Appendix "A." "*Jerry Haley v. Blair Leibach, Warden*, No. 17-6182 (6th Cir. June 8, 2018)"

No. 17-6182

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JERRY HALEY,

Petitioner-Appellant,

v.

BLAIR LEIBACH, Warden,

Respondent-Appellee.

ORDER

Jerry Haley, a Tennessee state prisoner, moves for in forma pauperis status and to hold his appeal in abeyance and appeals pro se a district court judgment dismissing his petition for a writ of habeas corpus, filed under 28 U.S.C. § 2254. The court construes the notice of appeal as an application for a certificate of appealability. *See* Fed. R. App. P. 22(b)(2).

In 2009, a jury convicted Haley of aggravated rape, aggravated kidnapping, and aggravated criminal trespass. He was sentenced to sixty years of imprisonment. Haley was identified as the rapist through a DNA match, and admitted having sex with the victim, but testified that it was consensual. On direct appeal, he challenged the admission of hearsay testimony and the validity of his kidnapping conviction. The conviction was affirmed. He also filed a state post-conviction action, raising claims of ineffective assistance of counsel, that was also unsuccessful.

In this petition for federal habeas corpus relief, Haley claimed that his counsel was ineffective in: 1) advising him that he would probably be sentenced to at most forty years, rather than the sixty that he received, alleging that he would have otherwise taken the state's plea offer of twelve years; 2) failing to raise the issues raised on direct appeal in his motion for a new trial; and 3) failing to challenge the aggravated element of his conviction. The district court found that the claims were procedurally defaulted because appointed counsel in the post-conviction proceeding did not raise these issues on appeal. The district court concluded that ineffective

assistance of post-conviction counsel could not constitute cause to excuse the procedural default, because *Martinez v. Ryan*, 566 U.S. 1, 15 (2012), limits that method of establishing cause to the initial post-conviction proceeding. The district court dismissed the petition and denied Haley's motion for relief from judgment.

In order to be entitled to a certificate of appealability, Haley must demonstrate that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and whether the district court was correct in its procedural ruling. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Haley argues that the district court erred in finding that his first claim was not raised in the post-conviction appeal. He points to a general discussion in his post-conviction appellate brief about the advice he received to plead guilty. However, the two claims raised were specifically identified as failing to meet with Haley enough before trial and waiving Haley's presence at the new trial motion—not misadvising him as to his sentencing exposure. Haley makes no argument as to his second claim. He contends that he needs to return to state court to raise his third claim, and therefore seeks to hold his proceeding in abeyance. However, only one post-conviction proceeding is permitted in Tennessee, with limited exceptions that Haley has not met. *See Fletcher v. State*, 951 S.W.2d 378, 380-81 (Tenn. 1997); *Blair v. State*, 969 S.W.2d 423, 425-26 (Tenn. Crim. App. 1997).

Haley's motion to hold his appeal in abeyance is based on his meritless argument that he needs to exhaust his third claim in the state court and on his motion for relief from judgment in the district court, which has now been denied. The motion to hold the appeal in abeyance is therefore **DENIED**. The motion for in forma pauperis status is **DENIED** as moot, and the application for a certificate of appealability is **DENIED** because jurists of reason would not find it debatable whether the district court was correct in its procedural ruling.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Appendix "B." "*Jerry P. Haley v. Blair Leibach*, No. 2:14-2460-JPM-tmp, U.S. Dist. Ct., W.D. Tenn. (September 12, 2017) (ECF No. 41.)"

CASENO: 2:14cv02460
DOCUMENT: 49

Jerry Haley
355420
TROUSDALE TURNER CORRECTIONAL COMPLEX
140 Macon Way
Hartsville, TN 37074

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

JERRY P. HALEY, Petitioner, v. BLAIR LEIBACH, Respondent.	)	No. 2:14-2460-JPM-tmp

ORDER DENYING MOTION FOR RELIEF FROM JUDGMENT

Before the Court is the Motion for Relief from Judgment filed by Petitioner Jerry Haley on October 13, 2017. (ECF No. 45.) Haley previously filed a motion under 28 U.S.C. § 2254 for a writ of habeas corpus. (ECF No. 1.) In an order entered on September 12, 2017, the Court denied Haley's § 2254 petition and denied Haley a certificate of appealability. (ECF No. 41.) Haley seeks relief from the Court's final judgment, arguing that (1) the Court mistakenly found that his first claim was procedurally defaulted, and (2) newly discovered evidence was not previously available to him. (*See* ECF No. 45.)

