No. 19-6178

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BYRON BECTON,

Petitioner-Appellant,

v.

SHAWN PHILLIPS, Warden,

Respondent-Appellee.

ORDER

Before: STRANCH, Circuit Judge.

Byron Becton, a Tennessee prisoner proceeding pro se, appeals the district court's judgment denying his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. Becton has filed an application for a certificate of appealability ("COA"), *see* Fed. R. App. P. 22(b), and a motion to proceed in forma pauperis on appeal, *see* Fed. R. App. P. 24(a)(5).

In 2011, a Tennessee jury convicted Becton of six counts of aggravated rape, in violation of Tennessee Code Annotated § 39-13-502. The trial court merged three of those counts as alternate theories and imposed an effective 65-year sentence. On direct appeal, Becton argued that his convictions were supported by insufficient evidence and that the prosecutor committed misconduct during closing arguments by commenting on his decision not to testify. The Tennessee Court of Criminal Appeals affirmed, *State v. Becton*, No. W2011-02565-CCA-R3-CD, 2013 WL 967755, at *25 (Tenn. Crim. App. Mar. 11, 2013), *partially abrogated by State v. Jackson*, 444 S.W.3d 554, 591 n.50 (Tenn. 2014), and Becton did not seek review from the Tennessee Supreme Court.

In May 2013, Becton filed a state petition for post-conviction relief, which he later amended, alleging that trial counsel rendered ineffective assistance. The trial court denied the petition after conducting an evidentiary hearing on the matter, and the Tennessee Court of Criminal

Appeals affirmed. *Becton v. State*, No. W2014-00993-CCA-R3-PC, 2015 WL 3867758, at *4 (Tenn. Crim. App. June 23, 2015). Becton again did not seek review from the Tennessee Supreme Court.[1]

In October 2015, Becton filed a § 2254 habeas petition, in which he argued that: (1) trial counsel rendered ineffective assistance by not: (i) filing pretrial motions, or (ii) conducting a reasonable investigation by visiting the crime scene or having physical evidence from the crime scene tested for blood; (2) the prosecutor committed misconduct by: (i) repeatedly referring to matters not in evidence, (ii) telling the jurors to do their duty, interpreting the jury instructions, and vouching for the witnesses' credibility, (iii) commenting on his decision not to testify, and (iv) waiting until the day before the sentencing hearing to file a notice of enhancement; (3) the trial judge was biased; and (4) cumulative error deprived him of a fair trial. Becton subsequently withdrew Claims 1(i), 2(i), 2(ii), 2(iv), and 3, conceding that they were procedurally defaulted. The district court dismissed Becton's withdrawn claims and denied his remaining claims after determining that they were either procedurally defaulted or meritless. The district court therefore dismissed the habeas petition with prejudice and declined to issue a COA.

Becton now seeks a COA from this court with respect to each of his habeas claims. Becton also advances new claims and arguments in his COA application that he did not raise in the district court, such as his claim that his convictions are supported by insufficient evidence or his argument that "untrained prison legal aides" are responsible for him omitting certain claims from his habeas petition. These claims are not properly before this court barring "exceptional circumstances" or if failing to consider them would result in a "plain miscarriage of justice," *United States v. Ellison*, 462 F.3d 557, 560 (6th Cir. 2006), and we decline to review them now.

A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). In order to be entitled to a COA, the movant must demonstrate "that jurists of reason could disagree

[1] A criminal defendant in Tennessee exhausts a claim by presenting it to the trial court and the Court of Criminal Appeals. *See* Tenn. S. Ct. R. 39; *see also Adams v. Holland*, 330 F.3d 398, 402-03 (6th Cir. 2003).

with the district court's resolution of his constitutional claims or that jurists could conclude that the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327. When the district court "denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim," the petitioner satisfies § 2253(c)(2) by establishing that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

At the outset, a review of the record confirms that Becton explicitly withdrew Claims 1(i), 2(i), 2(ii), 2(iv), and 3. Reasonable jurists therefore could not debate the district court's dismissal of those claims.

Ineffective Assistance of Trial Counsel

In Subclaim 1(ii), Becton advanced two arguments. He first argued that trial counsel was ineffective for not conducting a reasonable investigation by visiting the crime scene or having physical evidence from the crime scene forensically tested. The district court found that Becton failed to exhaust his state-court remedies with respect to this subclaim because, although he raised it in his post-conviction petition, he did not present it to the Tennessee Court of Criminal Appeals. A federal court may not entertain a habeas claim unless the petitioner has first exhausted his remedies in state court. 28 U.S.C. § 2254(b)(1)(A). To exhaust a claim, the petitioner "must 'fairly present' [the] claim in each appropriate state court . . . thereby alerting that court to the federal nature of the claim." *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (quoting *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995)). When a petitioner has failed to exhaust the remedies available in the state courts, his claims are procedurally defaulted. *See Gray v. Netherland*, 518 U.S. 152, 161 (1996).

"[T]he doctrine of exhaustion requires that a claim be presented to the state courts under the same theory in which it is later presented in federal court." *Wong v. Money*, 142 F.3d 313, 322 (6th Cir. 1998); *see Williams v. Bagley*, 380 F.3d 932, 969 (6th Cir. 2004). The only claims that Becton advanced in his post-conviction appeal concerned trial counsel's failure to present an alibi

to present either 'Ann' or an expert witness at the evidentiary hearing," and therefore declined to "speculate what either witness might have testified to at trial." *Id.* at *4. But it also concluded that "trial counsel's reasoning for not calling these witnesses—that 'Ann' would not have provided the petitioner with an alibi and that the DNA evidence presented by the State was already sparse"—constituted reasonable trial strategy. *Id.*

The district court determined that the state appellate court did not unreasonably apply *Strickland* in resolving this subclaim. In reaching that determination, the district court noted that "Becton conceded that Ann was not present when he had (what he contends was consensual) sex with the victim," and she therefore "had no personal knowledge about whether Becton raped the victim." It further agreed that counsel's decision not to present expert testimony was a strategic choice because the DNA evidence presented by the State "was not significantly probative of guilt." Reasonable jurists could not debate the district court's dismissal of this claim.

Prosecutorial Misconduct

In Subclaim 2(iii), Becton argued that the prosecutor committed misconduct during closing arguments by commenting on his decision not to testify at trial. The Tennessee Court of Criminal Appeals described the prosecutor's conduct as follows:

> In this case, the prosecutor asserted the following during the State's rebuttal closing argument, which ultimately led to the statement the Defendant argues was improper:
>
> > Now when [the victim] testified and she told you about her injuries, she told you a lot about her injuries but no one ever asked her, I never thought to ask her, [defense counsel] never asked her, no one asked her what was there right when you left and what was not there till two days later [referring to the victim's injuries] . . . . No one asked her that.
>
> Defense counsel immediately objected, stating that the prosecutor is "trying to put facts not into evidence in front of the jury." In response to the objection, the trial court stated, "All I got to say is the jury heard the testimony from the witness, they have heard the statements of the attorneys and they will be the final arbiters of what was said from that witness stand."
>
> The prosecutor then continued:

> No one asked her that. And the law tells you not to speculate, not to guess. *The law tells you you can't consider the fact that he decided not to testify, but that's his right. But the law tells you not to speculate and not to guess. And that means don't speculate and don't guess what he might of said had he got up there.*
>
> (Emphasis added). Defense counsel objected. The trial court responded, "I don't know if that's quite correct, general." A bench conference ensued . . . .

Becton, 2013 WL 967755, at *21. The trial court subsequently instructed the jury to disregard the prosecutor's remarks. *Id.* at *22.

The Fifth Amendment "forbids . . . comment by the prosecution on the accused's silence." *Griffin v. California*, 380 U.S. 609, 615 (1965). But Fifth Amendment violations are subject to harmless error review. *See Moore v. Mitchell*, 708 F.3d 760, 799-800 (6th Cir. 2013). On federal habeas review, a constitutional error requires reversal if it "had substantial and injurious effect or influence in determining the jury's verdict," i.e., it caused actual prejudice. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). For claims adjudicated on the merits by the state court, the *Brecht* test encompasses the question of whether a state court reasonably applied the "harmless beyond a reasonable doubt" standard set forth in *Chapman v. California*, 386 U.S. 18, 24 (1967). *Ruelas v. Wolfenbarger*, 580 F.3d 403, 412 (6th Cir. 2009); *see also Davis v. Ayala*, 135 S. Ct. 2187, 2198 (2015). A habeas court may, "before turning to *Brecht*, inquire whether the state court's *Chapman* analysis was reasonable. If it was reasonable, the case is over. But . . . a habeas court may [also] go straight to *Brecht* with full confidence that [*Chapman*'s] standards will also be satisfied." *Ruelas*, 580 F.3d at 413.

