No. 20-6275

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM FORD,
Petitioner,

v.

MIKE PARRIS,
Warden,

On Petition For A Writ of Certiorari To The
United States Court of Appeals
For the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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The record here shows that a teenage Mr. Ford found himself trapped in a neighborhood of which provided no safe avenue for travel to school and/or avoidance of gang violence and activity. Forced to defend himself, he now stands convicted of first-degree murder with no chance of release absent the Court's intervention. His chances have become even less likely when the lower Courts have disregarded Supreme Court precedent in upholding his conviction.

QUESTIONS PRESENTED FOR REVIEW

1. WOULD JURIST OF REASON DISAGREE AND FIND DEBATABLE THE CORRECTNESS OF THE SIXTH AND DISTRICT COURTS' FINDING OF EFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL FAILED TO REQUEST AN APPROPRIATE BURDEN OF PROOF INSTRUCTION IN THE CASE-ESPECIALLY WHERE SUCH COURTS RELIED UPON A SUFFICIENCY OF THE EVIDENCE ANALYSIS RELATIVE THE PREJUDICE PRONG?

2. WOULD JURIST OF REASON DISAGREE AND FIND DEBATABLE THE CORRECTNESS OF THE SIXTH AND DISTRICT COURTS' PROCEDURAL DEFAULT RULING RELATIVE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL-WHERE COUNSEL FAILED TO SUBMIT A PROMISED DEFENSE WITNESS, MISS LAURA SMITH, IN SUPPORT OF THE SELF DEFENSE THEORY PRESENTED BY COUNSEL-AS BEING NON-SUBSTANTIAL TO ESTABLISH CAUSE BASED UPON INEFFECTIVE ASSISTANCE OF POST-CONVICTION COUNSEL FOR FAILURE TO RAISE SUCH INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIM?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGES**

FEDERAL STATUTES

CONSTITUTIONAL AMENDMENTS

TENNESSEE STATUTES

MISC

PETITION FOR WRIT OF CERTIORARI

Petitioner, William Ford, respectfully petitions this Court for a writ of certiorari to review the judgment of the Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

APPENDIX A: *William Ford v. Mike Paris*, No. 19-5244 (6th Cir. April 15, 2020) (Denial of COA)

APPENDIX B: *William Ford v. Mike Parris*, No. 2:16-cv-01077 (W.D. Tenn. March 6, 2019) (District Court Denial).

APPENDIX C: *William Ford v. State of Tennessee*, 2015 WL 6942508 (Tenn.Crim.App. November 10, 2015) (Post-Conviction Appeal).

APPENDIX D: *State of Tennessee v. William Ford*, 2002 WL 1592746 (Tenn.Crim.App. July 12, 2002) (Direct Appeal).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254 (1). The Sixth Circuit entered its judgment on April 15, 2020. No Petition to Rehear was filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution made applicable to the states through the Fourteenth Amendment to the United States Constitution provides that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Federal Habeas Petition was filed under 28 U.S.C. §2254.

STATEMENT OF THE CASE

On September 21, 1999, a grand jury in Shelby County, Tennessee returned a single-count indictment charging Ford with the first-degree murder of Dilanthious Drumwright. **[ECF No. 13-1 at Page ID 40-41].**

A jury trial commenced in the Shelby County Criminal Court on April 10, 2000. **[*Id.* at pg. 47].** On April 13, 2000, the jury returned a guilty verdict. **[*Id.* at pg. 50].** At the conclusion of the penalty phase hearing on April 13, 2000, the jury sentenced Ford to life imprisonment without the possibility of parole. **(*Id.*)**. Judgment was entered on April 13, 2000 and on May 15, 2000, when the trial judge denied the motion for a new trial. **[*Id.* at pg. 51].** The Tennessee Court of Criminal Appeals ["TCCA"] affirmed. *State v. Ford*, 2002 WL 1592746 (Tenn.Crim.App. July 12, 2002), appeal denied (Tenn. Dec. 16, 2002).

On October 3, 2003, Ford filed a pro se Petition for Relief from Conviction or Sentence in the Shelby County Criminal Court. **[ECF No. 13-17, pgs. 1144-59].** The State filed its response on or about October 20, 2003. **[*Id.* at pgs. 1187-88].** After counsel was appointed, an amended petition was filed on February 11, 2004. **[*id.* at pgs. 1160-64]**. The State responded on or about March 1, 2004. **[*Id.* at pgs. 1189-90]**. An amended and supplemental petition for post-conviction relief was then filed, on November 4, 2009, by a different attorney who had been appointed to represent Ford. **[*Id.* pgs. 1165-74]**.[1]

The State responded on June 17, 2010. **[*Id.* at pgs. 1191-92]**. A supplement to Amended Petition for Post-Conviction Relief was filed on December 16, 2013. **[*Id.* at pgs. 1175-78]**. Hearings on the post-conviction petitions were held on November 14 and 15, 2013,

1 **The delay was due to the facts that the second attorney who was appointed withdrew due to conflicts with Ford, the third appointed attorney needed time to familiarize himself with the case, the assigned judge recused himself, and Ford had a serious medical issue. [*Id.* at pp. 1194-95, 1198-1203].**

December 16, 2013, January 24, 2014, February 25, 2014. **[ECF Nos. 13-18, 13-19, 13-20, 13-21, 13-22]**. The post-conviction court denied relief on September 29, 2014. **[ECF No. 13-17 pp. 1208-19].** The TCCA affirmed. *Ford v. State*, 2015 WL 6942508 (Tenn.Crim.App. Nov. 10, 2015), appeal denied (Tenn.Feb. 18, 2016).

