2020 WL 4875315
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United States Court of Appeals, Sixth Circuit.

Jerome Sidney **BARRETT**, Petitioner-Appellant,

v.

Mike PARRIS, Warden, Defendant-Appellee.

No. 20-5202
FILED July 20, 2020

Attorneys and Law Firms

Jerome Sidney **Barrett**, Wartburg, TN, pro se.

Richard Davison Douglas, Assistant Attorney General, Office Of The Attorney General, Nashville, TN, for Defendant-Appellee.

Before: SILER, Circuit Judge.

ORDER

***1** Jerome Sidney **Barrett**, a pro se Tennessee prisoner, appeals the judgment of the district court denying his 28 U.S.C. § 2254 petition for a writ of habeas corpus. **Barrett** has filed an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b)(1).

In 2009, **Barrett** was indicted on charges of first-degree murder and felony murder in the perpetration of larceny in connection with the 1975 death of a nine-year-old, who disappeared after going to deliver Girl Scout cookies to a neighbor across the street. *State v.* ***Barrett***, No. M2009-02636-CCA-R3-CD, 2012 WL 2870571, at *1 (Tenn. Crim. App. July 13, 2012). The victim was found in a neighbor's garage more than a month after she disappeared. *Id.* at *2. Although biological evidence was collected, DNA testing was not available in 1975. *Id.* at *6. A DNA profile was developed in 1992. *Id.* at *11. **Barrett** was eventually investigated as a suspect and police obtained a warrant for his DNA in 2007. *Id.* at *15. After **Barrett's** DNA matched a profile developed from the victim's blouse, he was arrested and indicted. *Id.* The evidence against **Barrett** at trial consisted of DNA and the testimony of two individuals—Sheldon Anter and Andrew Napper—who had been incarcerated with **Barrett** while he was awaiting trial and who testified that **Barrett** told them he killed the victim. *Id.*

at *12, *14. A jury convicted **Barrett** of the lesserincluded offense of second-degree murder for both the first-degree murder and felony-murder charges. *Id.* at *25. The trial court sentenced **Barrett** to forty-four years of imprisonment for each conviction, merged the convictions, and ordered that the forty-four-year sentence be served consecutively to a life sentence that had been imposed in a prior criminal case. *Id.*

Barrett appealed, challenging the sufficiency of the evidence against him; the denial of a motion to suppress his DNA sample; the denial of his motion to dismiss the indictment on the basis that the delay between the offense and the indictment violated due process; the trial court's admission of testimony of "prior bad acts"; the trial court's permitting the State to exceed the scope of cross-examination; the trial court's permitting a medical examiner to testify as an expert in DNA analysis; the sentence as excessive; and the trial court's imposition of his sentence to run consecutively to the life sentence for a previous conviction. The Tennessee Court of Criminal Appeals found no error and affirmed. *Id.* at *46. The Tennessee Supreme Court denied **Barrett's** application for permission to appeal in December 2012. 12-12-12

Barrett filed a pro se post-conviction petition in the trial court in November 2013. Subsequently appointed counsel filed an amended petition raising numerous grounds for relief. The trial court denied the motion. **Barrett** appealed the denial of only three claims: trial counsel was ineffective for failing to (a) call an alibi witness, (b) call a DNA expert to testify on behalf of the defense, and (c) timely request independent DNA testing. ***Barrett*** *v. State*, No. M2015-01161-CCA-R3-PC, 2016 WL 4410649, at *2 (Tenn. Crim. App. Aug. 18, 2016). The Tennessee Court of Criminal Appeals affirmed. The Tennessee Supreme Court denied **Barrett's** application for permission to appeal on December 14, 2016.

***2 Barrett** timely filed his habeas petition in January 2017 and an amended petition approximately two weeks later. The district court construed the pleadings as raising ten total claims, some with numerous sub-claims: (1) the indictment was not issued by a grand jury with a foreman; (2) the trial court erred in eighteen ways relating to the denial of certain motions, the admission and exclusion of evidence and testimony, jury instructions, and sentencing; (3) the State committed prosecutorial misconduct; (4) insufficient evidence supported **Barrett's** convictions; (5) trial counsel was ineffective in fourteen ways; (6) the Tennessee Supreme Court erred on direct appeal by reversing its decision to allow a discretionary appeal; (7) the post-conviction trial court erred in eleven ways; (8) post-conviction counsel was ineffective at the initial-review stage in three ways; (9) post-conviction counsel was ineffective on appeal in three ways; and (10) the Tennessee Court of Criminal Appeals erred on post-

conviction appeal by failing to address **Barrett's** claim that the trial court erroneously admitted Anter's testimony.

In a detailed and thorough opinion, the district court concluded that a majority of **Barrett's** claims were either non-cognizable on habeas review or were procedurally defaulted. Further, the district court concluded that **Barrett** had not demonstrated cause and prejudice to excuse his default. The district court reviewed the merits of the remaining claims but concluded that the state court's adjudication of them was not unreasonable or contrary to clearly established federal law. Accordingly, the district court dismissed **Barrett's** petition and declined to issue a COA.

To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). He may do so by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Where the district court denies an issue on procedural grounds without evaluating the merits of the underlying constitutional claim, courts should grant a COA only if two requirements are satisfied: first, the court must determine that reasonable jurists would find the district court's procedural assessment debatable or wrong; and, second, the court must determine that reasonable jurists would find it debatable or obvious that the petition states a valid underlying constitutional claim. *See Slack*, 529 U.S. at 484-85. "[A] COA does not require a showing that the appeal will succeed," *Miller-El*, 537 U.S. at 337; it is sufficient for a petitioner to demonstrate that "the issues presented are adequate to deserve encouragement to proceed further." *Id.* at 327 (citing *Slack*, 529 U.S. at 484).

I. Non-Cognizable Claims

In its opinion, the district court first determined that a number of **Barrett's** claims were not cognizable on habeas review. In particular, it concluded that six of **Barrett's** claims of trial-court error were not cognizable: Claims 2.F, 2.G, 2.I (as it related to the testimony of Anter), 2.J, 2.N, and 2.O. Reasonable jurists would not debate this conclusion.

In Claim 2.F, **Barrett** alleged that the trial court erred by denying his motion to suppress his DNA sample and any test results from that sample. However, federal habeas relief is precluded when a petitioner had a full and fair opportunity to litigate a Fourth Amendment claim in state court proceedings. *Stone v. Powell*, 428 U.S. 465, 494 (1976). A Fourth Amendment claim is barred by *Stone* unless "either the state provided no procedure by which the prisoner could raise his Fourth Amendment claim, or the prisoner was foreclosed from using that procedure." *Good v. Berghuis*, 729 F.3d 636, 639

(6th Cir. 2013) (quoting *Willett v. Lockhart*, 37 F.3d 1265, 1273 (8th Cir. 1994)).

Barrett could not establish that he was denied an opportunity to challenge the validity of the search warrant for his DNA. He challenged the warrant in a motion to suppress, the trial court held a hearing on the motion and denied it, and the Tennessee Court of Criminal Appeals affirmed that denial. Because **Barrett** had an available avenue to present his Fourth Amendment claim to the Tennessee courts, he was afforded a full and fair opportunity to litigate his claim and it does not deserve encouragement to proceed further.

***3** In the other non-cognizable claims of trial court error, **Barrett** asserted that the trial court erred by: allowing the medical examiner to testify as a DNA expert for the prosecution (Claim 2.G); allowing the testimony of Anter, a "jailhouse liar" (Claim 2.I); admitting Anter's testimony that **Barrett** stated that he "had killed before" (Claim 2.J); allowing the prosecution to ask a defense witness if he was "arrested, suspended, and had resigned from the police force in 1978" (Claim 2.N); and allowing the prosecution to impeach a defense witness with a prior misdemeanor conviction (Claim 2.O). **Barrett** raised these claims on direct appeal, challenging the trial court's application of the Tennessee Rules of Evidence, and the Tennessee Court of Criminal Appeals analyzed the claims under state law and rejected them.

As the district court explained, state court evidentiary rulings are generally not cognizable on habeas review. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). "A state court evidentiary ruling will be reviewed by a federal habeas court only if it were so fundamentally unfair as to violate the petitioner's due process rights." *Coleman v. Mitchell*, 244 F.3d 533, 542 (6th Cir. 2001) (emphasis omitted) (citing *Seymour v. Walker*, 224 F.3d 542, 552 (6th Cir. 2000)). **Barrett** did not establish that the alleged errors rose to this level, however. These claims do not deserve encouragement to proceed further.

The district court next concluded that **Barrett's** sixth claim, which alleged that the Tennessee Supreme Court erred on direct appeal by denying him permission to appeal, was not cognizable on habeas review. **Barrett** claimed that the court was "intimidated" into denying his appeal after a story about his case appeared on local television. Reasonable jurists would not debate the district court's denial of this claim, as it is a claim arising under state law. *See Estelle*, 502 U.S. at 67.

The district court also concluded that **Barrett's** seventh claim, which alleged that the post-conviction trial court erred in eleven ways, and his tenth claim, which alleged that the Tennessee Court of Criminal Appeals erred in addressing one of his claims on post-conviction, were not cognizable on habeas review. Reasonable jurists would not debate this conclusion. "[T]he Sixth Circuit has

consistently held that errors in post-conviction proceedings are outside the scope of federal habeas corpus review." *Cress v. Palmer*, 484 F.3d 844, 853 (6th Cir. 2007). These claims do not deserve encouragement to proceed further.

Barrett's eighth and ninth claims alleged the ineffective assistance of post-conviction counsel during trial court proceedings (Claims 8.A, 8.B, and 8.C) and on appeal (Claims 9.A, 9.B, and 9.C). Reasonable jurists would not debate the district court's determination that these were not cognizable as independent habeas claims, *see* 28 U.S.C. § 2254(i), but could be considered as cause to excuse procedural default of ineffective-assistance-of-trial-counsel claims. *See Martinez v. Ryan*, 566 U.S. 1, 17 (2012). Those procedural-default rulings will be discussed below.

II. Cognizable Claims Decided on the Merits

The district court found that five of **Barrett's** claims were cognizable in a § 2254 proceeding and were not procedurally defaulted: the trial court's denial of the motion to dismiss for excessive pre-indictment delay (Claim 2.A); the trial court's imposition of an improper consecutive sentence above the maximum (Claim 2.R); and the ineffective assistance of trial counsel for retaining DNA expert Ronald Acklen (Claim 5.D), failing to have a competent DNA expert conduct an independent DNA test (Claim 5.F), and advising **Barrett** not to call any alibi witnesses (Claim 5.L). After consideration, the district court determined that these claims did not warrant habeas relief.

***4** Reasonable jurists would not debate the district court's conclusion that the state court's resolution of **Barrett's** pre-indictment delay claim was not contrary to clearly established federal law. A delay in charging a defendant does not necessarily deprive him of due process, even if his defense is somewhat prejudiced by the lapse in time. *United States v. Lovasco*, 431 U.S. 783, 796 (1977). Rather, dismissal for pre-indictment delay is warranted only when the defendant shows both substantial prejudice to his right to a fair trial and that the delay was intentionally caused by the government to gain a tactical advantage. *See United States v. Brown*, 667 F.2d 566, 568 (6th Cir. 1982) (per curiam) (citing *United States v. Marion*, 404 U.S. 307, 325 (1971)).

Even assuming that **Barrett** was prejudiced by the delay in charging him, he could not establish that the State intentionally caused the delay. Rather, the investigation of the victim's murder took more than three decades because the DNA evidence in this case was developed over the years, as DNA-testing technology evolved, and the evidence was not available at the time of the victim's murder. A DNA profile was not even available until the 1990s, and the DNA test identifying **Barrett** did not take place until 2007. Because **Barrett's** due process rights were not violated by the delay, this claim does not deserve encouragement to proceed further.

Reasonable jurists would not debate the district court's denial of **Barrett's** claim that the imposition of consecutive sentences was excessive (Claim 2.R). On direct appeal, **Barrett** argued that his forty-four-year sentence was excessively long and that it should not have been ordered to be served consecutively to the life sentence he was already serving. He also argued that he should have not been sentenced pursuant to the law that applied to crimes committed before July 1, 1982, as mandated by Tennessee Code Annotated § 40-35-117, but should have been sentenced under the law that applied at the time of trial. The state appellate court concluded that **Barrett's** sentence was not improper and affirmed. ***Barrett***, 2012 WL 2870571, at *43-44.

First, the determination by the Tennessee Court of Criminal Appeals as to the propriety of **Barrett's** sentence under state law is binding on a federal court sitting in habeas review. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005). Second, there is no constitutional right to strict proportionality between a crime and its punishment. *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991). A sentence that falls within the maximum penalty authorized by statute—as **Barrett's** did here—generally does not constitute "cruel and unusual" or excessive punishment. *Austin v. Jackson*, 213 F.3d 298, 302 (6th Cir. 2000) (quoting *United States v. Organek*, 65 F.3d 60, 62 (6th Cir. 1995)). Finally, the discretion left to state court judges to determine whether a sentence should be served consecutively or concurrently is not unconstitutional. *See Oregon v. Ice*, 555 U.S. 160, 163-64 (2009).

Reasonable jurists would also not debate the district court's denial of **Barrett's** ineffective assistance of counsel claims. To establish ineffective assistance of counsel, a defendant must show deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The performance inquiry requires the defendant to "show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. The prejudice inquiry requires the defendant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. In habeas proceedings, the district court must apply a doubly deferential standard of review: "[T]he question [under § 2254(d)] is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

***5** Regarding the claims alleging ineffective assistance in connection with DNA experts, **Barrett** argued that counsel had known about the DNA evidence for eleven months before he moved to continue the trial to allow time to obtain independent testing; **Barrett** asserts that, had the motion been filed sooner, it might have been granted. **Barrett** also faults counsel for retaining Ronald Acklen as a DNA expert. Prior to trial, counsel consulted with Acklen, who

concurred with the conclusions of the state's DNA expert. As a result, Acklen was not called to testify. Acklen's opinion also informed counsel's decision regarding independent testing; at the post-conviction hearing, counsel testified that, because of Acklen's opinion, counsel decided that independent testing was unnecessary. ***Barrett***, 2016 WL 4410649, at *4. Counsel testified that he later filed a motion for independent testing because **Barrett** wanted it done. In his habeas petition, **Barrett** claims that, had Acklen been sufficiently competent, he would have disagreed with the state's expert and identified discrepancies or deficiencies in the state's testing.

These claims do not deserve encouragement to proceed further because **Barrett** failed to establish that he was prejudiced by counsel's actions. Primarily, **Barrett** provided no support during post-conviction proceedings that independent DNA testing would have produced results different from those produced by the State. **Barrett** also failed to establish that an expert was available to testify that the State's DNA results were flawed or misleading. Absent such evidence, he cannot establish that the result of the trial would have been different.

In his third exhausted ineffective-assistance-of-trial-counsel claim, **Barrett** argued that counsel was deficient for failing to present witnesses to support his alibi that he was in Chicago on the day that the victim went missing. In particular, **Barrett** argued that counsel should have called an individual named "Cicero," who was the only person who remembered **Barrett** being in Chicago that day. ***Barrett***, 2016 WL 4410649, at *2. Trial counsel testified that he discussed with **Barrett** the fact that he believed that Cicero would not be an effective witness, as he suffered from serious medical issues and had previously been incarcerated; **Barrett** acknowledged that, at the time, he agreed with counsel's judgment but now believed that "even a little bit might have been better than none." *Id.* Like his claims regarding an independent DNA expert, however, **Barrett** failed to provide support for his belief that Cicero would have impacted the outcome of trial by providing an affidavit from Cicero as to what testimony he could have provided. *See Tinsley v. Million*, 399 F.3d 796, 810 (6th Cir. 2005). Accordingly, he cannot establish prejudice in connection with counsel's failure to call Cicero as a witness—a decision with which **Barrett** initially agreed. This claim also does not deserve encouragement to proceed further.

III. Procedurally Defaulted Claims

The district court concluded that the remainder of **Barrett's** claims—the defective-indictment claim; the twelve remaining allegations of trial-court error; a prosecutorial-misconduct claim; an insufficient-evidence claim; and the eleven remaining allegations of the ineffective assistance of counsel—were

procedurally defaulted. Further, the district court determined that **Barrett** did not establish cause and prejudice to excuse the default.

If a petitioner fails to fully exhaust a claim by invoking one complete round of the state's established appellate review process, and no state remedy remains available, that claim is procedurally defaulted. *O'Sullivan v. Boerckel*, 526 U.S. 838, 847-48 (1999). "[F]ederal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). A habeas petitioner carries the burden of demonstrating cause and prejudice to excuse his procedurally defaulted claims. *Lucas v. O'Dea*, 179 F.3d 412, 418 (6th Cir. 1999).

***6** In Tennessee, a prisoner challenging a conviction may file only one post-conviction petition attacking a single judgment. Tenn. Code Ann. § 40-30-102(c). A prisoner may file a motion to reopen his first post-conviction petition only if his claim stems from a newly established constitutional right that applies retroactively, relies on scientific evidence showing that he is actually innocent, or involves a sentence enhanced because of a previous conviction that has been declared invalid. *Fletcher v. Tennessee*, 951 S.W.2d 378, 380-81 (Tenn. 1997) (citing Tenn. Code Ann. § 40-30-217(a)).

Reasonable jurists would not debate the district court's denial of **Barrett's** first claim, which alleged that the indictment was defective because it was not issued by a grand jury with a foreman. **Barrett** did not raise this claim on direct appeal and, though he raised it in his post-conviction petition, he did not present it on post-conviction appeal. Because the claim does not rely on a new constitutional right, scientific evidence, or an enhanced sentence, no state court remedies remain. Accordingly, the claim is procedurally defaulted. *See O'Sullivan*, 526 U.S. at 848.

Barrett asserts that the failure to present the claim on post-conviction appeal was due to the ineffective assistance of post-conviction counsel. The ineffective assistance of post-conviction counsel may establish cause to excuse default of a petitioner's claim of ineffective assistance of trial counsel where a state procedural law prohibits defendants from raising ineffective assistance of trial counsel claims on direct appeal. *Martinez*, 566 U.S. at 17. This exception applies in Tennessee cases. *Sutton v. Carpenter*, 745 F.3d 787, 795-96 (6th Cir. 2014). The exception, however, "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," "including appeals from initial-review collateral proceedings." *Martinez*, 566 U.S. at 16. Because **Barrett** asserts that post-

conviction counsel was ineffective for failing to raise this issue on appeal, and not on initial review, it cannot establish cause to excuse the default.

The district court also determined that **Barrett's** twelve remaining claims of trial-court error were defaulted. These errors involved pre-trial media coverage (Claims 2.B, 2.C, and 2.H), pre-trial motions (Claims 2.D and 2.E), the admission of evidence (Claims, 2.I, 2.K, 2.L, and 2.M), and jury instructions (Claims 2.P and 2.Q). Reasonable jurists would not debate the district court's procedural ruling because these claims were either not raised on direct appeal or were not appealed to the Tennessee Court of Criminal Appeals following the denial of **Barrett's** post-conviction petition. These claims are defaulted because **Barrett** may no longer present them to the state court. Further, **Barrett** did not assert cause to excuse the default.

In his third claim, **Barrett** asserted that the prosecutor committed misconduct during closing arguments. **Barrett** presented several claims of prosecutorial misconduct in his post-conviction petition but did not raise any of them on appeal from the denial of that petition. Reasonable jurists would not debate the district court's conclusion that this claim was defaulted and that **Barrett** did not establish cause for the default.

In his fourth claim, **Barrett** alleged that insufficient evidence supported his convictions because there was no evidence of a felony or premeditated murder. The district court concluded that this claim was defaulted because **Barrett** did not present this claim under the same theory in state court, where he contended that the evidence did not establish his identity as the perpetrator. *See Hicks v. Straub*, 377 F.3d 538, 552-53 (6th Cir. 2004). Reasonable jurists would not debate the district court's procedural ruling.

***7 Barrett's** remaining eleven allegations of ineffective assistance of trial counsel were presented in **Barrett's** initial post-conviction petition but were not appealed to the Tennessee Court of Criminal Appeals. Although some were raised in his application for permission to appeal to the Tennessee Supreme Court, he did not give the state courts "one full opportunity" to resolve the claims. *O'Sullivan*, 526 U.S. at 845. Because these claims do not present grounds based on an exception to Tennessee's rule for reopening a post-conviction petition, **Barrett** has no state remedy remaining and the claims are considered defaulted.

In support of cause for his default of these claims, **Barrett** asserted the ineffective assistance of post-conviction counsel. As explained above, however, post-conviction counsel raised these eleven ineffective-assistance-of-trial-counsel claims in his initial post-conviction petition, but did not appeal the denial of the eleven claims to the Tennessee Court of Criminal Appeals. As previously noted, the *Martinez* exception that allows the ineffective assistance

of post-conviction counsel to be considered as cause to excuse default of a petitioner's claim of ineffective assistance of trial counsel "does not extend to ... appeals from initial-review collateral proceedings." *Martinez*, 566 U.S. at 16. Accordingly, reasonable jurists would not debate the district court's procedural ruling relating to these claims.

IV. Requests for Discovery and an Evidentiary Hearing

Barrett's habeas petition also requested discovery and an evidentiary hearing; the district court denied both. Reasonable jurists would not debate this decision. **Barrett** requested discovery of sentence-reduction agreements that Anter and Napper made with the prosecution in exchange for their testimony. However, **Barrett** provided no support that these agreements existed and did not provide evidence that either Anter or Napper received a sentence reduction following his trial. Bald assertions and conclusory allegations do not provide sufficient grounds to warrant discovery. *Stanford v. Parker*, 266 F.3d 442, 460 (6th Cir. 2001).

Likewise, **Barrett** failed to make a threshold showing of how and why an evidentiary hearing could change the district court's resolution of his petition. Generally, "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim." 28 U.S.C. § 2254(e)(2). **Barrett** asserts that the fact-finding procedure in the state courts was not adequate because the state failed to turn over any information that Anter and Napper had sentence-reduction agreements. As with his request for discovery, however, he has no support for his claim that such agreements existed. Reasonable jurists would not debate the district court's decision to deny an evidentiary hearing under these circumstances.

For the foregoing reasons, we **DENY Barrett's** application for a COA.

MIS characterization of the issue

All Citations

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JEROME SIDNEY BARRETT

Petitioner/Appellant,

v.

MIKE PARRIS, Warden,

Respondent/Appellant.

CA NO. 20-5202

DC NO. 3:17-CV-00062

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

THE HONORABLE CHIEF JUDGE WAVERLY CRENSHAW

MOTION FOR CERTIFICATE OF APPEALABILITY

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MOTION FOR CERTIFICATE OF APPEALABILITY

INTRODUCTION

NOW COMES Jerome Sidney Barrett, a Tennessee Department of Correction inmate, and respectfully moves this Court to issue a Certificate of Appealability under 28 U .S.C. § 2253© and 22(b) of the Federal Rules of Appellate Procedure. Because reasonable jurists could disagree with the district court's resolution of several of petitioner's constitutional claims a Certificate of Appealbility is required. *"Under the '"unreasonable application"' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this court's decision but unreasonably applies that principle to the facts of the prisoner's case." Williams v. Taylor, 529 U.S. 362 (2000) discussing Section 2254 (d). ("In sum, the statute directs federal courts to attend to every state-court judgment with utmost care, but it does not require them to defer to the opinion of every reasonable state-court judge on the content of federal law...For purposes of today's opinion the most important point is that an unreasonable application of federal law is different from an incorrect application of federal law." Id.*

"On the other hand it is significant that the word '"deference"' does not appear in the text of the statute itself. Neither the legislative history nor the statutory text suggests any difference in the so-called '"deference"' depending on which of the two phrases is implicated." Id.

PROCEDURAL BACKGROUND

The petition for the Writ of Habeas Corpus was filed on January 12, 2017 for being wrongful convicted and imprisoned in violation of the Untied States Constitution. *(Barrett v. Genovese, U.S.D.Ct., M.D. Tenn. Nashville Div. No. 3:17-cv-00062)*. Honorable U.S. District Judge Aleta A. Trauger maintained jurisdiction until 17th day of December 2019, when she inexplicably "*recused*" herself from the case.

Thereafter, Chief Judge Waverly Crenshaw assumed jurisdiction on the case, denied the Petition for Writ of Habeas Corpus on January 24, 2020,

which raised several grounds for federal constitutional relief under 28 U.S. C. § 2254. [*"Petitioner is not entitled to relief on any of his claims."]* Court also denied a Certificate of Appealability on January 24, 2020. An evidentiary hearing was denied on his claims and motion for discovery also denied.

Petitioner now seeks a Certificate of Appealability from the Sixth Circuit Court of Appeals, with respect to several of those grounds for relief and files a timely Notice of Appeal and filing fee in conjunction with this Request. The Petitioner has not actually violated any procedural rule.

STANDARDS FOR GRANTING RELIEF

A petitioner seeking a Certificate of Appealability ("COA") must make a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253©(2). To make the requisite substantial showing, "*a petitioner must show 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 v. Cockrell 123 S.Ct. 1029 1039 (2003)* (citations omitted); *"Woolbright v. Crews, 2018 WL 7247245, No. 18-5131, (7-9-2018, 6th Cir.), citing, Slack v. McDaniel, 529 U.S. 473 484 (2000) (quoting Barefoot v. Estelle, 463 U .S. 880, 893 & n. 4 (1983).*

To be "*substantial*", a claim must have some merit under the standard for IAC set forth in *Strickland v. Washington 466 U .S. 668 (1984).* The standard under *Strickland* is that petitioner must establish that a counsel's performance was deficient and that he suffered prejudice as a result. *Strickland, 466 U.S. at 687.*

(21) Where a district court has rejected a petitioner's constitutional claims on the *"merits" "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong"* to secure a COA. *Swisher v. True 325 F. 3d 225 229 (4th Cir. 2003) (quoting Slack v. McDaniel 529 U .S. 473 484 (2000).* "The prefatory language of § 2254(d) provides: *"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was 'adjudicated on the merits' in State court proceedings unless the adjudication of the claim...."* In the usual case, a denial of relief on procedural grounds will completely bar federal review of the claim unless

the prisoner can prove cause and prejudice or a miscarriage of justice. See *Wainwright v. Sykes, Murray v. Carrier; Engle v. Issac; House v. Bell, (547 U.S. 518 (2006).*

(22) In *Coleman v. Thompson,* the Supreme Court concluded when a state decision *"fairly appears to rest primarily on federal law or to be interwoven with the federal law and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion" there is no adequate and independent state procedural bar supporting the judgment.* In the absence of an adequate and independent state procedural bar federal review is not precluded and if federal review is not precluded by an adequate and independent procedural rule, then federal review is not barred by AEDPA. *501 U.S. 722, 752-753 (1991).* (*De Novo* Review of the Merits of a Claim Permitted when the State Court System Summarily Denies the Constitutional Claim.)

(23) *"a petitioner who was represented by post-conviction counsel in his initial review collateral proceeding must show not only that his procedurally defaulted trial level IAC claim is substantial but also that there is a reasonable probability that the trial-level IAC claim would have succeeded had it been raised by post conviction counsel. Calderon v. Thompson 523 U.S. 538, 118 S.Ct. 1489 (1998). "[P]rejudice,' for purposes of the Coleman 'cause and prejudice' analysis in the Martinez context requires only a showing that the trial-level ineffective assistance of counsel claim was 'substantial.'" Id, @ 523 U.S. @ 560.* Therefore, in order for a petitioner to demonstrate cause and prejudice sufficient to excuse the procedural default, he must make two showings: First to establish "cause," he must establish that his counsel in the state postconvicton proceeding was ineffective under the standards of *Strickland. Strickland,* in turn, requires him to establish that both (a) post-conviction counsel's performance was deficient, and (b) there was a reasonable probability that, absent the deficient performance, the result of the post-conviction proceedings would have been different. See *Strickland, 466 U.S. at 687, 694, 104 S.Ct. 2052.* Second, to establish "prejudice," he must establish that his "*underlying ineffective-assistance-of-trial counsel claim is a substantial one, which is to say that the prisoner must demonstrate that*

the claim has some merit." Haley v. Cockrell, *306 F. 3d 257, 264 (5th Cir. 2002), vacated and remanded on other grounds, 541 U.S. 386 124 S.Ct. 1847 (2004).*

(24) *"Under the '"unreasonable application"' clause a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this court's decision but unreasonably applies that principle to the facts of the prisoner's case."* Williams v. Taylor, *529 U.S. 362 (2000). [' For purposes of today's opinion the most important point is that an unreasonable application of federal law is different from an incorrect application of federal law."* Id.*]*

(25) Like the state appellate courts on appeal, the Federal Court had jurisdiction within the statute 28 U.S.C.A. § 2254(a)(A)(B)(I)(ii) and (2) as to the *pro se* questions. *"An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State*

(26) Also *"[w]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling."* Id

(27) A COA determination is merely a "threshold inquiry" undertaken before full consideration of petitioner's claims. Miller-El v. Cockrell *123 S.Ct. at 1039. It "does not require a showing that the appeal will succeed."* Id. "Deciding the substance of an appeal in what should only be a threshold inquiry undermines the concept of a COA . The question is the debatability of the underlying constitutional claim not the resolution of that debate." Id. Moreover "a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." Id. *at 1040*, § 2253© actually forbids such "full consideration" of the factual or legal basis of the claims in the course of determining whether or not to grant a COA. *Id. at 1039.* ("When a court of appeals side steps [the COA] process by first deciding the merits of an appeal and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.") Swisher v. True, *325 F. 3d at 230.* See also Buck v. Davis, *137 S.C. 759.*

(28) **"Constitutional Claims"**

Therefore petitioner will attempt to first make a substantial showing of the denial of his constitutional rights and (2) and show that reasonable jurists could disagree with the district court's resolution of these constitutional claims or (3) these issues are capable of deserving encouragement to go further.