On direct appeal, the Tennessee Court of Criminal Appeals found "that the prosecutor's challenged statements "were highly improper," but nonetheless affirmed Becton's convictions because "the record establishe[d] beyond a reasonable doubt that the prosecutor's improper comment did not have a prejudicial effect upon the jury's verdict." *Becton*, 2013 WL 967755, at *25. In making the *Chapman* harmless-error determination, the state appellate court considered the following factors: (1) the conduct complained of in light of the facts and circumstances of the

case; (2) the curative measures undertaken by the trial court; (3) the prosecutor's intent in making the improper remarks; (4) the cumulative effect of the improper conduct and any other errors in the record; and (5) the relative strength or weakness of the case. *Id.* at *23 (citing *Judge v. State*, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976)). The state appellate court found that these factors all weighed in the State's favor, and therefore concluded that the State had met its burden of establishing that the prosecutor's improper remarks were harmless beyond a reasonable doubt.[2] *Id.* at *24-25. Specifically, it noted that "the prosecutor's challenged remarks were only a small portion of her closing argument, which otherwise focused on the facts and circumstances of the crime," and that the trial court gave a curative instruction to the jury. *Id.* at *24. It next found no other obvious errors in the record and no evidence that the prosecutor made her statements with malintent. *Id.* at *25. Finally, it found that the State's case against Becton was "strong" given the victim's detailed testimony, corroborating witness testimony, and crime-scene evidence. *Id.*

The district court concluded that the state appellate court's decision neither contradicted nor unreasonably applied *Chapman*, and did not "result[] 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). In reaching that conclusion, the district court reiterated the state appellate court's conclusion that Becton was not prejudiced by the prosecutor's remarks given their brevity, the trial court's subsequent curative instruction, and the overall strength of the State's case. *See Ruelas*, 580 F.3d at 413 (holding that a habeas court need not conduct the *Brecht* inquiry upon concluding that the state court's *Chapman* analysis was reasonable). The district court further determined that Becton failed to rebut any of the factual findings underpinning the state appellate court's harmless-error determination by clear and convincing evidence. *See* 28

[2] Following the Tennessee Court of Criminal Appeals' affirmance of Becton's convictions on direct appeal, the Tennessee Supreme Court held that the *Judge* test is properly used only for "an improper prosecutorial argument that does not rise to the level of a constitutional violation." *Jackson*, 444 S.W.3d at 591 n.50. The Tennessee Supreme Court thus adopted a new standard for evaluating whether *Griffin* error is harmless on direct review. *Id.* at 591. This change in the law is irrelevant when analyzing whether the Tennessee Court of Criminal Appeals reasonably applied clearly established *federal* law in resolving Becton's habeas claim.

U.S.C. § 2254(e)(1). Reasonable jurists could not disagree with the district court's resolution of this claim.

Cumulative Error

Finally, Becton argued in Claim 4 that he was denied his right to a fair trial in view of the cumulative effect of the foregoing claims. Because a claim of cumulative error is not a cognizable ground for relief on federal habeas review, *see Williams v. Anderson*, 460 F.3d 789, 816 (6th Cir. 2006), no reasonable jurist could disagree with the district court's rejection of this claim.

Accordingly, Becton's COA application is **DENIED** and his motion for pauper status is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
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POTTER STEWART U.S. COURTHOUSE
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Filed: October 17, 2019

Mr. Byron Becton
Northwest Correctional Complex
960 State Route 212
Tiptonville, TN 38079

Re: Case No. 19-6178, *Byron Becton v. Shawn Phillips*
Originating Case No. : 2:15-cv-02710

Dear Mr. Becton:

This appeal has been docketed as case number **19-6178** with the caption that is enclosed on a separate page. The appellate case number and caption must appear on all filings submitted to the Court.

The district court has certified that any appeal would not be taken in good faith and has denied you leave to proceed in forma pauperis. You have until **November 18, 2019,** to either pay the $505.00 appellate filing fee or file a motion for pauper status on appeal. If you choose to pay the fee, it must be submitted to the U.S. District Court. If you choose to request leave to proceed on appeal in forma pauperis, a motion and an accompanying financial affidavit must be submitted to this court, the U.S. Court of Appeals for the Sixth Circuit. (Forms are enclosed for your convenience). **Failure to do one or the other may result in the dismissal of the appeal without further notice.**

For this appeal to proceed, the district court or this court must issue a certificate of appealability (COA) stating at least one issue for review. If the district court has denied the COA as to some or all issues, this court will review all issues rejected by the district court. You do not need to take any further action for this review to occur. However, if you choose to do so, you may submit **one signed** motion to grant a COA with this court, stating the issues for review and why this court should review them. If that is your choice, please do so as soon as possible. 6th Cir. R. 22(a).

Theoury Theory

This court's review may take several months. If both the district court and this court deny a certificate of appealability as to all issues, the appeal cannot proceed and will be closed. 28 U.S.C. § 2253(c).

Sincerely yours,

s/Karen S. Fultz
Case Manager
Direct Dial No. 513-564-7036

cc: Mr. Michael Matthew Stahl

Enclosure

CASENO: 2:15cv02710
DOCUMENT: 39

Byron Becton
219081
Northwest Correctional Complex
960 State Route 212
Tipptonville, TN 38079

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

BYRON BECTON,	)	
Petitioner,	)	
v.	)	Case No. 2:15-cv-02710-JTF-dkv
SHAWN PHILLIPS,	)	
Respondent.	)	

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came for consideration before the Court. The issues have been duly considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that in accordance with the Order Denying Petition Pursuant to 28 U.S.C. § 2254, Denying a Certificate of Appealability, Certifying that an Appeal Would Not be Taken in Good Faith, and Denying Leave to Proceed *In Forma Pauperis* on Appeal, docketed on September 17, 2019, the § 2254 Petition is **DISMISSED** with prejudice.

APPROVED:

s/John T. Fowlkes, Jr.
JOHN T. FOWLKES, JR.
UNITED STATES DISTRICT JUDGE

THOMAS M. GOULD
CLERK

September 17, 2019
DATE

s/Patricia Dobberstein
(BY) LAW CLERK

Content-Type: text/html

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U.S. District Court

Western District of Tennessee

Notice of Electronic Filing
The following transaction was entered on 9/17/2019 at 9:40 AM CDT and filed on 9/17/2019

Case Name:	Becton v. Holloway
Case Number:	2:15-cv-02710-JTF-dkv
Filer:	
WARNING: CASE CLOSED on 09/17/2019	
Document Number:	39

Docket Text:
JUDGMENT in favor of Shawn Phillips against Byron Becton. Parties Byron Becton and Shawn Phillips terminated. Signed by Judge John T. Fowlkes, Jr. on 09/17/2019. (Dobberstein, Patricia)

2:15-cv-02710-JTF-dkv Notice has been electronically mailed to:
Michael Matthew Stahl Michael.Stahl@ag.tn.gov, Sheron.Johnson@ag.tn.gov
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Byron Becton
219081
Northwest Correctional Complex
960 State Route 212
Tipptonville, TN 38079

The following document(s) are associated with this transaction:

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

BYRON BECTON,

Petitioner,

v.

SHAWN PHILLIPS,

Respondent.

Case No. 2:15-cv-02710-JTF-dkv

ORDER DENYING PETITION PURSUANT TO 28 U.S.C. § 2254, DENYING A CERTIFICATE OF APPEALABILITY, CERTIFYING THAT AN APPEAL WOULD NOT BE TAKEN IN GOOD FAITH, AND DENYING LEAVE TO PROCEED *IN FORMA PAUPERIS* ON APPEAL

Before the Court are the Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody ("§ 2254 Petition") filed by Petitioner, Byron Becton, Tennessee Department of Correction prisoner number 219081, an inmate at the Northwest Correctional Complex ("NWCX") in Tiptonville, Tennessee (ECF No. 1), Respondent's Answer to Petition for Writ of Habeas Corpus ("Answer"), filed by the former respondent, Jonathan Lebo (ECF No. 23), Becton's Memorandum of Law in Opposition to Respondent's Answer/Motion to Dismiss ("Reply") (ECF No. 25), the Amended Answer to Petition for Writ of Habeas Corpus ("Amended Answer") filed by the current respondent, NWCX Warden Shawn Phillips (ECF No. 31), Becton's Reply to Respondent's Amended Answer to Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 ("Reply to Amended Answer") (ECF No. 34), Respondent's Second Amended Answer to Petition for Writ of Habeas Corpus ("Second Amended Answer") (ECF No. 35), and Becton's Second Reply to Respondent's Second Amended Answer to Petition for Writ of Habeas

Corpus Pursuant to 28 U.S.C. § 2254 ("Reply to Second Amended Answer") (ECF No. 37). For the reasons stated below, the Court **DENIES** the § 2254 Petition.