HABEAS CORPUS BACKGROUND

Mr. Ford timely filed his § 2254 Petition on April 18, 2016. The petition presented the following claims:

1. Trial counsel was ineffective for failing to present witnesses in support of a self-defense theory. **[ECF No. 1 at 5];**

2. The Court of Criminal Appeals opinion violated the Petitioner's federal due process rights by finding that counsel was not ineffective for failing to request the pattern jury instruction on burden of proof. **[*id.* at 6];**

3. The Petitioner's trial counsel was ineffective for failing to motion the court to withdraw from representing the petitioner in light of her open contempt for the petitioner. **[*id.* at 6; *see also id.* at 7-8];**

4. The Petitioner's post-conviction attorney was ineffective for failing to put on proof that the petitioner's trial attorney was ineffective for not recusing herself from the Petitioner's case. **[id. at 8];**

5. Post-conviction counsel was ineffective for failing to properly present claims that trial counsel was ineffective for failing to preserve for appellate review. **[*id.* at 8; see also *id.* 8-9].**

On February 19, 2019, the district court denied the Petitioner relief and on March 6, 2019 entered a final judgment denying a COA, certifying that an appeal would not be taken in good faith, denying leave to proceed informa pauperis and dismissing the action with prejudice.

In denying Mr. Ford relief the district court summarized the TCCA analysis of the evidence introduced at trial. *State v. Ford*, 2002 WL 1592746, at *1-2:

The victim, Drumwright, a high school student, was walking home with a group of students on February 4, 1999 when two cars pulled up near them. Ford exited one of the cars and got a

weapon from someone in the other car. Ford fired multiple shots, one of which hit the victim in the back, causing his death. The evidence was that Ford had shouted "LMGK" and "VLK", meaning "Lemoyne Garden Killer" and "Vice Lord Killer," immediately before he fired the weapon. *Id.* at *3.

District Court Order at pg. 3.

Mr. Ford timely filed a notice of appeal and formal request for an COA to the Sixth Circuit of which was denied on April 15, 2020.

Necessary here is a recitation of the following facts of the case that were set forth in the Tennessee Court of Criminal Appeal's direct appeal decision in the Petitioner's case:

On February 4, 1999, the victim, Dilanthious Drumwright was a high school student walking from school with a group of other young people of various ages. Within this group were Soibhan Fleming, Tiffany White, and Alfonzo Bowen. In order to avoid a potential confrontation resulting from an altercation which had taken place further up the street on the previous day, the students had left the street they would have ordinarily traveled. Nevertheless, two vehicles pulled up near the group. Demond Gardner drove the car in which the defendant and Jerry Joyce were riding. Chris Lewis drove the other vehicle with his brother Derrick Lewis as a passenger.

Fleming, White, Gardner, Joyce, and Bowen testified for the State as eyewitnesses to the incident. Gardner related that the defendant had left Gardner's car and obtained a weapon from someone in Chris Lewis' vehicle prior to the shooting. All five witnesses identified the defendant as the shooter and recalled that multiple shots had been fired. Bowen, in fact, stated that he had heard nine or ten shots, and Officer Sherman Bonds of the crime scene unit testified that he had recovered nine spent shell casings and one live round in the immediate area. Additionally, numerous individuals testified concerning threatening comments made shortly before the shooting by the defendant or others in the automobiles. It was determined that one of the shots had hit the victim in the back resulting in his death.

After firing the weapon, the defendant returned to Gardner's car, and both vehicles left the scene. Gardner recounted that he thereafter drove the defendant to Chris Lewis' house, where the defendant left the car taking the weapon with him. When the defendant returned shortly thereafter, Gardner saw no weapon. He then took the defendant to the defendant's home.

Following the defendant's arrest for this crime, the defendant composed and sent three letters to Gardner. These letters instructed Gardner to relay to various potential defense witnesses what their testimonies should include and to threaten female witnesses involved in the case. Gardner turned these letters over to the authorities before the defendant's trial, and all three were later admitted in that proceeding.

After hearing the above-outlined and additional proof, the jury convicted the defendant of first-degree murder and, at the conclusion of the sentencing phase of the trial, sentenced him to life without parole for the offense.

State of Tennessee v. William Ford, No. W2000-01205-CCA-R3-CD, slip. op. p. 2 (Tenn.Crim.App., at Jackson July 12, 2002).