(1) Failure To Communicate Or Assist On Post Conviction ("P.C.) Appeals: Counsel unilaterally terminated the right to file a Rule 11 appeal to the TN S.Ct. and rendered deficient performance by not filing Petitioner's clear requests and by failing to notify the Appellant of the decision of the TCCA and what grounds it had based its Brief to the TSCT (failed to notify the Appellant in writing....) See *Garza v. Idaho, 139 S.Ct. 738,744: "And, most relevant here, prejudice is presumed '"when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken."'* Citing, Flores-Ortega, 528 U.S. at 484, 120 S.C. 1029. *"So long as a defendant can show that '"counsel's constitutionally deficient performance deprive[d him] of an appeal that he otherwise would have taken."' Courts are to '"presume prejudice with no further showing from the defendant of the merits of his underlying claims." Ibid.* Gaza, @ *747, citing, Flores-Ortega, 528 U.S. at 484, 120 S.Ct. 1029.*

Petitioner relies on *Evitts v. Lucey 469 U.S. 387, 401 105 S.Ct. 830, 838-839 (1985),* for his position that even though the State of Tennessee does not grant a prisoner access to the effective assistance of counsel on post conviction relief process, it does provide the meaningful assistance of counsel for a prisoner seeking post conviction relief. T.C.A. § 40-30-106(e). See *United States v. Cronic, 466 U.S. at 658, 104 S.Ct. 2039(1984): "when 'counsel entirely fails to subject the prosecution's case to 'meaningful adversarial testing,' the process becomes '"presumptively unreliable"' and proof of actual prejudice is not required." Wallace v. State, supra, @ 657, citing, Cronic @ 659, 104 S.Ct. 2039.* (emphasis supplied)

The Due Process Clause of the Fourteenth Amendment requires. *"Due process is flexible and calls for such procedural protections as the particular situation demands." Smith v. State, 357 S.W. 3d 322, 359,[12-19-11], citing, Phillips v. State BD of Regents 863 S/W/ 2d 45, 50 (Tenn. 1993)*(citation omitted). that counsel's actions comport with the procedures in *Anders v. State of California, 386 U.S.738, 741 87 S.Ct. 1396,* instead of the unilateral fiasco represented

in his actions in the state appellate courts *"The flexible nature of procedural due process requires an imprecise definition because due process embodies the concept of fundamental fairness. Id, citing, State v. Barnett 909 S.W. 2d 423, 426 (Tenn. 1995); State v. Hale, 840 S.W. 2d 307, 313 (Tenn. 1992).* See *Matthews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, (1976).*

(26) **"Non-Constitutional Claims"**

"To warrant relief for a non-constitutional claim a petitioner must establish that a fundamental defect in the proceeding resulted in a complete miscarriage of justice or an egregious error that deprived him of '"the rudimentary demands of fair procedure."' Reed v. Fairley, 512 U.S. 339, 354 (1984); see Grant v. United States, 72 F. 3d 503 505-06 (6th Cir. 1996).

(27) "Non-Cognizable Claims"

1. Definition of non-cognizable claims in the Section 2254(a) habeas corpus context: ("*Petitioner asserts eighteen claims of trial error. Six are not cognizable.*" *[Order, 2020 WL 409688, 1-24-2020 @ *6](emphasis supplied)* Apparently twelve claims of trial error *are* cognizable. Petitioner will review those twelve claims and the adjudged non-cognizable claims in turn.

STATEMENT OF THE CASE

(28) In its Order dismissing his Petition for the Writ of Habeas Corpus, the District Court went on to find that *"In June 2008, a Davidson County grand jury indicted the Petitioner for first-degree murder and felony murder. In July 2009[1], (a) jury found Petitioner guilty of second-degree murder a lesser-included offense, on both counts.' 'The jury sentenced him to forty-four years for each conviction. The trial court ordered that the sentence be served consecutively to a life sentence for a previous conviction." Barrett v. Genovese, WL 409688@, *1.*

(29) Appellant contends that the District Court's agreement with the State of Tennessee, that *"the Petitioner is not entitled to relief because the claims are either (1) not cognizable, (2) do not survive the 'demanding review of claims exhausted in state court, or (3) are procedurally defaulted"* in this case is an unreasonable agreement, and secondly, unjustly maintains a state-federal edifice which should have been effaced long ago when relied on in similar circumstances.

[1] Petitioner was convicted September 9 2009

The District court's initial statements are difficult to understand because on the one hand, it states that *"(although the claims in the original petition are unsupported by facts...) the court will not rely on the pleading standard of Habeas Rule 2© to summarily deny Petitioner's claims."* Then in its next sentence in the Order, the Court decided that it *will* nonetheless use Habeas Rule 2©, to see if *"...Petitioner has complied with Rule 2©, 'as necessary' in its 'consideration' of each individual claim." [Id. @*6, Analysis]*

(30) Petitioner was never given an opportunity – as a *pro se* petitioner – to cure the original petition's "*unsupported facts*" conclusion of the District Court (*"...and much of the amended petition 'is difficult to decipher'... ")* or to attempt to relieve the Court of some of its difficulty by amendment. The first time he learned of any 'deficiency' in the Petition was when the Court dismissed it. He was never put on notice of the court's reported difficulty, or given an opportunity to amend and improve the ability of the Court to 'decipher' the amended Petition – before his Petition and certificate of appealaability were denied.

(31) The United States Supreme Court and Appellate courts of this Circuit appear to give guidance inapposite to the short shrift that his Petition was treated with by the District Court, even with the understanding that "*duty to be less stringent with pro se complaint does not require court to conjure up unplead allegations, Merritt v. Faulkner, 697 F. 2d 761 (7th Cir).*

However *"[F]undamental fairness entitles indigent defendants to an 'adequate opportunity to present their claims fairly within the adversary system." Ake v. Oklahoma, 470 U.S. 68, 77, 105 S.Ct. 1087, 1093 (1985)*(citation omitted). The Supreme Court has long-established that *pro se* pleadings are held to less stringent standards than formal pleadings drafted by lawyers. *Haines v. Kerner, 92 S.Ct. 594 596 (1972); Hughes v. Rowe 101 S.Ct. 173 176 (1960); Estelle v. Gamble, 97 S.Ct. 285, 292 (1976); Bounds v. Smith, 97 S.Ct. 1491 1497.* In as much as post conviction petitions and their appeals are often drawn by undereducated lay people proceeding *pro se* as in the instant case, one who is also one of the state's own citizens - a *pro se* prison inmate - the courts have *"long disregarded legalistic requirements in examining applications...and judged the papers by the simple statutory test of whether facts are alleged that*

entitle the applicant to relief." Darr v. Burford, *70 S.Ct. 587 590 (1950). (Overruled on other grounds by* Fay v. Noia, *83 S.Ct. 822 (1963).*

Appellant respectfully submits that to avoid *a miscarriage of justice,* does not include the Court to plead unpled grounds of action for appellant. *See Andre Lovell Dotson v. Shelby County, et. al., 2014 WL 3530820 [7-15-2014]: "Pro se complaints are to be held '"to less stringent standards than formal pleadings drafted by lawyers,' and should therefore be liberally construed."* Williams v. Curtin, *631 F. 3d 380, 383 (quoting* Martin v. Overton, *391 F. 3d 712 [6th Cir. 2004].*

(32) **"Procedural Default"**

As to those claims the district court found to be procedurally defaulted petitioner would show whether he stated valid claims of the denial of constitutional rights and whether the district court was correct in its procedural ruling. Because of what appellant believes is an unreasonable restriction on his right to present his own appellate brief(s), which even the District Court held that some claims were meritorious enough to consider and then dismiss them, contained claims that were abandoned by court appointed post conviction counsel("pcc") on appeal, this form of 'procedural default' should be unavailing to the State.

An Evidentiary Hearing was held in the trial court and it rejected all of petitioner's claims. He appealed some of his post conviction claims *pro se* because of the absence of or his inability to find out if he had counsel on appeal. The appellate courts refused to hear *his pro se* grounds on the excuse that he had an attorney. Petitioner made it plain in his *pro se* appeals that due to a lack of communication, he did not know he had an attorney on appeal. In *Gravely v. Mills, 87 F. 3d 779 [C.A. 6, Tenn. 1996],* this Court rules (1) that the defendant's trial counsel provided ineffective assistance, and defendant could thus bring habeas petition in spite of failing to comply with Tennessee rules for preserving constitutional claims; (2) prosecutor's references to defendant's post arrest silence violated due process; and (3) prosecutor's misconduct had substantial influence on jury mandating new trial.

(33) Further, the Tennessee Constitution and law in accord gives him the right to be heard by counsel *and* himself. *"But, by our State constitution it is provided: '"That in all criminal*

prosecutions, the accused has a right to be heard by himself and h is counsel.....'" and our Supreme Court has held in the case of Wilson v. State, 3 Heisk, 232 *, that the section means both in criminal cases...."* Grace v. Curley, *3 Tenn. App. 1 (1926); See* Charles Wilson v. The State, *50 Tenn. 232,234, Supreme Court of Tennessee, April Term, 1871 ("Under the Constitution of the State, Art. 1, § 9, giving to a person accused the right to be heard by himself and his counsel....")*

(34) The State of Tennessee unconstitutionally denied appellant his 5th, 6th and 14th Amendments appeal right with or without appointed counsel. *Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052,2064. (1984)* See *Rules of the Tennessee Supreme Court Rule 28, § 6©; T.C.A. § 40-30-113©; T.R.A.P. 13[a]: ("Dismissal of the original appeal shall not preclude issues raised by another party from being considered by an appellate court.")* (emphasis added) See also **Tennessee Rules of Appellate Procedure Rule 36(a) relief to be Granted; Relief Available (b):** "*when necessary to do substantial justice an appellate court may consider an error that has affected the substantial rights of a party at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal. Rule 3(b").* Advisory Commission Comment subdivision (a): This subdivision makes clear that the appellate courts are empowered to grant whatever relief an appellate proceeding requires. In addition this subdivision states that the appellate court should grant the relief to which a party is entitled." (emphasis) That is, when these dismissed grounds were first presented to the state appellate courts by petitioner, they were entitled to be review and not ignored, to prevent a fundamental and blatant miscarriage of justice, apparent from the typical position taken by the Federal Courts that deny relief because of the concocted "procedural bar". The petitioner fairly presented these grounds standing on his Federal Constitutional rights and state law in accord, by invoking one complete round of Tennessee State court appellate review and, therefore, he has exhausted his state remedies as to these claims.

(35) In dismissing some of his claims, for "procedurally default" and others "on the merits", it did not appear to rule on the *pro se* appeals and their substantive merits. As to those claims rejected on the merits, petitioner would show that reasonable jurists would find the district court's treatment of these claims debatable. Consequently, the state appellate courts' adjudication of the grounds alleged to be procedurally barred was contrary to, or an unreasonable

application of clearly established state and federal law that gives the petitioner the due process right to present his claims on appeal that had first been presented to the post conviction court.

(36) For cause Petitioner disagrees that he has procedurally defaulted his IAC claim by failing to raise it in his post conviction appellate proceedings. Petitioner did raise it in his post conviction appellate proceeding. He is not bound at the hip of derelict counsel who refused to not only communicate but also refuse to raise on appeal grounds petitioner insisted that counsel raise. As cause to excuse his procedural default, Petitioner submits that he received IAC of post conviction appellate counsel on purpose, as a deliberate act calculated to deny him federal oversight of his conviction by disappearing and two deaf ears. See in re *U.S. v. Cronic, 648, 104 S.Ct. 2039.*

(37) Petitioner did not fail to exhaust "available state remedies". *Hodges v. Colson 727 F. 3d 517, 529 (6th Cir. 2013).* Even the District Court gives slight reference to this notable lack of essential communication and coordination between petitioner and his "court-appointed counsel": "*Petitioner filed a pro se amended petition." (Id.)* but one was not filed by court-appointed counsel, even though he was hired ("appointed") to do so. T.*C.A. § 40-30-106(e).* (Petitioner had to file an amended petition pro se) Here at this point in time begins the denial of procedural and substantive due process of law. (*"The original petition and amended petition contained numerous grounds for post conviction relief only three of which have been maintained on appeal..." (Id.)*

(38) Petitioner was aware that only those grounds submitted on his Post Conviction Petition will be heard at the scheduled evidentiary hearing, and only those grounds will be available on appeal of the denial of the petition. Ergo if those post conviction grounds are not submitted to the state appellate courts, the treatment they receive when submitted to the Federal Courts, is they are "procedurally barred"....

Thus, petitioner was not trying to sit idly by while court appointed counsel let him be faced with denials of meritorious grounds as happened to many hundreds- if not thousands of *pro se* petitioners in the past whose counsel, -appointed by the same court the *pro se* petitioner was suing - to *assist* petitioner sue the court, with the result being as said, that post conviction appointed counsel never filed, and apparently had no intention of heeding his client's incessant requests to file these grounds in the appellate courts that are now ruled as being procedurally barred! The Supreme Court in *Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639 (1986)* ruled in

what appears to be the exact scenario here, "*cause for a procedural default exists where something external to the petitioner that cannot be fairly attributed to him, impeded [his] efforts to comply with the state's procedural rule.*" @ 496.

So, after many months of counsel failing to answer petitioner's request about the status of his appeals and to forward him a draft of the appellate brief *before* submitting it to the appellate court for assistance or status, petitioner took it upon himself to file his own appellate briefs, to avoid losing all rights to appeal or at a minimum, a possible procedural bar of grounds that he wanted to be appealed from the denial of post conviction relief in the trial court.

(39) Based upon the contentious relationship and lack of willingness to assist him that existed at the post conviction stage, petitioner was certain, based on the lack of correspondence his conduct at the evidentiary hearing, and failure to provide him with a copy of the requested evidentiary hearing transcript or Order of the trial Court, that counsel had abandoned the case. Petitioner submits that it is counsel who should be penalized in these circumstances, not him.

(40) Appellant claims that no matter how appointed counsel's conduct is seen, the results is that appellant had fewer possible claims than some other appellants who had the communication and coordination with their attorneys. Thus, a denial of due process and equal protection of the laws are also apparent. *"The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process." Pennsylvania v. Finley 107 S.Ct. 1990, 1994, citing Ross v. Moffitt, 417 U.S. 600 616, 94 S.Ct. 2437, 2447 (1974)* (emphasis added) *["These considerations apply with even more force to postconviction review." Pennsylvania, supra, @ 1994](emphasis added)*

(41) Contrary to *Evitts*, in spite of the circumstances which he put the appellate courts in Tennessee on notice of, right there in both briefs as the reason why he was appearing in the courts instead of appointed counsel, as the result of his court appointed counsel lack of communication/assistance on appeal, resulting in him filing his own appeal, the State appellate court's dismissed both appeals- but appellant provided each appeals court that he was filing because he did not know if or what appointed counsel was filing. Further, appointed counsel failed to follow the appellate rules regarding communication to his client.

(42) In cutting off defendant's *pro se* appeal briefs, the TCCA and TSC ran afoul of the Equal Protection and Due Process Clauses. *"The court reasoned that '"when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution- and, in particular in accord with the Due Process Clauses."* Pennsylvania, @558, 1995, citing, Evitts 469 U.S. 387, 401, 105 S.Ct. 830 839; Ross v. Moffitt, 417 U.S. at 609, 94 S.Ct. at 2443 *["Due process emphasizes fairness between the State and the individual dealing with the State.' Ross, 417 U.S. at 609, 94 S.Ct. at 2443.]*

The High Court in *Evitts* held that *"[t]he right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms."*469 U.S., at 400-401, 105 S.Ct. at 838.

(43) Here, the appellate courts of Tennessee essentially cut off his right to appeal because of his lawyer's lone wolf strategy that ended up causing manifest injustices to the Defendant, in terms of the "procedural bar" which the State unfairly relied on and the District Court unreasonably decided in favor of the State.

Again, the validity of these grounds in his pro se appellate briefs for appellate review is that they were first preferred in the post conviction trial Court, and addressed in its order of denial; they were never ruled as being frivolous or malicious by any court, and Petitioner argued *pro se* while appointed counsel stood there in the courtroom. There was no problem with petitioner personally arguing his grounds then at the first evidentiary hearing, while he had appointed counsel....

(44) Therefore Appointed Counsel's disappearances and refusal to respond or even give his client an idea of what he intends to file on appeal on petitioner's behalf, should *excuse* petitioner's resorting again to the technique that started his post conviction journey, going *"pro se"*. He contends that it is an unreasonable position to see it any other way under these circumstances. The only sensible thing would be to file his own *pro se* appellate brief in light of appointed counsel's misconduct.

(45) Note the observation made by the District Court below itself which supports appellant's description of the dilemma claimed herein: *"The (trial) court held an evidentiary hearing and denied relief. The TCCA affirmed. [Petitioner] then file two applications for permission to appeal: one prepared by counsel and another prepared by petitioner himself. On December 14, 2016, the TSC denied discretionary review and dismissed Petitioner's pro se application because*

*he was '"represented by counsel....' (Notations and citations omitted) Barrett v. Genovese, @ *1 (emphasis supplied)*

Here the District Court sees that the Tennessee Supreme Court was aware of the obvious lack of coordination and communication between counsel and client, Your Appellant on appeal.

(46) The next step in this all too often practiced ruse is that the Tennessee Court of Criminal Appeals ("TCCA") rejects petitioner's *pro se* appellate brief, on the excuse that *"because he has counsel appointed to represent him."* (See Barrett, *2020 WL 409688, fn. 1, citing, Barrett v. State, 2016 WL 4410649, @ *2, n. 1 (T.CCA, 8-18-16: "Although counsel had been appointed at the time the amended petition was filed, it was not filed by counsel and was submitted by the Petitioner.")* (Id. @ fn. 1) There the appellate court finds that counsel did not amend the petition, as he is required to do, and in his appellate brief *pro se*, he advised the appellate court that counsel was play8ng fast and loose with his obligations to consult with his client.

(47) This "*amended petition(s) submitted by the Petitioner*" was an act of desperation and motivated by the foreknowledge that only the grounds submitted in his post conviction petition, would be heard at a the evidentiary hearing and *only* those grounds would be heard on appeal in the TCCA, that were submitted to the post conviction court. See generally T.C.A. § 40-30-106(d)(e) and (g).

(49) Petitioner was totally in the designed dark as to whether his court appointed counsel would file an appeal brief to the TCCA, and what that brief would contain. He had every reason to belief that this attorney, who would not file or assist at the evidentiary hearing, the grounds petitioner wanted to assert, that he would do the same thing on appeal, and he did.

Since counsel never told petitioner whether he would file an appeal against his boss's denial of post conviction relief, and never sent his client, a copy of the appeal brief, petitioner had no obligation to sit there and let his time run out on appeal and be foreclosed on the concept of procedural default that way. In his *pro se* briefs to both appellate courts, the petitioner pleaded with them and informed them that the reason he was filing *pro se* was because court appointed counsel was playing 'hide n' seek' with his client, Your Appellant, at the amended petition stage, and at the appellate court stage.

Petitioner submits that counsel's actions were deliberate and determined to deny appellate review of rounds he asked to be filed, ignoring obstinately and unlawfully his client's requests to include grounds he wanted filed, or tell him why he thought they shouldn't be filed. This is what the law

requires. PCC did neither, and then the state appellate courts went along with these denials of due process, abusing their discretion to reject *pro se* applications to appeal and instead accepted counsel's recalcitrant and deficient filings.

(50) The petitioner was not aware that counsel had filed an Application in the Tennessee Supreme Court until he received the Order dismissing his federal habeas corpus petition. His grounds submitted in the federal district court were blocked all the way from the trial courthouse to the esteemed state supreme court: *"The (trial) court held an evidentiary hearing and denied relief. The TCCA affirmed. [Petitioner] then file two applications for permission to appeal: one prepared by counsel and another prepared by petitioner himself."* Barrett v. Genovese, @ *1 (emphasis supplied)

Appellant does not intend to be flippant or discourteous to these state actors. In his opinion from this jail cell and observation, America probably has the best judicial system in the world in toto, and many countries have imitated to a significant extent, our system of jurisprudence, as we have borrowed from others. But it is more than consternation that the Federal District Court- long the haven or North Star against state's denials of due process –would go with the flow and find as it does herein as to "*procedural bars*" and "*failure to exhaust*".

(51) Claims ' Barred By Procedural Default'

Relevant to the issues regarding indictment and the mysterious underlying felony, petitioner notes that the District Court did not cite in this synopsis, the part of the indictment where petitioner was charged with the underlying felony.... Or found guilty of the mysterious underlying felony....(mysterious because the Trial Court in the Evidentiary Hearing said Petitioner "was not convicted of larceny.")

Petitioner argues that any "procedural default" was due to the ineffective assistance of post-conviction appellate counsel. PCC failed in this procedural due on appeal by his absence or lack of communication at the appellate stage of post conviction process, which is a particular but crucial duty. *U.S. v. Cronic, 648, 104 S.Ct. 2039.* Petitioner's due process right is guaranteed by the Fourteenth Amendment. *Wolff v. McDonnell, 418 U.S. 539 558, 94 S.Ct. 2963, 2975 (1974). Heyne v. Metropolitan Nashville Bd. Of Public Education, 380 S.W. 3d 715 ("When a person asserts a procedural due process claim the court must first determine whether he or she has an interest entitled to due process protection." Board of Regents State Colls. V. Roth, 408 U.S. 564, 570-71, 92 S.Ct. 2701 (1972). If the court determines that the person has an interest that is*

entitled to constitutional due process protection then the court must determine '"what process is due"'. Morrissey v. Brewer 408 U.S. 471, 481 92 S.Ct. 2593 (1972).

(51) In an appellate court decision where PCC was also slack, the Tennessee Supreme Court held in *Donald Wallace v. State of Tennessee, 121 S.W. 3d 652. (Tenn. 12-23-2003), citing, United States v. Cronic, 466 U.S. at 658, 104 S.Ct. 2039(1984)*: "*when 'counsel entirely fails to subject the prosecution's case to 'meaningful adversarial testing,' the process becomes '"presumptively unreliable"' and proof of actual prejudice is not required." Wallace v. State, supra, @ 657, citing, Cronic @ 659, 104 S.Ct. 2039.* (emphasis supplied)

(52) And that '*meaningful adversarial testing,*' encompasses the following grounds in this case, where counsel, by failing to file the grounds on appeal or even let petitioner know he was going to file an appeal, his deficiency precluded the two appellate courts from even reviewing any of his appellate grounds. Thus, the denial of appeal in *Wallace* is equal to the denial by counsel to the petitioner's right to "meaningful adversarial testing" in the form of appellate review in the instant case.

(53) Cognizable Ineffective Assistance Of Pcc Claims May Establish Cause To Excuse A Procedural Default Under Two Circumstances

Reasonable jurists would find any and/or all of the STATE'S APPELLATE COURTS claims debatable whether the district court was correct in finding them procedurally defaulted, specifically whether Petitioner exhausted those claims by raising them on appeal from the trial court's denial of his post-conviction action. Cause and prejudice are established to the degree that will excuse any default or a fundamental miscarriage of justice would result if these claims are not examined.

(1) "**Complete abandonment**" with respect to those grounds appellant requested counsel to file on appeal, which he not only did not communicate or consult with his client but the grounds Appellant submitted to counsel in writing, he refused to add to the brief. When appellant tried to file these grounds *pro se*, the appellate state courts in effect said appellant had to file these

grounds through counsel or forget about it! A Catch-22. This unreasonably stringent reasoning satisfies one of the circumstances defined in Maples v. Thomas 565 U.S. 266, 288-89 (2012).

(2) Petitioner considers it a time-honored subterfuge or ruse where PCC, knowing for years that even if counsel does not 'assist' on appeal (i.e., fail to, or refuse to file all requested grounds for appeal, fail to file an appeal, fail to follow the appellate procedure, etc.) appellate PCC's failures will always be excused in the Federal District Court because the state appellate courts were therefore not 'willing' to review the contested claims on appeal due to appellant filing them and not his appointed Counsel, and will not review claims, that were *pro se* appeal grounds. This is what happened to appellant in the state courts.

(3) Then the well-honed step to the federal courts finds the petitioner barred from having these claims reviewed, because the State's position is that his appeal was dismissed based on an *"independent and adequate state ground"*, in the state appellate process, the dubious understanding that when a prisoner has an appointed attorney on appeal, he cannot open his mouth, which the Federal Courts typically and in this case, agree and "DISMISSED", the *pro se* petitioner's petition for the writ of habeas corpus.

(4) This scenario is unconstitutional and a cruel way to deny a *pro se* petitioner due process of law, because as long as it has been the law that dismissal based on an independent and adequate state ground constitutes a procedural default of *pro se* appellate court grounds, state post conviction attorneys know that when he refuses to file the grounds their client wants filed or simply disappears effectively from the radar of their prisoner client communication capability, what they are doing will upset and undermine the ability of his client's pursuit of the writ of habeas corpus on grounds that he intended the state appellate courts to review, and appointed counsel escapes censure because he doesn't have to be "effective" anyway on pot conviction appeal. This is the unjust case scenario here.

(5) To compound this series of inequities, the post conviction court is one of the three state court levels recognized by the Federal Courts, which may review prisoners' claims of ineffective assistance of trial counsel ("IATC"). In Tennessee, prisoners are strongly discouraged to bring IATC claims in direct appeal, thus collateral review is the only sensible level to review those claims. If a petitioner does not agree –as is the case here- with the dismissal of his post conviction petition in the same court where those claims originated, primarily against the post conviction (i.e. 'trial') court, he is often essentially foreclosed from any other review in the state

appellate or federal district courts, due to this game played by PCC on appeal and in the evidentiary hearing not raising meritorious IATC claims.

(54) DEBATABLE CLAIMS CONTRAY TO FEDERAL LAW OR BASED ON AN UNREASONABLE DETERMINATION OF THE FACTS OF COUNSEL'S INEFFECTIVENESS FOR FAILING TO:

(1) This Court currently holds that *cause* based on his attorney's failure to raise the claims in the appellate court or attorney error in a post-conviction appellate proceeding cannot constitute cause to excuse a procedural default. *Citing, Atkins v. Holloway, 792 F. 3d 654 661 [6th Cir. 2015])* This is where appellant encounters a miscarriage of justice. Appellant submits that he has a right to counsel and a right to be heard by himself in the State of Tennessee. Yet the courts should give constitutional significance to these deficiencies described above and herein. There is no recourse to a state prisoner if his PCC is blatantly ineffective on appeal of the dismissal of his client's post conviction petition by the trial court, which is typically the same court that appoints him as a public defender in the first place. Petitioner submits that his IATC clams were not fully and fairly addressed in his initial post-conviction review and should therefore survive a procedural default bar.

(2) The United States Supreme Court has recognized an exception to *Coleman v. Thompson, 501 U.S. 722, 752 (1991),* where as here, it is understood that a claim of ineffective assistance of trial counsel must be litigated in a collateral proceeding. In such cases "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding there was no counsel or counsel in that proceeding was ineffective." *Martinez v. Ryan, 132 S.Ct. 1309, 1320 (2012)*. In a subsequent Supreme Court ruling in *Trevino v. Thaler, 133 S.Ct. 1911, 1921 (2013), Martinez* was extended to include states like Tennessee, where the IATC claims are unlikely to be litigated on direct appeal. See *Sutton v. Carpenter 745 F.3d 787 (6th Cir. 2014).*

(2) The Supreme Court's decisions in *Martinez* and *Trevino* are applicable here because appellant's claims of IATC had to be advanced by petitioner from the stand, because PCC refused to argue or assist him at the evidentiary hearing. And then he had to forego reliance on this same recalcitrant incommunicado post conviction attorney on appeal, who refused to communicate with petitioner as to the nature and substance of appeal. He was effectively AWOL. Appellant did not know he had filed either appeal until after they were dismissed. In particular, he did not know of the appeal grounds filed in the Tennessee supreme court by

recalcitrant counsel until he read the denial of appeal in the documents submitted to the federal district court by the State's assistant attorney general.

(3) Thus the ineffective assistance of his substantial claims against trial counsel were compounded by a classic ruse used by post conviction attorneys to go it alone and fail to adhere to the wishes of their client or even communicate with him until the appeal had been denied. This is how meritorious appellate grounds such as those submitted to the district court by appellant don't receive due process of law in the appellate courts.

(4) Petitioner argues that therefore his claims of IATC were not given a full, fair or meaningful hearing by the post conviction court, counsel in that proceeding was "ineffective" and his right to due process pursuant to *T.C.A. 40-30-101 et seq., and T.R.A.P.,* were denied him. *Martinez, @ 1320; Thaler, @ 1921.*

(5) The Tennessee appellate courts refusal to address his pro se appellate claims which petitioner was forced to file due to the complete absence of counsel, or lack of even a cursory bit of communication, or to tell petitioner he has everything under control or he does not want the input from petitioner, therefore this complete absence of communication should not justify a dismissal based on an independent and adequate state ground and these state grounds are debatable as whether they should not have been dismissed by the Federal Court. *"Appellant cannot be charged with the omissions of his attorney...." Maples v. Thomas, 565 U.S. 266, 288-89 (2012)*

(55) CLAIMS DEBATABLE ON THE MERITS

(1) As to those claims the District court rejected *'on the merits',* Appellant must show that reasonable jurists would find the district court's assessment of those claims debatable. *Slack v. McDaniel, 529U.S.473 484 (2000).*

(56) District Court's Assessment Of Exhausted Ineffective-Assistance Of Counsel Claims Debatable:

(1) Petitioner did attack the "underlying state conviction". (Order of the District Court, pg. 18, factually erroneous).