I. BACKGROUND

A. State Court Procedural History

On August 10, 2010, a grand jury in Shelby County, Tennessee, returned a six-count indictment against Becton. Counts 1 through 3 charged that, on December 16, 2009, Becton, armed with an article used to reasonably lead T.B. to believe it to be a weapon, sexually penetrated T.B. by fellatio (Count 1), by sexual intercourse (Count 2), and by a bottle (Count 3). Counts 4 through 6 charged that, on the same date, Becton unlawfully sexually penetrated T.B. by fellatio (Count 4), by sexual intercourse (Count 5), and by a bottle (Count 6) and caused bodily injury to T.B. (ECF No. 22-1 at PageID 228-34.) On April 28, 2011, the State filed a notice of its intent to seek an enhanced sentence. (*Id.* at PageID 239-40.) On September 28, 2011, the State filed another notice of its intent to seek an enhanced sentence and a notice of enhancing factors. (*Id.* at PageID 241, 242-45.)

A jury trial commenced in the Shelby County Criminal Court on August 29, 2011. On September 1, 2011, the jury returned guilty verdicts on every count. (ECF No. 22-7 at PageID 982-83.) At a hearing on September 29, 2011, the trial judge merged Count 4 with Count 1, Count 5 with Count 2, and Count 6 with Count 3 and sentenced Becton to a term of imprisonment of forty years on Count 1, a consecutive term of twenty-five years on Count 3, and a concurrent term of twenty-five years on Count 2, for a total sentence of sixty-five years to be served as a Range II multiple offender. (ECF No. 22-8 at PageID 1011-14.) Judgments were entered on September 29, 2011. (ECF No. 22-1 at PageID 252-57.) The judgments reflect that, although multiple

offenders ordinarily have a release eligibility of 35%, Becton is required to serve his sentence as a violent offender at 100%. (*Id.*) The Tennessee Court of Criminal Appeals ("TCCA") affirmed. *State v. Becton*, No. W2011-02565-CCA-R3-CD, 2013 WL 967755 (Tenn. Crim. App. Mar. 11, 2013).

On May 30, 2013, Becton filed a *pro se* Petition for Relief from Conviction or Sentence in the Shelby County Criminal Court. (ECF No. 22-14 at PageID 1163-73.) After counsel was appointed to represent Becton (*id.* at PageID 1179), a First Amended Petition for Post Conviction Relief was filed on November 22, 2013 (*id.* at PageID 1174-78). A hearing on the post-conviction petition was held on April 16, 2014, at the conclusion of which the post-conviction court denied relief. (ECF No. 22-16 at PageID 1252-61.) An order denying the post-conviction petition was entered on April 28, 2014. (ECF No. 22-14 at PageID 1180.) The TCCA affirmed. *Becton v. State*, No. W2014-00993-CCA-R3-PC, 2015 WL 3867758 (Tenn. Crim. App. June 23, 2015).

In its opinion on direct appeal, the TCCA summarized the evidence introduced at trial. *State v. Becton*, 2013 WL 967755, at *1-17. Between 7:00 and 7:30 p.m. on December 16, 2009, the victim, T.B., left her home to walk to a friend's house to buy drugs. As the victim was walking down an unlighted alley, Becton seized her from behind, pressed a sharp object into her back, and threatened her that if she moved or screamed he would "kill you where you stand." *Id.* at *1. Becton took the victim to an abandoned house. Becton and the victim fought. Becton sprayed the victim with "dog spray" that she had been carrying and hit her with objects found in the house and with his fists. *Id.* at *2-3. Becton penetrated the victim with a bottle, forced her to perform oral sex, and had vaginal intercourse with her. *Id.* at *3. When the rape had concluded, the victim feared that Becton would not let her leave the house alive because she had seen his face.

The victim provided Becton with a fake name and promised to see him again. They eventually left the house together and, when she and Becton parted, the victim went home and told her fiancé what had happened. The victim and her fiancé went out to look for Becton, found him in a Mapco station, and notified two police officers who were parked across the street. The victim was taken to the hospital, where she remained until the morning of December 17, 2009. *Id.* at *4-5. The TCCA held that the evidence was sufficient to convict Becton on the three counts of aggravated rape through force or coercion with a weapon, *id.* at *20, and on the three counts of aggravated rape involving bodily injury, *id.* at *21.

B. Procedural History of Becton's § 2254 Petition, Case Number 2:15-cv-02710

On October 28, 2015, Becton filed his *pro se* § 2254 Petition, accompanied by a legal memorandum. (ECF Nos. 1, 1-1.) The § 2254 Petition presents the following claims:

1. "Did the ineffective assistance of counsel deprive the Petitioner of his rights guaranteed by the Sixth Amendment of the United States Constitution?" (ECF No. 1-1 at PageID 16 (irregular capitalization omitted); *see also id.* at PageID 20-33);

2. "Did the prosecutor's misconduct deprive the Petitioner of a fair trial?" (*id.* at PageID 16 (irregular capitalization omitted); *see also id.* at PageID 34-49);

3. "Did the judge being biased deprive the Petitioner of a fair trial (*id.* at PageID 16 (irregular capitalization omitted); *see also id.* at PageID 49-53); and

4. "Did the cumulative errors deprive the Petitioner of a fair trial[?]" (*id.* at PageID 16 (irregular capitalization omitted); *see also id.* at PageID 53-55).

On May 12, 2016, Becton filed a decision by the Tennessee Supreme Court addressing the standards to be applied in assessing prosecutorial misconduct. (ECF No. 9.) On June 1, 2016, Becton submitted his own declaration providing additional legal argument in support of Claim 2.

(ECF No. 10.) On September 16, 2016, Becton filed a document concerning a disciplinary proceeding against the Shelby County District Attorney General arising from her actions in an unrelated case. (ECF No. 14.)

The Court issued an order on November 2, 2016, directing Respondent to file the state-court record and a response to the § 2254 Petition. (ECF No. 17.) On December 29, 2016, Lebo filed the state-court record and his Answer. (ECF Nos. 22, 23.) Becton filed his Reply on February 8, 2017. (ECF No. 25.)

On January 23, 2018, Becton filed another document concerning a disciplinary proceeding against the Assistant District Attorney General who prosecuted his criminal case. (ECF No. 28.) The Tennessee Board of Professional Responsibility issued a Private Reprimand to the prosecutor. (*Id.* at PageID 1389.)

The Court issued an order on February 15, 2019 denying leave to amend as to the new challenge to the sufficiency of the evidence raised for the first time in Becton's Reply and directing the Warden to file an amended answer that addressed each of Becton's claims and sub-claims. (ECF No. 30.) On February 21, 2019, the Warden filed his Amended Answer. (ECF No. 31.) On April 4, 2019, the Court ordered the Warden to file a second amended answer addressing a portion of Claim 2. (ECF No. 33.) That order also extended Becton's time to reply to the Amended Answer. (*Id.* at 1 n.1.) Becton filed his Reply to Amended Answer on April 23, 2019. (ECF No. 34.) On May 2, 2019, Phillips filed his Second Amended Answer. (ECF No. 35.) Becton filed his Reply to Second Amended Answer on May 21, 2019. (ECF No. 37.)

II. ANALYSIS OF PETITIONER'S CLAIMS

A. The Alleged Prosecutorial Misconduct (Claim 2)[1]

In Claim 2, Becton alleges that the prosecution engaged in misconduct. Specifically, he complains that (i) the prosecutor repeatedly referred to matters not in evidence (ECF No. 1-1 at PageID 19, 34-43); (ii) the prosecutor told the jurors to do their duty, interpreted the jury instructions, and vouched for the credibility of the witnesses (*id.* at PageID 19, 43-44); (iii) the prosecutor commented on Becton's decision not to testify (*id.* at PageID 19, 44, 46-49); and (iv) the prosecutor waited until the day before the sentencing hearing to file a notice of enhancement (*id.* at PageID 19, 45). For the reasons that follow, Becton is not entitled to relief on Claim 2.