Further factual events reflected during state court collateral proceedings and appeals set forth that Venus Jones testified that she was with the Petitioner on the day of the shooting. **[PCHT (November 14-15, 2013) p. 4].** Ms. Jones testified that on the days leading up to the shooting, a local Vice Lord gang had been threatening the Petitioner at school. **[*Id.* at pp. 4-5].** On the day of the actual shooting, Ms. Jones testified that the Petitioner was walking her home when a larger group confronted them with curse words and gang signs. **[*Id.* at pp. 6-7]**. Ms. Jones stated that the Petitioner appeared "scared really, shocked" because "[i]t (sic) was a lot of them" and "[i]t (sic) was just us." **[*Id.* at p. 9, lines 15-16]**. Petitioner continued walking Ms. Jones to a location further down the road and they parted ways. **[*Id.* at p. 8].** To her knowledge, the Petitioner did not have a firearm on his person. **[*Id.* at p. 10].**

Ms. Jones saw the Petitioner shortly thereafter across the street from a liquor store not far from where she and he had separated earlier. **[*Id.* at p. 11]**. A large crowd had gathered in the parking lot and Ms. Jones saw the Petitioner and an individual named "Fred." **[*Id.* at pp. 11-12].** Fred was part of the group which earlier had been yelling curse words, and making threatening gestures toward the Petitioner. Fred had also threatened Ford at school in the days leading up to this incident. **[*Id.* at pp. 5, 11].**

For almost two weeks straight, Petitioner had been threatened and involved in fights at the hands of another gang. **[*Id.* at p. 26]**. Ms. Jones thought a fight was about to take place but

did not witness any altercation. **[*Id.* at pp. 12-13]**. Ms. Jones did witness the individuals who had previously threatened the Petitioner making threatening gestures with their hands, by reaching under and pulling their shirts. **[*Id.* at pp. 14-15].** Ms. Jones stated these individuals were from a different gang than that of Petitioner. **[*Id.* at p. 25]**. Ms. Jones testified that this was a threatening gesture that individuals use to indicate a willingness to engage in a fight. **[*Id.* at pp. 15-16, lines 11-13].** Ms. Jones was never interviewed by the defense or the police, despite being available. **[*Id.* at p. 18, lines, 9-15; p. 25].**

Mr. Eric Lewis testified that he attended school with the Petitioner at the time of the shooting. **[*Id.* at p. 31]**. Mr. Lewis stated that the Vice Lord gang had been threatening and fighting with Petitioner at school in the days prior to the shooting. **[Id]**. Mr. Lewis stated that the Petitioner started skipping school because "the threats was (sic) starting to bother him so you could tell he was kind of distant" and that Petitioner "just stopped coming as much as he was." **[*Id.* at p. 33, lines 10-13].** Mr. Lewis was subpoenaed to the trial court for the Petitioner's trial, but was not called as a witness despite being available and willing to testify. **[*Id.* at 37-39]**.

Mr. Demond Gardner testified that he went to high school and was a member of the same gang as Petitioner. **[*Id.* at p. 48]**. Mr. Gardner testified that, at their high school, several rival gangs existed and that in the weeks leading up to the shooting there were physical fights between Petitioner's gang and the Vice Lords. **[*Id.* at pp. 48-49]**. Mr. Gardner testified that he personally witnessed fights and threats between the Vice Lords and Petitioner. **[*Id.* at p. 49]**. Mr. Gardner testified that the Vice Lords were a dangerous group and known to have guns. **[*Id.* at pp. 49-50].**

Mr. Gardner was with the Petitioner at the tire shop when the Vice Lords were threatening the Petitioner on the day of the shooting. **[*Id.* at p. 50]**. Mr. Gardner, based on previous encounters with the group making the threats, thought they were likely armed. **[*Id.* at p. 51, lines 21-25]**. Minutes after the encounter at the tire shop, twelve (12) to fifteen (15) Vice Lords were threatening to kill the Petitioner and members of his gang. **[*Id.* at pp. 52, 54]**. Mr. Gardner testified that the lifting of the shirt, in the manner in which he and Ms. Jones both described, indicates the individual has a weapon on their person. **[*Id.* at 55, lines 1-15]**. Mr. Gardner also testified that at the time shots were fired, the twelve (12) to fifteen (15) Vice Lords were advancing upon the Petitioner and three (3) others. **[*Id.* at pp. 55-56]**. Mr. Gardner stated that he was in fear of his life because of the prior acts of violence the Vice Lords had engaged in with Petitioner and himself. **[*Id.* at pp. 57-58]**.

Mr. Lonnie Maclin, a member of the Vice Lords gang and high school classmates with Petitioner Ford, testified that he saw "plenty" of fights between Vice Lords and Crips (Petitioner's gang) in the days leading up to the shooting. **[*Id.* at p. 64]**. On the day of the shooting, Mr. Maclin saw Petitioner Ford on Lauderdale Street near the tire shop, prior to the confrontation at the liquor store. **[*Id.* at p. 65]**. When Mr. Maclin saw Petitioner Ford at the location of the shooting later, he testified that there were "a lot of us (Vice Lords) out there" and only a few of the Petitioner and his gang. **[*Id.* at p. 67, lines 12-18]**. Mr. Maclin testified that the Vice Lords were advancing upon the Petitioner and Crips stating "I'm going to kill you. You better get on back on the other end. This ain't your end. I ain't playing." **[*Id.* at p. 68, lines 5-10]**. Mr. Maclin said a few of the Vice Lords were making gestures, gang signs, and lifting their shirts. **[*Id.* at p. 68-69]**. Mr. Maclin said this meant that the person making this sign

means "I'm fixing (sic) pull out my gun or its fixing to go down." **[*Id.* at p. 71, lines 8-9]**. Mr. Maclin said this would be done if an individual was "pistol playing," meaning they were trying to scare and individual by acting if they possessed a firearm. **[*Id.* at p. 71, lines 9-12]**. Mr. Maclin said that, as a member of Vice Lords, Petitioner and his fellow gang members were in the wrong part of town and they were about to get "dealt with." **[*Id.* at p. 72, lines 16-25; p. 73]**.