(2) DNA was available in Tennessee Davidson County, in 1992 and petitioner quoted a Nashville Metro Detective's own words that he intended to have the exhibits in the case examined for DNA. For one reason or another, these tests were not utilized or referenced. Petitioner's arguments regarding the passage of time affecting his alibi defense, the reliability of

DNA tests results and the chain of custody issues were more than "general". Petitioner pointed to the corrosive effect of mixed donor samples that were reported and the integrity of the DNA and contamination – which could not be found by relying on the State's supportive DNA examinations.

(3) Petitioner provided Counsel with the names of several individuals that accompanied him on the trip to Chicago the day the child was missing. The Petitioner said that trial Counsel and the Defense Investigator Amber Cassitt tried to contact everyone on the list he gave them but on person "couldn't remember" and several others had "moved out of town, died, or they weren't able to locate them. (Id., pg. 3) the named potential witnesses whose memory according to the Public Defender Investigator had simply eroded, were real losses and consequences resulting from the dilatory pursuit of a suspect in this case. There was no factual assertion that "advances in DNA technology" lead them to the Petitioner because the technology they relied on was primarily decades in existence. The State never justified their delay because of "improved technology" in DNA Forensic typing. They simply resumed testing when they got ready to accuse Petitioner right before their retirement. Defense counsel named several specific witnesses that the Investigator had contacted and all but one admitted that the passage of time had eroded their abilities to recall if Petitioner had accompanied them to Chicago Illinois on the day the victim became missing. Plus the rapacious news media feeding frenzy was no doubt extremely intimidating because they had Petitioner convicted the first day the news releases went out.

(3) Consecutive sentence in this case rode right over the impermissible boundary line of the 8th Amendment's cruel and unusual prohibition. The District Court correctly concludes that there is a "federal '"due process right to a fair sentencing procedure." (Id., pg. 23) however the argument the District Court addressed was not the major one Petitioner claimed regarding the sentence he received. He was charged with 1st degree felony murder, which carries an automatic life sentience in 1975. However the weak justification given for consecutive sentencing is the issue here. The trial court used non-statutory reasons to justify running the 44-year sentences consecutive to the Life sentence, reasons that were clearly based more on emotion and caprice rather than the rational, logical or sensible requirements of the law. The trial Court went on record stating that it based its' decision to run sentences consecutive so that the victim's family in both cases, would feel satisfied in essence, that the sentences were consecutive to the Life sentence he had already received See *Barrett, 2012 WL 2870571m @ *43-44; [Order, Barrett v.*

Genovese, pg. 24]. Therefore, the District Court should not have deferred to the holding of the state trial and appellate courts, which seemed to miss the reasoning that is required by law for sentencing. ("Defendant's sentence '"needed to be long enough to keep [the Defendant] permanently incarcerated'" and that Petitioner must serve this sentence consecutive to a previously imposed (Life) sentence in part because to do other wise would minimize the death of the victim and the murder victim on the previous case." Id. Pg. 26, fn. 4). The trial court then justified the consecutive ordering of his sentences based on two cases that came after the date of offense: *Gray v. State 538 S.W. 2d 391 (Tenn. 1976)* and *State v. Taylor, 739 S.W. 2d 227 (Tenn. 1987).*

(4) The District Court erroneously found that *"Petitioner does not dispute the fact of these convictions." (Id., pg. 27)* Untrue! Petitioner has long disputed the fact that he was lawfully convicted of "unlawful carnal knowledge of minor", that there was insufficient evidence to convict him of murder and larceny or rape, all the way from the state courts to the federal court, both in this matter and previously. Thus the prior disposition of these claims as well are contrary to and an unreasonable application of federal law. See *Barrett v. State 1993 WL 8605.* Appellant submitted an exhibit "APPEAL" for an indictment for "Rape" and sentence for *"unlawful carnal knowledge of a woman forcibly and against her will"* in 1974. (T.C.A. § 39-3701) The State courts assumed the conviction under another statute – T.C.A. 39-3706. The federal court case which followed *2013 WL 1178266, M. D. Tenn.* found the concerned indictment *B-36512: "As the Indictment in B-36512 only made reference to carnal knowledge of a woman,* T.C.A. § 39-3701." (Tenn. Code Ann § 39-3701 [1955]) *Yet TDOC's Sentence Information Services unlawfully changed the conviction to* "carnal knowledge of Female between twelve eighteen not amounting to Rape" (*T.C.A.* § 393706). They knew and the trial Court knew that this was unconstitutional to alter the judgement of a trial Court but that is what the Courts are relying on. The Western District Federal Court in Case No. 1:12-cv-178, and related 6th Circuit Case No. 13-5814 found in this matter: *"The Court observes that Appellant alleged that he was indicted for '"'"rape"' and pleaded guilty to the indictment, and specifically to '"unlawful carnal knowledge of a woman forcibly and against her will." (U.S. District Court Case No. 1:12-cv-178) (Docket Entry No. 1-1, @21. At that time under Tennessee law the crime of rape was defined by statute as "the unlawful carnal knowledge of a woman forcibly and against her will." Tenn. Code Ann.* § 39-3701 (1955) (amended by Tennessee Public Acts 1979 pg. 1065, ch. 415)

The District Court was put on notice in his Petition for the Writ of Habeas Corpus, that the guilty plea conviction for *"unlawful carnal knowledge of minor"* was a unknowing guilty plea conviction which even the TDOC in a prior petition for relief in the U.S.District Court Middle District, Petitioner launched an attack on that sentence, where the victim in that case was a woman approximately 30+ years of age.

(5) Petitioner also pointed to the five years he was free and his conduct belied the justification upheld by the district court that "*Defendant was a dangerous offender with little or no regard for human life and who had no hesitation about committing a crime involving a high risk to human life." (Id. Pg. 26, Order)* The fact of the matter is that Petitioner had not been accused of coming any crime since March 1975 a total of 34 years including over five calendar years of freedom. Petitioner was over sixty (60) years of age when he was sentenced in January 2009. A "Life" sentence in 1975 requires a service of "30 full calendar years" before parole. This would make him <u>eligible</u> for parole at the dangerous age of ninety (90). Clearly, the consecutive sentencing was primarily a political stunt tinged with racism and caprice.

(6) All of the talk about protecting the public from some who is over 90 years of age is grandstanding and political opportunism. See T.C.A. 40-3613: *"Provided further, any person who shall have been convicted and sentenced to a term of imprisonment in the state penitentiary for a period or term of sixty-five (65) years or more <u>or life</u> may become eligible for parole provided such person shall have been confined or served a term in the state penitentiary of not less than thirty (3) full calendar years...."*

(7) The trial court observed from the media focus on the case which he noted in court, that the pre trial publicity had made the case known to the jury and to ensure a fair trial should have been moved to West Tennessee. Again even thought he trial court is noted to have heard the Petitioner's claims that he was denied a fair and impartial trial due to incessant inflammatory pre-trial publicity, because the PCC did not raise these issues on post conviction appeal, *in short Petitioner did not exhaust the available remedies for these three claims by presenting them to the TCCA and he can no longer do so." (Id., pg. 39)* Again the familiar refrain. According to law, petitioner did not have to raise these claims to the TCCA to be properly exhausted for federal review so he contests that conclusion, however as stated herein petitioner did raise those claims his pro se appeal to the TCCA.

(8) Both state jailhouse liars were presented as due process and equal protection issues not *"solely as a matter of state evidence law"*. Nonetheless, thought the District Court held that the claim regarding *"Sheldon Anter"* ("S.A.") *"Claim is not cognizable in this federal habeas proceeding because Petitioner raised it on direct appeal 'solely' as a matter of state evidence law"*. The Court did not cite any law to justify the learned court's odd holding on this matter. (Id., pg. 40). Trial Counsel should have at least moved to strike the pernicious biased testimony of jailhouse liar S.A. a twice-deported illegal alien, who was undergoing DEPORTATION proceedings by our Federal Government when Assistant (now Deputy) District Attorney Tom Thurman went down to New Orleans and begged the Feds to allow Anter to come back to Tennessee in order to (lie) his way back into the U.S. It was exhibited that Mr. Thurman wrote a letter to the Federal authorities on behalf of S.A. His sister thought that Mr. Thurman had reneged on his promise to the Anter family that if he testified at the first trial he would not be deported. So she went hysterical, exposed the quid pro quo, to avoid her brother being deported back to Trinidad for the third time after 14 years a daughter and the fear of *"being killed if he returned"*. She and went to the news media with her complaint that the "DA lied to her and her brother, that he wouldn't be deported if he "testified" against petitioner in the first trial, which he did. This was her complaint made *before* the second trial and counsel did not follow up on this information which was in the newspapers. True counsel put up a spirited criticism during trial but Anter told so many lies, he no doubt contributed to the violation of Petitioner's constitutional right and helped to deprive petitioner of his constitutional rights to be free from imprisonment. His testimony and appearance at the second trial should have been stricken, suppressed or something.

The State appellate court *pro se* application for permission to appeal was finally recognized by the District Court (pg. 40) regarding the prevarication of Andrew Napper ("A.N.") and prosecutorial misconduct but the Court's review was extremely strict against the pro se appellant: *"Although Petitioner did raise this claim in a 'conclusory' fashion in his pro se application for permission to appeal to the Tn Sup Ct in his state post-conviction proceedings....that is not sufficient to fairly present the claim to the state courts." Id., pg. 40)* Andrew Napper was a claim that petitioner stated was extremely prejudicial as well though not as extensively damaging as Anter's was . Anter's testimony was fueled by personal animosity toward Defendant as well as the huge desire to parlay his lies into an agreement to stay in the

U.S. with his family of 13 years. Napper was motivated by the scenario that he might be killed if sent back to state prison because he had been used by DEA previously to bust up gang related drug activities. He understood that he could stand a better chance in a small jail than the wild blue yonder of state prison grounds. Counsel was deficient in his handling of these two biased criminal informants.

(9) The District Court overlooked again the fact that petitioner did present his claim of prejudicial photographs in post conviction petition and pr se appeals and unreasonably held that petitioner did not present the claim of prejudicial photographs to the TCCA on either direct appeal or post conviction appeals. (Id., pg. 40) then it went on to hold that the photographs were useful as in State v. Nesbitt, *978 S.W. 2d 872, 901 n. 2, "as proof that the deceased was a reasonable creature in being; that is to say a child that was born alive"* is at least a strained justification for these provocative pictures. There had been no assertion by anyone that the child had not been living for nine years when she was killed. There was no question asked by anyone if the *"person killed was the same person named in the indictment"*. Plus the District Court using still another unreasonable excuse for the pictures of the child stating *"And Ms. Trimble used the victim's school picture to identify her as the person named in the indictment." (Id., pg. 56)* is ludicrous. The mother did not need a picture to identify her own child. Even after 33 years, identity was not an issue. The purpose intended and served was to inflame the passion and sympathy of the jury, to make it more probable than not to convict anyone on trial for this crime appear guilty. *"Photos can sometimes be overwhelming depending on how they're presented..."* State v. Larkin, *443 S.W. 3d 751, 765, CCA- Knoxville; 3-28-2013.* The only seemingly rational connection with pictures of the child's birthday party provided by the District Court, was that Petitioner's DNA was reported on it after the warrantless 2nd DNA search u sing swabs. Testimony was uncontrovered was elicited that the child had that blouse on around the time of her disappearance. There was no need to show her to the jury in her gala Happy Birthday party with this blouse on celebrationing, except to evoke the sympathy and passion of the jury. Counsel was deficient in not challenging the introduction of these prejudicial provocative pictures to the Jury or at least objecting to the surprise introduction on the grounds of relevance and prejudice. With permission to appeal petitioner will be far more exact in proving these assertions.

(10) Petitioner did not strenuously and repeatedly raise the trial court errors regarding admission of the jailhouse video in all of his petitions, which he believes and claimed undermined his presumption of innocence and his right against compulsory self incrimination from the mouths of three witnesses, Assistant District Attorney General Tom Thurman, S.A. and A. N., and then, as the District Court proposes: *"...not then raise this claim to the TCCA." (Pg. 41)* The Court is being used by the ruse employed time and time again in Tennessee where the court-appointed attorney refuses to communicate with his client-prisoner and refuses to file the proper appeal, which was insisted upon by the client. The trial (post conviction) court never denied that it did not promise to review the video overnight....The transcript of the trial, as Petitioner showed in his state Petitions for post conviction relief proved contrary to the District Court's finding that Mr. Thurman did describe to the jury why he felt what was happening during the alleged altercation and why.

(11) This fact design should also satisfy cause of IAC with respect to substantial claims because the state appellate courts typically prohibit defendants from raising IAC or any other claims on Appeal unless PCC raises them for him. *Pro se* appellants are forcibly tied at the hip of a person who in this case intends to restrict his access to the appellate courts. Thus, both causes should excuse *any "procedural default"* of IAC claims. *Trevino v. Thaler 569 U.S. 413, 429, (2013); Martinez v. Ryan, 566 U.S. 1, 17 (2012). Abdur Rahman v. Carpenter, 805 F. 3d 710 713 (6th Cir. 2015) ("Martinez* and *Trevino* apply in Tennessee") Further, the district court was unreasonable by concluding that post-conviction's alleged ineffectiveness could not constitute cause to excuse "procedural default".

(12) He has a constitutional right in Tennessee and in the Federal Constitution to raise those issues along with the issues raised by the appointed attorney. Even if the appellate courts in Tennessee concluded that the petitioner waived these issues for review because he was bringing them himself, they could have nonetheless considered whether a plain error analysis was applicable under the facts and still examines whether any error occurred. His claims are subject to review insofar as they are "plain". *Holguin-Hernandez v. U.S., 140 S.Ct. 762 (2020); United States v. Olano 507 U.S.725, 732-736, 113 S.Ct. 1770 (1993). "Appellate courts in Tennessee have 'the authority to 'consider an error that has affected the substantial rights of a party at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal.'" State v. Knowles, 470 S.W. 3d 416, 423 (Tenn. 2015) (quoting Tenn. R. App. P.*

36[b]). "We refer to this discretionary consideration of waived issues as 'plain error' review." Knowles, *470 S.W. 3d at 423*; see also Grindstaff v. State, *297 S.W. 3d 208, 219 n. 12. (Tenn. 2009). "Plain error"* review is also available when counsel fails to lodge a contemporaneous objection when the issue first arises. State v. Thomas, *158 S.W. 3d 361, app. 413 (Tenn. 2005).(*emphasis supplied) "*Two essential requirements are needed for there to be an effective waiver: (1) knowledge of the right being waived and (2) the grant of authority to waive the right. A party cannot waive a right that they do not know they have". Citing,* Reed v. Washington Cnty. Bd. Of Educ., *756 S.W. 2d 250 255 (Tenn. 1988)([a] waiver is a voluntary relinquishment by a party of a known right." Morgan, supra, @ 8("However, if an individual does not know of his rights or if he fails to understand them he cannot waive those rights." Reed, 756 S.W. 2d at 255)*[citations omitted)

(57) SUBSTANTIAL GROUNDS

The following grounds are proposed as having substantial merit:

(13) **Constructive Amendment of Indictment**

Trial counsel performed ineffectively by failing to object to a constructive amendment of the indictment. The charge of rape was never pled in the indictment. The grand jury did not make this charge on its own judgment, which is a substantial right, which cannot be taken away with or without court amendment. *U.S.C.A. Const. Amend. 5; Tennessee Constitution Article 1, § 14;* State v. Goodson, *77 S.W. 3d 240; T.R.Crim. P. Rule 7 (b)(2); T.C.A. § 40-1713.* While Count I of the indictment purports to charge the petitioner with First Degree Murder and felony murder, there is no indictment for any other "underlying felony" that identifies what other offense the defendant was put on notice to defend against, and more importantly, insufficient evidence of an underlying felony or of a jury verdict to one. *"A valid indictment is an essential jurisdictional element without which there can be no prosecution."* Wyatt v. State, *24 S.W.3d 319, 323 (Tenn. 2000);* State v. Perkinson, *867 S.W.2d 1, 5 (Tenn. Crim. App. 1992).* By authority of *Article I, Section 8 of the Tennessee Constitution the Fifth, Sixth and Fourteenth Amendments* of the Federal Constitution, Count I and 2 should be dismissed. See State v. Smith, *612 S.W.2d 493, 497 (Tenn. Crim. App. 1980), citing,* Inman v. State, *195 Tenn. 303, 304-305, 259 S.W.2d 532,* 532 *(1953) ("The test for the sufficiency of an indictment is whether it contains the elements of the offense intended to be charged . . .")* When the indictment fails to assert an essential element of

the offense - - - no offense has been charged - - - [and] subsequent proceedings are a nullity. *State v. Perkinson, 867 S.W.2d 1, 6 (Tenn. Crim., App. 1992).* (Emphasis supplied)

The State of Tennessee was without jurisdiction or authority to prosecute petitioner for rape, larceny or burglary, *State ex rel, Kuntz v. Bomar, 214 Tenn. 500, 504, 381 S.W.2d 290, 291-92 (1964)* but based on the record before us, this is what the state of Tennessee did in this case. Whereas the records below show that the state of Tennessee is uncertain whether the defendant was on trial for and convicted of rape or larceny. "*Tennessee necessarily requires that the factual allegations [in an indictment] must relate to all the essential elements of [the] offense including that of scienter.*" *State v. Marshall, 870 S.W.2d 532, 537 (Tenn. Crim. App. 1993).*

Thus, an indictment that is so defective as to fail to vest jurisdiction in the trial court may be challenged at any stage of the proceedings, including in a habeas corpus petition. *Wyatt v. State, 24 S.W.3d 319, 323 (Tenn. 2000). "The Supreme Court held that the Sixth Amendment right to jury trial as incorporated against the States by way of the Fourteenth Amendment, requires a unanimous verdict to convict a defendant of a serious offense...." Ramos v. Louisiana, 2020 WL1906545; Patton v. United States, 281 U.S. 276, 50 S.Ct. 253, (1930); Andres v. United States, 333 U.S. 740 68 S.Ct. 880 (1948); Blakely v. Washington, 542 U.S. 296, 301, 124 S.Ct. 2531, (2004); Apprendi v. New Jersey, 530 U.S. 466 477, 120 S.Ct. 2348 (2000).*

By way of prosecutorial misconduct the constructive amendment of the case took place when the prosecutor repeatedly argued to the jury that the petitioner "raped" the nine-year old victim. The prosecutor did not have any proof of rape. He was not told by the criminal informants jailhouse liars, that petitioner said he raped the child. There was no evidence of rape by the petitioner. The child's vaginal vault contained another person's DNA. The District Court jumped over his factual innocence to the charge of rape when it wrote in its Order of dismissal that: *"the medical examiner took vaginal swabs from the victim's vagina...Subsequent analysis showed the presence of sperm..."* Why does the Court note this without adding that the DNA analysis exonerated appellant as the depositor of the "sperm"? Just writing that examination had been performed for DNA, without connecting the results to anyone, leaves the impression that appellant was the depositor of the DNA. That is an unfair machination at the very least. To appellant, this "Factual Background" (Pg. 4, Order) omission indicates that the Court tripped over finding half-truths rather than objective analysis, when it leads to proof of innocence.

The extremely prejudicial aspersions by the State's attorney Tom Thurman that petitioner was guilty of rape, was repeated in argument and in the false statements to the jury that the two jail house liars also said that *"he* (petitioner) *raped her. He even lied on his witnesses S.A. and A.N.*

By extremely improper closing argument to the jury was so inflammatory and improper that it affected the outcome of the trial and clearly denied him a unanimous jury verdict and obstructed petitioner's constitutional right to a fair trial by an impartial jury. *State v. Cribbs, 967 S.W. 2d 773, 786 (Tenn. 1998); State v. Goltz, 111 S.W. 3d 1,5 (Tenn. Crim. App. 2003); Judge v. State, 539 S.W. 2d 340, 344 (Tenn. Crim. App. 1976)*

Deprivation of the right to indictment by grand jury is a structural error which rendered petitioners trial fundamentally unfair. Rape and larceny or rape and burglary do not share the same elements. Allowing the prosecutor to argue to the jury two or more underlying felonies which then permitted the jury to pick which underlying felony offense they wanted.

(14) **Insufficient Evidence Beyond a Reasonable Doubt**

*"In June 2008, a Davidson County grand jury indicted the Petitioner for first-degree murder and felony murder. In July, 2009, (a) jury found Petitioner guilty of second-degree murder a lesser-included offense, on both counts." (Barrett v. Genovese, @ *1).* The District Court concluded that since Petitioner was convicted of second-degree murder whereas he had been charged with "premeditated murder" and "felony murder in the perpetration of larceny" this means there was sufficient evidence to support both convictions. However as the TCCA explained in their direct appeal response petitioner was convicted of "2nd degree *felony murder* and *second degree premeditated murder*. He was convicted of both offenses and yet there is no equivalent lesser-included offense for 1st degree felony murder and 1st degree premeditated murder, which were the original charges. Therefore there is insufficient evidence to support these convictions. A simple review of the record will show that there was no evidence of any monetary value taken from the victim, which is required to sustain a charge of "larceny". (See *Barrett v. Genovese @ *23).*

Again, as in each case that is viewed as "procedurally defaulted", petitioner relies on the Statement of the Case argument and laws herein. In addition, the District Court abused its discretion by concluding that Petitioner's brief was apparently in the "pipe line" when the Tennessee Supreme Court decision in *State v. Dorantes 331 S.W. 3d 370, 379 (Tenn. 2011)* was

decided. *Dorantes* introduced a more lenient standard of proof for conviction based on sufficiency of evidence than that which existed at that date of offense in this case. Petitioner submits that it is a denial of due process and cruel and unusual punishment for the TCCA to rely on a standard of proof that reduced the State's burden to be upheld on appeal or ex post facto standard of proof *after he was convicted. (See Genovese supra, @ *24.* The TCCA decision that post-date a state court's prior determination cannot be '*clearly established law*' for the purposes of the federal habeas statute. For the Federal Court to uphold the TCCA decision of *State v. Dorantes, 331 S.W. 3d 370 379 (Tenn. 2011),* which eliminated the "*every other reasonable theory or hypothesis except that of guilt" analysis for conviction based on circumstantial evidence alone ('"must be consistent with the guilt of the accused but it must also be inconsistent with his [or her] innocence and must exclude every other reasonable theory or hypothesis except that of guilt."')* and replaced it with the standard of proof being the same "*without regard to whether evidence is direct or circumstantial" (Genovese, @ 44)* is an unreasonable application because the Dorantes, decision in this case cannot be *clearly established law* and therefore the Court utilized an unreasonable application of law which was not clearly established when Appellant was convicted.

Further the conclusion that the victim died from *asphyxia* is also inconclusive, in that this diagnosis is one of *exclusion*, where every other possible cause of death has been scientifically excluded. This test was not applied in this case, and the characteristics of second degree murder are unavailing and there is insufficient evidence to support this conviction. *Id, 2 *25.* The court concluded that the description of the suspect fit the petitioner, overlooks one salient fact that was never refuted: the eye witnesses all testified that the perpetrator was White (Caucasian) and their was DNA evidence that the killer of the child was White, not Black. Further, a description of the injuries to the child does not in themselves prove that the Petitioner was the assailant. (See generally @ 25, *Id) especially since there was DNA evidence on the victim's clothing indicating another male profile.*

Had Appellant been afforded a fair and impartial jury as guaranteed to every American by the, 6th, and 14th Amendments to the United States Constitution and Article I, § of the Constitution of the State of Tennessee, minus the prejudicial acts and omissions of the trial Court, the State's prosecutors petitioner would not have been convicted;

(15) **Irrational Consecutive Violates 8th Amendment, U.S. Constitution**

'Second-degree murder (T.C.A.§ 39-13-202(a)(2)[formerly *T.C.A.§ 39-2403]* is *not* a lesser included offense of first degree *felony* murder (T.C.A. *§* 39-2402(4). *"The only lesser included offenses of first-degree felony murder are reckless homicide and criminally negligent homicide."* See State v. Gilliam, *901 S.W. 2d 385[TCCA 1995]*; State v. Brown *311 S.W. 3d 422 (Tenn. 5-27-10).* Therefore, petitioner's conviction and sentence for this offense is unconstitutional. There was no proof that petitioner had killed anyone or knew anyone who killed the victim.

The state court, in violation of Eddings v. Oklahoma, *455 U.S. 104 113-114, 102 S.Ct. 869 (1982)* refused to consider as mitigating evidence the five years of freedom event-free petitioner spent prior to arrest and after having served nearly 29 consecutive years of incarceration in the state prison system. In Eddings, the sentencing judge and appellate court found mitigating evidence about the defendant's "family history" irrelevant as a matter of law. *455 U.S. at 113, 102 S.Ct. 869.* The Supreme Court held: "*Just as the State may not by statute preclude the sentencer from considering any mitigating factor neither may the sentencer refuse to consider as a matter of law any relevant mitigating evidence.*" Id., at 113-114, 102 S.Ct. 869.

Those five (5) years that petitioner spent in the free world free of any wrong doing or accusation of wrong doing, after nearly thirty (30) years of incarceration, were entitled to be proffered as mitigating evidence. "*Williams, 529 U.S. at 397, 120 S.Ct. 1495; Rompilla, 545 U.S. at 382, 125 S.Ct. 2456. Dawson v. Delaware, 112 S.Ct. 1093, 503 U.S. 159 (3-9-92); Jells v. Mitchell, 538 F. 3d 478 (6th Cir. 8-18-2008)*: "*failure to use mitigation specialist was deficient*". Those five years appellant did not even get a traffic ticket. His business (*"A.J.'s 'One Man Army' Expert Lawn Service"*) required him to have contact with hundreds of people each month. He told trial counsel he was elected to the Neighborhood Anti-Crime block Club presidency by members of his neighborhood (Evergreen). He also was a "judge" on the Shelby County Voting Registrar for the years 2005-7). Counsel also learned that appellant received several decorations for combat tour in Viet Nam including the Purple Heart. These facts could have gone to sway the jury to a lesser sentence.

The consecutive sentencing and indeed the sentence of "44 years" is "*'greater than necessary to accomplish the goals of sentencing.'*" Holguin supra, *[2]*, citing, Kimbrough v. United States, *552 U.S. 85, 101, 128 S.Ct. 558, (2007)* "*Congress has instructed sentencing courts to impose sentences that are '"sufficient, but not greater than necessary, to comply with'"*

(among other things) certain basic objectives, including the need for '"just punishment, deterrence protection of the public, and rehabilitation."' Holquin, *[3], citing,* Dean v. United States, *581 U.S. ____, ___, 137 S.Ct. 1170, 1175.*

Here, it is very doubtful that the sentencer had the proper motives to give consideration to whether the sentences should run consecutive, but the question for the Court is whether the trial court's choice of consecutive sentencing was reasonable or whether the judge instead abused his discretion in determining that the factors he considered supported the sentence imposed. *"A finding of abuse of discretion 'reflects that the trial court's logic and reasoning was improper when viewed in light of the factual circumstances and relevant legal principles involved in a particular case."* State v. Ronald Lee Freels, Jr., *citing,* State v. Shaffer *45 S.W. 3d 553, 555 (Tenn. 2001).*

(58) **TRIAL COURT ERRORS**

(15) Prejudicial pre-indictment delay (Please see #56 infra)

(16) Defective Indictment. The District Court acknowledges that he petitioner *"did raise this claim in his original pro se post-conviction petition..."* But it falls for the same ruse again, when although petitioner did submit his claim to the TCCA on post conviction appeal, but *pro se* due to the lack of assistance of counsel on appeal. Conversely the Court concluded wrongly that *"thus, Petitioner did not fully exhaust his available remedies in the state courts, and he is now barred from doing so...." This claim is procedurally defaulted." Id. At *21.*

(17) Prejudicial pre-trial publicity was not addressed and the district Court's assessment of this claim also falls into the ruse that the post conviction process laid out in that they all say petitioner did not raise this issue of prejudicial pretrial publicity *"In short Petitioner did not exhaust the available remedies for these three claims (Claims 2.B., 2.C., 2 H.) by presenting them to the TCCA and he can no longer do so. He has not demonstrated cause to overcome this default. These claims will be denied."(Id. @ *21)* petitioner has shown over and over again before the District Court and herein, how he was hamstrung by the defunct involvement of the post conviction counsel appointed by the post conviction court even though he has shown that he did present these grounds in his *pro se* appeals on post conviction stages.

(18) Trial Court's Denial of Motion to Continue in order for the Defendant to obtain independent DNA analysis; This ground was presented to the state appellate courts following the denial of his post conviction petition alleging them, albeit *pro se*. Therefore the continued

reliance by the District Court on the deficiency of post conviction counsel not filing these grounds which petitioner had put in his post conviction petition and tried to get counsel to file on appeal, is at least unreasonable. One example of the need for an independent DNA expert is from trial Counsel, who "*...said that, with respect to the DNA evidence a profile other than the Petitioner's had been developed from the victim's clothing but was never matched to an individual...*" See Barrett v. State *No. M2015-01161-CCA-R3-PC, 8-8-16.*

(19) Assisting in concocting prejudicial, fabricated testimony of two jailhouse liars. Biased, dishonest redaction of Sheldon Anter's testimony by court putting lies on top of lies; including attributing statements to the defendant alleging he said things which in fact the trial court told him to say that the defendant said things, i.e., " he has killed before..." etc.