1. Sub-Claims (i), (ii), and (iv) Have Been Procedurally Defaulted

In sub-claim (i), Becton complains that the prosecutor referred to matters not in evidence. Specifically, the victim testified that she gave Becton a piece of paper containing a false name and telephone number. A police officer testified that, when Becton was being held in a squad car, Becton was tearing up a piece of paper. Although the officer collected the scraps, they were not introduced into evidence because they were lost by the police. The State referred to the note in its closing argument. (*See* ECF No. 1-1 at PageID 35-36.) Becton also complains that the prosecutor claimed that a photograph depicted blood on the wall of the abandoned house where the victim was raped, but no blood tests were performed. (*Id.* at PageID 37-40.) An officer was also asked to opine on whether stains on a shirt found in the house were blood. (*Id.* at PageID 40-42.)

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[1] In the interest of clarity, the Court will address Claims 2 and 3 before Claim 1.

In sub-claim (ii), Becton complained that the prosecutor told the jurors to do their duty, gave her interpretation of the jury instructions, and vouched for the credibility of witnesses. Specifically, the prosecutor stated in her closing argument that the law presumes that witnesses tell the truth. She told the jury that it was their job to reconcile the differences in the testimony of the witnesses. (*Id.* at PageID 42-43.)

In sub-claim (iv), Becton complained that the prosecutor filed a notice of enhancement factors the day before the sentencing hearing. (*Id.* at PageID 44.)

In his Amended Answer, Phillips argues that Becton failed to exhaust these sub-claims in state court and, therefore, they are barred by procedural default. (ECF No. 31 at 32-33.) In his Reply to Amended Answer and Reply to Second Amended Answer, Becton has agreed and has withdrawn his unexhausted sub-claims. (ECF Nos. 34 at 3, 37 at 4.) Therefore, sub-claims (i), (ii), and (iv) are **DISMISSED**.

2. Becton is Not Entitled to Relief on Sub-Claim (iii)

In sub-claim (iii), Becton complains that the prosecutor, during closing arguments, commented on his decision not to testify. (ECF No. 1-1 at PageID 43, 46-49.) Becton raised this issue in his brief to the TCCA on direct appeal. (ECF No. 22-10 at PageID 1052, 1058-64.) The TCCA has described the conduct at issue:

> In this case, the prosecutor asserted the following during the State's rebuttal closing argument, which ultimately led to the statement the Defendant argues was improper:
>
> > Now when [the victim] testified and she told you about her injuries, she told you a lot about her injuries but no one ever asked her, I never thought to ask her, [defense counsel] never asked her, no one asked her what was there right when you left and what was not there till two days later [referring to the victim's injuries].... No one asked her that.

> Defense counsel immediately objected, stating that the prosecutor is "trying to put facts not into evidence in front of the jury." In response to the objection, the trial court stated, "All I got to say is the jury heard the testimony from the witness, they have heard the statements of the attorneys and they will be the final arbiters of what was said from that witness stand."
>
> The prosecutor then continued:
>
> > No one asked her that. And the law tells you not to speculate, not to guess. *The law tells you you can't consider the fact that he decided not to testify, but that's his right. But the law tells you not to speculate and not to guess. And that means don't speculate and don't guess what he might of said had he got up there.*
>
> (Emphasis added). Defense counsel objected. The trial court responded, "I don't know if that's quite correct, general." A bench conference ensued . . .

State v. Becton, 2013 WL 967755, at *21. "After the bench conference, the Court instructed the jury, 'All right, ladies and gentlemen of the jury, you will disregard the last words of the district attorney.' The prosecutor then continued in a different vein." *Id.* at *22.

The TCCA denied relief on the merits, reasoning that "[a] prosecutor's comment on the defendant's failure to testify violates the Fifth Amendment to the United States Constitution and Article I, § 9 of the Tennessee Constitution, both of which guarantee the defendant the right to remain silent." *Id.* The TCCA ruled that the challenged statement violated Becton's rights, reasoning that, "[i]n this case, the prosecutor directly referenced the Defendant's decision not to testify . . . . We hold that the prosecutor's challenged statements clearly constituted a comment on the Defendant's choice not to testify at trial and, thus, were highly improper." *Id.* at *23.

The TCCA then addressed the remedy to be afforded, relying on the standard in *Chapman v. California*, 386 U.S. 18, 24 (1967), which applied the "harmless error doctrine to constitutional violations, including improper prosecutorial comments on the defendant's failure to testify." *State v. Becton*, 2013 WL 967755, at *23. Under *Chapman*, the State has the burden of

demonstrating beyond a reasonable doubt that an error is harmless. *Id.* In making this determination, the TCCA applied the five-part test used in cases such as *State v. Thornton*, 10 S.W.3d 229, 236 (Tenn. Crim. App. 1999) and *Judge v. State*, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976). *Id.* In holding that the State had satisfied its burden of showing that the prosecutor's misconduct was harmless beyond a reasonable doubt, the TCCA reasoned as follows:

> We first consider the prosecutor's misconduct "in light of the facts and circumstances of the case[.]" *Thornton*, 10 S.W.3d at 235. In analyzing this factor, "the courts have considered whether the remarks were lengthy or repeated, or whether the statement was single or isolated." *See Judge*, 539 S.W.2d at 344. "They have also taken into account whether the improper remark of the prosecutor was made in response to the defendant's comments or argument" and "the general 'atmosphere' of the courtroom." *Id.* (citation omitted). Here, the prosecutor's challenged remarks were only a small portion of her closing argument, which otherwise focused on the facts and circumstances of the crime. Although the prosecutor explained that she made this comment in response to a statement defense counsel made in his closing argument, her comment was not a proper response. Nevertheless, this factor weighs in favor of the State.
>
> Next we consider the curative measures undertaken. *Thornton*, 10 S.W.3d at 235. Here, the prosecutor's improper comment elicited a prompt objection by defense counsel. The trial court immediately stated to the prosecutor, "I don't know if that's quite correct, general," and a bench conference ensued. The trial judge implicitly sustained the objection by stating that the prosecutor would not "go there" again and by instructing the jury to "disregard the last words of the district attorney." The prosecutor then proceeded in a different vein. Additionally, in the jury instructions given at the close of trial, the trial court issued the following instruction:
>
> > The [D]efendant is not required to take the witness stand in his own behalf and his failure to do so cannot be considered for any purpose against him nor can any inference be drawn from such failure of the [D]efendant who did not take the stand in his own behalf.
>
> The jury is presumed to have followed this instruction. *See, e.g., State v. Shaw*, 37 S.W.3d 900, 904 (Tenn. 2001). Although an improper remark by the prosecutor made during argument may constitute reversible error despite curative instructions by the trial court, *see Judge*, 539 S.W.2d at 345, we conclude that the curative measures taken by the trial court, albeit minimal, marginally were sufficient for this factor to weigh in favor of the State.

We next examine the prosecutor's intent in making the improper comment, *Thornton*, 10 S.W.3d at 235, "although arguably the prejudicial effect to the defendant is the same regardless of the prosecutor's good or bad intent." *See Judge*, 539 S.W.2d at 346. Here, the prosecutor asserted that she made the improper comment in response to defense counsel's statement in his closing argument. She added, "And I didn't get to finish what I was saying with it. I apologize for the inference." Thus, it is clear she made her comment intentionally. Nevertheless, we hesitate to infer bad intent on the part of the prosecutor. While we reiterate that it is incumbent upon prosecutors to refrain from commenting, whatsoever, on a defendant's decision not to testify, because we find no bad intent, this factor also weighs in favor of the State.

We next consider the cumulative effect of the misconduct and any other errors evident in the record. *See Thornton*, 10 S.W.3d at 235. The only other error about which [Becton] complains is the sufficiency of the evidence, which we have determined is without merit. Accordingly, this factor weighs in favor of the State.