Mr. Maclin testified that the Petitioner along with the Crips were in immediate danger of harm from the advancing Vice Lords. **[*Id.* at p. 74]**. Furthermore, Mr. Maclin said it was clear the intent of those advancing, and that prior to the shooting Vice Lords had shown Mr. Ford they had a gun. **[*Id.* at p. 74]**. Mr. Maclin testified that one of the Vice Lords pointed a gun at the Petitioner. **[*Id.* at pp. 74-75]**. No one from the public defender's office contacted Mr. Maclin to testify on the Petitioner's behalf. **[*Id.* at pp. 75-76]**.

Petitioner testified that his trial counsel never discussed any self-defense strategy prior to trial. **[PCHT (January 24, 2014) p. 22]**. The Petitioner informed counsel of the altercations between the victim/Vice Lords and Petitioner/Crips leading up to the shooting. **[*Id*]**. Petitioner testified that he made counsel aware (of the available witnesses who could testify on his behalf) prior to trial, but trial counsel failed to locate those witnesses. **[*Id.* at p. 23-25, 37, 73]**. The Petitioner testified that ten (10) to fifteen (15) Vice Lords surrounded him and Mr. Gardner. **[*Id.* at pp. 31, 69-70]**. Petitioner Ford testified that, although he did not see any guns, he did see individuals reaching toward their waistbands, an act he understood as someone reaching for a weapon. **[*Id.* at pp. 32-33].** Petitioner testified that he was afraid of the Vice Lords advancing upon him and he did not know if they had weapons on them or not. **[*Id.* at pp. 33-**

34, 69-70]. Petitioner Ford stated that, leading up to the shooting, he personally had been involved in multiple fights with the Vice Lords, including fights where he was outnumbered. **[*Id.* at p. 35-36]**. Petitioner testified that he went to the parking lot unarmed and without murderous intentions, however, obtained a gun from another individual after the Vice Lords were advancing upon his group. **[*Id.* at p. 67-68].**

Petitioner's trial counsel testified that the theory that she was presenting was self-defense but could not recall if this was requested as a jury instruction. **[PCHT, (February 25, 2014) p. 10]**. Trial counsel testified that she was aware of the problems between the Petitioner's group and the victim's group. **[*Id.* at pp. 10, 18-19]**. Trial counsel testified that she and her investigators attempted to locate witnesses that the Petitioner provided to her. **[*Id.* at p. 11, 28-31]**. Trial counsel could not recall whether the victim and his gang were aggressively advancing upon the Petitioner, however, did state that she was aware of a verbal altercation. **[*Id.* at pp. 14-15, 19]**. Trial counsel testified that she was familiar with the theory of using the victim's prior violence as a basis for being the initial aggressor. **[*Id.* at p. 21]**. Trial counsel testified that it was an oversight to fail to request a burden of proof instruction, as it was mandatory and not a tactical decision to include such instruction. **[*Id.* at p. 23]**. Trial counsel testified that she could not recall whether or not a jury instruction on self-defense was requested. **[*Id.* at p. 24]**.

Mr. Randy Bennett testified that he attended school with the Petitioner and was a member of the same gang. **[PCHT (February 26, 2014) p. 6]**. Mr. Bennett testified that he knew of three occasions where the Petitioner had been "jumped," attacked by gang members of the Vice Lords; and he testified that he personally witnessed two of these attacks. **[*Id.* at p.**

6-7]. Mr. Bennett stated that, leading up to the shooting, the Vice Lords told the Petitioner that if he returned to school they were "going to kill him or something like that." **[*Id.* at p. 8, lines 11-12]**. Mr. Bennett testified that the waistband gesture indicated that an individual was reaching for a weapon, and that doing so when you were not armed would not be a wise decision, it could result in the individual reaching for their waistband getting shot. **[*Id.* at p. 9]**. Mr. Bennett stated that, if he had been contacted by the defense at the time of trial, he would have testified for the Petitioner. **[*Id.* at p. 10]**.

The gist of this case establishes that the witnesses in this case were either friends and/or associates of the victim, with a bend toward such victim, or friends and/or associates of the Petitioner who either turned on him in order to save themselves or for whatever other reason.

REASONS FOR GRANTING THE WRIT

I. **The Sixth Circuit continues to utilize a sufficiency of the evidence type standard for decisive issues wherein application of the proper standard would entitle a petitioner's like Mr. Ford to relief.**

As has been repeatedly set forth, this case involves evidence where the essential witnesses were either friends and/or associates of the victim, with a bend toward such victim, or friends and/or associates of the Petitioner who either turned on him in order to save themselves or for whatever other reason testified for or against him.

The issues reflect that we have a young high school student, Petitioner Ford, trying to attend and graduate from school, while being harassed, threatened and tormented daily by a rival gang. We then have another young man, the victim, in whom suffered the unfortunate consequences of the frustrations resulting from the gang rivalry that was stirred. The issues were hence close and needed to be reflected through accurate burden of proof instructions of the court.