Federal Rule of Civil Procedure ("Rule") 60(b)(1) permits a court to relieve a party from a final judgment for "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). Haley contends that the Court made a mistake in finding that the first claim in his habeas petition—that his trial counsel provided ineffective assistance by failing to have knowledge about his sentencing guidelines—was procedurally defaulted. In support of this contention, Haley points to the "Statement of Facts" portion of his Tennessee Court of Criminal Appeals ("TCCA") brief, which states that "Appellant asserts that Mr. Stockton did not

adequately explain to him the range of punishment he would be facing if he went to trial. As a result of this, Appellant argues that he was unable to make a reasonable, informed decision with regard to his defense." (ECF No. 45-1 at PageID 878.) The "Brief and Argument" section of Haley's TCCA brief, however, asserts only two claims: (1) Haley's counsel was ineffective because he did not meet with Haley enough prior to trial; and (2) Haley's counsel was ineffective for waiving Haley's appearance at the motion for a new trial without permission. (*See* ECF No. 33 at 755.) "[I]t is a settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *United States v. Elder*, 90 F.3d 1110, 1118 (6th Cir. 1996) (internal quotation marks and citations omitted). As the Court stated in its order denying Haley's § 2254 petition, the procedural default of Haley's first claim "occurred when post-conviction counsel exercised his discretion to limit the brief to the TCCA to the strongest arguments." (ECF No. 41 at PageID 866.)

Rule 60(b)(2) permits a court to relieve a party from a final judgment for "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." Fed. R. Civ. P. 60(b)(2). Haley contends that the third issue in his habeas petition—that his trial counsel provided ineffective assistance by failing to challenge the evidence supporting an aggravated crime—should be reconsidered in light of "newly discovered evidence" provided to Haley by his trial counsel. In support of this contention, Haley points to a letter from his trial counsel, dated December 21, 2014, that apparently accompanied a copy of a transcript provided to Haley by his trial counsel. (*See* ECF No. 45-2.) It is unclear what evidence accompanied the letter, but any evidence that was in the possession of Haley's trial counsel at the time of Haley's trial is not "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new

trial . . . ." *See* Fed. R. Civ. P. 60(b)(2). Moreover, Haley had *himself* been in possession of the letter from his trial counsel (and any accompanying documents) for almost three years when this Court denied Haley's § 2254 petition in September 2017. (*See* ECF No. 45-2.)

For the foregoing reasons, Haley is not entitled to relief from the Court's September 12, 2017 Judgment. His Motion for Relief from Judgment is DENIED.

IT IS SO ORDERED, this 12th day of February, 2018.

/s/ Jon P. McCalla
JON P. McCALLA
UNITED STATES DISTRICT JUDGE

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U.S. District Court

Western District of Tennessee

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355420
TROUSDALE TURNER CORRECTIONAL COMPLEX
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Appendix "C." "*Jerry P. Haley v. Blair Leibach*, No. 2:14-2460-JPM-tmp, U.S. Dist. Ct., W.D. Tenn. (February 12, 2018) (ECF No. 49.)"

CASENO: 2:14cv02460
DOCUMENT: 41

Jerry Haley
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140 Macon Way
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JERRY P. HALEY, Petitioner, v. BLAIR LEIBACH, Respondent.	)	No. 2:14-2460-JPM-tmp

ORDER GRANTING MOTION TO MODIFY 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 June 17, 2014, Petitioner Jerry Haley, Tennessee Department of Correction ("TDOC") prisoner number 355420, who is currently an inmate at the Trousdale Turner Correctional Complex ("TTCC") in Hartsville, Tennessee, filed a petition pursuant to 28 U.S.C. § 2254. (Petition ("Pet."), ECF No. 1.) On September 21 and October 22, 2015, Haley filed supplements to the petition. (First Supplement ("Supp."), ECF No. 8-1; Second Supp., ECF No. 10.) On December 16, 2016, Respondent filed an answer and the state court record. (Answer, ECF No. 34; Record ("R."), ECF No. 33.) On January 10, 2017, Petitioner Haley filed a reply. (Reply, ECF No. 37.) On January 26, 2017, Haley amended his reply. (Amended ("Am.") Reply, ECF 38.) On May 1, 2017, Haley filed a motion to modify the named respondent to the current Warden of the TTCC, Blair Leibach. (Motion, ECF No. 39.) The motion is **GRANTED**. The Clerk shall update the docket with the current Respondent.

As more fully discussed below, the issues Petitioner raises are procedurally defaulted. For the reasons discussed below, the petition is **DISMISSED**.