Finally, we consider the relative strength or weakness of the case in determining the likelihood of prejudice in the minds of the jury. *See Thornton*, 10 S.W.3d at 235; *see also Judge*, 539 S .W.2d at 346. The prejudicial impact of an improper remark on the jury is likely to be greater in a case that is "close" than it would be in a case where evidence of defendant's guilt is overwhelming. *See, e.g., Judge*, 539 S.W.2d at 346. The proof in this case is strong. The victim testified in detail to three different incidents of rape. Her account of what transpired on the night of the incident also is supported by the evidence collected from the crime scene and the testimony of the State's witnesses concerning her demeanor, injuries, and account of what happened. Thus, this factor weighs in favor of the State.

Considering all of the *Judge* factors, we hold that the record establishes beyond a reasonable doubt that the prosecutor's improper comment did not have a prejudicial effect upon the jury's verdict. Accordingly, [Becton] is not entitled to a new trial on this basis.

State v. Becton, 2013 WL 967755, at *24-25 (footnote omitted).

When a state prisoner's claim has been adjudicated on the merits in state court, as it has been here, a federal court can issue a writ only if the adjudication:

(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 for this "difficult to meet" and "highly deferential standard," which "demands that state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (internal quotation marks and citations omitted).

The Fifth Amendment to the United States Constitution, which has been made applicable to the states through the Fourteenth Amendment, bars prosecutors from commenting on a criminal defendant's decision not to testify at trial. *Griffin v. California*, 380 U.S. 609, 615 (1965). In *Griffin*, the trial judge instructed the jury that it could take into account the defendant's failure to explain or justify facts within his knowledge, and the prosecutor repeatedly commented on the defendant's failure to testify. *Id.* at 610-11. The Supreme Court reversed, holding that the Fifth Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Id.* at 615.

In *Chapman v. California*, 386 U.S. 18, 24 (1967), the Supreme Court held that *Griffin* violations are subject to harmless-error analysis, meaning that the conviction can be upheld if the State establishes that the error is harmless beyond a reasonable doubt. That standard was not satisfied in *Chapman*. There, the Supreme Court emphasized that "the state prosecutor's argument and the trial judge's instruction to the jury continuously and repeatedly impressed the jury that from the failure of petitioners to testify, to all intents and purposes, the inferences from the facts in evidence had to be drawn in favor of the State—in short, that by their silence petitioners had served as irrefutable witnesses against themselves." *Id.* at 25. "[A]bsent the constitutionally

forbidden comments, honest, fair-minded jurors might very well have brought in not-guilty verdicts." *Id.* at 25-26. Therefore, the Supreme Court held that the State had not established that the prosecutor's comments and the trial judge's instructions were harmless beyond a reasonable doubt. *Id.* at 26.

Becton cannot establish that the TCCA's decision was contrary to *Griffin* and *Chapman*. 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). The TCCA cited the correct legal rule from *Griffin* and *Chapman* and from Tennessee cases applying those decisions. *State v. Becton*, 2013 WL 967755, at *22, 23-25. This is "a run-of-the-mill state-court decision applying the correct legal rule . . . to the facts of a prisoner's case" and, therefore, it does not "fit comfortably within § 2254(d)(1)'s 'contrary to' clause." *Williams*, 529 U.S. at 406.

This conclusion is not altered by the fact that the TCCA ruled in Becton's favor, holding that "the prosecutor's challenged statements clearly constituted a comment on [Becton's] choice not to testify at trial and, thus, were highly improper." *State v. Becton*, 2013 WL 967755, at *23. Although the TCCA's holding goes well beyond the rule announced in *Griffin*, the Warden does not challenge that decision. (*See* ECF No. 35 at 9-10.) Notably, the Warden does not argue that the TCCA's decision rested on the Tennessee constitution or on Tennessee Code Annotated § 40-17-103. *See State v. Becton*, 2013 WL 967755, at *22.[2] The Supreme Court has held that, under

[2] *See also State v. Jackson*, 444 S.W.3d 554, 586-88 (Tenn. 2010) (summarizing federal and state decisions applying *Griffin*).

28 U.S.C. § 2254's "contrary to" clause, "[a] federal court may not overrule a state court for simply holding a view different from its own, when the precedent from this Court is, at best, ambiguous." *Mitchell v. Esparza*, 540 U.S. 12, 17 (2003) (per curiam). Because the TCCA's decision finding a constitutional violation "does not conflict with the reasoning or the holdings of [Supreme Court] precedent, it is not 'contrary to ... clearly established Federal law.'" *Id.*

Given the TCCA's finding of a *Griffin* violation, the Court must assess whether the TCCA's holding that the State established that the error was harmless beyond a reasonable doubt was an objectively unreasonable application of *Chapman*. 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." *Williams*, 529 U.S. at 413. The state court's application of federal law must be "objectively unreasonable" for the writ to issue. *Id.* at 409. It is not sufficient that 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).

> As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

Harrington v. Richter, 562 U.S. 86, 103 (2011).

Where, as here, the state court holds that a constitutional violation is harmless, "habeas relief is appropriate only if the [state court] applied harmless-error review in an objectively unreasonable manner." *Esparza*, 540 U.S. at 18 (internal quotation marks omitted). In evaluating the TCCA's decision on Claim 2 under 28 U.S.C. § 2254(d)(1), the relevant standard

is whether the petitioner has established that the challenged error "had [a] substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993) (internal quotation marks omitted); *see Fry v. Pliler*, 551 U.S. 112, 119-20 (2007) (applying *Brecht* to review under 28 U.S.C. § 2254(d)(1)). In holding that the constitutional error at issue in *Brecht*, which consisted of prosecutorial comments on the defendant's silence after being advised of his *Miranda* rights, did not warrant habeas relief, the Supreme Court noted that "[t]he State's references to petitioner's post-*Miranda* silence were infrequent, comprising less than two pages of the 900-page trial transcript in this case," and were cumulative of its "extensive and permissible references to [his] pre-*Miranda* silence." 507 U.S. at 639. The Supreme Court also relied on the fact that "the State's evidence of guilt was, if not overwhelming, certainly weighty." *Id.*

As a preliminary matter, Becton's primary argument, that the Tennessee Supreme Court invalidated the legal standard applied by the TCCA in his case, is irrelevant. (*See* ECF No. 9 (attaching copy of *Jackson* decision); *see also* ECF No. 14 (petition for discipline filed against the Shelby County District Attorney General for her conduct in *Jackson* case); *see also* ECF No. 37 at 21-22, 24-25 (arguing that the TCCA's decision is inconsistent with current Tennessee law).) In this case, the TCCA analyzed *Chapman* error by applying the five-factor test from *Judge v. State*, 539 S.W.2d at 344. *See State v. Becton*, 2013 WL 967755, at *23. Subsequently, in *State v. Jackson*, 444 S.W.3d at 591 n.50, the Tennessee Supreme Court held that the *Judge* test is properly used only for "an improper prosecutorial argument that does not rise to the level of a constitutional violation." In performing the *Chapman* analysis for *Griffin* error, the Tennessee Supreme Court found that "courts should consider the nature and extensiveness of the prosecutor's

argument, the curative instructions given, if any, and the strength of the evidence of guilt." *Id.* at 591.

That the Tennessee courts adopted a new standard for evaluating whether *Griffin* error is harmless on direct review has no bearing on whether the TCCA's decision in this case was an unreasonable application of *Chapman*. Ordinarily, the clearly established federal law for purposes of 28 U.S.C. § 2254(d)(1) is the law at the time of the state-court decision at issue. *Strickler v. Greene*, 565 U.S. 34, 43-44 (2011). Moreover, the Court's task is to assess whether the TCCA's decision in Becton's case "involved an unreasonable application of[] **clearly established Federal law, as determined by the Supreme Court of the United States.**" 28 U.S.C. § 2254(d)(1) (emphasis added). That the TCCA, a state court, has changed its test for assessing harmless error for non-structural constitutional violations is irrelevant to that inquiry. *Cf. Parker v. Matthews*, 567 U.S. 37, 48-49 (2012) (per curiam) (holding that Sixth Circuit "erred in consulting its own precedents, rather than those of this Court, is assessing the reasonableness of the Kentucky Supreme Court's decision. . . . [C]ircuit precedent . . . cannot form the basis for habeas relief under AEDPA."). Thus, in assessing the TCCA's decision on Claim 2, this Court will consider only whether the TCCA's decision was an unreasonable application of federal law as established by the applicable Supreme Court decisions.

