relates to the severity of his offenses and is necessary to protect the public from further criminal conduct of the defendant. *State v. Lane*, 3 S.W.3d 456, 460–61 (Tenn. 1999); *State v. Wilkerson*, 905 S.W.2d 933, 937–38 (Tenn. 1995).

The defendant argues that the professional criminal criterion should not have been applied because, with the exception of a felony drug conviction, "the record fails to suggest that [he] received any financial remuneration from any criminal activity"; the extensive offender criterion should not have been applied because most of his previous convictions were misdemeanor offenses; and the dangerous offender criterion should not have been applied because there was no proof that his gun was operational and the trial court merely recited the *Wilkerson* factors without specifically stating on the record the reasons behind its imposition of consecutive sentences under this criterion.

> We conclude that the records supports the trial court's imposition of consecutive sentencing under any one of the three criteria found by the trial court. According to the trial testimony, the enraged defendant followed two young boys home from school, pointed a gun at them and threatened to kill them, parked behind their home, and then pointed a gun at their mother while threatening her life. Moreover, the criminal history section of the defendant's presentence report, which includes not only the seventeen criminal convictions but also numerous arrests in cases in which the charges were nolle prosequied, covers almost seven full pages of the report. Furthermore, the only employment history the twenty-nine-year-old defendant reported, which was unverified, consisted of a single year working as a general laborer for two different temporary employment services. Accordingly, we affirm the effective thirteen-year sentence imposed by the trial court.

State v. Spraggins, 2010 WL 1839303, at *6-*8.

Petitioner did not "fairly present" this issue as a federal claim to the state appellate courts, as required by *Baldwin*, 541 U.S. at 29. Instead, he presented the claim as an error under Tennessee law. (R., Br. of the Appellant, ECF No. 14-7 at PageID 508-12.) The TCCA reviewed Tennessee statutes and applied Tennessee case law in its decision. The TCCA did not rule on the merits of a federal constitutional claim. Because no state court decision contains the necessary federal content to constitute a ruling on the merits of a federal constitutional claim, this claim is noncognizable and is **DENIED**.

D. Ineffective Assistance of Counsel

Spraggins contends that his trial counsel provided ineffective assistance by failing to:

(1) object to the State's claim that Spraggins had a gun;
(2) investigate and secure witnesses to testify about Spraggins' whereabouts;
(3) advise Petitioner to testify on his own behalf;
(4) ask for proper jury instructions;
(5) prepare for trial by expediting discovery;
(6) argue on direct appeal that the trial court erred in denying a continuance;
(7) present evidence of Spraggins' innocence at the sentencing hearing or during the motion for new trial;
(8) cross-examine victim Charlesetta Patterson about her motive to keep Spraggins from his child and cross-examine victims Charles and Troy Patterson about how one could see things that the other did not;

(9) present or consult an expert on the perils of child testimony; and
(10) object to Spraggins' improper sentence.

(Pet., ECF No. 8 at PageID 77-78.) Respondent replies that these claims are procedurally defaulted because, although they were presented in Spraggins' initial post-conviction petition, they were abandoned on appeal. (Answer, ECF No. 13 at PageID No. 125.)

Spraggins raised these claims of ineffective assistance in the *pro se* petition for post-conviction relief. (R., Pet. for Post-Conviction Relief, ECF No. 14-12 at PageID 608-16.) Both amended post-conviction petitions incorporated the allegations of the initial *pro se* petition by reference. (R., Am. Pet., ECF No. 14-12 at PageID 645-47, Second Am. Pet., ECF No. 14-12 at PageID 649-51.) The second amended petition grouped the claims into four categories: (1) counsel's failure to adequately prepare for trial, (2) counsel's failure to call alibi witnesses, (3) counsel's failure to introduce documentary evidence of alibi, and (4) counsel's failure to properly prepare Spraggins to testify. (R., Second Am. ECF No. 14-12 at PageID 646-67.)