I. STATE COURT PROCEDURAL HISTORY

On June 9, 2009, a Lauderdale County circuit court jury convicted Jerry Haley of one count of aggravated rape, one count of aggravated criminal trespass, and one count of aggravated kidnapping. (R., Verdict Forms, ECF No. 33-1 at Page ID 134-37.) On June 8, 2009, the trial court sentenced Haley to an effective sixty-year sentence. (R., Judgments, ECF No. 33-1 at PageID 161-63.) Haley's Motion for New Trial, filed on July 23, 2009, challenged the sufficiency of the evidence. (R., Motion ("Mot.") for New Trial, ECF No. 33-1 at PageID 164.) On August 7, 2009, the trial court denied the Motion for New Trial. (R., Order, ECF No. 33-1 at PageID 165.) Haley appealed. (R., Notice of Appeal, ECF No. 33-1 at PageID 166.) The Tennessee Court of Criminal Appeals ("TCCA") affirmed. *State v. Haley*, No. W2009-01800-CCA-R3-CD, 2010 WL 3605235 (Tenn. Crim. App. Sept. 16, 2010), *perm. app. denied* (Tenn. Feb. 17, 2011).

On January 20, 2012, Haley filed a *pro se* petition in Lauderdale County Circuit Court pursuant to the Tennessee Post-Conviction Procedure Act, Tenn. Code Ann. §§ 40-30-101-122. (R., Pet. for Post-Conviction Relief, ECF No. 33-13 at PageID 622-45.) On July 9, 2012, counsel was appointed to represent him. (R., Order, ECF No. 33-13 at PageID 661-62.) On February 27, 2012, counsel filed an amended petition. (R. Am. Pet., ECF No. 33-13 at PageID 663-65.) The post-conviction court conducted an evidentiary hearing and denied relief in an order entered on September 21, 2012. (R., Order, ECF No. 33-13 at PageID 675-81.) The TCCA affirmed. *Haley v. State*, No. W2013-00419-CCA-R3-PC, 2013 WL 6389590 (Tenn. Crim. App. Dec. 5, 2013), *perm app. denied* (Tenn. Apr. 9, 2014).

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

> Ripley to pick up the defendant. After picking up the defendant, the two, along with Wallace's girlfriend, proceeded to a home, which the defendant believed belonged to Courtney Ricks, in order to purchase cocaine. The defendant further testified that Courtney Ricks informed him that his girlfriend was in the back bedroom and that she might have sex with the defendant in exchange for cocaine. According to the defendant, he went into the back bedroom of the home and found the victim, with whom he then engaged in consensual sex. Afterward, according to both the defendant and Wallace, the group left the home and went to a motel in Union City.
>
> After hearing the evidence presented, a jury convicted the defendant of aggravated rape, aggravated kidnapping, and aggravated criminal trespass. He was subsequently sentenced to forty years, twenty years, and eleven months and twenty-nine days for the respective convictions. Additionally, the rape and kidnapping sentences were ordered to be served consecutively for an effective sentence of sixty years in the Department of Correction. The defendant filed a motion for new trial in which he challenged only the sufficiency of the evidence. The trial court denied the motion, and the defendant has timely filed an appeal with this court.

State v. Haley, 2010 WL 3605235, 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"[1] 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 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)).[2] In general, a federal court "may only treat a state court order as

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[1]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).

[2]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

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 either show cause to excuse his failure to present the claim and actual prejudice stemming from the constitutional violation or must show 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 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). The 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)).

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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).

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

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.

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 instant § 2254 petition, Haley raises the following issues:

1. Trial counsel provided ineffective assistance by failing to have knowledge about Haley's sentencing guidelines (Pet., ECF No. 1 at PageID 5, First Supp., ECF No. 8-1 at PageID 31);

2. Trial counsel provided ineffective assistance by failing to raise issues in the motion for new trial that were raised on direct appeal (Pet., ECF No. 1 at PageID 6, First Supp., ECF No. 8-1 at PageID 32); and

3. Trial counsel provided ineffective assistance by failing to challenge the evidence supporting an aggravated crime. (First Supp., ECF No. 8-1 at PageID 32.)

The claims of ineffective assistance presented to the TCCA in the post-conviction appellate argument and addressed by the TCCA in the appellate opinion were:

> Appellant contends that he did not have adequate time to meet with counsel before Trial. Therefore Mr. Stockton was uninformed about certain defenses that would have been suggested by Appellant because of inadequate preparation. . . . Trial counsel testified that he met with the petitioner three or four times prior to trial. Had the Appellant been able to confer with his legal counsel in more depth, he may not have gone to trial and Mr. Stockton would have had adequate time to locate witnesses given to him by the Appellant. Further, Appellant argues that Mr. Stockton waived Appellant's appearance at the Motion for New Trial without his permission.

(R., Br. of the Appellant, ECF No. 13-15 at PageID 755 (citation omitted).) The issues raised in this petition have never been reviewed by the TCCA.