(20) Improperly bolstering prosecutorial misconduct regarding jailhouse (silent) video and the rendition of what it was about from the mouths of the prosecutor Tom Thurman and testimony of jailhouse liar Sheldon Anter who hated petitioner, telling the jury about what the altercation was about and who was the aggressor;

(39) Failure to require the State to decide as a result of their bifabricated argument of two offenses, as to what charge the defendant was on trial for, thus it is impossible to know what the jury convicted the Defendant for. *"The Sixth Amendment right to a jury trial, as incorporated against the States by way of the Fourteenth Amendment, requires a unanimous verdict to convict a defendant of a serious offense." (other cites omitted)*

(40) His convictions for murder are unconstitutional. Had the jury not been so inflamed by the clever tricks of the learned prosecutor Tom Thurman, they would not have found sufficient evidence beyond a reasonable doubt to support conviction predicated on rape or larceny. Had the jury been given the special jury form or instruction verdict would have shown which of the underlying felonies argued to the jury, were relied upon in reaching their verdict.

(41) The trial Court denied petitioner due process by not giving instruction defining "sexual intercourse". Absent evidence of sexual intercourse as that term is defined by statute or a substantial step toward an overt act of sexual intercourse, rape or attempted rape had not been proven. The DNA test closest to this offense exonerated petitioner. The court erred in instructing the jury. The court declined to provide the jury with a special verdict form that would have shown which of the underlying felonies the jury relied upon in reaching its verdict. There is no way for the District Court to know whether jury based its verdict on a unanimous determination.

(21) Failure to fulfill his word to the Defendant and the Jury that he would take the video under advisement that night and inform them the next day as to who was the aggressor because there was considerable argument before the jury as to the prejudicial description of the video as stated by state prosecutor Tom Thurman and jailhouse liar Sheldon Anter.

(42) The honorable Court below justified the failure of the trial Court to instruct the jury according to law. (pg. 60, Id) The petitioner was not challenging "*jury instructions as a whole...*" State and Federal laws require juries be informed in specific terms and logic about how they should view testimony from criminal informants, who are not giving testimonies as lay witnesses. Petitioner takes the case offered by the Court that jury instructions should "adequately inform the jury regarding the credibility of witness testimony", and "alert[s] the jury to the various considerations that it should take into account in weighing testimony." Citing and quoting *Goff v. Bagley, 601 F. 3d 445 469 (6th Cir. 2010, quoting, Scott v. Mitchell 209 F. 3d 854, 883 (6th Cir. 2000). However these two cases are not talking about "criminal informants" such as Andrew Napper and Sheldon Anter. The Court quoted the trial court as stating to the jury:* "If from the evidence presented you find that a witness has been convicted of a prior crime...and the trial court adds additional doubt to the meaning of how to weigh testimony of a criminal informant *"'''you can consider such only for the purpose of its effect, if any on his or her credibility as a witness"* This information was far less specific that what the Tennessee Supreme Court required of it state judges in *State v. Stevens, 989 S.W. 2d 290, 294 (Tenn. 1-1-1999). Jacumin 778 S.W. 2d @ 436 (citing, test of Aguiliar-Spinelli, U.S. Supreme Court (See pg. 34,* Petitioner's *ISSUES FOR REVIEW)* Failure to comply with state law governing the testimony of criminal informants in that they are not ordinary citizens doing their duty to God and their country but the special cautionary jury instructions specifically designed for "criminal informants" and "professional informants" was completed ignored by the trial Court and Defense Counsel which compounded his deficiency in assisting his client. If the use of these jail house liars was no big deal, why were they used? Why did the state prosecutor Mr. Thurman, gamble on using such obviously shady characters, who were obviously unfit to testify against petitioner? What did he have to gain? These jail house liars violated with the assistance of the prosecutor Mr. Thurman, the defendant's right to remain silent. After 33 years and never any 'confession' to anyone of guilt to the charged offense, these criminal informants were allowed to testify that petitioner told them he was guilty of the charged offense. The lead prosecutor verbally and

physically made forceful delivery of the remark that appellant told them he was guilty and imbued it with a potential for prejudice greater than would ordinarily be ascribed to a single remark made during a lengthy trial. Mr. Thurman made these statements to the jury in closing argument. The State admitted at trial that each jailhouse liar received benefits from their lies against Petitioner. Petitioner quoted the terms of these tacit agreements that were admitted by both witnesses and S.A.'s sister but the District Court unreasonably ignored these admissions.

(43) Failing to act as the 13th juror to overturn the verdict for insufficient evidence that the Defendant had committed any crime against the victim.

(44) Failures to give the requisite jury instructions on the pivotal absentee witness Frank White. The court and defense counsel allowed for impermissible hearsay testimony by S.A. putting accusatory, prejudicial remarks from absentee witness Frank White, which prejudiced Petitioner's right to confront his accuser. According to S.A., Frank White accused Petitioner of assaulting him, name-calling and his presumption of innocence. Counsel should have rose to strike or seek to suppress Anter's hearsay testimony as being in violation of the absentee witness rule as aforesaid. (Order of Court, pg. 62)

(45) BY DENIAL OF MOTION TO SUPPRESS 2ND DNA WARRANTLESS SEARCH. The record clearly indicates that this 2nd DNA search did take place, that the petitioner addressed this issue in each court in the State of Tennessee, and that there was never a resolution of this claim. For the Court to now conclude that there may not have been a 2nd DNA test is unreasonable and unfounded.

(46) FAILURE TO HAVE A INDEPENDENT DNA TESTING OF EVIDENCE

(47) FAILURE TO DENY ADMISSION OF SURPRISE EXHIBITS OF PHOTOGRAPHS. The court's admission of the child's photos by the state prosecutor prejudiced petitioner's ability to receive a fair trial that a mistrial or reversal were the only remedies. The photos were impressible provocative and prejudicial. It was uncontroverted that the child was nine years of age. It was not in dispute that she was a child. In *State v. Trusty, 326 S.W. 3d 582 (Tenn. Crim. App. 2010)* , the Tennessee Court of Criminal Appeals explained the process by which a trial court must determine whether photographs are admissible:

> *"In determining whether a photograph is admissible the trial court must first determine whether it is relevant to a matter at issue in the case."* State v. Jackson, *2012 WL 6115084 @ *38, citing, State v. Trusty, Id. At 604* (other citations omitted)

"The court must next consider whether the probative value of the photograph is '"substantially outweighed by the danger of unfair prejudice confusion of the issue or misleading the jury. Id., citing, Tenn. R. Evid. 403; 2012 WL 6115084

Unlike the court in *State v. Noura Jackson, 444 S.W. 3d 554 (rev. 2012 WL 6115086),* the trial Court never described in detail what each photograph that it allowed depicted nor explained why each was admissible. The thin justification offered by the District Court was over the top and redundant in terms of the necessity for those photographs. The State of Tennessee never made the argument in post conviction or at trial, that the Federal Court made in justifying those prejudicial photographs. Therefore the Distract Court was objectively unreasonable and its treatment of this issue is subject to debate by reasonable scholars of law.

(48) FAILURE TO REQUEST JURY INSTRUCTION ON ABSENTEE WITNESS since the trial Court allowed his client's right to confrontation of hostile witnesses (whose testimony was given against Petitioner through the mouth of S.A. and A.N.) was deficient assistance.

(49) FAILURE TO OBJECT TO IMPROPER PROSECORTIAL ARGUMENTS which were extremely prejudicial and lies.

(58) INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL ("IATC")

(50) On his IATC claims the District Court held *"all eleven remaining sub-claims are procedurally defaulted." (Id., pg. 47, #5)* Here the differences between trial and post conviction counsel are qualitative and quantitative. Trial counsel performed ineffectively by failing to call Cicero X as an *alibi* wittiness to testify. Cicero X possessed exculpatory information and told counsel's investigator that he remembered Petitioner being in Chicago, on the date of the offense. Cicero was a true alibi and the only one he had due to the erosion of time on other Muslims' memory. According to law the decision of whether to use a witness is the defendant's, not as the District Court concludes, a *"matter of strategy"* alone. (*Barrett v. Genovese, Id., at *20.* Cicero as alibi witness was not called after consulting with Petitioner *"a decision that the Petitioner admitted he agreed with at the time...In retrospect however the Petitioner said that '"even a little bit might have been better than none"', because Cicero was the "only person who remembered his being in Chicago on the day the victim went missing.'" Barrett v. State, 2016 WL 4410649.*

Trial counsel was responsible for calling this witness, *"because these decisions require the skill, training and experience of the advocate, the power of decision on them should rest with*

the lawyer", and that the lawyer should maintain '"the ultimate choice and responsibility for the strategic and tactical decisions in the case." Pylant v. State *263 S.W. 3d 854, 874, citing, A.B.A. Standards for Criminal Justice §4-5-2(b) (3d ed. 1993) and* Baxter v. Rose, *523 S.W. 2d 930, 936.*

(51) Trial counsel performed ineffectively by failing to object and request a mistrial based on prosecutorial misconduct committed repeatedly during trial and closing that the Defendant raped the victim, and that he lied to his daughter on the phone. Prosecutors may not express his personal belief that the defendant's testimony was not credible." Here he commented on the wiretap of petitioner's phone call to his daughter. See *United States v. Young, 470 U.S. 1 17 (1985); United States v. Collins, 78 F. 3d 1021, 1040 (6th Cir. 1996).* And then, the prosecutor went on to describe the defendant as the assailant in a jailhouse video confrontation that the trial court promised the jury he would take the video under advisement that night and render his decision the next day as to who was the aggressor in the video. This never happened and the prejudicial description of the prosecutor as to appellant being the aggressor went unchallenged by anyone. These comments infected the trial with so much unfairness as to make the resulting conviction a denial of due process. *Darden v. Wainwright 477 U.S. 168 181 (1986) (quoting Donnelly v. DeChristoforo, 416 U.S. 637 643 (1974).*

(52) The excessive rapacious pre-trial publicity salted the ground of a jury pool for over a year. Described by the media as "the Crime of the Century" and with daily and weekly "specials" on the crime, typically juxtaposing pictures of the Defendant next to that of the 9 year old victim, local television and newspapers made a lot of money and their obviously race-based axe to grind performing the historic role of convicting a black man for 'rape' of a white victim, which somehow was done in an all-white upper class neighborhood 33 years previously was intent on saying and doing everything they could publicize to aid the prosecution in obtaining a conviction of the Defendant. It was learned at trial that the mother of the victim had remarried an editor of the Tennesseean newspaper the major news source in the city of Nashville, TN in the years following the death of her child. Trial counsel was deficient and their failure to properly weigh the class, race and political underpinnings of this crime cost Petitioner a fair trial by an impartial jury. The decision to support a change of venue due to pre trial publicity should have impressed counsel to move for a change of venue to West Tennessee if not to dismiss the indictment.

(53) Counsel should have moved for a mistrial due to the constructive amendment of the indictment.

(59) DENIAL OF DUE PROCESS BY P.C. COUNSEL AT HEARING OR APPEAL

(54) Petitioner had repeatedly made clear to the Evidentiary hearing court that he was dissatisfied with PCC. Without any consultation or communication with petitioner he filed a lackadaisical appeal to the TCCA without Petitioner's knowledge. Petitioner also filed a pro se appeal. PCC was in effect a "block" to prevent Petitioner from appealing his claims that had been denied by the trial court. (Id., pg. 48) FAILURE TO SHOW ANY INTEREST OR ASST. FOR OBTAINING WITNESSES

(55) FAILURE TO ASSIST PETITIONER IN OBTAINING TRANSCRIT OF EVID. HEARING SO HE COULD ASSIST IN HIS OWN APPEAL. That Appellant was denied counsel at a critical stage of the proceedings in state appellate court is further exemplified by his failure to provide appellant requested copy of the evidentiary hearing following post conviction process, nor with copy of either appeal briefs and failure to combine appellant's requested claims for appeal or communicate with him about his appeals in the least. "*For example, no showing of prejudice is necessary '"if the accused is denied counsel at a critical stage of his trial. United States v. Cronic, 466 U.S. 648, 659, 104 S.Ct. 2039 (1984).* Appeal of a wrongful conviction where he received two (2) forty-four (44) year sentences is certainly a critical state of the trial process notwithstanding the post conviction appeal stage.

FAILURE TO CHALLENGE THE COLLECTION, CUSTODY, TESTING OF DNA EVIDENCE; The State's reliance on DNA as proof of guilt was not conclusive. Had the questions and issues Petitioner raised at trial to counsel and again in his post conviction petitions as well as the two petitions for the writ of habeas corpus in federal court, would have caused the reasonable review to throw this evidence out for unreliability chain of custody issues mixed donor profiles and selective prosecution. The SERI lab amplified "swabs" received by DNA expert on "December 12 2007 two months *after* the first search and seizure and reported Petitioner's DNA on the victim's pants. (Id., pg. 53, Order) Contrary to the District Court and the State's findings there was no proven custodial pavane that establishes that any or all of these DNA search results came from the October 17 2007 search. The Court remonstrated that the SERI lab experts "*relied on the DNA sample obtained pursuant to a search warrant in October 2007.*" Actually the SERI lab reports according to the court's earlier finding was based on swabs

received December 12 2007. Thus it is unreasonable for the court to go against clearly established Supreme Court law in *Dunaway v. New York*, and the questions easily discerned in the chain of custody, by finding counsel was not in breach of the *Strickland* standards.

(56) REFUSED TO ASSIST IN SUBPOENA WITNESSES OR SECURE INDEPENDENT DNA ANALYSIS; When Petitioner made his thoughts and observations known to court-appointed PCC, he had plenty of time at that point, to secure or attempt to secure independent DNA analysis. Petitioner informed the trial court that their appointed was refusing to assist petitioner in obtaining DNA analysis to independently report on the errors in the TBI testing, the first thing the trial Court did in its Order was to deny this ground because petitioner did not obtain (on his own from the prison cell) a DNA expert to prove his allegations. It was not as the District Court concluded that his decision not to secure independent analysis was made before he talked with his client. That is why Counsel regretted that he did not secure that analysis instead of relying on the contested analysis of the State; Petitioner had secured while he was in jail waiting on trial the premier scientist as recognized by the U.S. Supreme Court, for DNA Typing and analysis. This is the source that petitioner relied on when he made his thoughts known to Counsel. When Counsel became aware of the grounds once again, through his review of Petitioner's Post Conviction Petition and appeal, then his regret came home to him. The District Court falls back on the ruse which petitioner has made plain in this motion that since petitioner did not have a DNA expert to testify at the post conviction stage he looses. However petitioner has made it plain throughout and in his Petition for the Writ of Habeas Corpus, that post conviction counsel refused to assist him in securing this witness to testify at an evidentiary hearing.

(57) REFUSAL TO ASSIST ON APPEAL OR COMMUNICATE WITH HIS CLIENT;

(60) DENIAL OF RIGHT TO APPEAL BY TCCA AND TSCT

(58) Rejection of *pro se* appeal in light of circumstances was unreasonable. He *"did all he could do to fairly present these claims to satisfy the exhaustion requirement...reasonable jurists could debate that conclusion..." Woolbright v. Crews,supra, 2018 WL 7247245, 6th Cir., No. 18-5131; 7-9-18.* The federal Court cannot presume that because counsel did submit one or two grounds for appeal, that therefore appellant was afforded all the Due Process needed, because those meritorious grounds which the Court went on to deny habeas relief upon which the PCC did not present, may have been a turning point in his state appeals had those courts exercised due

process and reviewed them. Therefore the *pro se* appeal grounds that were presented by the defendant and heard in the evidentiary hearing at post conviction but were ignored on appeal by counsel and the appellate courts, were treated unreasonably in the federal court and of course the state appellate courts. To attempt to avoid redundancies please see "Statement of the Case".

(59) Failure to review *pro se* appeal grounds that were heard in the evidentiary hearing and submitted *pro se* on appeal was error. To hold otherwise is offensive to the Due Process Clause of the Fourteenth Amendment because, on its face and as construed and applied, denies him access to the courts and not to be deprived of liberty without due process of law.

(61) PROSECUTORIAL MISCONDUCT

(60) The way the Court's decision lies now is that after all of the efforts Petitioner put in addressing prosecutorial misconduct (constructive amendment) as changing the nature and description of the offense without notice to the Defendant, improper argument throughout the trial and sentencing, denying him a fair trial by an impartial jury and due process of law, right to confront his accuser, and employing without conscience jailhouse liars in a blatant quid pro quo. State's attorney violated Defendant's constitutional right to remain silent by making the statement that why he had not come forward to explain why his DNA is on the exhibit thus denying him a fair and impartial jury trial. Mr. Thurman directly and indirectly commented on petitioner's silence.

(62) DENIAL OF A, FAIR & MEANINGFUL EVIDENTIARY HEARING BY THE POST CONVICTION COURT

(61) FAILURE TO HEAR MOTION TO RECUSE or to recuse itself;

(62) FAILURE TO GRANT MOTION FOR INDEPENDENT DNA TESTING

(63) DENIAL OF SUBPOENAS FOR ESSENTIAL WITNESSES AT E.HEARING

(64) STACKING TWO EVIDENTARY HEARINGS FOR SEPARATE TRIALS TEN (10) MINUTES APART TO PREJUDICE PETITONER'S RIGHT TO POST CONVICTON RELIEF.

(65) FAILURE TO ADDRESS THE LACK OF INSTRUCTIONS ON CRIMINAL INFORMANTS. TRIAL JUDGE NEVER ADDRESSED THESE CLAIMS IN THE EVIDENTIARY HEARING

(66) FAILURE TO REVERSE CONVICTION BASED ON WARRANTLESS DNA ANALYSIS AND DEFECTIVE DNA SEARCH WARRANT. The State should have been

required to prove that no second warrantless DNA search took place at the NMPD jail before trial but after the 1st DNA search. Petitioner was not even charged with this crime until after Detectives Bill Pridemore (now retired) and Pat Postiligione time (now retired) took his DNA the second. They called Defendant's then counsel for the previous case (Kerry G. Haymaker) and got him to tell Petitioner on their phone to go ahead and let them take his DNA the second time. (Petitioner protested to counsel and these two detectives as to why the necessity to take his DNA the second time when he was already charged with the previous crime. Haymaker kept assuring petitioner that it would be all right. He was in on the snicker. This is why counsel should have honored petitioner's request to have a *Dunaway* hearing in order to test the legality of the warrantless search and what happened in terms of chain of custody, CODIC circulation and why the first DNA search did not produce the same results, i.e., a "match" to the Trimble killing...Therefore counsel should have objected and moved to suppress the introduction of the test results following the warrantless second DNA search. (See Order fn. 13 pg. 52) The District Court is in error that *"But there is nothing in the record to reflect that a second DNA sear4ch occurred at all, 'much less' that it occurred in the manner described by Petitioner." (Id)* Then why has it not been denied prior to the District Court's question? There again it was remiss of the District Court to not Order for an Evidentiary hearing on this pivotal issue. The accusation followed the second DNA test by only a few days; thus the references to an October date could refer to either DNA search(pg. 53, Id)

(67) Then again the FBI report for *"the DNA profile"* is undated by the Court. There is nothing apparent that Jennifer Luttman used DNA profile – not sample – came from the 1st or *2nd* DNA search, to report Petitioner's DNA on the victim's blouse. The Court cites the ratio of identification but does not mention the fact that this ratio was based on less loci than is required in the field for a "match" to be declared, as there were reportedly only "9 loci" when the TBI Special Agent Chad Johnson told the Jury that at least "13 loci" must match before a match can be declared....

(68) FAILURE TO ISSUE SUBPOENAS FOR WITNESSES. Petitioner requested a DNA analysis, jail inmates, Sheldon Anter's sister, Sheldon Anter, Tennesseean reporters (2) and all were denied by the trial (evidentiary hearing) Court.

(69) FAILURE TO ADDRESS THE CLAIM THAT PETITIONER WAS UNLAWFULLY CONVICTED OF LARCENY AND THAT THE CHARGE LACKED SUFFICIENT EVIDENTARY FOUNDATION FOR CONVICTION.

CONCLUSION

Therefore Petitioner submits that the foregoing grounds are properly exhausted and within the interests of comity and federalism having been satisfied Counsel's failure to file an appeal of these grounds is no bar to the Habeas Courts review of those same grounds. *"A unilateral decision to terminate appellate review without the appellant's knowledge or consent is ineffective assistance of counsel. Jones v. State 1987 WL 15535 (TCCA, 1987), citing, Moultrie v. State, 542 S.W. 2d 835, 838 (TCCA 1976) That is the law in the state of Tennessee and the Federal law. When "an attorney who fails to file an appeal that a criminal defendant explicitly request has, as a matter of law, provided ineffective assistance of counsel that entitles the defendant to relief in the form of a delayed appeal." Campbell v. United States 686 F. 3d 353 (6th Cir. 2012; Ludwig v. United States 162 F. 3d 456 458-59 (6th Cir. 1998)*

Appellant respectfully moves this Honorable Court for a Certificate of Appealability for any or all of the (cumulative) foregoing.

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing upon Chief Deputy Clerk Ms. Susan Rogers; 100 E 5th Street, 540 Potter Steward US Cthse, Cincinnati, OH 45202-3988

On this the _18th ___ day of June 2020.

_____

2020 WL 409688
Only the Westlaw citation is currently available.
United States District Court, M.D. Tennessee, Nashville Division.

Jerome Sidney **BARRETT**, Petitioner,

v.

Kevin **GENOVESE**, Warden, Respondent.

No. 3:17-cv-00062
Filed 01/24/2020

Attorneys and Law Firms

Jerome S. **Barrett**, Only, TN, pro se.

John H. Bledsoe, III, Richard Davison Douglas, Tennessee Attorney General's Office, Nashville, TN, for Respondent.

MEMORANDUM OPINION

WAVERLY D. CRENSHAW, JR., CHIEF UNITED STATES DISTRICT JUDGE

*1 Jerome Sidney **Barrett**, a state prisoner, filed a *pro se* petition for the writ of habeas corpus under 28 U.S.C. § 2254 (Doc. No. 1) and an amended habeas petition (Doc. No. 3) (collectively, the "Petition"). Respondent filed an answer (Doc. No. 23) and Petitioner filed a reply (Doc. No. 33). In the reply, Petitioner requests discovery and an evidentiary hearing. (Doc. No. 33 at 45–48.) For the following reasons, these requests will be denied, Petitioner is not entitled to relief on any of his claims, and this action will be dismissed.

I. Procedural Background

In June 2008, a Davidson County grand jury indicted Petitioner for first-degree murder and felony murder. (Doc. No. 22-1 at 5–7.) In July 2009, a jury found Petitioner guilty of second-degree murder, a lesser included offense, on both counts. (Doc. No. 22-2 at 63.) "The jury sentenced him to forty-four years for each conviction. The trial court merged the convictions and ordered that the sentence be served consecutively to a life sentence for a previous conviction." State v. **Barrett**, No. M2009-02636-CCA-R3-CD, 2012 WL 2870571, at *25 (Tenn. Crim. App. July 13, 2012). The Tennessee Court of Criminal Appeals ("TCCA") affirmed the judgment. Id. at *46. Petitioner filed an application for permission to appeal to the Tennessee Supreme Court (Doc. No. 22-27), and the Supreme Court denied it on December 12, 2012 (Doc. No. 22-28).

In November 2013, the trial court received Petitioner's *pro se* petition for post-conviction relief. (Doc. No. 22-29 at 66–110.) The court appointed counsel (id. at 111), and Petitioner filed a *pro se* amended petition [1] (id. at 112–30). The court held an evidentiary hearing (Doc. No. 22-31) and denied relief (Doc. No. 22-29 at 134–42). The TCCA affirmed. **Barrett** v. State, No. M2015-01161-CCA-R3-PC, 2016 WL 4410649 (Tenn. Crim. App. Aug. 18, 2016). Petitioner then filed two applications for permission to appeal: one prepared by counsel (Doc. No. 22-36), and another prepared by Petitioner himself (Doc. No. 22-37). On December 14, 2016, the Tennessee Supreme Court denied discretionary review and dismissed Petitioner's *pro se* application because he was "represented by counsel who filed a timely application for permission to appeal." (Doc. No. 22-38.)

Petitioner filed a habeas corpus petition (Doc. No. 1) and an amended petition (Doc. No. 3) in this Court, and Respondent concedes that the Petition is timely (Doc. No. 23 at 2).

II. Factual Background

On direct appeal, the TCCA provided a comprehensive account of the evidence at trial. **Barrett**, 2012 WL 2870571, at *1–25. The Court will refer to specific evidence as necessary in the analysis below. Here, to provide a basic context for Petitioner's claims, the Court relies on the TCCA's summary of the underlying facts on post-conviction appeal:

> *2 In 2009, the Petitioner was convicted of second degree murder for the February 1975 murder of nine-year-old Marcia Trimble.... [O]n the evening of February 25, 1975, the

victim left her Nashville home to deliver Girl Scout cookies to a neighbor who lived across the street. When the victim's mother called for her approximately twenty-five minutes later, the victim did not respond and did not return home.

Following an extensive search, the victim's body was found on March 30, 1975, in a neighbor's garage. The garage where she was found was open-ended without doors, and her body was well-hidden. An autopsy showed that the victim's cause of death was asphyxia caused by manual strangulation. The forensic examiner who performed the autopsy opined that based upon decomposition, livor mortis, and the victim's stomach contents, she died at or near the time of her disappearance and was likely in the garage almost from the time of death.

The medical examiner took vaginal swabs from the victim's vagina, and that evidence was preserved by rolling the swabs onto slides. Subsequent analysis showed the presence of sperm, but DNA testing was not available in 1975. The slides prepared were preserved by the medical examiner's office. The Federal Bureau of Investigation ("FBI") conducted serology testing on the victim's underwear, pants, and blouse. Those tests revealed no blood or semen on the underwear but did show the presence of semen on the pants and blood on the blouse.

The case remained unsolved, but the Metro Nashville Police Department continued to investigate the murder, and in 1990 the victim's case file was reviewed in an attempt to locate evidence that could be submitted for DNA testing. Between 1990 and 2004, the victim's pants, blouse, and the slides created from the vaginal swabs were tested multiple times by various laboratories. A DNA profile from this evidence was created in March 1992. That DNA was compared to samples from over one hundred individuals, including samples from almost everyone in the victim's neighborhood, but there were no matches.

The Petitioner was eventually developed as a suspect, and police obtained a search warrant for his DNA in 2007. The Petitioner's DNA matched a profile developed from the victim's blouse. A DNA expert opined that the probability of a random match was one in six trillion. The Petitioner was subsequently arrested and indicted. In 2008, two jailhouse informants informed authorities that while he was in jail, the Petitioner made statements admitting that he had killed the victim but denying that he had raped her.

Barrett, 2016 WL 4410649, at *1–2 (internal citations and quotation marks omitted).

III. Asserted Claims

Petitioner asserts several claims in the original petition and amended petition. Because many of the bare assertions in the original petition overlap with arguments raised in the more expansive amended petition, the Court considers the original and amended petitions collectively. In doing so, the Court has liberally construed the Petition to the fullest extent to identify the following claims. For clarity, the Court has grouped these claims by type, and listed them in roughly chronological order.

1. The indictment was not issued by a grand jury with a foreman. (Doc. No. 1 at 25; Doc. No. 3 at 33.)

2. The trial court erred in the following eighteen ways:

   2.A. Denying the motion to dismiss for excessive pre-indictment delay (Doc. No. 1 at 12; Doc. No. 3 at 16);

   *3 2.B. Failing to minimize the effect of prejudicial pretrial publicity (Doc. No. 3 at 26–27);

   2.C. Failing to dismiss the indictment based on prejudicial pretrial publicity (id.);

   2.D. Denying the motion to continue trial to allow independent DNA analysis (id. at 10);

   2.E. Denying the motion for a bill of particulars (id. at 20);

   2.F. Denying the motion to suppress (Doc. No. 1 at 10; Doc. No. 3 at 15);

   2.G. Allowing the person who performed the autopsy of the victim to testify as a DNA expert for the prosecution (Doc. No. 1 at 18);

   2.H. Being influenced by media coverage to admit evidence (Doc. No. 3 at 27);

   2.I. Allowing the testimony of "two jailhouse liars" (Doc. No. 3 at 13–14, 23–24);

2.J. Admitting testimony of Petitioner's statement that he "had killed before" (Doc. No. 1 at 14);

2.K. Admitting photographs of the victim (Doc. No. 3 at 32–33);

2.L. Admitting a video recording of a jail altercation involving Petitioner and fellow inmate Frank White, and allowing Sheldon Anter to testify about what White said to Petitioner (Doc. No. 1 at 27; Doc. No. 3 at 14, 28);

2.M. Failing to tell the jury the court's opinion of who the aggressor was in the jail altercation (Doc. No. 3 at 28);

2.N. Allowing the prosecution to ask a defense witness if he was arrested, suspended, and resigned from the police force in 1978 (Doc. No. 1 at 15; Doc. No. 3 at 16);

2.O. Allowing the prosecution to impeach a defense witness with a prior misdemeanor conviction (Doc. No. 1 at 20; Doc. No. 3 at 16);

2.P. Failing to give a jury instruction on criminal and professional informants (Doc. No. 3 at 17, 23);

2.Q. Failing to instruct the jury that it must find Petitioner guilty of an underlying felony to find him guilty of felony murder (Doc. No. 3 at 19–21); and

2.R. Imposing an improper consecutive sentence above the maximum (Doc. No. 1 at 22; Doc. No. 3 at 34).