Relative trial counsel's failure to request an appropriate pattern instruction on burden of proof, the district court found it difficult to evaluate whether the TCCA's decision was an unreasonable application of *Strickland* or was based on an unreasonable factual finding because the TCCA relied heavily on a state court decision in *Bane* that was issued eleven years after Petitioner's trial. Even under a *de novo* review, the district court found the Petitioner had not shown deficient performance or prejudice; with the strongest proof that the conduct was deficient was in the fact that the omitted instruction was mandatory at the time of Ford's trial.

Even if a de novo review was required, the court found that Petitioner had not shown deficient performance. The court credited trial counsel's testimony that her decision not to object to the omission of the instruction was not trial strategy. **[ECF No. 13-21 at PageID 1425-26] [District Court Order at 10].** The court went on, however, to posit that there was no clearly established duty for an attorney to ensure that the trial judge gave each of the required pattern jury instructions. **[District Court Order at 10-11].**

The Court went on to note that "although use of the pattern jury instruction may have been mandatory in Tennessee, the trial judge was required to give the necessary instruction even in the absence of a request by defense counsel. **[District Court Order at 11]**

While recognizing that "[t]he beyond a reasonable doubt standard is a requirement of due process," the district court essentially agreed with the state court finding that the erroneous instructions given "sufficiently described the degree of doubt necessary for acquittal and the degree of proof necessary for conviction, and sufficiently guided the jury to look to the evidence in the case and, in considering the evidence, sufficiently cast the standard for the degree of proof necessary to convict in terms of the level of certainty humanly attainable with respect to human affairs," **[District Court Order at 11].**

The court went on to further find that even if counsel's conduct was deficient, Ford cannot establish prejudice. The District Court premised this on the basis of the state court's utilization a sufficiency of the evidence analysis writing:

Even if trial counsel's performance arguably was deficient in failing to request that the trial judge give the pattern instruction on the burden of proof, Ford cannot establish prejudice. Ford shot the unarmed victim in the back in broad daylight in front of numerous witnesses. *In evaluating the sufficiency of the evidence on direct appeal, the TCCA concluded that, "[r]esolving all conflicts in favor of the prosecution*, we find ample support for the conclusion that [Ford] announced himself as a killer; went to another car, obtained a weapon therefrom;

and then fired multiple times killing the victim with one of these shots. These facts support a finding of intent to kill." *State v. Ford*, 2002 WL 1592746, at *4.

Ford makes no argument that, if only the jury had been instructed on the burden of proof, there is a reasonable probability that the outcome of his trial would have been different. Ford also overlooks the fact that, had trial counsel made a timely objection to the failure to include the required instruction on burden of proof, the trial judge would almost certainly have given the instruction.

[District Court Order at 11-12].

In a footnote 5, the district court noted that Ford had not argued a claim relative ineffective assistance of appellate counsel where counsel failed to raise the trial court's erroneous instruction on appeal and found that under existing law Ford might have not only received a reversal on direct appeal but also post-conviction relief for ineffective assistance of appellate counsel. **[District Court Order at 12].**

The district court's footnote is essentially saying that reversible error existed on this defective instruction issue during motion for new trial and direct appeal, or essentially under a claim of ineffective assistance of appellate counsel, but not on an ineffective assistance of trial counsel claim.

Petitioner submits this analysis is debatable three ways. The first is that a sufficiency of evidence prejudice analysis is improper for a constitutional claim.

Precedent requires that the Court consider the totality of the evidence before the judge and jury and not just that partial to the state or alleged to be sufficient under a sufficiency analysis. *Weary v. Cain*, 136 S.Ct. 1002 (March 7, 2016)(recognizing as improper the emphasizing of reasons a juror might disregard evidence while ignoring reasons she might not); *Williams v. Taylor*, 120 S.Ct. 1479 (April 18, 2000); *Strickland v. Washington*, 466 U.S. 668, 695-696 (1984); *Rose v. Lundy*, 455 U.S. 509, 526 (1982)(...and whether they require an

understanding of the totality of the circumstances and therefore necessitate examination of the entire record).

Mr. Ford submits that decisions in nearly every court to consider a reasonable probability of a different result, relative ineffective assistance of counsel and prosecution suppression claims, find the use of a sufficiency of the evidence type analysis, as occurred in the petitioner's case, as not permitted. *Strickler v. Greene*, 527 U.S. 263, 289-291 (1999); *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *Breakiron v. Horn*, 642 F.3d 126, 140-141 (3rd Cir. 2011) (Even partial reliance on sufficiency of evidence is problematic where court failed to weigh all of the evidence of record); Further *see Reginald Walker v. Bonita Hoffner*, 534 Fed. Appx. 406, 413 (6th Cir. 2013) (Furthermore, even if we construed the court's reasoning as stating the correct rule, the court failed to properly apply the rule, because it focused its inquiry on improper factors).

Secondly here attorneys have long been required to prepare for appropriate instructions in criminal cases. *State v. Bryant*, 654 S.W.2d 389, 390 (Tenn. 1983) ("A criminal defendant has no right to have redundant instructions charged at his trial. Nor does he have a right to have irrelevant instructions charged. But he does have a right to instructions which state all the applicable law, and it is this right that prompts counsel to offer instructions which protect his client's interest in a fair deliberation by the jury").