IV. ANALYSIS OF PETITIONER'S CLAIMS

A. All Claims barred by Procedural Default

Respondent contends that Haley's issues are barred by procedural default because, although they were presented in Haley's initial post-conviction petition, they were abandoned on appeal. (Answer, ECF No. 34 at PageID 825-26.) Respondent contends that the claims are not subject to the default exception created by *Martinez*. (*Id.* at PageID 827-28.)

Petitioner Haley replies that post-conviction counsel's "job was to file the appeal on the same issues raised at [the] post-conviction hearing" and that post-conviction counsel "chose to file an appeal that did not contain [Haley's] *pro se* issues." (Reply, ECF No. 37 at PageID 838.)

The issues of the instant proceeding were contained in the post-conviction petition filed by Haley. (R., Pet. for Post-Conviction Relief, ECF No. 33-13 at PageID 626-28, 636, 640-41.) Review of the post-conviction testimony demonstrates that Haley testified or had the opportunity to testify and present evidence on each of these issues during the post-conviction hearing. (R., Post-conviction Hr'g. Tr., ECF No. 33-14.)

Haley testified that his trial attorney never discussed the elements of the crime, the nature of the crime, or why certain crimes were aggravated. (*Id.* at PageID 696.) Haley stated that counsel told him that taking the plea the State offered was in Haley's best interest. (*Id.*) Haley testified that counsel told him that the State was asking for the maximum of forty years if he went to trial and that he did not understand that convictions on all counts could result in a sentence "roughly anywhere from sixty-eight to seventy-five" years. (*Id.* at PageID 696-97.)

Haley testified that if he had known the actual sentence exposure, he would have taken the State's offer. (*Id.* at PageID 697.) Haley stated that, because he did not have a preliminary hearing, he did not understand the crimes or the range of punishment. (*Id.*)

Haley testified during cross-examination that he had consensual sex with the victim. (*Id.* at PageID 710-11.) Haley emphasized that the sexual assault nurse examiner "stated there was [sic] no physical injuries from head to toe on [the victim]." (*Id.*) When asked if he recalled that the victim had testified that a screwdriver was used as a weapon, Haley responded that "even people without weapons with their hands on people, have left bruises." (*Id.* at PageID 711.) Haley did not agree that trial counsel "did everything within his power to convince the jury first of all that the screwdriver was not a weapon, second of all that it wasn't placed on [the victim's] body because it didn't leave any visible marks." (*Id.*) Haley also testified that the issues raised on appeal were not included in the motion for new trial and were considered waived by the TCCA. (*Id.* at PageID 717-18.)

Counsel believed that Haley understood the range of punishment. (*Id.* at PageID 733.) Counsel broke the plea offers down "to the point that he would have about eight and a half years or nine years left to serve on this 12-year sentence, that he had – I think he had a six that he was doing, picked up another three consecutive to that because it was a parole violation, so he had a nine-year stretch he was doing" anyway "and the offer was to do I think 12 concurrent." (*Id.* at PageID 734-35.) Counsel testified that he explained that Haley was "looking at some serious time." (*Id.* at PageID 725.) Counsel recalled that Haley was "still a Range 2 at that time" and counsel thought Haley might be looking at "maybe 40, 50 years" but "didn't think he would get that much." (*Id.* at PageID 726.) Counsel testified that, before trial, he stipulated to the medical records from Baptist Hospital and waived the appearance of the records' custodian. (*Id.* at

PageID 730.) Counsel admitted that he did not subpoena Nurse Gines, whose name was on the victim's medical records to testify about the victim's complaints. (*Id.*) Counsel stated that it really didn't matter if the victim "was hurting or not hurting, the question was consent." (*Id.*) Counsel recalled that Haley never wavered that the sex with the victim was consensual. (*Id.* at PageID 733.) Counsel testified that he spent a considerable amount of time in opening and closing argument about whether a screwdriver was actually a deadly weapon. (*Id.* at PageID 736.) Counsel stated that there were few viable issues to appeal where the jury has made a determination. (*Id.* at PageID 738.)

Haley attempts to demonstrate cause and prejudice for his default by arguing that post-conviction counsel provided ineffective assistance by failing to raise on appeal all issues from the post-conviction petition. (Reply, ECF No. 37 at PageID 838.) 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 Haley's default of these 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.

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 non-cognizable, without merit, and barred by procedural default. Because any appeal by Haley 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**.[5]

IT IS SO ORDERED, this 12th day of September, 2017.

/s/ Jon P. McCalla
JON P. McCALLA
UNITED STATES DISTRICT COURT JUDGE

[5]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).

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U.S. District Court

Western District of Tennessee

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Case Number:	2:14-cv-02460-JPM-tmp
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Document Number:	41

Docket Text:
ORDER GRANTING [39] Motion To Modify 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. Signed by Judge Jon Phipps McCalla on 9/12/2017. (McCalla, Jon)

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