Becton has not satisfied his burden of demonstrating that the TCCA's decision was an objectively unreasonable application of *Chapman*. First, as the TCCA observed, the prosecutor's remark was brief, consisting of three sentences in the 600-page trial transcript. *See State v. Becton*, 2013 WL 967755, at *24 ("Here, the prosecutor's challenged remarks were only a small portion of her closing argument, which otherwise focused on the facts and circumstances of the

crime."). Those remarks "elicited a prompt objection by defense counsel," *id.*, and "[t]he trial judge implicitly sustained the objection by stating that the prosecutor would not 'go there' again and by instructing the jury to 'disregard the last words of the district attorney,'" *id.* "The prosecutor then proceeded in a different vein." *Id.*

Second, in its *Chapman* analysis, the TCCA relied on the fact that "[t]he proof in this case is strong. . . . [The victim's] account of what transpired on the night of the incident . . . is supported by the evidence collected from the crime scene and the testimony of the State's witnesses concerning her demeanor, injuries, and account of what happened." *Id.* at *25. Just as in *Brecht*, therefore, Becton has not demonstrated that the *Griffin* error had a substantial and injurious effect or influence in determining the jury's verdict in light of the prosecutor's relatively brief remark and the strength of the evidence at trial. Therefore, the Court concludes that Becton has not established the TCCA's decision was an unreasonable application of *Chapman*.

Finally, Becton has failed to demonstrate that the TCCA's decision "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)(2). "[W]hen a federal habeas petitioner challenges the factual basis for a prior state-court decision rejecting a claim, . . . [t]he prisoner bears the burden of rebutting the state court's factual findings 'by clear and convincing evidence.'" *Burt v. Titlow*, 571 U.S. 12, 18 (2013) (quoting 28 U.S.C. § 2254(e)(1)). A state court's factual determination is not "unreasonable" merely because the federal habeas court would have reached a different conclusion. *Wood v. Allen*, 558 U.S. 290, 301 (2010); *see also Rice v. Collins*, 546 U.S. 333, 341-42 (2006) ("Reasonable 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.").

Here, Becton takes issue with the TCCA's finding that the prosecutor acted in good faith. He emphasizes that the State's misconduct was "flagrant" (ECF No. 37 at 23, 28), which he says is evidence that the remark was made in bad faith (*id.* at 26-27). Were the Court to review this factual finding *de novo*, it might well agree. [3] However, although the TCCA examined the prosecutor's motivation, *State v. Becton*, 2013 WL 967755, at *25, that does not appear to be a proper consideration under *Brecht* and its progeny. Instead, the appropriate inquiry addresses the frequency and prominence of the remarks in the context of the trial as a whole. *See supra* pp. 11-12, 13-14. Becton's analysis conflates the appropriateness of remarks that were deliberately made with the showing that they "had [a] substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 638.

Becton also argues that "the evidence in this case was circumstantial." (ECF No. 37 at 28.) Becton notes that "some of [the victim's] alleged injuries were never proven to exist by any

[3] In the context in which it was made, the prosecutor's comment was a *non sequitur*. In its closing argument, the defense argued that the victim had exaggerated the violence of the assault by noting that the various persons who encountered her shortly after the assault did not notice the bruises and other injuries she claimed to have sustained. (ECF No. 22-7 at PageID 935-36, 937-41.) The State, in its rebuttal, argued that bruising sometimes does not become apparent until a day or two after an injury. (*Id.* at PageID 967.) The prosecutor stated, over defense objection, that she did not think to ask whether additional injuries were evident "two days later." (*Id.* at PageID 967.) The challenged remark about Becton's failure to testify occurred immediately after the trial judge overruled the defense objection. (*Id.* at PageID 968.) Although the State argued at the time that the argument was a response to the defense argument (*id.* at PageID 970), the remark does not appear to be logically connected to the defense's argument. This suggests, as Becton has pointed out, that the State was looking for the opportunity to comment on his decision not to testify. However, as discussed in the text, it is unnecessary to address whether this finding by the TCCA is objectively unreasonable because the good faith or bad faith of the prosecutor are not a factor under *Chapman* and *Brecht*.

medical testimony." (*Id.*) Becton fails to address the TCCA's finding that the victim's testimony was corroborated by the evidence from the crime scene and the testimony of the State's witnesses. *State v. Becton*, 2013 WL 967755, at *25. Moreover, in holding that the evidence was sufficient to sustain Becton's convictions on Counts 4 through 6, which require a showing of bodily injury, the TCCA held that "[t]he evidence also showed that the victim suffered bodily injury," *id.* at *20, and that "[t]he evidence further established 'physical pain,' a necessary element of bodily injury, *id.* at *21. Although there was a dispute about the extent of the victim's injuries, by convicting Becton on all counts, the jury found the victim to be credible notwithstanding the defense's attempts to impeach her.

Becton is correct that the DNA evidence did not "positively prove" that he sexually assaulted the victim. (ECF No. 37 at 28.) The DNA evidence implicating Becton was not conclusive. *See State v. Becton*, 2013 WL 967755, at *16-17 (DNA from Becton's penis provided a "partial DNA profile" consistent with that of the victim and Becton). Despite the weakness of the DNA evidence, the TCCA nonetheless concluded that the evidence was sufficient to sustain Becton's convictions. *See id.* at *18-21; *see also id.* at *25 ("The proof in this case is strong."). Although the TCCA's factual findings may, in some respects, be debatable, Becton has not satisfied his burden of demonstrating that its application of *Chapman* rested on objectively unreasonable factual findings.

For all the foregoing reasons, Claim 2 is without merit and is **DISMISSED**.

B. The Alleged Judicial Bias (Claim 3)

In Claim 3, Becton argues that the trial judge exhibited unconstitutional bias. (ECF No. 1-1 at PageID 16.) Specifically, Becton complains that there were twenty-six bench conferences

in the presence of the jury (*id.* at PageID 45), that the trial judge "kept referring to the Court of Appeals" (*id.*; *see also id.* at PageID 45-46), that the trial judge refused to grant a mistrial after the prosecutor commented on Becton's failure to testify (*id.* at PageID 46, 49), and that the jury instructions were coercive (*id.* at PageID 49-53).

In his Answer, the Warden argues that Becton did not exhaust any aspect of Claim 3 in state court and, because there is no longer any way to do so, the claim is barred by procedural default. (ECF No. 23 at 37-38.) Becton does not disagree. Instead, in his Reply to Amended Answer, he has withdrawn this claim. (ECF No. 34 at 5.) Therefore, Claim 3 is without merit and is **DISMISSED**.

C. Ineffective Assistance of Counsel (Claim 1)

In Claim 1, Becton argues that his trial counsel rendered ineffective assistance, in violation of the Sixth Amendment. (ECF No. 1-1 at PageID 16, 20-33.) Specifically, Becton complains that his attorney (i) failed to file pretrial motions, including a motion to dismiss the indictment as multiplicitous (*id.* at PageID 23-25); and (ii) failed to investigate or interview witnesses, including an alibi witness and a DNA expert, failed to visit the crime scene, and failed to have the substance on the wall tested to determine whether it is blood (*id.* at PageID 25-31).

1. Sub-Claim (i) Has Been Procedurally Defaulted

In his Amended Answer, the Warden argues that sub-claim (i), counsel's failure to file pretrial motions, has been procedurally defaulted. (ECF No. 31 at 20-25.) Becton does not disagree. In his Reply to the Amended Answer, Becton has withdrawn this sub-claim. (ECF No. 34 at 4.) Therefore, sub-claim (i) is **DISMISSED**.

2. Becton is Not Entitled to Relief on Sub-Claim (ii)

In sub-claim (ii), Becton complains that his trial counsel failed to conduct a reasonable investigation by visiting the crime scene and by having the substance on the wall tested to determine whether it is blood. Becton also complains that his attorney failed to interview an alibi witness and to hire a DNA expert.

The Warden first argues that Becton's claim that his attorney failed to visit the crime scene was not exhausted in state court and is now barred by procedural default. (ECF No. 31 at 30-31.) The Court agrees. 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 petition to the state courts pursuant to 28 U.S.C. §§ 2254(b) and (c). *Pinholster*, 563 U.S. at 181. The petitioner must "fairly present" each claim to each appropriate state court. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004). If a claim has never been presented to the state courts but a state court remedy is no longer available (*e.g.*, when an applicable statute of limitations bars a claim), the claim is technically exhausted, but procedurally barred. *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991). To avoid procedural default, a habeas petitioner in Tennessee must present his federal claims to the trial court and, on appeal, to the TCCA. *Covington v. Mills*, 110 F. App'x 663, 665 (6th Cir. 2004).