Thirdly, the issues, in light of all the proof, shows counsel's conduct as deficient and prejudicial.

Mr. Ford submits that, on review of a state prisoner's habeas corpus claim, the federal court may only grant relief if the state court's adjudication of the claim on the merits "was contrary to, or involved an unreasonable application of, clearly established federal law, as

determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2). Under AEDPA, section 2254 review focuses on how the state court adjudicated the claim.

The Petitioner claimed in state and federal courts that his federal constitutional rights were violated when the trial court failed to give the jury the pattern jury instruction on the State's burden of proof beyond a reasonable doubt. That instruction states:

Before you can find the defendant guilty of any offense, you must find that the State has proved each and every element of the offense beyond a reasonable doubt and further that the offense occurred before the commencement of the prosecution, and it occurred in _____ County, Tennessee, by a preponderance of the evidence.

Pattern Jury Instruction 2.04 (2nd ed. 1988).

The actual instruction given by the trial court states:

You enter upon this investigation with the presumption that the defendant is not guilty of any crime and this presumption stands as a witness for him until it is rebutted and overturned by competent and credible proof. It is, therefore, incumbent upon the State, before you can convict the defendant, to establish to your satisfaction, beyond a reasonable doubt, that the crime charged in the indictment has been committed; that the same was committed within the County of Shelby and State of Tennessee before the finding of this indictment and that the defendant at the bar committed the crime in such manner that would make him guilty under the law heretofore defined and explained to you.

Reasonable doubt is that doubt created by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily upon the certainty of guilt. Reasonable doubt does not mean a doubt that may arise from possibility. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required and this certainty is required as to every element of proof needed to constitute the offense.

Petitioner claimed that trial counsel was ineffective for failing to ensure that the pattern jury instruction was given. At the post-conviction hearing, his trial counsel admitted his error. "Counsel testified that leaving out a mandatory pattern jury instruction concerning the burden

of proof was an oversight." *William Ford v. State*, W2014-02105-CCA-R3-PC, 2015 WL 6942508, at *4 (Tenn. Crim. App. Nov. 10, 2015) *perm. to appeal denied* (Tenn. Feb. 18, 2016). The post-conviction court denied the claim, finding that the jury instructions given "sufficiently described the degree of doubt necessary for acquittal and the degree of proof necessary for conviction." *Ibid*.

Failure to give or misstating instructions on the presumption of innocence or reasonable doubt violates due process. Supreme Court cases have indicated that failure to instruct the jury on the necessity of proof of guilt beyond a reasonable doubt can never be harmless error. *Taylor v. Kentucky*, 436 U.S. 478 (1978); *Cool v. United States*, 409 U.S. 100 (1972). A jury must be properly instructed on the prosecution's burden of proof beyond a reasonable doubt.

The United States Supreme Court has further observed that "state courts have the solemn responsibility equally with the federal courts to safeguard constitutional rights" *Trainor v. Hernandez*, 431 U.S. 434, 443 (1977).

As exemplified by the record in this case, that responsibility simply was not shouldered by the Petitioner's trial counsel and no fair-minded jurist could deny that there was no semblance of due process in the Petitioner's trial.

The state and district courts findings that trial counsel was not ineffective for failing to request a critical jury instruction "was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

The district court decision is thus reasonably debatable and deserving of encouragement to proceed further through the grant of a COA of which the Sixth Circuit denied. Herein this Honorable Court is now asked to review.

II. **The Sixth Circuit has refused to properly apply this court's ineffective assistance of post-conviction counsel precedent in a manner intended by this court for addressing such claims.**

Here trial counsel had spoken to witness Laura Smith prior to trial, the witness's purported testimony was conceded to as to what it would be during state court proceedings, trial counsel promised the jury that they would hear from the witness and the witness's testimony would have added credible testimony and issues to the case that no other disinterested or credible defense witness would have added to refute the prosecution's case, inclusive of the fact that the prosecution capitalized on the witness's absence, and counsel's broken promise, in closing argument.

The district court found that the claim was procedurally defaulted where Ford failed to raise the claim in state court. Secondly, the court found the ineffective assistance of trial counsel claim as not substantial enough to meet the threshold to establish cause to excuse the procedural default based upon ineffective assistance of post-conviction. **[District Court Order at 12-19].**

The district court pointed out, the evidence at trial was that Ford was the only one who was armed despite that being record proof that indicated the actions of others around in raising their shirts and the like was that those individuals were armed. The TCCA went on to indicate that the evidence showed that the Petitioner had fired tens rounds at a group of high school students and younger children who were walking away from him. Based on the fact the court

found no ineffective counsel in counsel having failed to call other witnesses mentioned by Ford, the district court essentially found there could be no deficiency, prejudice or actual innocence showing here. **[District Court Order at 15-16].**

The District Court goes on to find that Ford did not offer any proof of what Lori Smith would have testified to. The court went on to write:

Even if it were assumed that Lori Smith testified that members of the Vice Lords were present at the scene and were armed, that testimony would be cumulative to that of Lonnie Maclin, a member of the Vice Lords who testified at the post-conviction hearing. Any testimony that other gang members were firing their weapons is belied by the fact that the only ballistic evidence recovered from the scene were the ten rounds that witnesses testified came from Ford's weapon.