3. The state committed prosecutorial misconduct through comments during closing argument. (Doc. No. 1 at 24; Doc. No. 3 at 6, 14, 30–31.)

4. There is insufficient evidence to support Petitioner's convictions. (Doc. No. 1 at 8; Doc. No. 3 at 14, 22.)

5. Trial counsel was ineffective in the following fourteen ways:

5.A. Failing to file a motion to dismiss the indictment due to prejudicial pretrial publicity (Doc. No. 3 at 26);

5.B. Failing to adequately question potential jurors regarding media coverage (id. at 27);

5.C. Failing to ask constitutionally required questions during *voir dire* (id. at 33);

5.D. Retaining DNA expert Ronald Acklen (Doc. No. 3 at 3–4, 6–8);

5.E. Failing to assess the constitutionality of the collection, testing, and custody of DNA evidence (id. at 3–4, 7);

5.F. Failing to have a DNA expert conduct an independent DNA test (id. at 4, 9);

5.G. Failing to request a Dunaway hearing of a second DNA search (id. at 9, 16);

5.H. Failing to object and move to suppress evidence obtained as a result of a second warrantless DNA search (id. at 15–16);

5.I. Failing to investigate the backgrounds of state witnesses Sheldon Anter and Andrew Napper (id. at 13);

5.J. Failing to object to the admission of photographs of the victim from around the time of her death (id. at 33);

*4 5.K. Failing to object to the prosecutor's playing and narrating a video recording of the jail altercation (id. at 28);

5.L. Advising Petitioner not to call any alibi witnesses, including an individual named Cicero (id. at 17);

5.M. Failing to request a jury instruction on criminal and professional informants regarding Anter and Napper (id. at 13–14, 17, 23); and

5.N. Failing to request a jury instruction on the absentee witness rule regarding Frank White (id. at 25–26).

6. The Tennessee Supreme Court erred on direct appeal by reversing its decision to allow him a discretionary appeal after a one-week feature on his case aired on local news. (Id. at 27.)

7. The post-conviction trial court erred in the following eleven ways:

   7.A. Failing to appoint substitute counsel in a timely manner (id. at 28–29);

   7.B. Failing to hear the motion to appoint counsel from outside Nashville (id. at 2, 10);

   7.C. Failing to hear the motion to recuse (id. at 2);

   7.D Failing to hear the motion for independent DNA testing (id. at 2);

   7.E. Failing to hear the motion to move the evidentiary hearing due to media bias (id. at 2);

   7.F. Failing to issue a subpoena to help Petitioner secure witnesses and documentation for the evidentiary hearing (id. at 8, 10, 12);

   7.G. Holding two evidentiary hearings on the same day, five minutes apart (id. at 12);

   7.H. Failing to address the claim that trial counsel should have requested a jury instruction regarding the testimony of Anter and Napper (id. at 24);

   7.I. Failing to address the claim that Petitioner's larceny conviction was void (id. at 18, 20);

   7.J. Ignoring the defense of "selective prosecution" based on differences between DNA samples (id. at 3); and

   7.K. Refusing to provide a copy of the evidentiary hearing transcript (id.).

8. Appointed post-conviction counsel was ineffective at the initial review stage in failing to:

   8.A. Secure an independent expert's DNA analysis (id. at 5, 9–10);

   8.B. Support Petitioner's *pro se* motion for independent expert assistance (id. at 9, 11); and

   8.C. Arrange for alibi witness Cicero to testify at the evidentiary hearing (id.).

9. Appointed post-conviction counsel was ineffective on appeal in:

   9.A. Denying Petitioner's right to appeal by refusing to include all the requested grounds for relief in the appellate brief (id. at 10, 13, 30);

   9.B. Failing to provide Petitioner a copy of the evidentiary hearing transcript (id. at 12, 30); and

   9.C. Failing to provide Petitioner a copy of the appellate brief (id. at 12–13, 30).

10. The TCCA erred on post-conviction appeal by failing to address Petitioner's claim that the trial court erroneously allowed Anter's testimony. (Id. at 24–25.)

IV. Standard of Review

The authority for federal courts to grant habeas corpus relief to state prisoners is provided by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Harrington v. Richter, 562 U.S. 86, 97 (2011). Under AEDPA, a habeas claim "adjudicated on the merits" in state court cannot be the basis for federal relief unless the state court's decision was: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "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). Thus, "[t]he question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." Schriro v. Landrigan, 550 U.S. 465, 473 (2007) (citing Williams v. Taylor, 529 U.S. 362, 410 (2000)).

***5** Under Section 2254(d)(1), a state court's decision is "contrary to" clearly established federal law " 'if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases' or 'if the state court confronts a set of facts that are materially indistinguishable from a decision [of the Supreme Court] and nevertheless arrives at a

[different result].' " Hill v. Curtin, 792 F.3d 670, 676 (6th Cir. 2015) (en banc) (quoting Lockyer v. Andrade, 538 U.S. 63, 73 (2003)). "Under the 'unreasonable application' clause of [Section] 2254(d)(1), habeas relief is available if 'the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case.' " Id. (quoting Harris v. Haeberlin, 526 F.3d 903, 909 (6th Cir. 2008)). A state court's application is not unreasonable under this standard simply because a federal court finds it "incorrect or erroneous"—instead, the federal court must find that the state court's application was "objectively unreasonable." Id. (quoting Wiggins v. Smith, 539 U.S. 510, 520–21 (2003)).

To grant relief under Section 2254(d)(2), a federal court must find that "the state court's factual determination was 'objectively unreasonable' in light of the evidence presented in the state court proceedings." Young v. Hofbauer, 52 F. App'x 234, 236 (6th Cir. 2002). State-court factual determinations are only unreasonable "if it is shown that the state court's presumptively correct factual findings are rebutted by 'clear and convincing evidence' and do not have support in the record." Pouncy v. Palmer, 846 F.3d 144, 158 (6th Cir. 2017) (quoting Matthews v. Ishee, 486 F.3d 883, 889 (6th Cir. 2007)). "[I]t is not enough for the petitioner to show some unreasonable determination of fact; rather, the petitioner must show that the resulting state court decision was 'based on' that unreasonable determination." Rice v. White, 660 F.3d 242, 250 (6th Cir. 2011) (citing Byrd v. Workman, 645 F.3d 1159, 1172 (10th Cir. 2011)).

The demanding review of claims rejected on the merits in state court, however, is ordinarily only available to petitioners who "exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A); Harrington, 562 U.S. at 103. In Tennessee, a petitioner is "deemed to have exhausted all available state remedies for [a] claim" when it is presented to the Tennessee Court of Criminal Appeals. Adams v. Holland, 330 F.3d 398, 402 (6th Cir. 2003) (quoting Tenn. Sup. Ct. R. 39). "To be properly exhausted, each claim must have been 'fairly presented' to the state courts," meaning that the petitioner presented "the same claim under the same theory ... to the state courts." Wagner v. Smith, 581 F.3d 410, 414, 417 (6th Cir. 2009) (citations omitted).

The procedural default doctrine is "an important 'corollary' to the exhaustion requirement," under which "a federal court may not review federal claims that ... the state court denied based on an adequate and independent state procedural rule." Davila v. Davis, 137 S. Ct. 2058, 2064 (2017) (citations omitted). A claim also may be "technically exhausted, yet procedurally defaulted," where "a petitioner fails to present a claim in state court, but that remedy is no longer available to him." Atkins v. Holloway, 792 F.3d 654, 657 (6th Cir. 2015) (citing Jones v. Bagley, 696 F.3d 475, 483–84 (6th Cir. 2012)).

To obtain review of a procedurally defaulted claim, a petitioner must "establish 'cause' and 'prejudice,' or a 'manifest miscarriage of justice.' " Middlebrooks v. Carpenter, 843 F.3d 1127, 1134 (6th Cir. 2016) (citing Sutton v. Carpenter, 745 F.3d 787, 790–91 (6th Cir. 2014)). A petitioner may establish cause by "show[ing] that some objective factor external to the defense"— a factor that "cannot be fairly attributed to" the petitioner—"impeded counsel's efforts to comply with the State's procedural rule." Davila, 137 S. Ct. at 2065 (citations omitted). There is also "a narrow exception to the cause requirement where a constitutional violation has 'probably resulted' in the conviction of one who is 'actually innocent' of the substantive offense." Dretke v. Haley, 541 U.S. 386, 392 (2004) (quoting Murray v. Carrier, 477 U.S. 478, 496 (1986)). To establish prejudice, "a petitioner must show not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Garcia-Dorantes v. Warren, 801 F.3d 584, 598 (6th Cir. 2015) (quoting Hollis v. Davis, 941 F.2d 1471, 1480 (11th Cir. 1991)) (internal quotation marks omitted).

V. Analysis

***6** Respondent contends that all of the claims in the original petition—and some of the claims in the amended petition—should be dismissed because they do not comply with the pleading requirements of Habeas Rule 2(c). (Doc. No. 23 at 40–42.) Rule 2(c) requires a petitioner to " 'specify all the grounds for relief available to the petitioner' and 'state the facts supporting each ground.' " Mayle v. Fenix, 545 U.S. 644, 655 (2005) (citations omitted). This rule is "more demanding" than Rule 8(a) of the Federal Rules of Civil Procedure, under which "a complaint need only provide 'fair notice of what the plaintiff's claim is and the grounds upon which it rests.' " Mayle, 545 U.S. at 655 (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

Here, as stated above, the Court considers the original and amended petitions collectively. Accordingly, although the claims in the original petition are unsupported by facts, and much of the amended petition is difficult to decipher, the Court will not rely on the pleading standard of Habeas Rule 2(c) to summarily deny Petitioner's claims. Instead, the Court will consider whether Petitioner has complied with Rule 2(c), as necessary, in its consideration of each individual claim. See Mayle, 545 U.S. at 656 (explaining that a primary purpose of "Rule 2(c)'s demand that habeas petitioners plead with particularity is to assist the district court in determining whether" to order the State to respond). Nonetheless, Respondent also contends that Petitioner is not entitled to relief because the claims are either not cognizable, do not survive the demanding review of claims exhausted in state court, or are procedurally defaulted. (Doc. No. 23 at 40.) The Court agrees and addresses each category of claims in turn.

A. Non-Cognizable Claims

"Section 2254(a) states that a federal court 'shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.' " Kirby v. Dutton, 794 F.2d 245, 246 (6th Cir. 1986). Thus, federal district courts traditionally grant habeas corpus relief only "when the petitioner is in custody or threatened with custody and the detention is related to a claimed constitutional violation." Id. As explained below, some of Petitioner's challenges to his trial proceedings, direct appeal proceedings, and post-conviction proceedings are outside the scope of federal habeas corpus review for this reason. Id. at 246–47 (discussing Preiser v. Rodriguez, 411 U.S. 475 (1973)) (analyzing the scope of the federal writ of habeas corpus).

1. Claims 2.F, 2.G, 2.I, 2.J, 2.N, 2.O—Trial Proceedings

Petitioner asserts eighteen claims of trial court error. Six are not cognizable. First, Petitioner asserts in Claim 2.F that the trial court erred in denying his motion to suppress. (Doc. No. 1 at 10; Doc. No. 3 at 15.) To provide some context for this claim, Bill Pridemore, a detective assigned to the cold case unit of the Metro Nashville Police Department ("MNPD"), obtained a search warrant for Petitioner's DNA in October 2007. **Barrett**, 2012 WL 2870571, at *28. Before trial, Petitioner filed a motion to suppress the resulting DNA sample and any test results based on the sample. (Doc. No. 22-1 at 38–46.) He argued that Pridemore's affidavit accompanying the warrant did not establish probable cause, contained a false statement, and omitted material information. (Id.)

This Court cannot grant "habeas relief based on a state court's failure to apply the exclusionary rule of the Fourth Amendment, unless the claimant shows that the State did not provide him 'an opportunity for full and fair litigation of [his] Fourth Amendment claim.' " Rashad v. Lafler, 675 F.3d 564, 570 (6th Cir. 2012) (quoting Stone v. Powell, 428 U.S. 465, 494 (1976)). An " 'opportunity for full and fair consideration' means an available avenue for the prisoner to present his claim to the state courts, not an inquiry into the adequacy of the procedure actually used to resolve that particular claim.' " Good v. Berghuis, 729 F.3d 636, 639 (6th Cir. 2013) (quoting Powell, 528 U.S. at 949).

*7 Here, Petitioner had a full and fair opportunity to present this claim in state court, and, indeed, thoroughly availed himself of that opportunity. He filed a pretrial motion to suppress (Doc. No. 22-1 at 38–52), the court held an evidentiary hearing (Doc. No. 22-3), and the court denied the motion on the merits (Doc. No. 22-1 at 119–26). After trial, Petitioner raised this claim again in a motion for new trial (Doc. No. 22-2 at 70), and the court rejected it (id. at 84). Finally, Petitioner presented this claim on direct appeal (Doc. No. 22-24 at 55–68), and the TCCA thoroughly analyzed it before rejecting it on the merits, **Barrett**, 2012 WL 2870571, at *27–30. In these circumstances, the denial of Petitioner's motion to suppress is not reviewable in a federal habeas corpus proceeding. See Good, 729 F.3d at 640 (holding that presenting a suppression motion to both the state trial court and the state appellate court "suffices to preclude review of the claim through a habeas corpus petition under Stone v. Powell").

Petitioner's five other non-cognizable claims related to his trial proceedings—Claims 2.G, 2.I, 2.J, 2.N, and 2.O—challenge the state court's application of Tennessee evidentiary rules. A federal habeas court " 'must defer to a state court's interpretation of its own rules of evidence and procedure' when assessing a habeas petition." Miskel v. Karnes, 397 F.3d 446, 453 (6th Cir. 2005) (quoting Allen v. Morris, 845 F.2d 610, 614 (6th Cir. 1988)). "A state court evidentiary ruling will be reviewed by a federal habeas court only if it were so fundamentally unfair as to violate the petitioner's due process rights." Wilson v. Sheldon, 874 F.3d 470, 475 (6th Cir. 2017) (quoting Coleman v. Mitchell, 244 F.3d 533, 542 (6th Cir. 2001)). "[A]s a

general matter, 'state-court evidentiary rulings cannot rise to the level of due process violations unless they offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " Id. at 475–76 (quoting Seymour v. Walker, 224 F.3d 542, 552 (6th Cir. 2000)) (internal citation and quotation marks omitted). This "standard for habeas relief is not easily met," id. at 475, and Petitioner does not meet it here.

In Claim 2.G, Petitioner asserts that "the trial court erred in allowing the forensic pathologist who performed the victim's autopsy"—Dr. Jerry Francisco—"to testify as an expert in DNA analysis." (Doc. No. 1 at 18.) When Petitioner raised this claim on direct appeal, the TCCA noted that "the admissibility of opinion testimony of expert witnesses" is governed by Tennessee Rules of Evidence 702 and 703, and that "[q]uestions regarding the admissibility, qualifications, relevancy, and competency of expert testimony are left to the discretion of the trial court." **Barrett**, 2012 WL 2870571, at *41 (citing McDaniel v. CSX Transp., Inc., 955 S.W.2d 257, 263–64 (Tenn. 1997)). The TCCA then carefully analyzed the claim under state law and concluded that the trial court did not abuse its discretion. Id. at *41–43. The asserted failure of the state court to comply with state law is not subject to federal habeas review.[2] See Peek v. Carlton, No. 3:04-cv-496, 2008 WL 4186939, at *13 (E.D. Tenn. Sept. 5, 2008) (finding that a petitioner's claim regarding "testimony as an expert witness involves the alleged failure of the trial judge to comply with state law and thus is not cognizable in federal habeas proceedings").

Next, Petitioner asserts in Claim 2.I that the trial court erred by admitting the testimony of "two jailhouse liars." (Doc. No. 3 at 13–14, 23.) Here, Petitioner is referring to Sheldon Anter and Andrew Napper, two inmates who were incarcerated with Petitioner and testified as state's witnesses at trial. See **Barrett**, 2012 WL 2870571, at *12–15. The part of Claim 2.I referring to Napper will be addressed below as a procedurally defaulted claim of trial court error. Infra Section V.C.2. And the part of Claim 2.I referring to Anter is subsumed by the more specific challenge to Anter's testimony in Claim 2.J.

***8** As to Claim 2.J, Petitioner asserts that "the trial court erred in admitting evidence that [he] stated he 'had killed before.' " (Doc. No. 1 at 14.) As background, Sheldon Anter testified regarding conversations he had with Petitioner, as well as an argument between Petitioner and another inmate named Frank White. **Barrett**, 2012 WL 2870571, at *12–14. Among other things, Anter testified that Petitioner told White he had killed before. Id. at *13. On direct appeal, Petitioner argued that the trial court should have found this testimony to be inadmissible under Tennessee Rule of Evidence 404(b). Id. at *32. The TCCA considered this claim solely under the relevant Tennessee Rules of Evidence and state law and concluded that the trial court did not abuse its discretion in admitting this testimony. Id. at *32–35. Accordingly, the Court will not review Claim 2.J here. See Allen v. Parris, No. 2:15-CV-23-JRG-MCLC, 2018 WL 1595784, at *6–7 (E.D. Tenn. Mar. 30, 2018) (finding that habeas claim regarding trial court's asserted failure to exclude evidence under Tennessee Rule of Evidence 404(b) did not "state a cognizable basis for § 2254 relief").

In Claim 2.N, Petitioner asserts that "the trial court erred in allowing the State to ask defense witness whether he was arrested, suspended, and had resigned from the police force in 1978." (Doc. No. 1 at 15; Doc. No. 3 at 16.) During trial, the defense called a former MNPD employee named Ewen Robert "Bobby" Downs to testify. **Barrett**, 2012 WL 2870571, at *22–23. Before cross-examining Downs, the prosecution requested permission at a bench conference to "ask the witness 'if he was suspended from the police department on August 22nd, '78 for lying during a police investigation.' " Id. at *36. Defense counsel objected, and the court ruled this question would be allowed. Id. Petitioner challenged this ruling on direct appeal under Tennessee Rule of Evidence 608, and the TCCA considered this claim under state rules of evidence and state law. Id. at *35–38. The TCCA, in fact, found that "the trial court erred in allowing the State to cross-examine Mr. Downs about the circumstances of his departure from the police force." Id. at *38. But the TCCA did not find that this error "more probably than not affected the judgment" under Tennessee Rule of Appellate Procedure 36(b), and therefore held that Petitioner was not entitled to relief. Id. Petitioner's challenge to the state court's resolution of this claim does not state a claim for federal habeas corpus relief. See Guartos v. Colson, No. 3:12-cv-0048, 2013 WL 247415, at *33 & n.7 (M.D. Tenn. Jan. 23, 2013) (finding that a petitioner's challenge to the state court's application of state evidentiary rules and Tenn. R. App. P. 36(b) did not "state a claim upon which habeas corpus relief can be granted").

Finally, Petitioner asserts in Claim 2.O that "the trial court erred in permitting impeachment of a defense witness with evidence of a misdemeanor conviction." (Doc. No. 1 at 20; Doc. No.

3 at 16.) Another former MNPD employee named Larry Felts testified during Petitioner's presentation of proof at trial. See **Barrett**, 2012 WL 2870571, at *23–24. Before Felts testified, the prosecution requested a ruling at a bench conference regarding whether it would be allowed to question him about the circumstances of his departure from the MNPD and about a misdemeanor conviction. Id. at *39. Defense counsel objected, and the court allowed the questions. Id. Petitioner, on direct appeal, argued that this evidence "should have been excluded because it did not qualify for admission under Tennessee Rules of Evidence 608, 609, or 616 and that it was barred by Rule 403." Id. The TCCA concluded that "the trial court did not err in allowing the State to cross-examine Mr. Felts about his conviction and employment termination." Id. at *41. Like the four preceding claims, this claim is not cognizable in a federal habeas corpus proceeding. See Knighton v. Mills, No. 3:07-cv-2, 2011 WL 3843696, at *11–12 (E.D. Tenn. Aug. 29, 2011) (finding that a petitioner's habeas claim challenging the state court's application of Tenn. R. Evid. 609 and state law was "not cognizable").

2. Claim 6—Denial of Permission to Appeal

***9** Petitioner's claim that the Tennessee Supreme Court erred during his direct appeal proceedings is also not reviewable in this case. In Claim 6, Petitioner asserts that the Supreme Court was "intimidated against giving justice to the petitioner's appeal" due to media coverage. (Doc. No. 3 at 27.) That is, Petitioner asserts that the Supreme Court initially granted his application for permission to appeal but changed course after a local news channel aired a one-week feature on his case. (Id.) This claim is without merit for at least two reasons.

First, the Tennessee Supreme Court's decision to deny permission to appeal is not reviewable in a habeas corpus proceeding because Petitioner has not identified an applicable federal right to this discretionary review. See Kirby, 794 F.2d at 246 (holding that district courts typically grant habeas relief only based on "a claimed constitutional violation"). Indeed, the Sixth Circuit has held that Tennessee's scheme of discretionary Supreme Court review does not conflict with federal law. See Adams v. Holland, 330 F.3d 398, 403 (6th Cir. 2003) (discussing O'Sullivan v. Boerckel, 526 U.S. 838, 847–49 (1999)) ("[T]here is no 'actual conflict' between [Tennessee] Rule [of Appellate Procedure] 39 and federal law.").

Second, this claim has no basis in the record, and appears to arise from Petitioner's improperly conflating this case with his other criminal case from around the same time. In this case—Davidson County Criminal Court Case No. 2008-B-1791—Petitioner was convicted of second-degree murder, and the TCCA affirmed the trial court's judgment on July 13, 2012. **Barrett**, 2012 WL 2870571, at *1. In another case—Davidson County Criminal Court Case No. 2007-D-3201—Petitioner was convicted of first-degree murder, and the TCCA affirmed the trial court's judgment on July 18, 2012. State v. **Barrett**, No. M2010-00444-CCA-R3CD, 2012 WL 2914119, at *1 (Tenn. Crim. App. July 18, 2012). As support for Claim 6, Petitioner cites to an unrelated TCCA opinion including a notation that the Tennessee Supreme Court granted discretionary review in his *other* direct appeal. See State v. Keeton, No. M2012-02536-CCA-RM-CD, 2013 WL 1619379 (Tenn. Crim. App. Apr. 16, 2013) (citing **Barrett**, 2012 WL 2914119). Petitioner does not point to any proof that the Supreme Court ever did so in *this* direct appeal. Accordingly, Petitioner's claim that the Tennessee Supreme Court erred in denying discretionary review of his direct appeal will be denied.

3. Claims 7, 10—Post-Conviction Proceedings

Petitioner's assertions of error by the post-conviction court at the initial review stage and on appeal—Claim 7, its eleven sub-claims, and Claim 10—are "outside the scope of federal habeas corpus review." Cress v. Palmer, 484 F.3d 844, 853 (6th Cir. 2007) (citing Kirby, 794 F.2d at 246– 49 and Roe v. Baker, 316 F.3d 557, 571 (6th Cir. 2002)). A challenge to a state's post-conviction proceedings "cannot be brought under the federal habeas corpus provision, 28 U.S.C. § 2254," because "the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and [ ] the traditional function of the writ is to secure release from illegal custody." Kirby, 794 F.2d at 247 (quoting Preiser, 411 U.S. at 484). Indeed, the Sixth Circuit has reaffirmed that "attacks on post-conviction proceedings 'address collateral matters and not the underlying state conviction giving rise to the prisoner's incarceration.' " Leonard v. Warden, Ohio State Penitentiary, 846 F.3d 832, 855 (6th Cir. 2017) (quoting Kirby, 794 F.2d at 247). These claims, accordingly, will be denied.

4. Claims 8, 9—Ineffective Assistance of Post-Conviction Counsel

***10** In Claims 8 and 9, respectively, Petitioner asserts three sub-claims of ineffective assistance against his post-conviction counsel on initial review, and three sub-claims of

ineffective assistance against his post-conviction counsel on appeal. These assertions of error are not cognizable as independent habeas claims because they are specifically barred by statute and long-standing precedent.[3] Hodges v. Colson, 727 F.3d 517, 531 (6th Cir. 2013) (citing Martinez v. Ryan, 566 U.S. 1, 17 (2012)) ("28 U.S.C. § 2254(i) bars a claim of ineffective assistance of post-conviction counsel as a separate ground for relief ...."); Coleman v. Thompson, 501 U.S. 722, 752 (1991) ("There is no constitutional right to an attorney in state post-conviction proceedings.") (citations omitted). Thus, Petitioner's standalone claims challenging the effectiveness of his post-conviction attorneys will be denied.

In some circumstances, however, the ineffective assistance of post-conviction counsel may be used to establish the "cause" necessary to obtain review of a procedurally defaulted claim. Martinez, 566 U.S. at 17. This is a narrow rule, subject to several limitations, including that it can only serve as "cause to overcome the default of a single claim—ineffective assistance of trial counsel." Davila, 137 S. Ct. at 2062–63 (discussing Martinez, 566 U.S. 1, and Trevino v. Thaler, 569 U.S. 413 (2013)).

In the reply, Petitioner argues that he can "rely on Martinez and Thaler" because his post-conviction counsel was ineffective and his procedurally defaulted claims "have some merit." (Doc. No. 33 at 4.) Thus, as discussed in more detail below, the Court will consider Petitioner's assertions of post-conviction ineffectiveness as allegations of "cause" regarding his procedurally defaulted claims of ineffective assistance of trial counsel. Infra Section V.C.5.

B. Adjudicated Claims

Petitioner exhausted two of his twelve remaining claims of trial court error, and three of his fourteen sub-claims for ineffective assistance of trial counsel.

1. Claim 2.A—Motion to Dismiss Due to Pre-Indictment Delay

Petitioner filed a pretrial motion to dismiss the indictment due to the thirty-three-year delay between the offense and the return of the indictment. (Doc. No. 22-2 at 7–8, 11–15.) The state filed a response. (Id. at 35–37.) The trial court heard oral argument on the motion at a pretrial hearing (Doc. No. 22-6 at 135–38) and denied the motion at the conclusion of argument (id. at 138–39). Petitioner contends that this ruling was in error. (Doc. No. 1 at 12; Doc. No. 3 at 16). He raised this claim on direct appeal, and the TCCA rejected it:

> A criminal defendant has the right to due process under the Fifth and Fourteenth Amendments to the United States Constitution and article I, section 8 of the Tennessee Constitution. The delay between the commission of an offense and the initiation of formal proceedings may violate this right to due process. State v. Gray, 917 S.W.2d 668, 671 (Tenn. 1996).
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> In State v. Dykes, 803 S.W.2d 250, 256 (Tenn. Crim. App. 1990), relying upon United States v. Marion, 404 U.S. 307 (1971), this court stated that "[b]efore an accused is entitled to relief based upon the delay between the offense and the initiation of adversarial proceedings, the accused must prove that (a) there was a delay, (b) the accused sustained actual prejudice as a direct and proximate result of the delay, and (c) the State caused the delay in order to gain tactical advantage over or to harass the accused." In State v. Utley, 956 S.W.2d 489, 495 (Tenn. 1997), the Supreme Court acknowledged the "Marion-Dykes" analysis for cases of delay in charging a defendant.
>
> ***11** The offense was committed in February 1975, and the victim's body was discovered in March 1975. It is undisputed that DNA technology was not available to the State in 1975. The DNA testing that identified the Defendant took place in 2007. The indictment was returned in June 2008.
>
> We agree with the Defendant that sufficient delay occurred in this case to trigger a due process inquiry. See, e.g., State v. Carico, 968 S.W.2d 280 (Tenn. 1998) (conducting due process inquiry in case involving seven-year delay between offense and arrest); Utley, 956 S.W.2d 489 (five-year delay). Without question, the thirty-three-year delay was lengthy. We do not dispute that in some cases, the passage of this many years may be prejudicial to the defense. The Defendant argues, "[T]he extraordinary delay between the commission of the crime and the return of the indictment rendered all but impossible the Defendant's ability to formulate an alibi defense or produce witnesses or other evidence in his favor." He argues generally that the passage of time may impair the quality and quantity of evidence available and may compromise the reliability of the outcome. We acknowledge that this is a relevant concern. See, e.g., Carico, 968 S.W.2d at 285 n.5. We

> note that the Defendant has not identified any specific unavailable witness or evidence due to the passage of time, nor is any actual prejudice apparent. We likewise note that the Defendant does not contend that the State intentionally delayed the prosecution in order to obtain a tactical advantage. In fact, the record reflects that the police continued to investigate the crime through the cold case unit and that advances in DNA technology eventually proved fruitful in identifying the Defendant.
>
> The record supports the trial court's determination that the Defendant's due process rights were not violated by the pre-indictment delay. The trial court did not err in denying the motion to dismiss the indictment. The Defendant is not entitled to relief.

Barrett, 2012 WL 2870571, at *31–32.

The TCCA correctly identified the federal standard for this claim, and its application of the standard was reasonable. "The [United States] Supreme Court recognizes that the Due Process Clause of the Fifth Amendment protects against oppressive pre-indictment delay." United States v. Schaffer, 586 F.3d 414, 424 (6th Cir. 2009) (citing Marion, 404 U.S. at 324–25 and United States v. Lovasco, 431 U.S. 783, 789 (1977)). "A due process claim based on [pre-indictment] prosecutorial delay" requires a two-part inquiry: (1) whether the delay "caused substantial prejudice to [Petitioner's] rights to a fair trial," and (2) whether "the delay was an intentional device to gain tactical advantage over the accused." Brenson v. Coleman, 680 F. App'x 405, 407 (6th Cir. 2017) (quoting Marion, 404 U.S. at 324). "[A] defendant must meet both parts of the test to warrant dismissal of the indictment." United States v. Baltimore, 482 F. App'x 977, 981 (6th Cir. 2012) (citing United States v. Greene, 737 F.2d 572, 574–75 (6th Cir. 1984)).