To fairly present a federal claim, a prisoner must present the same facts and legal theory to the state courts as is raised in his federal habeas petition. *See Anderson v. Harless*, 459 U.S. 4, 6-7 (1982); *Picard v. Connor*, 404 U.S. 270, 276-77 (1971); *Hodges v. Colson*, 727 F.3d 517, 529 (6th Cir. 2013) ("The exhaustion doctrine requires the petitioner to present the same claim under

the same theory to the state courts before raising it on federal habeas review.") (internal quotation marks and alteration omitted). In evaluating whether a prisoner has "fairly presented" a claim to a state appellate court, the controlling document is the inmate's brief. *See Baldwin*, 541 U.S. at 32 ("[O]rdinarily a state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does so.").

Here, the only claims presented by Becton on the post-conviction appeal were that counsel failed to present an alibi witness and an expert witness. (ECF No. 22-17 at PageID 1267.) Becton is barred from filing another post-conviction petition because of Tennessee's one-year statute of limitations and its "one petition" rule. Tenn. Code Ann. §§ 40-30-102(a), (c). Because there is no longer any means of exhausting this aspect of sub-claim (ii), it is barred by procedural default.

Becton raised his attorney's failure to call his alibi witness in a post-conviction petition. (ECF No. 22-14 at PageID 1175 (failure to present an alibi defense).) At the post-conviction hearing, Becton complained that his attorney failed to interview and call someone he knew only as "Ann" or "Auntie," who he described as an alibi witness. (ECF No. 22-16 at PageID 1198-99.) Becton did not know Ann's address, but he knew that "she had stayed in the vicinity where everything supposed to had happened at." (*Id.* at PageID 1200.) He testified that "[a]ll the [defense] investigator had to do was go over there and ask anybody who was standing out. They would have pointed out where Ann stayed at." (*Id.* at PageID 1221). Becton claimed that he was able to identify Ann's house. (*Id.*) Becton indicated he informed his lawyer about his alibi witness, but counsel "just wouldn't do nothing about it. He wouldn't move on it." (*Id.* at PageID

1198; *see also id.* at PageID 1208 (counsel "wouldn't even go out there and get her, wouldn't even talk to her").) Becton claims that his attorney said that Ann "wouldn't be a good witness." (*Id.*)

According to Becton, Ann was smoking crack with him and the victim the afternoon of the rapes. (*Id.* at PageID 1199, 1207-08, 1214.) Becton belies that, if counsel had interviewed Ann, the jury would have learned that the victim was a crack user. (*Id.* at PageID 1201.) Becton conceded that Ann was not present when he had (what he contends was consensual) sex with the victim. (*Id.* at PageID 1215.)[4] Although he gave a voluntary statement to the police, Becton admitted that he said nothing about Ann to the police. (ECF No. 22-14 at PageID 1212-13.) Ann did not testify at the post-conviction hearing. (*Id.* at PageID 1217.)

Becton's attorney, Lawrence Russell White, testified that "I have a vague recollection of him telling me about somebody that they had smoked pot [with], but the thing about it was there was no witness that was there when he had consensual sex." (*Id.* at PageID 1228.) White did not believe that Ann would have been allowed to testify that the victim was known as "a prostitute and a street whore." (*Id.*) Ann might have been able to testify that the victim used drugs, but the victim admitted that in her testimony. (*Id.* at PageID 1229.) Ultimately, White concluded that "this person would not do any good because they were not there to see what happened" when the events at issue occurred. (*Id.*; *see also id.* at PageID 1231 ("[W]e didn't have an alibi witness. We didn't have a witness that could testify as to what happened that night. That was in there that could say, yeah, I was smoking crack in the room while they were having sex. Or I was smoking crack in the room while he was beating her or raping her.")

[4] The defense presented no proof at trial and, consequently, made no argument that Becton and the victim had consensual sex. *See State v. Becton*, 2013 WL 967755, at *17.

Becton also raised his claim that counsel failed to hire DNA and sexual-assault experts in a post-conviction petition. (ECF No. 22-14 at PageID 1175, 1176.) At the post-conviction hearing, Becton testified that he wanted an expert witness to testify about the injuries the victim claimed to have incurred but his attorney relied on the State's experts. (ECF No. 22-16 at PageID 1204-05.) Consequently, one witness allegedly explained the absence of bruises on the victim by testifying that "black folks don't bruise." (*Id.* at PageID 1205.) Becton also complained that DNA testing had not been performed on his clothing, the knife, and the crime scene. (*Id.*)

White testified that the case boiled down to "his word versus her word and circumstantial evidence, and I felt the circumstantial evidence was weak." (*Id.* at PageID 1232.) White attempted to impeach the victim with inconsistencies between her trial testimony and her prior statements. (*Id.* at PageID 1234-36, 1239-41, 1242-43.) The DNA evidence presented by the State was largely favorable to Becton. White recalled that "the DNA evidence excluded [Becton] from the panties [the victim] was wearing that night. And I pointed that out to the jury." (*Id.* at PageID 1233.) The most incriminating DNA evidence from the penile swab "could have been thousands of people in our community that made that combination." (*Id.* at PageID 1232.) Defense counsel also made the point that none of the items found in the house had been tested. (*Id.* at PageID 1241.) The defense "got all that in front of the jury, all the inconsistencies" between the victim's trial testimony, her previous statements, and the physical evidence. (*Id.* at PageID 1232.)

The post-conviction court denied relief. (*Id.* at PageID 1252-60.) Becton raised these parts of sub-claim (ii) in his brief to the TCCA on the post-conviction appeal. (ECF No. 22-17 at PageID 1267, 1272-76.) The TCCA affirmed. *Becton v. State*, 2015 WL 3867758, at *4.

Becton's claim that his attorney rendered ineffective assistance, in violation of the Sixth Amendment, is controlled by the standards stated in *Strickland v. Washington*, 466 U.S. 668 (1984), which require a showing that "counsel's performance was deficient" and that "the deficient performance prejudiced the defense." *Id.* at 687. 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. "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Richter*, 562 U.S. at 105 (quoting *Strickland*, 466 U.S. at 690).

To demonstrate prejudice, a prisoner must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding. Counsel's errors must be so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Richter*, 562 U.S. at 104 (internal quotation marks and citation omitted); *see also id.* at 111-12 ("In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. . . . The likelihood of a different result must be substantial, not just

conceivable.") (citations omitted); *Wong v. Belmontes*, 558 U.S. 15, 27 (2009) (per curiam) ("But *Strickland* does not require the State to 'rule out' [a more 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 to be accorded a state-court decision under *Strickland* is magnified when reviewing an ineffective assistance claim under 28 U.S.C. § 2254(d):

> 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., [111,] 123 [(2009)]. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. 556 U.S., at 123. 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.

Richter, 562 U.S. at 105 (parallel citations omitted).

Becton cannot establish that the TCCA's decision was contrary to *Strickland*. The TCCA cited *Strickland*, Tennessee decisions applying *Strickland*, and a Tennessee decision that predates, and is not inconsistent with, *Strickland*. *Becton v. State*, 2015 WL 3867758, at *3-4. This is a run-of-the-mill decision applying the correct legal rule to the facts of a prisoner's case and, therefore, the "contrary to" clause of § 2254(d)(1) is inapplicable.

Becton also cannot demonstrate that the TCCA's decision was an unreasonable application of *Strickland* or that it was based on an objectively unreasonable factual finding. In affirming the post-conviction court's denial of relief, the TCCA reasoned as follows:

> In our view, the record supports the post-conviction court's denial of relief. [Becton] failed to present either "Ann" or an expert witness at the evidentiary

> hearing. As such, we cannot speculate what either witness might have testified to at trial. *See Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990) ("When a petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing."). [Becton] encourages this court to depart from this firmly-held rule, arguing that trial counsel's failure to procure the requested witnesses should not be held against [him]. This argument fails for two reasons. First, that trial counsel did not present the testimony of witnesses requested by [Becton] at trial does nothing to change the fact that [Becton] failed to present the testimony of those witnesses at the post-conviction evidentiary hearing, as required by *Black*. Second, trial counsel's reasoning for not calling these witnesses—that "Ann" would not have provided [Becton] with an alibi and that the DNA evidence presented by the State was already sparse—was a "reasonably based trial strategy" that we will not "second-guess." *See Adkins* [*v. State*], 911 S.W.2d [334,] 347 [(Tenn. Crim. App. 1994)]. As such, we hold [Becton] has failed to prove by clear and convincing evidence that trial counsel's representation was deficient or prejudicial.