Spraggins testified at the post-conviction hearing that counsel would not "check into" the trial strategy he provided. (R, Post-conviction Tr., ECF No. 14-14 at PageID 795.) He testified that his alibi was that he was out of town. (*Id.*) He testified that counsel did not contact his alibi witness in Iowa. (*Id.* at 795-96.) Spraggins testified that he provided counsel with food stamp records demonstrating that he was in Iowa at the time of the offense. (*Id.* at PageID 796.) He testified that counsel told him that she could not use the records because they were inadmissible. (*Id.* at PageID 797, 807.) Spraggins testified that counsel never went to the scene or got an investigator to go to the scene and ask questions. (*Id.* at PageID 799, 804.) He testified that counsel assumed that, if he took the stand, "they're going to throw my past history in my face."

(*Id.* at PageID 800-01.) Spraggins testified that, if counsel had told him about the potential sentence, he would have testified. (*Id.*)

Spraggins testified that counsel should have objected during trial when a police officer testified about his familiarity with Spraggins "from past incidents". (*Id.* at PageID 802.) Spraggins testified that counsel should have objected when Charlesetta Patterson brought up additional incidents not pertaining to the trial. (Id. at PageID 802-03.) Spraggins denied knowing Charlesetta Patterson. (*Id.* at PageID 803.) Spraggins testified that counsel told him that she could not subpoena an out-of-state witness, then changed her mind the day of trial. (*Id.* at PageID 805.)

Trial counsel testified that a police officer testified at trial that he was familiar with Spraggins from the neighborhood and that she did not object because she "didn't want to get into how he knew him" and "thought it would draw attention to the fact that the police officer knew him from something that might . . . have been incriminating to" Spraggins. (*Id.* at Page ID 812.) Counsel testified that she thought it was best not to object. (*Id.* at PageID 813.) Counsel testified that she met with Spraggins on each court date and in the jail. (*Id.*) She testified that she gave Spraggins his options on testifying, went over his prior record with him, and that he did not make a decision until the day of trial. (*Id.*)

Counsel testified that she:

> thoroughly investigated the food stamp issue. He was receiving E.B.T. money, or the equivalent, in Iowa. The card, or the account had been used. I looked at the dates that account had been used and where it was used and there was enough time for him to have used it here [sic] and driven back. But, the greater issue was the E.B.T. card continued to be used while he was in jail. So the time frame did not help him. And additionally, there was a fraud that was occurring, because the card continued to be used while he was in jail and that would come out. And, after speaking with the people in Iowa, for somebody to use that card they had to have his personal information and he would have had to. . . The card continued to

> be used while he was in custody. So for that card to have continued to be used, he had to have given out his personal information. A regular person off the street could not have used that account. So that brought into issue, had that come up, a fraud issue and another crime. So no, we did not use that.

(*Id.* at PageID 814-15.)

> Counsel testified that she spoke with Spraggins about witnesses:
>
> We went through the E.B.T. thing and when that didn't work out he told me that he was in jail in Iowa. I had to investigate with Iowa to see if he was in jail. He had a new arrest in Iowa, they had flooding there and they couldn't find the records. When I checked the dates of all of his arrest dates in Iowa, none of them matched the date here. So that was not an alibi. He gave me specific information. It took me a month, or two months to clarify the Iowa jail visits. It took me a month or two months to clarify the Iowa E.B.T. cards. So each time, that is why his case got continued is because he would just throw out new information. The witnesses, I did try to talk to, he never gave me addresses. And he did not bring up the witnesses that he wanted to have for trial until the week beforehand and he gave me numbers. I repeatedly called those numbers, I left messages there and did not hear from anybody. . . Two were [local]. One was-actually, the [mother] of the baby and she was a minor when she got pregnant by him. I think that there was a twelve year age difference. So then we had to worry about the statutory rape issue if she testified and she was not there on the scene, so she could not help with anything regarding that and she had not talked to her mom, so she had no statements regarding the actual incident. The woman in Iowa never returned my phone calls. And then he told me his sister's name and she had no direct knowledge of the direct incident either and they were not alibi witnesses. The woman in Iowa was supposed to be, but she did not return my call. And I didn't have an address on her, so I could not write her.

(*Id.* at PageID 815-16.)