As to the first prong, "[t]he [United States] Supreme Court has repeatedly emphasized that, in order to establish a due process violation, the defendant must show that the delay 'caused him *actual* prejudice in presenting his defense.' " Schaffer, 586 F.3d at 425 (quoting United States v. Gouveia, 467 U.S. 180, 192 (1984)). The TCCA found that "actual prejudice" was not "apparent," and that Petitioner had "not identified any specific unavailable witness or evidence due to the passage of time." **Barrett**, 2012 WL 2870571, at *31. Here, Petitioner argues only that "all of his witnesses but one were not able to recall to counsel's satisfaction or were dead." (Doc. No. 3 at 16.) Such general assertions of prejudice are not sufficient to establish a due process violation. See Brenson, 680 F. App'x at 407–08 (denying a petitioner's habeas claim for excessive pre-indictment delay where the state court found that speculative assertions of witnesses' memories fading and unavailability did not establish actual prejudice).

***12** The TCCA likewise found, regarding the second prong, that Petitioner did not even "contend that the State intentionally delayed the prosecution in order to obtain a tactical advantage." **Barrett**, 2012 WL 2870571, at *31. Petitioner now seems to imply that the delay must have been intentional because DNA testing has been used in Tennessee at least since 1990, and he was not indicted until 2008. (Doc. No. 3 at 16.) This is mere speculation, however, and it is inconsistent with the record. As the TCCA found, Petitioner's prosecution was the result of continued investigative efforts by the MNPD cold case unit and advancements in DNA technology, and did not involve any intentional delay tactic. **Barrett**, 2012 WL 2870571, at *31. That is, MNPD personnel took steps to investigate the case after 1990 but did not develop Petitioner as a suspect and obtain a search warrant for his DNA until October 2007. Id. at *11–12, 15. Petitioner was arrested and indicted after the MNPD obtained the results from the testing. Id. at *15. This sequence of events is consistent with due process. See Smith v. Caruso, 53 F. App'x 335, 336–37 (6th Cir. 2002) (citing Lovasco, 431 U.S. at 796) ("Where delay is investigative, rather than intentional in order to gain a tactical advantage, due process principles are not offended ....")

In conducting its analysis of this claim, the TCCA recognized that the "thirty-three-year delay" in this case was "lengthy." **Barrett**, 2012 WL 2870571, at *31. It also acknowledged Petitioner's "relevant concern" that "the passage of time may impair the quality and quantity of evidence available and may compromise the reliability of the outcome." Id. But such general concerns would apply to any prosecution involving a prolonged pre-indictment delay, and the Court simply cannot presume prejudice based on the unavoidable passage of time. The state court thoroughly considered this claim, its reasoning was consistent with clearly established federal law, and the ruling was not based on an unreasonable interpretation of the facts. This claim will be denied.

2. Claim 2.R—Improper Sentence

Next, Petitioner asserts that "the trial court erred in imposing a forty-four-year sentence to be served consecutively to [his] life sentence." (Doc. No. 1 at 22; Doc. No. 3 at 34.) On direct appeal, he raised the two issues that comprise this claim separately. First, Petitioner argued that the jury imposed an excessively long sentence. **Barrett**, 2012 WL 2870571, at *43–44. And second, he argued that the court erred by "imposing his sentence consecutively to a life sentence for a previous conviction." Id. at *44–45. Here, Respondent contends that this entire claim is not reviewable because it challenges a state court's application of state sentencing law. (Doc. No. 23 at 64–65.) While "trial courts have historically been given wide discretion in determining 'the type and extent of punishment for convicted defendants,' " Austin v. Jackson, 213 F.3d 298, 301 (6th Cir. 2000) (quoting Williams v. New York, 337 U.S. 241, 245 (1949)), convicted defendants nonetheless retain a federal "due process right to a fair sentencing procedure." Id. at 300 (quoting United States v. Anders, 899 F.2d 570, 575 (6th Cir. 1990)). Thus, in an abundance of caution, the Court will review the TCCA's resolution of this claim. In doing so, however, the Court concludes that Petitioner is not entitled to relief.

The TCCA considered and rejected the excessive-sentence argument as follows:

> As noted by the State, second degree murder at the time of the offense carried a sentence to prison "for life or for a period of not less than ten (10) years." T.C.A. § 39-2408 (1975) (renumbered at T.C.A. § 39-2-212) (repealed 1989); see id., § 40-35-117(c) (2010) (providing that prior law shall apply to sentencing of a defendant for a crime committed before July 1, 1982). The law also provided, "The jury before whom the offender is tried, shall ascertain in their verdict whether it is murder in the first or second degree; and if the accused confess his guilt, the court shall proceed to determine the degree of crime by the verdict of a jury, upon the examination of testimony, and give sentence accordingly." See id., § 39-2404 (1975) (amended 1977, 1988) (repealed 1989); see, e.g., State v. Bryant, 805 S.W.2d 762, 763 (Tenn. 1991). "Until 1982, appellate review of sentencing was limited to issues of probation, consecutive sentencing, and capital punishment. Where the jury fixed sentences within the range authorized by the criminal statute, no appeal was available." Bryant, 805 S.W.2d at 763 (citing Ryall v. State, 321 S.W.2d 809 (Tenn. 1959); State v. Webb, 625 S.W.2d 281 (Tenn. Crim. App. 1980); Johnson v. State, 598 S.W.2d 803 (Tenn. Crim. App. 1980)).
>
> ***13** The Defendant acknowledges that jury-imposed sentences within the range prescribed by the former sentencing law normally have not been considered to be "excessive or indicative of passion, prejudice, or caprice on the part of the jury." See Dukes v. State, 578 S.W.2d 659, 666 (Tenn. Crim. App. 1978). He notes that the Tennessee Supreme Court modified sentences involving jury-imposed jail confinement in McKnight v. State, 106 S.W.2d 556 (Tenn. 1937) and Bacon v. State, 385 S.W.2d 107 (Tenn. 1964). We note, however, that both cases cited by the Defendant involved misdemeanors, and distinguish them on that basis. See Bacon, 385 S.W.2d at 270 (identifying "assault and battery" and describing a misdemeanor assault); McKnight, 106 S.W.2d at 557 (identifying unlawfully soliciting insurance as a misdemeanor).
>
> In any event, the Defendant advocates that this court should reduce his sentence to one commensurate to a Range I sentence for second degree murder under current law. He notes that his forty-four year sentence is greater than the maximum sentence for both Range I and Range II sentences for second degree murder under current law. He argues that pursuant to current Code section 39-11-112, he should receive the benefit of the lesser sentence provided for second degree murder by current law. Code section 39-11-112 states:
>
> > When a penal statute or penal legislative act of the state is repealed or amended by a subsequent legislative act, the offense, as defined by the statute or act being repealed or amended, committed while the statute or act was in full force and effect shall be prosecuted under the act or statute in effect at the time of the commission of the offense. Except as provided under the provisions of § 40-35-117, in the event the subsequent act provides for a lesser penalty, any punishment imposed shall be in accordance with the subsequent act.
>
> T.C.A. § 39-11-112 (2010) (emphasis added). Code section 40-35-117 provides that prior law shall apply for all defendants who committed crimes before July 1, 1982. Id., § 40-35-117(c) (2010). This court has said that section 40-35-117 is constitutional. See, e.g., State v. Turner, 919 S.W.2d 346, 361–62 (Tenn. Crim. App. 1995); State v. Melvin, 913 S.W.2d 195, 201–02 (Tenn. 1995).

> We conclude that the jury imposed a sentence that was within the applicable range and that the Defendant is not afforded further review by this court. The Defendant is not entitled to relief.

Barrett, 2012 WL 2870571, at *43–44.

As this analysis reflects, the excessive-sentence portion of this claim is essentially an argument that Petitioner should not have been sentenced under the sentencing laws in place at the time of the underlying offense. Under Tenn. Code Ann. § 40-35-117(c), however, "all persons who committed crimes prior to July 1, 1982" are sentenced based on prior law. And the TCCA applied its prior holding that "section 40-35-117 is constitutional." **Barrett**, 2012 WL 2870571, at *44. In doing so, the TCCA cited State v. Turner, 919 S.W.2d 346 (Tenn. Crim. App. 1995), where that court explained as follows:

> The Tennessee General Assembly has the exclusive authority to designate what conduct is prohibited and the punishment for that conduct. As a corollary, the General Assembly had the authority to provide that crimes committed prior to July 1, 1982, would be exempted from both the 1982 and the 1989 Acts. Moreover, the General Assembly did not violate any constitutional right guaranteed to the appellant, or any other citizen, by exempting crimes committed prior to July 1, 1982, from both Acts.
>
> Whether this Court makes an analysis based upon the strict scrutiny test, as the appellant suggests, or the rational basis test, as the state suggests, the results will be the same. The appellant's right to Due Process was not violated by the imposition of a sentence based upon the law and punishment that existed when he committed the offense.

***14** 919 S.W.2d at 362. Petitioner has not demonstrated that the TCCA's determination of this excessive-sentence issue was objectively unreasonable, or contrary to clearly established federal law. See Frazier v. Fortner, No. 1:09-cv-00016, 2011 WL 4402959, at *4–7 (M.D. Tenn. Sept. 21, 2011) (finding that the TCCA's application of Tenn. Code Ann. § 40-35-117(c) "did not violate the Ex Post Facto clause nor any due process rights of the Defendant under any clearly established Supreme Court precedents at the time of his sentencing"). Petitioner is not entitled to relief on this ground.

The state court's determination of the consecutive-sentence portion of Petitioner's sentencing claim was also reasonable. The TCCA analyzed this portion as follows:

> Before considering the issue raised, we note that at the Defendant's request, the trial court considered consecutive sentencing of the Defendant under current Code section 40-35-115. That statute was not in effect at the time of the Defendant's crime. At that time, the Code provided:
>
> When any person has been convicted of two (2) or more offenses, judgment shall be rendered on each conviction after the first, providing that the terms of imprisonment to which such person is sentenced shall run concurrently or cumulatively in the discretion of the trial judge; provided, that the exercise of the discretion of the trial judge shall be reviewable by the Supreme Court on appeal.
>
> T.C.A. § 40-2711 (1975) (amended 1979) (repealed 1982). As we noted in Section VIII, the current Criminal Code provides that prior law shall apply for all defendants who committed crimes before July 1, 1982. See id., § 40-35-117(c). The proper law for determining whether the Defendant should receive a consecutive sentence was the law as it existed in 1975.
>
> In that regard, the Defendant's crime was committed before our Supreme Court's decisions in Gray v. State, 538 S.W.2d 391 (Tenn. 1976) and State v. Taylor, 739 S.W.2d 227 (Tenn. 1987). Those cases established the framework that was adopted by our legislature in defining the current consecutive sentencing scheme. See generally T.C.A. § 40-25-115, Sent'g Comm. Cmts. Collectively, Gray and Taylor defined five categories of offenders for whom consecutive sentencing was appropriate. See id. The legislature added two additional categories in 1990. Id. Before the Gray and Taylor decisions, there was no guidance for a trial court in imposing consecutive sentencing. See Gray, 538 S.W.2d at 392–93 (noting the absence of guidelines for determining when consecutive sentencing was appropriate and defining guidelines to be followed in the future); see also Bundy v. State, 140 S.W.2d 154 (Tenn. 1940) (stating that consecutive sentencing was in the discretion of the trial court); Wooten v. State, 477 S.W.2d 767, 768 (Tenn. Crim. App. 1971).

All of that said, the development of the law is of little consequence to the outcome of this case. Use of the subsequently developed guidelines only reinforces that the trial court did not abuse its discretion. In the present case, the trial court found two bases for imposing consecutive sentencing. First, the court found that the Defendant's history of criminal activity was extensive. See Gray, 538 S.W.2d at 393. The record reflects that the Defendant had prior convictions for first degree murder, rape, unlawful carnal knowledge of a minor, and assault with intent to rape. This was an appropriate consideration that was within the discretion of the trial court, without regard to the timing of the Gray decision. The trial court did not abuse its discretion in imposing consecutive sentencing on this basis.

***15** Second, the trial court found that the Defendant was a dangerous offender with little or no regard for human life and who had no hesitation about committing a crime involving a high risk to human life. See id. With regard to this finding, the court noted that the sentence "need[ed] to be long enough to keep [the Defendant] permanently incarcerated" and that an extended sentence would minimize the deaths of the victim and the murder victim from the previous case.[4] See id.; see also State v. Wilkerson, 905 S.W.2d 933 (Tenn. 1995). Again, this was an appropriate consideration for the trial court to have considered. The trial court did not abuse its discretion in relying on this basis to impose consecutive sentences.

Barrett, 2012 WL 2870571, at *44–45.

Here, Petitioner contests only the first factor relied on by the trial court—that he had an extensive history of criminal activity. As the TCCA observed, at the time of sentencing in this case, Petitioner "had prior convictions for first degree murder, rape, unlawful carnal knowledge of a minor, and assault with intent to rape." **Barrett**, 2012 WL 2870571, at *45. Petitioner does not dispute the fact of these convictions. Instead, he seems to argue that these convictions should not have been used to impose a consecutive sentence because the offenses occurred "less than one month apart" and "were all over thirty (30) years old" at sentencing. (Doc. No. 3 at 34.) Petitioner has not, however, cited any clearly established federal law to support this argument. The TCCA explained that "the proper law for determining whether the Defendant should receive a consecutive sentence was the law as it existed in 1975," and that the imposition of consecutive sentences, at that time, was entirely within the trial court's discretion. **Barrett**, 2012 WL 2870571, at *45 (citations omitted). The United States Supreme Court has recognized this sentencing scheme as constitutional. See Oregon v. Ice, 555 U.S. 160, 163–64 (2009) (noting that states "entrust[ing] to judges' unfettered discretion the decision whether sentences for discrete offenses shall be served consecutively or concurrently" do not "transgress[ ] the Sixth Amendment"). The consecutive sentence portion of this claim, therefore, is without merit.

Because the state court's determination of Petitioner's sentencing claim was neither contrary to nor an unreasonable application of clearly established federal law, Claim 2.R will be denied.

3. Claims 5.D, 5.F, 5.L—Ineffective Assistance of Trial Counsel

The Court now turns to Petitioner's exhausted sub-claims of ineffective assistance of trial counsel. On post-conviction appeal, Petitioner asserted that trial counsel was ineffective for failing to: (1) timely request independent DNA testing; (2) call a DNA expert; and (3) call an alibi witness. **Barrett**, 2016 WL 4410649, at *1. Here, Petitioner does not raise the first and second sub-claims verbatim. Nonetheless, as explained in more detail below, the Court liberally construes Claims 5.F and 5.D, respectively, to be exhausted through the first and second sub-claims raised on post-conviction appeal. Meanwhile, Petitioner clearly exhausted Claim 5.L by asserting that trial counsel was ineffective for failing to call an alibi witness.

***16** The federal law governing the adequacy of a criminal defendant's representation is defined in Strickland v. Washington, 466 U.S. 668 (1984). Premo v. Moore, 562 U.S. 115, 121 (2011). The TCCA correctly identified and set forth the Strickland standard before considering Petitioner's ineffective-assistance claims on the merits. **Barrett**, 2016 WL 4410649, at *4–5.

Under Strickland, a petitioner must show (1) deficient performance of counsel and (2) prejudice to the defendant. Knowles v. Mirzayance, 556 U.S. 111, 124 (2009) (citing Strickland, 466 U.S. at 687). Trial counsel's performance is deficient where it falls "below an objective standard of reasonableness." Strickland, 466 U.S. at 687–88. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of

reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " Id. at 689 (citing Michel v. Louisiana, 350 U.S. 91, 101 (1955)). To establish prejudice, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. "[A] court deciding an ineffective assistance claim" need not "address both components of the inquiry if the defendant makes an insufficient showing on one." Id. at 697.

When a petitioner raises an exhausted ineffective-assistance claim in a federal habeas petition, "[t]he pivotal question" is not "whether defense counsel's performance fell below Strickland's standard," but "whether the state court's application of the Strickland standard was unreasonable." Harrington, 562 U.S. at 101. This amounts to a " 'doubly deferential' standard of review that gives both the state court and the defense attorney the benefit of the doubt." Burt v. Titlow, 571 U.S. 12, 15 (2013) (quoting Cullen v. Pinholster, 563 U.S. 170, 190 (2011)). That is because, under Section 2254(d)(1), "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." Id. (quoting Williams, 529 U.S. at 410). Accordingly, "[a] state court must be granted a deference and latitude that are not in operation when the case involves review under the Strickland standard itself." Id.

Here, in Claim 5.F, Petitioner asserts that trial counsel was ineffective for failing to have an expert conduct independent DNA testing. (Doc. No. 3 at 9–10.) As background for this sub-claim, Petitioner's counsel filed a motion to continue trial on June 30, 2009, to allow adequate time to obtain independent DNA testing. (Doc. No. 22-2 at 21–23.) At that time, trial was set to begin on July 13, 2009. (Id. at 21.) The court denied the motion, stating that counsel had "known about the DNA for 11 months." (Doc. No. 22-5 at 111–12.) On post-conviction appeal, Petitioner argued that "trial counsel was deficient for failing to make a timely request for independent DNA analysis." **Barrett**, 2016 WL 4410649, at *5. While Claim 5.F does not specifically question the timing of counsel's request, it raises the same issue as on post-conviction appeal: counsel's failure to ensure that an expert conducted independent DNA testing before trial. Thus, the Court liberally construes Claim 5.F to have been exhausted on post-conviction appeal.

***17** The TCCA rejected this sub-claim as follows:

> [T]he Petitioner contends that trial counsel was deficient for failing to make a timely request for independent DNA analysis. The Petitioner asserts that if "independent testing [had] been requested at an earlier and more reasonable time the request might have been granted." However, the Petitioner failed to introduce any results of independent testing at the hearing in support of his claim and offered no explanation as to how he was prejudiced by the absence of independent DNA testing.
>
> At the evidentiary hearing, trial counsel testified that after consulting with Dr. Acklen, he determined that independent testing was not necessary. Dr. Acklen opined to counsel that he agreed with the conclusions reached by the State's experts. Additionally, Dr. Acklen advised trial counsel about particular areas of cross-examination. Counsel admitted at the hearing that "[i]n retrospect" he wished that he had requested independent testing earlier, mostly because it was something that the Petitioner wanted. However, when reviewing an attorney's conduct in the post-conviction context, "a fair assessment ... requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689. Likewise, deference is made to trial strategy or tactical choices if they are informed ones based upon adequate preparation. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). Trial counsel made a decision not to request independent testing based on his consultation with an expert and subsequent conclusion that additional testing would not be helpful. Although he expressed regret in hindsight that he did not request independent testing, we conclude that at the time, he made a reasonable strategic decision not to request independent testing earlier in the case. Accordingly, the Petitioner has not proven that counsel rendered deficient performance, and he is not entitled to relief.

Barrett, 2016 WL 4410649, at *5–6.

It was reasonable for the state court to determine that counsel did not perform deficiently in deciding not to obtain independent DNA testing prior to trial. As the TCCA noted, counsel's decision was based on his consultation with Dr. Ronald Acklen, a DNA expert. Counsel testified at the evidentiary hearing that Dr. Acklen reviewed all of the laboratory reports,

notes, and procedure manuals related to the DNA testing in this case. (Doc. No. 22-31 at 63–64.) "Counsel and Dr. Acklen discussed the 'methodology and procedure' utilized by the various laboratories involved in the DNA analyses," and Dr. Acklen informed counsel that he agreed with the assessments reflected in the state's reports. **Barrett**, 2016 WL 4410649, at *4. Based on Dr. Acklen's opinion, counsel decided that it was unnecessary to obtain independent testing.

Counsel's expression of regret at the evidentiary hearing regarding this decision was clearly based on Petitioner's desire, not his own. (Doc. No. 22-31 at 66 ("In light of the fact that [Petitioner] wanted it done and we were unable to achieve that, I wish that I had done it sooner.").) Even so, "[u]nder Strickland, courts give little weight to counsel's hindsight assessment of [his] trial actions." O'Neal v. Burt, 582 F. App'x 566, 573–74 (6th Cir. 2014) (collecting cases); see also Tyler v. Ray, 610 F. App'x 445, 449 (6th Cir. 2015) ("The question under Strickland is not what the reviewing judge would have done in hindsight, or even what the attorney himself would have done in hindsight."). Counsel's decision not to obtain independent DNA testing before trial was an informed one, "within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. Applying the "doubly deferential" standard of review for exhausted claims of ineffective assistance of counsel, the Court concludes that the state court was not unreasonable in determining that counsel was not deficient.

***18** The TCCA's finding that Petitioner failed to demonstrate prejudice resulting from the failure to obtain independent DNA testing was also not unreasonable. The TCCA pointed out that Petitioner did not "introduce any results of independent testing at the hearing in support of his claim and offered no explanation as to how he was prejudiced by the absence of independent DNA testing." **Barrett**, 2016 WL 4410649, at *5. Here, Petitioner blames this failure on the post-conviction trial court's refusal to consider *pro se* motions seeking independent DNA analysis, [5] documents, and witnesses. (Doc. No. 3 at 10–12.) Petitioner also lays this failure at the feet of post-conviction counsel for inadequately assist him. (Id. at 9–10, 12.) But, as the Court explained in denying Petitioner's claims of error by the post-conviction trial court, supra Section V.A.3, "[e]rrors or deficiencies in post conviction proceedings are not properly considered in habeas corpus proceedings." Hayden v. Warden, Marion Corr. Inst., No. 2:15-cv-2927, 2016 WL 2648776, at *3 (S.D. Ohio May 10, 2016) (collecting cases). And there is no constitutional "right to the effective assistance of postconviction counsel." Stojetz v. Ishee, 389 F. Supp. 2d 858, 889 (S.D. Ohio 2005); see also Gerth v. Warden, Allen Oakwood Corr. Inst., 938 F.3d 821, 830 (6th Cir. 2019) (quoting Coleman, 501 U.S. at 752) ("The Supreme Court has explained that a defendant has 'no constitutional right to an attorney in state post-conviction proceedings' and therefore 'cannot claim constitutionally ineffective assistance of counsel in such proceedings.' ").

"A federal habeas court's review of 'any claim that was adjudicated on the merits in State court proceedings' is limited to the evidence presented in the state proceeding." Smith v. Carpenter, No. 3:99-cv-0731, 2018 WL 317429, at *4 (M.D. Tenn. Jan. 8, 2018) (citing Pinholster, 563 U.S. at 181–82). Here, regardless of Petitioner's current complaints, the fact remains that Petitioner failed to present evidence in his post-conviction proceedings that the absence of independent DNA testing prejudiced him. Thus, the state court's determination to this effect was not unreasonable.

The TCCA's reasonably determined that Petitioner failed to demonstrate both deficiency and prejudice as to counsel's failure to obtain independent DNA testing before trial. Claim 5.F, therefore, will be denied.

Next, in Claim 5.D, Petitioner seems to assert that trial counsel was ineffective for retaining an insufficient DNA expert. (Doc. No. 3 at 3–4.) As noted above, trial counsel consulted with DNA expert Dr. Acklen before trial. On post-conviction appeal, Petitioner contended that "trial counsel was ineffective for not calling a DNA expert to testify for the defense." Id. at *5. Here, Petitioner argues that Dr. Acklen did not have the "scientific objectivity" necessary to "independently assess" the DNA state's reports and "advise defense counsel as to the reliability and admissibility of the DNA evidence in the case." (Doc. No. 3 at 3.) The implication of this argument is that, if Dr. Acklen was sufficiently competent, he would have identified deficiencies with the state's DNA reports, advised counsel to that effect before trial, and testified to that effect during trial. Accordingly, the Court liberally construes Claim 5.D to have been exhausted through Petitioner's second sub-claim on post-conviction appeal.

The TCCA essentially found that Petitioner failed to demonstrate that he was prejudiced by trial counsel's retaining an allegedly inadequate DNA expert. **Barrett**, 2016 WL 4410649, at

*5. That is, because Petitioner "failed to produce the testimony of a DNA expert at the hearing," the TCCA held, it could not "assess what impact" a DNA expert's testimony "would have had at trial." Id. (citing Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990)). As explained above, counsel did not call a DNA expert to testify at trial because Dr. Acklen concurred with the conclusions of the state's DNA reports. Petitioner now disagrees with Dr. Acklen's assessment, reasoning that Dr. Acklen must have lacked the "scientific objectivity" necessary to render an adequate opinion. But without the testimony of either Dr. Acklen or another DNA expert at the post-conviction evidentiary hearing, the TCCA had no basis to conclude that Dr. Acklen's opinion was flawed in some way. Again, while Petitioner blames post-conviction counsel for the failure to present this evidence, the Court must consider only the evidence actually presented. See Smith, 2018 WL 317429, at *4 (citing Pinholster, 563 U.S. at 181–82). In doing so, the Court concludes that it was not unreasonable for the TCCA to find that Petitioner failed to demonstrate prejudice resulting from counsel's use of Dr. Acklen as a DNA expert.

***19** The TCCA did not make a finding on whether counsel was deficient in retaining Dr. Acklen. "When a state court relied only on one Strickland prong to adjudicate an ineffective assistance of counsel claim," the Court reviews the unadjudicated prong *de novo*. Rayner v. Mills, 685 F.3d 631, 638 (6th Cir. 2012). Here, the Court concludes that Petitioner has not demonstrated deficiency under this standard.

Counsel testified at the evidentiary hearing that he had worked with Dr. Acklen before and that he hired Dr. Acklen through Tennessee's Administrative Office of the Courts. (Doc. No. 22-31 at 63.) Under Tennessee Supreme Court Rule 13, Section 5(b)(2)(B), in order to obtain Dr. Acklen's expert services in this case, counsel had to file a motion including information about Dr. Acklen's qualifications and licensure status. The trial judge signed an *ex parte* order authorizing this expenditure. (Doc. No. 22-31 at 63.) Counsel then ensured that Dr. Acklen received all of the laboratory reports, notes, and procedure manuals provided by the state. (Id.) Although Petitioner now takes issue with Dr. Acklen's assessment of this information, he does so only by presenting scattershot assertions of error in the state's DNA reports. (See Doc. No. 3 at 3–4, 6–8, 9.) Petitioner does not assert that counsel had any reason to doubt Dr. Acklen's qualifications prior to consulting with him, or that Dr. Acklen has since suffered some professional disrepute. Petitioner's conclusory assertion of ineffectiveness does not overcome the strong presumption that counsel performed adequately in retaining Dr. Acklen. See Burt, 571 U.S. at 23 (citing Strickland, 466 U.S. at 690) ("Counsel should be 'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.' ").

In sum, the Court concludes that the TCCA's application of Strickland to the prejudice prong of this claim was not unreasonable, and Petitioner has not demonstrated deficiency under a *de novo* review. Claim 5.D will be denied.

Finally, in Claim 5.L, Petitioner asserts that trial counsel was ineffective for advising him not to call any alibi witness, including an individual named Cicero who would have testified that Petitioner was in Chicago, Illinois at the time of the murder. (Doc. No. 3 at 17.) The TCCA rejected this sub-claim:

> According to the Petitioner, Cicero would have testified that he was in Chicago on the day that the victim disappeared. In order to satisfy the prejudice prong of Strickland when alleging that trial counsel was ineffective for failing to investigate or call witnesses, a petitioner must "show that through reasonable investigation, trial counsel could have located the witness ... and ... elicit[ed] both favorable and material testimony from the witness." State v. Denton, 945 S.W.2d 793, 802–03 (Tenn. Crim. App. 1996) (citing Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990)). When a petitioner claims that trial counsel was ineffective for failing to call witnesses, the only way he can prove prejudice is by producing the testimony of those witnesses at the evidentiary hearing. See Black, 794 S.W.2d at 757.
>
> Although the Petitioner and trial counsel testified that Cicero recalled the Petitioner's being in Chicago on the day of the victim's disappearance, Cicero was not called as a witness at the evidentiary hearing. Consequently, it is unclear what Cicero would have actually testified to and what impact, if any, that testimony would have had on the outcome of trial. Accordingly, the Petitioner has not shown prejudice, and he is not entitled to relief.

***20** Because Petitioner did not call Cicero at the evidentiary hearing to clarify what he would have actually testified to at trial, the state court's determination that he failed to demonstrate prejudice on this sub-claim is not objectively unreasonable. See Hutchison v. Bell, 303 F.3d

720, 748–49 (6th Cir. 2002) (citations omitted) ("[A] petitioner cannot show deficient performance or prejudice resulting from a failure to investigate if the petitioner does not make some showing of what evidence counsel should have pursued and how such evidence would have been material."). Moreover, the evidentiary hearing testimony of Petitioner and trial counsel reflects that counsel was not deficient. Regarding Cicero, Petitioner testified as follows:

> Cicero suffered from serious medical issues and was an ex-convict. According to the Petitioner, counsel did not want to call Cicero because he did not believe Cicero would be an effective witness, which counsel discussed with the Petitioner. Ultimately, Cicero was not called as an alibi witness, a decision that the Petitioner admitted he agreed with at the time, noting that he "trusted [counsel's] judgment." In retrospect, however, the Petitioner said that "even a little bit might have been better than none" because Cicero was the only person who remembered his being in Chicago on the day the victim went missing.