Becton v. State, 2015 WL 3867758, at *4.

Becton has not demonstrated that the TCCA's decision was an objectively unreasonable application of *Strickland*. Trial counsel decided not to interview or call "Ann" because she had no personal knowledge about whether Becton raped the victim and her testimony about the victim's character would have been inadmissible or was cumulative to evidence in the record. Counsel did not present expert testimony because the State's testimony was not significantly probative of guilt. "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . ." *Strickland*, 466 U.S. at 690. Becton does not argue that his attorney overlooked any relevant fact or that he was unfamiliar with the law.

Becton also has not established that the TCCA's decision was based on an objectively unreasonable factual determination. The TCCA found that Becton could not show deficient performance or prejudice because neither "Ann" nor any expert witness testified at the post-

conviction hearing. Becton does not dispute that fact. The TCCA's conclusion that, in the absence of such testimony, it was in no position to assess either prong of the *Strickland* standard is not objectively unreasonable.

Becton argues, at length, that it is unfair to require indigent criminal defendants to shoulder the expense of hiring expert witnesses. (ECF No. 37 at 7-12.) However, Becton has not explained how this alleged unfairness should affect the Court's review of his claim. The post-conviction court and the TCCA adjudicated these sub-claims on the merits. *Richter*, 562 U.S. at 99. Therefore,

> review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. Section 2254(d)(1) refers, in the past tense, to a state-court adjudication that "resulted in" a decision that was contrary to, or "involved" an unreasonable application of, established law. This backward-looking language requires an examination of the state-court decision at the time it was made. It follows that the record under review is limited to the record in existence at that same time[,] *i.e.*, the record before the state court.

Pinholster, 563 U.S. at 181-82.

The Sixth Circuit Court of Appeals has construed *Pinholster* as prohibiting district courts from holding evidentiary hearings on claims that have been adjudicated on the merits in state court. *Ballinger v. Prelesnik*, 709 F.3d 558, 561 (6th Cir. 2013). This rule applies even where the state-court record is deficient through no fault of the prisoner. The Court of Appeals explained that, "[w]hile allowing a petitioner to supplement an otherwise sparse trial court record may be appealing, especially where he diligently sought to do so in state court, the plain language of *Pinholster* and *Harrington* precludes it." *Ballinger*, 709 F.3d at 562. The Court of Appeals cited with approval a decision by the First Circuit, which "rejected the petitioner's claim that the state court's decision was not on the merits because he had not received a full and fair evidentiary

hearing." *Id.* (citing *Atkins v. Clarke,* 642 F.3d 47, 49 (1st Cir. 2011) (internal quotation marks omitted). The Sixth Circuit also observed that its previous decision in *Brown v. Smith,* 551 F.3d 424, 428-29 (6th Cir. 2008), which held that a state-court adjudication was not "on the merits" because a document relevant to the prisoner's claim was not presented to the state courts, "is no longer the law." *Ballinger*, 709 F.3d at 561-62.

There is a limited class of cases in which deficiencies in state procedures undermine the validity of the state-court decision. In *Panetti v. Quarterman,* 551 U.S. 930, 948 (2007), the Supreme Court held that "no deference [was] due" to a state court's adjudication of a prisoner's claim that he was not competent to be executed because "[t]he state court's failure to provide the procedures mandated by *Ford* [*v. Wainwright*, 477 U.S. 399 (1986),] constituted an unreasonable application of clearly established federal law as determined by this Court." The Supreme Court concluded that, "[w]hen a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in § 2254(d)(1) is satisfied. A federal court must then resolve the claim without the deference AEDPA otherwise requires." *Panetti*, 551 U.S. at 948.

The *Panetti* exception to the rule announced in *Pinholster* and *Richter* is narrow. In *Loza v. Mitchell,* 766 F.3d 466, 494 (6th Cir. 2014), the petitioner argued that his claim that he was selectively prosecuted for capital offenses was not adjudicated on the merits in state court because "he tried to develop his claim in state court, but the state court denied him an evidentiary hearing, which . . . violated his due process rights." The Sixth Circuit rejected that argument, explaining that

> Loza's case is distinguishable from *Panetti.* Loza does not demonstrate that [the] Ohio Court of Appeals's decision that he did not satisfy the requirements for an

> evidentiary hearing on a selective prosecution claim was contrary to or an unreasonable application of [*United States v.*] *Armstrong*[, 517 U.S. 456 (1996)]. There is no indication that the court's ruling violated Loza's rights.

766 F.3d at 494-95.

In order to apply *de novo* review because of deficiencies in the state-court procedures, the Court must first conclude that Becton had a constitutional right to appointment of an expert in his post-conviction proceeding. However, there is no clearly established federal law that would require Tennessee to fund expert services for post-conviction petitioners. A federal court cannot use a habeas proceeding as a vehicle to announce a new rule of constitutional criminal procedure. *Teague v. Lane,* 489 U.S. 288, 316 (1989).

Becton also has no valid argument that his post-conviction counsel rendered ineffective assistance by failing adequately to present sub-claim (ii) to the state courts. "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 (citations omitted). The Supreme Court's decision in *Martinez v. Ryan*, 566 U.S. 1 (2012), which provides a means for habeas petitioners to avoid a procedural default that was caused by the ineffective assistance of counsel, has no bearing on this case. *Martinez* is inapplicable because Becton did not procedurally default his claim that trial counsel failed to hire expert witnesses or to call "Ann" at trial. *Martinez* does not apply to claims that were raised, but not properly litigated, by post-conviction counsel because those claims have not been procedurally defaulted. *West v. Carpenter*, 790 F.3d 693, 699 (6th Cir. 2015); *Dixon v. Houk*, 737 F.3d 1003, 1012 & n.2 (6th Cir. 2013); *Moore v. Mitchell*, 708 F.3d 760, 784-85 (6th Cir. 2013). Because these aspects of sub-claim (ii) were exhausted in state court, *Martinez* is inapplicable. Therefore,

Becton has not satisfied the stringent standards for overturning a state-court decision on the merits of the exhausted portions of sub-claim (ii).

For all the foregoing reasons, Claim 1 is without merit and is **DISMISSED.**

D. Cumulative Error (Claim 4)

In Claim 4, Becton argues that he is entitled to habeas relief due to cumulative errors that occurred during his trial, including the ineffective assistance of counsel, prosecutorial misconduct, and judicial bias issues presented in Claims 1, 2, and 3. (ECF No. 1-1 at PageID 53-55.) In his Answer, the Warden argues that the doctrine of cumulative error has not been recognized in habeas cases. (ECF No. 23 at 28.) The Court agrees. Cumulative error is not a viable constitutional claim under 28 U.S.C. § 2254. *Lorraine v. Coyle*, 291 F.3d 416, 447 (6th Cir. 2002) ("The Supreme Court has not held that distinct constitutional claims can be cumulated to grant habeas relief."), *amended on other grounds*, 377 F.3d 459 (6th Cir. 2002); *see also Gillard v. Mitchell*, 445 F.3d 883, 898 (6th Cir. 2006) (same); *Moore v. Parker*, 425 F.3d 250, 256 (6th Cir. 2005) (same). In addition, the Court has rejected the substantive claims on the merits or as barred by procedural default.

Claim 4 is without merit and is **DISMISSED.**

* * * *

Because every claim asserted by Becton is without merit, the Court **DENIES** the § 2254 Petition. The § 2254 Petition is **DISMISSED WITH PREJUDICE.** Judgment shall be entered for Respondent.

III. APPEAL 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); *Bradley v. Birkett*, 156 F. App'x 771, 772 (6th Cir. 2005). The Court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to a § 2254 petitioner. Rule 11, § 2254 Rules. 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 (internal quotation marks omitted); *see also Henley v. Bell*, 308 F. App'x 989, 990 (6th Cir. 2009) (per curiam) (same). 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). Courts should not issue a COA as a matter of course. *Bradley*, 156 F. App'x at 773.

In this case, there can be no question that the § 2254 Petition is meritless for the reasons previously stated. Because any appeal by Petitioner on the issues raised in his § 2254 Petition does not deserve attention, the Court **DENIES** a certificate of appealability.

Rule 24(a)(1) of the Federal Rules of Appellate Procedure provides that a party seeking pauper status on appeal must first file a motion in the district court, along with a supporting

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