The post-conviction court determined that Spraggins failed to present an alibi witness at the hearing and that his food-stamp evidence had no credibility because the card continued to be used after Spraggins was in jail in Tennessee. (R., Order, ECF No. 14-12 at PageID 562.) The post-conviction court decided that Spraggins failed to show either deficient performance or prejudice. (*Id.*)

Post-conviction counsel raised two issues on appeal: (1) counsel's failure to introduce the food stamp records and (2) counsel's failure to object to police officer testimony that was indicative of a prior arrest history. (R., Br. of the Appellant, ECF No. 14-15 at PageID 833.) Those issues are not raised in the instant petition. (Am. Pet., ECF No. 1 at PageID 77-78.)

Spraggins attempts to demonstrate cause and prejudice for his default by arguing that post-conviction counsel provided ineffective assistance. (*Id.* at PageID 79.) Ineffective assistance of state post-conviction counsel can establish cause to excuse a Tennessee prisoner's procedural default of a substantial federal habeas claim that his trial counsel was constitutionally ineffective. *Sutton*, 745 F.3d at 787. To qualify as "substantial" under *Martinez*, a claim must have "some merit" based on the controlling standard for ineffective assistance of counsel. *Martinez*, 132 S. Ct. at 1318-19.

Martinez and *Trevino* cannot excuse Petitioner's default of his claims of ineffective assistance. *Martinez* does not encompass claims that post-conviction appellate counsel was ineffective. *See Martinez*, 132 S. Ct. at 1319 ("*Coleman* held that an attorney's negligence in a postconviction proceeding does not establish cause, and this remains true except as to initial-review collateral proceedings for claims of ineffective assistance of counsel at trial.") The procedural default of these claims of ineffective assistance occurred when post-conviction counsel exercised his discretion to limit the brief to the TCCA to the strongest arguments. Counsel has no duty to raise frivolous issues and may exercise his discretion to limit a brief to the TCCA to the strongest arguments. This claim is without merit and is **DENIED**.

The issues raised in this petition are noncognizable, without merit, and barred by procedural default. The petition is **DISMISSED WITH PREJUDICE**. Judgment shall be entered for Respondent.

V. APPELLATE ISSUES

There is no absolute entitlement to appeal a district court's denial of a § 2254 petition. *Miller-El v. Cockrell*, 537 U.S. 322, 335 (2003). The Court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to a § 2254 petitioner. Rule 11, Rules Governing Section 2254 Cases in the United States District Courts. A petitioner may not take an appeal unless a circuit or district judge issues a COA. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22(b)(1).

A COA may issue only if the petitioner has made a substantial showing of the denial of a constitutional right, and the COA must indicate the specific issue or issues that satisfy the required showing. 28 U.S.C. §§ 2253(c)(2)-(3). A "substantial showing" is made when the petitioner demonstrates that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El*, 537 U.S. at 336 (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)); *Henley v. Bell*, 308 F. App'x 989, 990 (6th Cir. 2009) (per curiam) (holding a prisoner must demonstrate that reasonable jurists could disagree with the district court's resolution of his constitutional claims or that the issues presented warrant encouragement to proceed further). A COA does not require a showing that the appeal will succeed. *Miller-El*, 537 U.S. at 337; *Caldwell v. Lewis*, 414 F. App'x 809, 814-15 (6th Cir. 2011) (same). Courts should not issue a COA as a matter of course. *Bradley v. Birkett*, 156 F. App'x 771, 773 (6th Cir. 2005) (quoting *Slack*, 537 U.S. at 337).

In this case, there can be no question that the claims in this petition are noncognizable, without merit, and barred by procedural default. Because any appeal by Petitioner on the issues raised in this petition does not deserve attention, the Court **DENIES** a certificate of appealability.

In this case for the same reasons the Court denies a certificate of appealability, the Court determines that any appeal would not be taken in good faith. It is therefore **CERTIFIED**, pursuant to Fed. R. App. P. 24(a), that any appeal in this matter would not be taken in good faith, and leave to appeal *in forma pauperis* is **DENIED**.[7]

IT IS SO ORDERED, this 30th day of December, 2016.

s/ Samuel H. Mays, Jr.
SAMUEL H. MAYS, JR.
UNITED STATES DISTRICT JUDGE

[7]If Petitioner files a notice of appeal, he must pay the full $505 appellate filing fee or file a motion to proceed *in forma pauperis* and supporting affidavit in the Sixth Circuit Court of Appeals within thirty (30) days of the date of entry of this order. *See* Fed. R. App. P. 24(a)(5).