Barrett, 2016 WL 4410649, at *2. Trial counsel also testified as follows:

> Trial counsel ... agreed that he and the Petitioner discussed an alibi defense early in the case. Counsel said that he worked with a defense investigator, Amber Cassitt, and that he gave her the list of potential alibi witnesses and asked her to meet with the Petitioner to discuss details of the alibi and then to meet with as many people on the list as possible. According to trial counsel, Ms. Cassitt spent a "substantial amount of time" attempting to locate these potential witnesses. Trial counsel said that Ms. Cassitt was able to locate about half of the individuals named by the Petitioner, but some of them did not remember the Petitioner. Two people remembered the Petitioner and "thought that it was likely that he would have gone [to Chicago] because he was active in [the] [Nation of Islam] community at that time." However, Cicero was the only person who "specifically" told Ms. Cassitt that he recalled the Petitioner's being in Chicago on the relevant date.
>
> According to trial counsel, Cicero was not actually located until closer to the trial date. Counsel decided to file a notice of alibi and then he and the Petitioner "had further discussion about whether ... [Cicero] would be a good witness in terms of credibility issues." Trial counsel said that he stood by his decision not to call Cicero as a witness, saying that if there had been "stronger means to prove that [the Petitioner] was in Chicago," trial counsel would have presented that evidence. However, trial counsel opined that the alibi evidence they had was not strong, and he ultimately concluded that "putting out a weak alibi was worse than putting on no proof at all."

Id. at *3.

"[D]eciding which witnesses to present at trial is a matter of strategy." Yancey v. Haas, 742 F. App'x 980, 984 (6th Cir. 2018) (citations omitted). And Petitioner "must overcome the presumption that" his counsel's decision not to call Cicero as an alibi witness "might be considered sound trial strategy." Strickland, 688 U.S. at 689 (citing Michel, 350 U.S. at 101). Petitioner's counsel testified that he considered presenting an alibi defense, investigated potential alibi witnesses, and concluded that Cicero—the only potential alibi witness—was not a strong enough witness to carry an alibi defense without additional evidence corroborating his testimony. In counsel's judgment, "putting out a weak alibi was worse than putting on no proof at all." **Barrett**, 2016 WL 4410649, at *3. And as the TCCA noted, Petitioner agreed with this judgment at the time; only later, during his post-conviction evidentiary hearing, did Petitioner state that "in retrospect,...even a little bit might have been better than none." (Doc. No. 22-31 at 11.) Petitioner's purely speculative, retrospective disagreement with counsel's judgment goes against Strickland's instruction to "eliminate the distorting effect of hindsight" when assessing an attorney's performance. 466 U.S. at 689. The Court concludes that, in these circumstances, counsel's decision not to call an alibi witness was not deficient performance. Having failed to demonstrate both deficiency and prejudice on this sub-claim, Petitioner is not entitled to relief.

C. Procedurally Defaulted Claims

***21** Petitioner's remaining claims will be denied as procedurally defaulted without cause. This includes a defective-indictment claim, several claims of trial court error, a claim of prosecutorial misconduct, an insufficient-evidence claim, and various sub-claims of ineffective assistance of trial counsel.

1. Claim 1—Defective Indictment

Petitioner asserts, without elaboration or explanation, that the indictment is unconstitutional because it was issued by a grand jury that did not appoint a foreman. (Doc. 1 at 25; Doc. No.

3 at 33.) Petitioner did not present this claim to the TCCA on direct appeal. He did raise this claim in his original *pro se* post-conviction petition (Doc. No. 22-29 at 80), and the trial court squarely rejected it (id. at 138). Petitioner did not, however, present this claim to the TCCA on post-conviction appeal. Thus, Petitioner did not fully exhaust his available remedies in the state courts, and he is now barred from doing so by Tennessee Rule of Appellate Procedure 4, Tennessee's one-year statute of limitations for post-conviction petitions, and Tennessee's "one-petition" limitation on post-conviction relief. Tenn. Code Ann. §§ 40-30-102(a), (c). This claim is procedurally defaulted.

Petitioner generally argues that his failure to present claims to the TCCA on post-conviction appeal was due to ineffective assistance. (See Doc. No. 3 at 10, 13, 30 (asserting that post-conviction appellate counsel was ineffective in failing to include requested grounds for relief in the appellate brief).) But Petitioner cannot rely on this argument to establish the cause required to overcome this claim's default because it is not a claim of ineffective assistance of trial counsel. See Davila, 137 S. Ct. at 2062–63 (citations omitted). Accordingly, Claim 1 is not subject to further review.[6]

2. Trial Proceedings

Petitioner's remaining claims of trial court error concern four subjects—media attention, pretrial motions, the admission of evidence, and jury instructions.

a. Claims 2.B, 2.C, 2.H—Media Attention

First, in Claim 2.B, Petitioner asserts that the trial court failed in its "affirmative constitutional duty to minimize the effect of prejudicial pretrial publicity." (Doc. No. 3 at 26.) Relatedly, Claim 2.C asserts that the court should have dismissed the indictment before trial due to this publicity. (Id.) And in Claim 2.H, Petitioner asserts that the court improperly admitted evidence during trial due to media coverage. (Id.)

Petitioner raised Claim 2.B in his motion for new trial (Doc. No. 22-2 at 75), the trial court rejected it (Doc. No. 22-29 at 138), and Petitioner did not present it to the TCCA on direct appeal. Nor did he raise Claim 2.C or 2.H at that stage. Later, through his *pro se* post-conviction petitions, Petitioner asserted all three claims. (Doc. No. 22-29 at 91–94, 115–16.) The trial court found that Petitioner did not present any evidence that "the pre-trial publicity and media coverage of the trial denied [him] due process of law and a fair trial." (Id. at 140.) Then, Petitioner did not raise Claim 2.B, 2.C, or 2.H on post-conviction appeal. In short, Petitioner did not exhaust the available remedies for these three claims by presenting them to the TCCA, and he can no longer do so. He has not demonstrated cause to overcome this default. These claims will be denied.[7]

b. Claims 2.D, 2.E—Pretrial Motions

***22** Second, Petitioner takes issue with the trial court's denial of certain pretrial motions. Specifically, Claim 2.D pertains to Petitioner's motion to continue trial to allow independent DNA analysis (Doc. No. 3 at 10), and Claim 2.E addresses his motion for a bill of particulars. (Id. at 20.) Petitioner raised both claims in a motion for new trial (Doc. No. 22-2 at 70, 73), and the trial court denied each one (id. at 84, 85). Petitioner did not then present these claims to the TCCA on either direct or post-conviction appeal. Thus, Petitioner did not fairly present Claims 2.D and 2.E to the state courts, and he has not shown cause to overcome this default. These two claims are not subject to further review.

c. Claims 2.I, 2.K, 2.L, 2.M—Admission of Evidence

Third, Petitioner takes issue with the admission of certain evidence at trial. Claim 2.I challenges the trial court's admission of testimony from two different witnesses—Sheldon Anter and Andrew Napper. (Doc. No. 3 at 13–14, 23–24.) As explained above, supra Section V.A.1, the Anter portion of this claim is not cognizable in this federal habeas proceeding because Petitioner raised it on direct appeal solely as a matter of state evidentiary law. As to the Napper portion of this claim, however, Petitioner did not raise it on direct appeal at all. While Petitioner expressed displeasure with Napper's testimony in his *pro se* post-conviction petition, he did so under the umbrella of prosecutorial misconduct. (See Doc. No. 22-29 at 83–84.) Regardless, the trial court denied the claim (Doc. No. 22-29 at 139), and Petitioner did not present it to the TCCA on post-conviction appeal.

Although Petitioner did raise this claim in a conclusory fashion in his *pro se* application for permission to appeal to the Tennessee Supreme Court in his state post-conviction proceedings (Doc. No. 22-37 at 7), that is not sufficient to fairly present the claim to the state courts. "[W]here a habeas petitioner had the opportunity to raise a claim in the state courts on direct appeal but only raised it for the first time on discretionary review, such a claim is not fairly presented." Thompson v. Bell, 580 F.3d 423, 438 (6th Cir. 2009) (discussing

Castille v. Peoples, 489 U.S. 346, 351 (1989)). That is the case here, as Petitioner failed to raise this claim prior to his request for discretionary Supreme Court review. Because Petitioner has not demonstrated cause for this failure, the Napper portion of claim 2.I will be denied as procedurally defaulted.

As to Claim 2.K, Petitioner asserts that the trial court erred in admitting two photographs of the victim from around the time of her death because they were unduly prejudicial. (Doc. No. 3 at 32–33.) But Petitioner did not present this claim to the TCCA on either direct or post-conviction appeal. And raising this claim in his request for discretionary Supreme Court review of his post-conviction proceedings (see Doc. No. 22-37 at 31) is not sufficient to exhaust it, because that is not a "procedural context in which ... the merits [of a claim] are considered as of right." Olson v. Little, 604 F. App'x 387, 402 (6th Cir. 2015) (discussing Castille, 489 U.S. 346); see also Smith v. Parker, No. 10-1158-JDB-egb, 2013 WL 5409783, at *30 (W.D. Tenn. Sept. 25, 2013) (applying Castille and concluding that a petitioner does not fairly present a claim to the state courts by raising it in an application for permission to appeal to the Tennessee Supreme Court). This claim is procedurally defaulted without cause.

In Claim 2.L, Petitioner asserts that the trial court erred in admitting a video recording of an altercation in the jail between Petitioner and fellow inmate Frank White, and allowing Sheldon Anter to testify about what White said to Petitioner. (Doc. No. 1 at 27; Doc. No. 3 at 14, 28.) As context for this claim, Anter testified that White called Petitioner a "baby killer and a rapist" immediately before this altercation. (Doc. No. 22-13 at 38–41.) On direct appeal, Petitioner did not raise any claim about the admissibility of this recording, or Anter's testimony about White's remarks. Petitioner did raise this claim in his *pro se* post-conviction petition (Doc. No. 22-29 at 100–03), and the trial court denied it (id. at 141). Petitioner did not then appeal this claim to the TCCA. Because Petitioner did not fairly present this claim to the state courts, he can no longer do so, and he has not demonstrated cause for this default, Claim 2.L will be denied

***23** Petitioner's other claim related to this video recording will be denied as well. In Claim 2.M, Petitioner asserts that the judge erred by failing to do what he told the jury he would do — view the video overnight and tell the jury his opinion of who the aggressor was the next day. (Doc. No. 3 at 28.) This claim will be denied as procedurally defaulted without cause because Petitioner did not present it to the TCCA at any point.[8]

d. Claims 2.P, 2.Q—Jury Instructions

The final category of procedurally defaulted claims of trial court error relates to jury instructions. In Claim 2.P, Petitioner asserts that the court erred by failing to instruct the jury on criminal and/or professional informants in connection with the testimony of Sheldon Anter and Andrew Napper. (Doc. No. 3 at 17, 23–24.) And in Claim 2.Q, Petitioner asserts that the court should have instructed the jury that a finding of guilt for the charge of felony murder required a finding of guilt on an underlying felony. (Id. at 17–21.)

Petitioner did not present either jury-charge claim to the TCCA on direct or post-conviction appeal. He did raise these two claims in his *pro se* application for permission to appeal in his post-conviction proceedings (Doc. No. 22-37 at 19, 34), but, as explained above, this did not exhaust the claims. Petitioner has not demonstrated cause for this default. Claims 2.P and 2.Q will be denied.

3. Claim 3—Prosecutorial Misconduct

In Claim 3, Petitioner asserts that the state committed prosecutorial misconduct through improper closing argument at trial. (Doc. No. 1 at 24; Doc. No. 3 at 6, 14, 30–31.) He did not raise a prosecutorial misconduct claim on direct appeal. In his *pro se* post-conviction petitions, Petitioner presented several arguments regarding prosecutorial misconduct based on the prosecutor's actions during trial and closing argument. (Doc. No. 22-29 at 86–88, 123–25.) The state court denied these claims (id. at 139–40), and Petitioner did not raise a prosecutorial misconduct claim before the TCCA on post-conviction appeal. Petitioner did assert a sprawling claim of prosecutorial misconduct throughout his *pro se* request for permission to appeal to the Supreme Court (Doc. No. 22-27 at 20, 23, 26–30), but that is not sufficient to exhaust a claim. Claim 3 is procedurally defaulted without cause.

4. Claim 4—Sufficiency of the Evidence

Petitioner next asserts, in Claim 4, that there is insufficient evidence to support the conviction. (Doc. No. 1 at 8; Doc. No. 3 at 14, 22.) Petitioner's presentation of this claim is based on a faulty premise, and the claim itself is procedurally defaulted. The premise is flawed because Petitioner maintains that there is not sufficient "evidence of the conviction for

felony or premeditated murder."[9] (Doc. No. 3 at 14.) But Petitioner was not convicted of these offenses. As the TCCA clearly explained on direct appeal, although the indictment *charged* Petitioner with "premeditated murder" and "felony murder in the perpetration of larceny," the jury *convicted* Petitioner of second-degree murder. **Barrett**, 2012 WL 2870571, at *25. Because Petitioner was not convicted of premeditated murder or felony murder, his argument that there is insufficient evidence to support convictions for those offenses is immaterial.

***24** Regardless, Petitioner's arguments in support of his insufficient-evidence claim are procedurally defaulted. Petitioner raised an insufficient-evidence claim on direct appeal, but did not rely on the same theory as he does in his federal habeas corpus petition. That is, in the claim presented to the TCCA, Petitioner argued "that there was no eyewitness account of the crime, that the evidence is circumstantial, and that the conviction rests 'solely' upon proof of his DNA on the victim's blouse and the testimony of two convicted felons." **Barrett**, 2012 WL 2870571, at *25. Here, by contrast, Petitioner contends that there is insufficient evidence to support his convictions "due to lack of specificity of the indictment" (Doc. No. 3 at 14, 22), because there is no evidence of larceny or rape (id. at 14), and because there is an inadequate chain of custody regarding DNA evidence (id. at 4). Petitioner, therefore, failed to present "the same claim under the same theory [ ] to the state courts," so he did not properly exhaust his insufficient-evidence claim. See Wagner, 581 F.3d at 417. He has not established cause for this default, so Claim 4 will be denied.

Finally, even if the Court were to liberally construe this claim as having been exhausted on direct appeal, the state court's rejection of the claim before it was clearly reasonable. The TCCA analyzed Petitioner's insufficient-evidence claim as follows:

> Our standard of review when the sufficiency of the evidence is questioned on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979); State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). This means that we may not reweigh the evidence but must presume that the trier of fact has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the State. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); Statev. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Any questions about the "credibility of the witnesses, the weight to be given to their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as the trier of fact." State v. Dotson, 254 S.W.3d 378, 395 (Tenn. 2008) (citing State v. Vasques, 221 S.W.3d 514, 521 (Tenn. 2007)); see State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997).
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> The Defendant's contention is premised, in part, upon the former standard for analysis of convictions based solely upon circumstantial evidence. Previously, Tennessee law provided that for a conviction to be based upon circumstantial evidence alone, the evidence "must be not only consistent with the guilt of the accused but it must also be inconsistent with his [or her] innocence and must exclude every other reasonable theory or hypothesis except that of guilt." Pruitt v. State, 460 S.W.2d 385, 390 (Tenn. Crim. App. 1970); see also State v. Crawford, 470 S.W.2d 610, 612 (Tenn. 1971). Shortly after the Defendant filed his brief, however, our Supreme Court adopted the United States Supreme Court's perspective that the standard of proof is the same, without regard to whether evidence is direct or circumstantial, eliminating the "every other reasonable theory or hypothesis except that of guilt" analysis. State v. Dorantes, 331 S.W.3d 370, 379 (Tenn. 2011) (citing Jackson, 443 U.S. at 326; Holland v. United States, 348 U.S. 121, 139–40 (1954)). We will, therefore, conduct our review in accord with Dorantes. See State v. Sisk, 343 S.W.3d 60, 68 (Tenn. 2011) (reinstating convictions based on Dorantes analysis after Court of Criminal Appeals reversed convictions for insufficient evidence under Crawford circumstantial evidence analysis but noting that intermediate court did not err in applying Crawford because its ruling was pre-Dorantes).
>
> At the time of the Defendant's crime, the relevant statute provided that the defining characteristics of second degree murder were an unlawful, willful, and malicious killing of a victim. T.C.A. §§ 39-2401 (1975, 1985) (renumbered at T.C.A. § 39-2-201) (repealed 1989), 39-2402 (1975) (amended 1977, 1979, 1988) (renumbered at T.C.A. § 39-2-202) (repealed 1982), 39-2403 (1975) (amended 1979) (renumbered at T.C.A. § 39-2-211) (repealed 1989); see, e.g., State v. Johnson, 541 S.W.2d 417, 418–19 (Tenn. 1976); State v. Shepherd, 862 S.W.2d 557, 565 (Tenn. Crim. App. 1992).

*25 The Defendant challenges both the sufficiency of the proof of the statutory elements of the crime and that of his identity as the perpetrator or as an aider and abettor to the crime. In the light most favorable to the State, the record reflects that the victim died from asphyxia due to manual strangulation. Her injuries were so great that her thyroid cartilage and hyoid bone were broken. Dr. Francisco testified that this would take considerable pressure because a child's cartilage and bones were flexible. The evidence demonstrates that the killing was unlawful, willful, and malicious and is sufficient to support the conviction for second degree murder.

With respect to the proof that the Defendant perpetrated the crime, the evidence in the light most favorable to the State established that the Defendant's DNA was present on the victim's blouse. The chance of the same STR DNA profile occurring in another person was one in five quadrillion for the African–American population and one in 160 quadrillion for the Caucasian population. The Defendant's DNA alpha type was present on the victim's pants. This type was shared by only eight percent of the population. Over 100 other individuals, including virtually everyone from the victim's neighborhood, were eliminated as the contributors of the DNA evidence. Two of the Defendant's fellow inmates testified that the Defendant admitted that he killed the victim and that his DNA was on her. Their testimony regarding the altercation between the Defendant and Frank White was consistent with the video recording of the altercation. There was no indication of any prior acquaintance or association of the victim and the Defendant that might provide an alternate explanation of the presence of his DNA on her clothing. Dr. Francisco and Dr. Bass testified that the victim died at or near the time of her disappearance, which was before the Defendant was in jail. When the Defendant was arrested, he was wearing a full length coat, a ski mask, another hat, and two pairs of gloves. His clothing and physical stature were consistent with the description Ms. Maxwell gave of the adult she saw in Ms. Howard's driveway with the child she presumed was the victim. The Defendant is not entitled to relief.

Barrett, 2012 WL 2870571, at *25–26.

The TCCA thus accurately identified the federal standard governing claims for sufficiency of the evidence, as set forth in Jackson v. Virginia, 443 U.S. 307, 319 (1979). " 'Under Jackson, habeas corpus relief is appropriate based on insufficient evidence only where the court finds, after viewing the evidence in the light most favorable to the prosecution, that no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Tucker v. Palmer, 541 F.3d 652, 656 (6th Cir. 2008) (quoting Parker v. Renico, 506 F.3d 444, 448 (6th Cir. 2007)). On federal habeas review, this standard "commands deference at two levels": "First, deference should be given to the trier-of-fact's verdict, as contemplated by Jackson; second, deference should be given to the [state court's] consideration of the trier-of-fact's verdict, as dictated by AEDPA." Id. (citing Parker, 506 F.3d at 448).

Here, the state court concluded that there was sufficient evidence for the jury to find Petitioner guilty of second-degree murder as it was defined at the time of the crime—the unlawful, willful, and malicious killing of a victim. As to the elements of the crime, the TCCA's analysis focused on the testimony of Dr. Jerry Francisco, an expert in forensic pathology. The TCCA noted Dr. Francisco's testimony that he performed an autopsy on the victim and determined the cause of death to be asphyxia resulting from manual strangulation. (See Doc. No. 22-10 at 31–32.) Dr. Francisco testified that he made this determination based on his conclusions "that the victim's thyroid cartilage and hyoid bone were broken [and] that the victim had an adjacent hemorrhage, blue lips, and small hemorrhages of the scalp, surface of the chest organs, heart, and lungs." **Barrett**, 2012 WL 2870571, at *4. According to Dr. Francisco, it would have required "considerable pressure" to break the victim's cartilage and bones. (Doc. No. 22-10 at 32.) Based on this evidence, it was reasonable for the TCCA to find that the victim's killing was unlawful, willful, and malicious.

*26 It was also reasonable for the TCCA to find, based on an assortment of evidence, that Petitioner committed the crime. The state court essentially based this conclusion on four factors— DNA evidence connecting Petitioner to the victim's blouse and pants, with no exculpatory explanation for how it got there; testimony of Petitioner's fellow inmates Sheldon Anter and Andrew Napper that Petitioner admitted killing the victim and that his DNA was on her; expert testimony that the timing of the victim's death coincided with a period during which Petitioner was not in jail; and testimony of the victim's neighbor that she saw an adult "with the child she presumed was the victim," and that this adult's clothing and stature was consistent with Petitioner's at the time of his arrest in 1975.

As to DNA evidence on the victim's blouse, Jennifer Luttman testified as an expert in forensic DNA analysis. According to Ms. Luttman, there was a "reasonable degree of scientific certainty" that Petitioner was the source of DNA on the blouse. (Doc. No. 22-15 at 119.) Ms. Luttman testified that "[t]he chance of the same STR DNA profile occurring in another person was one in five quadrillion for the African–American population and one in 160 quadrillion for the Caucasian population." **Barrett**, 2012 WL 2870571, at *26. And as to the DNA evidence on the victim's pants, DNA expert Gary Harmor testified that Petitioner's "DNA alpha type" was on the victim's pants, and that "[t]his type was shared by only eight percent of the population." Id. Given the evidence presented to the jury, it was reasonable for the TCCA to conclude that there was sufficient evidence to convict Petitioner of second-degree murder.

5. Ineffective Assistance of Trial Counsel

Finally, there are eleven remaining sub-claims of ineffective assistance of trial counsel: Claims 5.A, 5.B, 5.C, 5.E, 5.G, 5.H, 5.I, 5.J, 5.K, 5.M, and 5.N. Petitioner did not present these sub-claims to the TCCA. He did raise some of them—in particular, Claims 5.E, 5.G, 5.H, 5.J, and 5.M—in his *pro se* application for permission to appeal his post-conviction proceedings to the Tennessee Supreme Court (Doc. No. 22-37 at 5, 31–35, 37), but that does not constitute proper exhaustion. Accordingly, all eleven sub-claims are procedurally defaulted.

As noted above, supra Section V.A.4, the " 'ineffective assistance of post-conviction counsel can establish cause to excuse [the] procedural default of a ... claim of ineffective assistance at trial.' " Atkins, 792 F.3d at 658 (quoting Sutton, 745 F.3d at 795–96). Here, in addition to several specific assertions of ineffectiveness during his initial post-conviction proceeding, Petitioner generally asserts that appointed post-conviction counsel "failed to provide meaningful assistance ... in amending his petition for post conviction relief." (Doc. No. 3 at 10.) The Court liberally construes this as an allegation of cause to overcome the default of his remaining sub-claims of ineffective assistance at trial.

To determine whether Petitioner has effectively demonstrated cause, the Court considers "(1) whether state post-conviction counsel was ineffective; and (2) whether [Petitioner's] claims of ineffective assistance of counsel were 'substantial.' " Atkins, 792 F.3d at 660 (citations omitted). If Petitioner demonstrates "cause," then the Court must consider "whether [he] can demonstrate prejudice." Id. And if Petitioner has established both "cause" and "prejudice," only then would the Court "evaluate [his] claims on the merits." Id. (citations omitted). Here, the Court need not reach the issue of whether post-conviction counsel was ineffective because, as explained in more detail below, Petitioner has not demonstrated that his remaining sub-claims are "substantial."

"A substantial claim is one that has some merit and is debatable among jurists of reason." Abdur'Rahman v. Carpenter, 805 F.3d 710, 713 (6th Cir. 2015) (citing Martinez, 566 U.S. at 14). "In the converse, a claim is insubstantial when 'it does not have any merit,' 'is wholly without factual support,' or when 'the attorney in the initial-review collateral proceeding did not perform below constitutional standards.' " Porter v. **Genovese**, 676 F. App'x 428, 432 (6th Cir. 2017) (quoting Martinez, 566 U.S. at 15–16).

***27** Through his remaining sub-claims, Petitioner asserts that counsel was ineffective both before and during trial. Because these sub-claims are insubstantial, Petitioner has not established cause to overcome their default. The Court will address each group of claims in turn.

a. Claims 5.A, 5.B, 5.C, 5.E, 5.G, 5.H, 5.I—Pretrial Assistance

First, in Claim 5.A, Petitioner asserts that counsel was ineffective for failing to file a motion to dismiss the indictment due to excessive pre-trial publicity. (Doc. No. 3 at 26.) This sub-claim is insubstantial because trial counsel was not deficient, and Petitioner has not demonstrated that prejudice ensued, for failing to file a motion on this ground. The Court acknowledges that there was extensive media coverage of this case. But Petitioner has not alleged, with any degree of specificity, how this publicity would have justified dismissing the indictment. In general, the preferred methods for ensuring that publicity does not undermine the constitutional fairness of a trial include questioning the prospective jurors appropriately and changing the venue. [10] See Jackson v. Houk, 687 F.3d 723, 733 (6th Cir. 2012) (discussing Mu'Min v. Virginia, 500 U.S. 415, 433 (1991) and Skilling v. United States, 561 U.S. 358, 386 (2010)). Not, as Petitioner proposes in this sub-claim, dismissing the indictment altogether. See United States v. Silver, 103 F. Supp. 3d. 370, 380 (S.D.N.Y. 2015) (noting the lack of any federal precedent for taking "the extreme step of dismissing an indictment solely based

on pre-indictment publicity"). Thus, it was objectively reasonable for counsel not to file a motion to dismiss the indictment due to pretrial publicity, and Petitioner suffered no prejudice for his failure to do so. Claim 5.A will be denied.

Next, Claims 5.B and 5.C challenge counsel's performance during *voir dire*. In Claim 5.B, Petitioner asserts that "[c]ounsel failed to adequately question potential jurors to determine the extent to which they were subjected [to] and influenced by [the] constant, inflammatory and exploitative media coverage." (Doc. No. 3 at 27.) And in Claim 5.C, Petitioner asserts that "counsel failed to ask constitutionally compelled *voir dire* quest[i]ons" in light of the "tainted ... jury pool" that resulted from "[t]he explosive, racially-charged publicity from the first trial where he was convicted of first degree murder." (Id. at 33.)

These assertions, while sensational, are devoid of factual support. That is, Petitioner does not explain how counsel's questioning was inadequate or identify any particular question counsel should have asked. Petitioner also does not allege that counsel's questioning resulted in the empaneling of a juror who was actually biased against him. See Campbell v. Bradshaw, 674 F.3d 578, 594 (6th Cir. 2012) (citation omitted) (denying habeas challenge to counsel's failure to request a venue change due to pretrial publicity where the petitioner did "not identif[y] any juror who was actually seated that indicated an inability to set aside any prior knowledge about the case or to judge the case fairly and impartially"). The Court cannot presume prejudice based on the mere existence of substantial publicity surrounding a case. Jackson, 687 F.3d at 733. Although the Court is unable to independently review the *voir dire* transcript, because it is not a part of the state court record,[11] Petitioner's conclusory assertions of inadequate questioning by counsel do not overcome the presumption of juror impartiality. See Foley v. Parker, 488 F.3d 377, 387 (6th Cir. 2007) (citing Ritchie v. Rogers, 313 F.3d 948, 962 (6th Cir. 2002)) ("Negative media coverage by itself is insufficient to establish actual prejudice, and the existence of a juror's preconceived notion as to the guilt or innocence of the defendant, without more, is not sufficient to rebut the presumption of impartiality."). Claims 5.B and 5.C are insubstantial and will be denied as procedurally defaulted without cause.

***28** Petitioner's next sub-claim is a broad challenge to counsel's handling of Petitioner's instructions regarding DNA evidence. In Claim 5.E, Petitioner asserts that counsel "failed to properly assess and review [his] assignment of error as to the serious omissions and constitutional blunders regarding the collection, testing and custody of the purported DNA evidence." (Doc. No. 3 at 3–4.) This sub-claim, therefore, has three parts—a collection component, a testing component, and a chain of custody component. The collection component is subsumed by Petitioner's more specific challenges in Claims 5.G and 5.H, discussed below. The testing component is subsumed by Claim 5.F, Petitioner's assertion that counsel failed to obtain independent DNA testing before trial. As discussed above, supra Section V.B.3, the Court liberally construed this sub-claim to have been exhausted on post-conviction appeal, and the TCCA's rejection of it was not unreasonable.

Finally, as to the chain of custody component, Petitioner raised this same basic argument in his *pro se* post-conviction petition. That is, Petitioner asserted that counsel was ineffective for failing to challenge the chain of custody of DNA evidence at trial. (Doc. No. 22-29 at 99–100.) Here, likewise, Petitioner essentially asserts that counsel could have undermined the chain of custody at trial if he would have "properly assess[ed] and review[ed his] assignment of error" before trial. The post-conviction court rejected this claim (Doc. No. 22-29 at 141),[12] and Petitioner did not raise it on post-conviction appeal. Ineffective assistance of post-conviction counsel can act as cause only when the ineffectiveness occurs at the initial review stage, not the appeal stage. Atkins, 792 F.3d at 661 (emphasis added) (quoting West v. Carpenter, 790 F.3d 693, 699 (6th Cir. 2015)) ("[A]ttorney error at state post-conviction appellate proceedings cannot excuse procedural default."). Accordingly, because the post-conviction trial court ruled on the chain of custody component of this sub-claim, it is procedurally defaulted without cause. For all of these reasons, Claim 5.E will be denied.