[District Court Order at 17].

The final finding point of the district court, relative this claim, sets forth:

Here, Ford has not established that his attorney's failure to call Smith constituted deficient performance or that he suffered prejudice. As previously noted, *see supra* p. 17, Smith's testimony would be, at best, cumulative of that of Lonnie Maclin, who testified at the post-conviction hearing, and would be contradicted by the eyewitnesses and the physical evidence. Moreover, it is doubtful that Ford believed, at or before the time of his trial, that Smith's testimony would be favorable to him. Demond Gardner testified at trial that Ford had written letters to him instructing him to threaten Smith so that she would not appear at this trial. **[ECF No. 13-5 at PG ID 402-05, 409-10]**. Ford has not attempted to reconcile his pretrial attempts to scare Smith to prevent her from testifying with his recent position that his attorney rendered ineffective assistance by failing to call Smith as a witness at trial.

For the foregoing reasons, sub-claim (i) is barred by procedural default and Ford is unable to overcome that default.

[District Court Order at 19].

The district court decision is clearly debatable.

It is well clear now that in this Circuit the *Martinez v. Ryan*, 566 U.S. 1 (2012), the cause exception relative, "[i]nadequate assistance of counsel at initial-review collateral proceedings

may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Sutton v. Carpenter*, 745 F.3d 787 (6th Cir., 2014).

The question of post-conviction counsel's effectiveness is necessarily tied to the strength of the underling question of trial counsel's effectiveness. The question of an ineffective assistance of trial counsel ("IATC") claim is necessarily connected to the standard of *Strickland v. Washington*, 466 U.U. 668 (1984). That standard is two-prong, deficient performance and resulting prejudice. To prevail on the second prong, the habeas petitioner must establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Ibid*.

Petitioner did establish that his trial attorneys' conduct fell outside the range of reasonable professional conduct.

Pursuant to Tennessee Code Annotated section 39-11-203(c), "[t]he issue of the existence of a defense is not submitted to the jury unless it is fairly raised by the proof." The Sentencing Commission Comments to section 39-11-203 make clear that "[t]he defendant has the burden of introducing admissible evidence that a defense is applicable."

Citing Tennessee Code Annotated section 39-11-201(a), the pattern jury instruction for self-defense states, in part, that "[i]f evidence is introduced supporting self-defense, the burden is on the state to prove beyond a reasonable doubt that the defendant did not act in self-defense." 7 Tenn. Prac. Pattern Jury Instr. T.P.I. - Crim. 40.06(b). Once a defendant has raised sufficient facts to support a claim of self-defense, "[t]he state has the burden of proof to negate

the defense; the burden is not upon the defendant to prove the defense exists." *State v. Belser*, 945 S.W.2d 776, 782 (Tenn. Crim. App., 1996) (citing Tenn. Code Ann. § 39-11-201(a)(3).

When there are sufficient facts to support a claim of self-defense, the defense becomes an element of the offense. "The statutory language requires the State to prove beyond a reasonable doubt the elements of the offense, including mens rea, the timing of the return of the indictment, and the negation of any non-affirmative defense when it has been raised by the proof." *State v. Tanya Nicole Slimick*, No. M2014-00747-CCA-R3-CD, 2015 WL 9244888, at * 20 (Tenn. Crim. App. Dec. 17, 2015) *perm. to appeal denied* (Tenn. April 6, 2016).

Tennessee has a self-defense statute. Tenn. Code Ann. § 39-11-611. Under the self-defense statute, a person may respond to the use or threat of force "when and to the degree the person reasonably believes the force [used in response] is immediately necessary to protect against the other's use or attempted use of unlawful force." Tenn. Code Ann. § 39-11-611(b)(1). It is a defense to prosecution that the defendant possessed, displayed or employed a handgun in justifiable self-defense. "That the accused was acting in self defense is a complete defense to an offense." *State v. Tanya Nicole Slimick*, 2015 WL 9244888, at * 12 (citing *State v. Ivy*, 868 S.W.2d 724, 727 (Tenn. Crim. App., 1993)).

Attorneys Diane Thackery and Larry Nance represented the Petitioner at his trial. Ms. Thackery was the lead attorney. The Petitioner's theory of his case has always been that he acted in self-defense. At the post-conviction hearing, Ms. Thackery testified that prior to trial the Petitioner presented her with a list of witnesses who would testify in support of his theory:

> Counsel testified that the ... Petitioner provided a list of witnesses, but there were only two or three with whom the defense team were able to speak. Counsel testified that she tried to leave messages with several witnesses but did not hear back from them.

William Ford v. State, 2015 WL 6942508, at *3 (Tenn. Crim. App. Nov. 10, 2015) *perm. to appeal denied* (Tenn. Feb. 18, 2016). The Respondent even pointed out that Lori Smith was not one of the potential witnesses that the defense team was unable to contact. "Trial counsel Thackery testified at the post-conviction hearing that she spoke to Ms. Smith prior to trial." **[ECF No. 14 at 17, Page ID# 2411]**.