Turning to Petitioner's specific challenges to the collection of DNA evidence, Claim 5.G asserts that counsel provided ineffective assistance by failing to request a pretrial Dunaway hearing[13] "to determine whether the warrant[ ]less DNA search" violated the Fourth Amendment. (Doc. No. 3 at 9, 16.) Similarly, in Claim 5.H, Petitioner asserts that counsel "should have objected and moved to suppress the introduction of the test results following the warrantless [second] DNA search." (Id. at 15–16.) Despite using different terminology for the name of motion that counsel should have filed, the substance of both sub-claims is the same—counsel was ineffective for failing to properly challenge the admissibility of a second,

warrantless DNA search before trial. The Court, accordingly, considers these two sub-claims together.

*29 These claims have no factual support. Petitioner makes a conclusory assertion that the DNA evidence obtained from this second DNA search "played a significant role in the State's case-in-chief." (Doc. No. 3 at 15.) And he attempts to support this assertion by stating that certain "unknown male" profiles in the state's DNA reports were only connected to Petitioner after this second DNA collection. (Id. at 3, 9.) But there is nothing in the record to reflect that a second DNA search occurred at all, much less that it occurred in the manner described by Petitioner.

Even assuming that law enforcement officers obtained a DNA sample from Petitioner without a warrant while he was in jail, however, Petitioner has not explained how this second sample was used against him in this case. It is undisputed that officers collected a DNA sample from Petitioner pursuant to a search warrant in October 2007, before his arrest. (Doc. No. 3 at 15.) And the record reflects that the crucial DNA evidence used against Petitioner during trial was based on this October 2007 sample [14]—not some later sample collected without a warrant.

Pat Postiglione, a Metro Nashville Police Detective, testified at trial that the October 2007 sample "was collected by swabbing the inside of [Petitioner's] mouth on both cheeks." **Barrett**, 2012 WL 2870571, at *15. Postiglione "identified the swabs used to collect evidence from [Petitioner]," and testified that these swabs "were first sent to the TBI laboratory and later sent to the SERI laboratory in California." Id.

First, as to the TBI laboratory, DNA expert Chad Johnson testified that he received Petitioner's swabs on October 25, 2007, obtained a DNA profile from the swabs, and issued a report on November 7, 2007. (Doc. No. 22-15 at 63–65.) The FBI requested the DNA profile generated at the TBI laboratory. (Id. at 65.) Jennifer Luttman, an expert in DNA analysis with the FBI, used this DNA profile—again, a DNA profile obtained from the October 2007 sample—to connect Petitioner to DNA on the victim's blouse. (Id. at 116–20.)

Second, as to the SERI laboratory, DNA expert Gary Harmor testified that he received Petitioner's swabs on December 12, 2007. (Doc. No. 22-15 at 37–38.) Harmor gave the swabs to another SERI employee named Amy Lee, who used the swabs to extract DNA. (Id. at 38–39.) Harmor then "amplified the extracted DNA, determined the typing, and wrote his report," which connected Petitioner to DNA on the victim's pants. **Barrett**, 2012 WL 2870571, at *19.

In sum, Petitioner has not demonstrated that a second, warrantless DNA search occurred, or that the state used the results of such a search against him at trial. Instead, the record reflects that experts at the TBI, FBI, and SERI relied on the DNA sample obtained pursuant to a search warrant in October 2007 to conduct testing that ultimately connected Petitioner's DNA to DNA on the victim's blouse and pants. Accordingly, counsel was not ineffective for failing to challenge the admissibility of a second, warrantless DNA search before trial, and Claims 5.G and 5.H are insubstantial.

Finally, in Claim 5.I, Petitioner asserts that counsel was unable to sufficiently attack the credibility of Sheldon Anter and Andrew Napper at trial because he failed to investigate them beforehand. (Doc. No. 3 at 13.) This sub-claim is belied by the record.

In a pretrial motion for exculpatory evidence, counsel requested background information on Anter and Napper, including whether they had been promised or provided compensation in exchange for their assistance, whether they previously provided any unreliable information in another case, and whether they demanded compensation for their cooperation in this case. (Doc. No. 22-1 at 132–33.) In regard to Anter, specifically, counsel asked whether the district attorney provided him any assistance "with respect to his pending immigration case." (Id. at 133.) The court granted the motion (Doc. No. 22-2 at 51), and counsel received the information. Counsel also filed a pretrial notice of intent to use Anter and Napper's prior convictions for impeachment purposes. (Id. at 39–40.) Then, at trial, the state attempted to mitigate the impact of this information by eliciting some of it on direct examination. (Doc. No. 22-13 at 32–35 (Anter's testimony); id. at 94, 97 (Napper's testimony).) This strategy was outside counsel's control and has no bearing on his performance. Moreover, counsel extensively cross-examined the witnesses on this information in an attempt to undermine their credibility. (Id. at 44–46, 69–76 (Anter's testimony); id. at 98–102, 105 (Napper's testimony).) While putting on Petitioner's proof, counsel also called Antonio Johnson, a Corporal at the Davidson County Sheriff's Office, to impeach Anter's prior testimony in which

he denied asking Johnson about Petitioner. (Doc. No. 22-16 at 136–39.) Finally, counsel devoted a substantial portion of closing argument to Anter and Napper's asserted unreliability. (Doc. No. 22-17 at 78–81.)

***30** For all of these reasons, the record reflects that counsel's pretrial investigation of Anter and Napper was objectively reasonable, and his handling of these witnesses at trial was not deficient. Petitioner has not identified any alternative strategy toward Anter and Napper with a reasonable probability of resulting in a different outcome. Claim 5.I will be denied.

b. Claims 5.J, 5.K, 5.M, 5.N—Assistance During Trial

The final group of sub-claims pertains to counsel's performance during trial. First, in Claim 5.J, Petitioner asserts that counsel was ineffective in failing to object to the admission of photographs of the victim from around the time of her death. (Doc. No. 3 at 32–33.) As context, the prosecution introduced two photographs of the victim through Virginia Trimble, her mother: one is the victim's school picture, and the other is a picture of the victim at another child's birthday party wearing the same blouse she was wearing when she disappeared. (Doc. No. 22-9 at 52, 72– 73 (introduction of photographs at trial); (Doc. No. 22-19 at 2–3, 8–9 photographs).) Petitioner argues that these photographs were "inflammatory," "provocative," and "extremely prejudicial," while being either "marginally probative" or "in no way probative." (Doc. No. 3 at 32–33.) Petitioner asserts that counsel should have objected to the introduction of the photographs on this basis. (Id. at 33.)

This sub-claim is insubstantial because Petitioner has failed to demonstrate both deficiency and prejudice. The Tennessee Supreme Court has explained the state law on the admissibility of photographs as follows:

> Tennessee courts have followed a policy of liberality in the admission of photographs in both civil and criminal cases. State v. Banks, 564 S.W.2d 947, 949 (Tenn. 1978) (citations omitted). This policy translates into the rule that "the admissibility of photographs lies within the discretion of the trial court." Id. ... However, before a photograph may be admitted into evidence, it must be relevant to an issue that the jury must decide and the probative value of the photograph must outweigh any prejudicial effect that it may have upon the trier of fact. State v. Braden, 867 S.W.2d 750, 758 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1993) (citation omitted); see also Tenn. R. Evid. 401 and 403.

State v. Nesbit, 978 S.W.2d 872, 901 (Tenn. 1998). Moreover, " '[i]f relevant, the photograph is not rendered inadmissible because the subject portrayed could be described by words; ... the photograph would be cumulative; ... or [the photograph] is gruesome or for some other reason is likely to inflame the jury.' " State v. Sparrow, No. M2012–00532–CCA–R3–CD, 2013 WL 1089098, at *22 (Tenn. Crim. App. Mar. 14, 2013) (quoting Collins v. State, 506 S.W.2d 179, 185 (Tenn. Crim. App. 1973)).

Here, both of the challenged photographs were relevant under Tennessee law. The Tennessee Supreme Court "has previously approved of the admission during trial of a photograph taken while the victim was alive to establish the corpus delecti of the crime and to prove that the 'person killed was the same person named in the indictment.' " Id. (quoting Nesbit, 978 S.W.3d at 902).[15] And Ms. Trimble used the victim's school picture to identify her as the person named in the indictment. (Doc. No. 22-9 at 52 ("It's my Marcia.").)

***31** The picture of the victim at another child's birthday party was also relevant. This picture was taken a few days before the victim's disappearance, and showed the victim wearing the same blouse as she wore when she disappeared. **Barrett**, 2012 WL 2870571, at *2. This blouse featured prominently in the state's case, as a DNA expert would testify that Petitioner's "DNA profile matched the major contributor's [DNA] profile developed from the blouse," and that "the random match probability was one in six trillion." Id. at *21. Accordingly, this challenged photograph was relevant to show that the blouse belonged to the victim, and that she wore it around the time of her disappearance.

Because the challenged photographs were relevant, this Court has no basis to conclude that the trial court would have found them to be inadmissible if counsel had objected to their introduction. See Sparrow, 2013 WL 1089098, at *22 (quoting Collins, 506 S.W.2d at 185) (" 'If relevant, the photograph is not rendered inadmissible because the subject portrayed ... is gruesome or for some other reason is likely to inflame the jury.' "). Petitioner, therefore, has not demonstrated that counsel was deficient for failing to do so. Moreover, given all of the evidence presented at trial, there is not a reasonable probability that there would have been a different outcome if the jury did not view two photographs of the victim while she was alive. For these reasons, Claim 5.J is insubstantial.

Next, in Claim 5.K, Petitioner asserts that counsel was ineffective for failing to object when the prosecutor played a video recording of a jail altercation without sound and explained "to the jury what was happening as the jury watched." (Doc. No. 3 at 28.) As an initial matter, the record belies Petitioner's assertion that the prosecutor explained what was happening while this recording played. It is true that the video recording did not have audio. But it was Sheldon Anter, not the prosecutor, who explained the activity in the video to the jury. **Barrett**, 2012 WL 2870571, at *13 ("The video recording introduced during Ms. Ray's testimony, which had no audio, was played for the jury as Mr. Anter narrated it."). Anter testified that this video showed an altercation between Petitioner and fellow inmate Frank White, precipitated by White taunting Petitioner about being a "baby killer and a rapist." (Doc. No. 22-13 at 38–41.) And the TCCA found that Anter's "testimony regarding the altercation between [Petitioner] and Frank White was consistent with the video recording of the altercation." **Barrett**, 2012 WL 2870571, at *26.

Even liberally construing Claim 5.K as a challenge to counsel's handling of Anter's testimony regarding the video recording, however, the sub-claim is still meritless. Counsel did not lodge an objection to this testimony at trial, but he did file a pretrial motion to exclude some of Anter's expected testimony under Tennessee Rule of Evidence 404(b). (Doc. No. 22-1 at 148, 150–51.) At a pretrial hearing, Anter testified that, during the altercation, Petitioner told White that "he had killed four people and had no problem killing again," and that he would "kill [White] like [he] killed them blue-eyed bitches." (Doc. No. 22-6 at 81.) The court found Anter's testimony regarding this first statement to be admissible, and the second statement to be inadmissible. (Doc. No. 22-7 at 8–10.) Additionally, in an effort to mitigate the prejudicial effect on Petitioner, the court "redacted" the first statement by allowing Anter to testify only that Petitioner said, "I've killed before and I will kill you." (Id. at 8.) Petitioner challenged the trial court's ruling on direct appeal, and the TCCA found that the trial court did not abuse its discretion. **Barrett**, 2012 WL 2870571, at *32–35.

***32** In short, counsel did not render inadequate performance by failing to object to Anter's description of the jail video recording at trial because he litigated the issue before trial. Petitioner does not explain how counsel's pretrial challenge to Anter's expected testimony was deficient, or identify another strategy that counsel should have pursued on this issue. Claim 5.K is not substantial.

The remaining two sub-claims—Claims 5.M and 5.N—accuse counsel of ineffectiveness for failing to request certain jury instructions. In Claim 5.M, Petitioner asserts that counsel should have requested an instruction on the unreliability of Sheldon Anter and Andrew Napper because they were "criminal and/or professional informants." (Doc. No. 3 at 23.) Claim 5.N, meanwhile, relates to Anter's testimony regarding statements made by Frank White. Here, Petitioner asserts that White testified against him "through the mouth of ... Sheldon Anter," so counsel should have requested an instruction on the "absentee witness rule." (Id. at 25–26.)

When reviewing a habeas petitioner's claim regarding an omitted jury instruction, the Court considers whether the absence of the instruction " 'so infected the entire trial that the resulting conviction violates due process.' " Leberry v. Howerton, 583 F. App'x 497, 502 (6th Cir. 2014) (quoting Estelle v. McGuire, 502 U.S. 62, 72 (1991)). The asserted error " 'must be so egregious that [it] render[ed] the entire trial fundamentally unfair. Without such a showing, no constitutional violation is established and the petitioner is not entitled to relief.' " Wade v. Timmerman-Cooper, 785 F.3d 1059, 1078 (6th Cir. 2015) (quoting White v. Mitchell, 431 F.3d 517, 533 (6th Cir. 2005)). This is a "very high burden," id., and Petitioner has not met it in Claims 5.M and 5.N.

First, counsel did not perform deficiently by failing to request an instruction on "criminal and/or professional informants." The Court "review[s] jury instructions 'as a whole, in order to determine whether they adequately informed the jury of the relevant considerations and provided a basis in law for aiding the jury in reaching its decision.' " Dixon v. Houk, 737 F.3d 1003, 1010 (6th Cir. 2013) (quoting United States v. Frederick, 406 F.3d 754, 761 (6th Cir. 2005)). Thus, a defendant's constitutional rights are not violated where the trial court " 'adequately inform[s] the jury regarding the credibility of witness testimony' and 'alert[s] the jury to the various considerations that it should take into account in weighing testimony.' " Goff v. Bagley, 601 F.3d 445, 469 (6th Cir. 2010) (quoting Scott v. Mitchell, 209 F.3d 854, 883 (6th Cir. 2000)).

Here, the trial court thoroughly instructed the jury regarding the credibility of witness testimony. (Doc. No. 22-18 at 24–26.) These instructions were constitutionally adequate, and, indeed, directly addressed several of Petitioner's stated concerns regarding the

unreliability of Anter and Napper. Petitioner states that: Napper previously worked as a police informant (Doc. No. 3 at 23); Anter disliked Petitioner (id. at 28); both Anter and Napper received or expected to receive benefits from the state in exchange for their testimony (id. at 13); and both had criminal backgrounds (id. at 23). During trial, the jury heard testimony about these topics from Anter and Napper. And the court instructed the jury, in part, as follows:

> ***33** In forming your opinion, as to the credibility of a witness, you may look to the proof, if any, of the witness' reputation for truth and veracity; the intelligence and respectability of the witness; *his or her interest or lack of interest in the outcome of the trial*; his or her feelings; *his or her apparent fairness or bias*; his or her means of knowledge; his or her appearance and demeanor while testifying; his or her contradictory statements as to material matters, if any are shown; and all the evidence in the case tending to corroborate or to contradict him or her.
>
> * * *
>
> If, from the evidence presented, you find that a witness has been convicted of a prior crime, you can consider such only for the purpose of its effect, if any, on his or her credibility as a witness.

(Id. at 24–25 (emphasis added).)

The jury had all of the information and instruction necessary to evaluate the credibility of Anter and Napper's testimony. The absence of a specific instruction on "criminal and professional informants" did not deprive Petitioner of due process, and counsel was not deficient for failing to request this instruction at trial. Claim 5.M will be denied.

Second, counsel was also not deficient for failing to request an instruction on the "absentee witness rule" addressed in Claim 5.N. Petitioner does not explain what this instruction would have entailed. It appears, however, that Petitioner believes he was entitled to some kind of special instruction because the introduction of Frank White's statements, through Sheldon Anter's testimony, violated the Confrontation Clause. (See Doc. No. 3 at 25–26); California v. Green, 399 U.S. 149, 179 (1970) (Harlan, J., concurring) ("From the scant information available it may tentatively by concluded that the Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, trials by anonymous accusers, and absentee witnesses."). Petitioner is mistaken.

"The Confrontation Clause guarantees a defendant the opportunity to cross-examine the witnesses against him." Landers v. Romanowski, 678 F. App'x 295, 300 (6th Cir. 2017) (citing United States v. Owens, 484 U.S. 554, 559 (1998)). This right of confrontation, however, "applies only to testimonial statements." Jackson v. Stovall, 467 F. App'x 440, 443 (6th Cir. 2012) (citing Davis v. Washington, 547 U.S. 813, 823–26 (2006)). While the Supreme Court has not established "a comprehensive definition of 'testimonial,' " Crawford v. Washington, 541 U.S. 36, 68 (2004) (footnote omitted), it has noted that "[t]estimony ... is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " Id. at 51 (quoting 2 Noah Webster, An American Dictionary of the English Language (1828)). Accordingly, the term "testimonial" most readily applies to statements made at a preliminary hearing, grand jury proceeding, previous trial, or police interrogation. Id. at 68.

Here, Anter testified about a statement White made when "taunting" Petitioner in a common area at the jail immediately prior to a physical altercation between White and Petitioner. (Doc. No. 22-13 at 38–39); **Barrett**, 2012 WL 2870571, at *13 ("Mr. Anter testified that on August 16, 2008, Mr. White was taunting the Defendant about being a 'baby killer and a rapist.' "). Later that evening, Anter testified, White continued to taunt Petitioner through vents in the cells. (Doc. No. 22-13 at 40.) Thus, White's statements were far from the type of "testimonial" statements that trigger the protections of the Confrontation Clause. For this reason, counsel was not deficient for failing to request a special jury instruction regarding White's supposedly "testifying against [Petitioner] through" Anter. Petitioner also has not demonstrated a reasonable probability of a different outcome if counsel had requested such an instruction. Claim 5.N is procedurally defaulted without cause because it is insubstantial.

VI. Requests for Discovery and an Evidentiary Hearing

***34** In the reply, Petitioner seeks discovery under Habeas Rule 6 and an evidentiary hearing under Habeas Rule 8. (Doc. No. 33 at 45–48.) Petitioner is entitled to neither.

First, habeas petitioners do not have a " 'right to automatic discovery.' " Williams v. Bagley, 380 F.3d 932, 974 (6th Cir. 2004) (quoting Stanford v. Parker, 266 F.3d 442, 460 (6th Cir. 2001)). "Rule 6 embodies the principle that a court must provide discovery in a habeas proceeding only 'where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is ... entitled to relief.' " Id. (quoting Bracy v. Gramley, 520 U.S. 899, 908–09 (1997)). " 'Conclusory allegations are not enough to warrant discovery under Rule 6; the petitioner must set forth specific allegations of fact.' " Cornwell v. Bradshaw, 559 F.3d 398, 409 (6th Cir. 2009) (quoting Williams, 380 F.3d at 974).

Here, the only specific factual allegations Petitioner attempts to present in support of his discovery request, as relevant to this case, [16] pertain to Sheldon Anter and Andrew Napper. Petitioner alleges that both Anter and Napper "had a tacit non-prosecution agreement in return for their testimony," and that Napper "had a tacit sentence reduction agreement in return for his testimony." (Doc. No. 33 at 46.) These allegations appear to be speculative rationalizations for why Anter and Napper agreed to testify, rather than concrete factual allegations. (See id. at 47 ("[T]here is a *prima facie case* [sic] that the State did in fact have a non-prosecution and leniency agreement with its key witnesses and is knowingly concealing these facts, acting as if these witnesses simply came forward out of the goodness of their hearts, as good citizens.").) Accordingly, Petitioner's request for evidence is akin to an impermissible "fishing expedition." Williams, 380 F.3d at 974 (quoting Rector v. Johnson, 120 F.3d 551, 562 (5th Cir. 1997)) ("Rule 6 does not 'sanction fishing expeditions based on a petitioner's conclusory allegations.' ").

Even if the state possessed evidence regarding favorable agreements with Anter and Napper, moreover, these materials would not entitle Petitioner to relief. " '[W]here undisclosed evidence merely furnishes an additional basis on which to challenge a witness whose credibility has already been shown to be questionable or who is subject to extensive attack by reason of other evidence, the undisclosed evidence may be cumulative, and hence not material.' " Davis v. Gross, No. 18-5406, 2018 WL 8138536, at *3 (6th Cir. Sept. 10, 2018) (quoting Byrd v. Collins, 209 F.3d 486, 518 (6th Cir. 2000)). As the Court explained when rejecting Petitioner's claim that counsel was ineffective for failing to investigate Anter and Napper's backgrounds, supra Section V.C.5.a, both the prosecutor and counsel questioned them on their criminal histories and dealings with the state. This questioning covered Napper's prior work as a police informant, and counsel called a jail officer to testify for the sole purpose of impeaching Anter's testimony. "Given these circumstances, evidence that [Anter and Napper] struck deals in the current case, while undoubtedly a basis for impeachment, would have been cumulative in light of the other impeachment that occurred." Davis, 2018 WL 8138536, at *3 (citing Byrd, 209 F.3d at 518). Cumulative impeachment evidence is not a basis for discovery. See id.

***35** Petitioner is also not entitled to an evidentiary hearing. "[W]ith a few exceptions," none of which apply here, a district court " 'shall not hold an evidentiary hearing on [a] claim' " where " 'the applicant has failed to develop the factual basis of [the] claim in State court proceedings.' " Hodges v. Colson, 727 F.3d 517, 541 (6th Cir. 2013) (quoting 28 U.S.C. § 2254(e)(2)). And the Court cannot consider new evidence on claims that were adjudicated on the merits in state court. Id. (citing Pinholster, 563 U.S. at 181). Finally, "[a] district court is not required to hold an evidentiary hearing if the record 'precludes habeas relief.' " Muniz v. Smith, 647 F.3d 619, 625 (6th Cir. 2011) (quoting Schiro v. Landrigan, 550 U.S. 465, 474 (2007)). Applying these principles to this case, and for the reasons stated throughout the Court's analysis of Petitioner's claims, Petitioner's request for an evidentiary hearing will be denied.

VII. Conclusion

For these reasons, Petitioner's claims are either not cognizable, fail on the merits, or procedurally defaulted. He is also not entitled to discovery or an evidentiary hearing. Accordingly, the Petition (Doc. Nos. 1 and 3) will be denied and this action will be dismissed.

Because this constitutes a "final order adverse to" Petitioner, the Court must "issue or deny a certificate of appealability." Habeas Rule 11(a). A certificate of appealability may issue only if Petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 327 (2003) (citing Slack v. McDaniel, 529 U.S. 473, 484 (2000)). "If the petition [is] denied on procedural grounds, the petitioner must show,

'at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.' " Dufresne v. Palmer, 876 F.3d 248, 253 (6th Cir. 2017) (quoting Slack, 529 U.S. at 484). Here, the Court concludes that Petitioner has not satisfied these standards, and will therefore deny a certificate of appealability.

An appropriate Order is filed herewith.

All Citations

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Footnotes

1 As the TCCA recognized on post-conviction appeal, this amended petition "was not filed by counsel and was submitted by the Petitioner" even though "counsel had been appointed at the time the amended petition was filed." **Barrett** v. State, No. M2015-01161-CCA-R3-PC, 2016 WL 4410649, at *2 n.1 (Tenn. Crim. App. Aug. 18, 2016). Thus, Petitioner's *pro se* post-conviction petitions were the operative petitions before the trial court.

2 Moreover, as the TCCA found, this claim is based on a faulty premise. Namely, "Dr. Francisco did not testify as an expert in DNA analysis." **Barrett**, 2012 WL 2870571, at *42. Instead, "[h]e testified as an expert in forensic pathology, and as part of his expertise as a physician, he described basic scientific knowledge as it related to his laboratory's lack of procedures for preventing contamination of DNA evidence in 1975." Id.

3 The Court also notes that Petitioner's broad assertion, in Claim 9.A, that appellate post-conviction counsel denied his right to appeal is plainly belied by the record. See **Barrett**, 2016 WL 4410649 (raising three claims on post-conviction appeal).

4 To be clear on this point, the trial court found that Petitioner must serve this sentence consecutively to a previously imposed sentence, in part, because "[t]o do otherwise would minim[ize] the death[s] of" the victims in each case. (Doc. No. 22-21 at 13.)

5 The Court notes that, while there is not a record of the post-conviction court's formally ruling on Petitioner's request for independent DNA analysis, the court did find that it "heard no evidence" to support Petitioner's claim that "the DNA tests were unreliable, prejudicial, and unscientific." (Doc. No. 22-29 at 140.)

6 The Court also notes that this claim appears to be baseless on the merits because the indictment bears the signature of a foreperson and reflects that it is a true bill. (Doc. No. 22-1 at 5.)

7 As part of these claims, Petitioner complains that changing the trial venue to Chattanooga was "a farce" because "the media there had begun to crank up their publicity before the jury was picked, which allowed for such media sensationalizing to infect the whole trial." (Doc. No. 3 at 27.) Here, as in Claim 6, it appears that Petitioner is incorrectly referring to another case he faced around the same time as this one. Petitioner is currently challenging the judgment in Case No. 2008-B-1791. (Doc. No. 1 at 1.) This trial was held in Nashville. (See Doc. No. 33 at 39–40 (Petitioner's reply reflecting that trial was held in Nashville).) The trial for Petitioner's other case was apparently held in Chattanooga. (See Doc. No. 22-31 at 18–19, 48–49 (Petitioner's testimony from the evidentiary hearing on his post-conviction petition regarding the venue for these two trials).)

8 Based on the trial transcript, it also does not appear that the judge made any statement to the jury like the one alleged in this claim in the first place.

9 Similarly, Petitioner repeatedly asserts that the indictment and jury charge were not sufficient to convict him of felony murder or larceny. (Doc. No. 3 at 17–22.)

10

The Court notes, again, that Petitioner did not request a change of venue in this case. At the evidentiary hearing on Petitioner's post-conviction petition, Petitioner testified that he discussed requesting a venue change with counsel, and they agreed that it would not have been a helpful strategy. (Doc. No. 22-31 at 18–19.)

11 According to the minutes for this case, however, the jurors were "duly elected, impaneled, tried and sworn to well and truly try the issues joined and true deliverance make according to the law and evidence." (Doc. No. 22-2 at 57.) And the trial court specifically instructed the jury, after closing argument, as follows: "Members of the Jury, some of you may have been exposed to pretrial publicity in this case. *I again instruct you* that you can consider no information in reaching your verdict, other than the evidence you hear in the courtroom." (Doc. No. 22-18 at 19 (emphasis added).) From this instruction, it is reasonable to infer that the trial court had previously instructed the jury regarding pretrial publicity.

12 The post-conviction court specifically rejected Petitioner's claim that "counsel should have explored and presented cross contamination and substitution defenses to the jury." (Doc. No. 22-29 at 141.) To the extent that Petitioner is attempting to assert a different chain of custody claim here, the Court concludes that it is insubstantial because Petitioner has not provided sufficient supporting factual allegations to satisfy Habeas Rule 2(c)'s pleading standard. See Lynn v. Donahue, No. 1:14-cv-01284, 2017 WL 5930304, at *7 n.1 (W.D. Tenn. Nov. 30, 2017) (citations omitted) (noting that habeas claims are "subject to dismissal" if "they are pled only as general allegations which fail to identify the specific error and the resulting prejudice"). For instance, Petitioner seems to assert that counsel provided inadequate assistance by not addressing "the fact that Detective Bill Pridemore[ ] examined the case exhibits seven different times." (Doc. No. 3 at 4.) But Petitioner supports this assertion with a citation to the TCCA's opinion on direct appeal of his other case from around the same time. (Id. (citing **Barrett**, 2012 WL 2914119, at *5).)

13 Here, Petitioner is presumably referring to the United States Supreme Court's decision in Dunaway v. New York, 442 U.S. 200 (1979). In Dunaway, the Supreme Court held that "an investigative interrogation ... must be supported by probable cause to avoid infringing upon an individual's Fourth Amendment right to be free from an unreasonable seizure." Myers v. Potter, 422 F.3d 347, 356 (6th Cir. 2005) (citing Dunaway, 442 U.S. at 216). Petitioner has not explained how the holding in Dunaway has any bearing on this claim.

14 Counsel, in fact, filed a pretrial motion to suppress this October 2007 DNA sample. See supra section V.A.1.

15 In Nesbit, the Tennessee Supreme Court also noted that under Tennessee's criminal code prior to 1989, one of the "material element[s] of the offense of murder" was "proof that the deceased was a 'reasonable creature in being,' that is, to say a child that was born alive." 978 S.W.2d at 901 n.2 (citing Morgan v. State, 256 S.W. 433, 434 (1923)). That material element appears to apply here, as the state prosecuted Petitioner for the charged offenses of first-degree murder and felony murder as they existed in 1975. The victim's school picture was also relevant for this reason.

16 Petitioner also alleges that the state withheld material regarding "the TBI investigation of Dr. Levy." (Doc. No. 33 at 47.) But no one by that name testified at Petitioner's trial in this case. Instead, this seems to be another reference to Petitioner's other criminal case from around the same time. See **Barrett** v. State, No. 2007-D-3201, 2015 WL 13756082, at *3 (Tenn. Crim. Ct. May 18, 2015) (denying Petitioner's post-conviction claim that counsel was ineffective for failing to investigate "whether Dr. Levy was being investigated by the TBI at the time of his trial"), rev'd on procedural grounds, No. M2015-01143-CCA-R3-PC, 2016 WL 4768698 (Tenn. Crim. App. Sept. 12, 2016). This allegation, therefore, does not justify discovery here.

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