In his opening statements, Mr. Nance told the jury that Lori Smith would testify on behalf of the Petitioner. *See State v. William J. Ford*, 2002 WL 1592746, at *11 (Tenn. Crim. App. July 12, 2002) *perm. to appeal denied* (Tenn. Dec. 16, 2002) ("Factually, the record discloses that the defense announced the following during its opening statement: 'Now, you will hear testimony, I believe, from ... Lori Smith. ... Lori Smith will testify, I believe, that several people were armed and several fired weapons.' "). The intermediate court on direct appeal noted that in his opening statements Mr. Nance argued to the jury that Ms. Smith "had knowledge of material facts." *State v. William J. Ford*, 2002 WL 1592746, at *12. The Respondent admits that Mr. Nance's statement "indicate[s] that the defense was aware of Ms. Smith and the substance of her potential testimony at the time of trial." **[ECF No. 14 at 17, Page ID# 2411]**. The Respondent concedes that had Lori Smith testified, her testimony would have shown "that there were multiple shooters, bolstering the petitioner's self-defense claim that he fired his weapon to protect himself during a gang shootout." **[ECF No. 14 at 16, Page ID# 2410]**. Yet, it is undisputed that Mr. Nance and Ms. Thackery failed to present proof of Petitioner's claim that he acted in self-defense.

Material to Petitioner's plea was the fact that there were multiple shooters. The failure of Mr. Nance and Ms. Thackery to have Lori Smith testify to that fact left the jury with the

impression that the Petitioner was the only person with a gun. The prosecution utilized that untruth in its first closing argument to the jury:

The judge is going to instruct you in a few minutes what the law is in this case. You've heard the evidence from the witness stand. The evidence is what and who you heard from. Evidence is not who didn't testify. ... Mr. Nance got up and said the proof is going to show you that at least one of the witnesses identified four people with guns. Everybody had guns. I don't think we heard that. You're the triers of fact but I don't think witnesses got on the stand and said that. I think he said Ms. Lori Smith was going to say that. I don't think she testified. But you use your own memories.

State v. William J. Ford, 2002 WL 1592746, at *11. During the Prosecution's second closing argument, the State's attorney added:

And, you know, opening statements are where you stand up and you say, "[L]adies and gentlemen, we expect the proof to show this ["] and you go through it. But you better make sure what you say is going to happen or it's going to come back to haunt you. Isn't it? If I got up and said it and it didn't happen, [the defense attorneys] would be the first one[s] ringing the bell. ["The prosecutor] promised you this. Where was it?["]

What did they promise? ["]Well, we expect you'll hear from a witness named Lori Smith who's going to say there were four people out there shooting guns.["] ... They wanted you to think that somebody was going to come in here and say, ["] I saw four different people shooting and it was chaos. [I]t was the OK Corral. ["] But what did you hear? Every single witness said [the defendant] was the only person shooting.

Ibid. "At no point did the defense object to these comments." *State v. William J. Ford*, 2002 WL 1592746, at *12. The appellate court stated that there was only one reasonable inference to be drawn from Mr. Nance's and Ms. Thackery's failure to put Lori Smith on the witness stand:

The logical inference drawn from these remarks is that the prosecution wished to highlight the fact that a defense theory involving other shooters had never manifested itself in proof.
Ibid.

The United States Constitution guarantees the effective assistance of counsel in criminal cases. U.S. Const. Amend. VI; *Strickland*, 466 U.S. at 685 ("The Constitution guarantees a fair

trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause."). The Sixth Amendment guarantees criminal defendants the right to the effective assistance of counsel to ensure that a trial produces just results. *Strickland*, 466 U.S. at 686. The performance prong of Strickland is satisfied when counsel demonstrates legal competence, does relevant research, and raises important issues. *Strickland*, 466 U.S. at 687-690. However, review of the performance prong cannot countenance "omissions [that] were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. Evaluation of counsel's competence is by reference to the reasonableness of counsel's decisions under "professional norms." *Padilla v. Kentucky*, 559 U.S. 356, 366-367 (2010).

There was/is even a Tennessee case where an attorney had evidence of material facts that would defeat an element of the charged offense, told the jury in opening statements that the evidence would be presented at trial, and failed to present that evidence-which allowed the State to essentially prove to the jury through closing arguments that the material facts did not exist. *Anthony v. State*, 2004 WL 1947811 (Tenn. Crim. App. 2004).

In fact, in *Anthony*, as in Mr. Ford's case, counsel did not even permit the petitioner, who had nothing to lose to testify as to the matter. *Anthony v. State*, 2004 WL 1947811 (Tenn. Crim. App. 2004) (The Appellant's testimony would have allowed favorable evidence into the record, including that Moore had threatened the Appellant's life and that Moore pulled a gun first, but this evidence was not admitted based upon trial counsel's decision to forego any defense proof. Any disadvantage by calling the Appellant to testify was well known to counsel

prior to the trial. It would appear that little was to be lost in not permitting the Appellant to testify....).

Clearly, Mr. Nance's and Ms. Thackery's conduct at the Petitioner's trial demonstrated legal incompetence, falling outside the range of reasonable professional conduct, denying Petitioner the right to the effective assistance of counsel. The Petitioner has satisfied the first prong of *Strickland*. *Anthony, supra; Wiley v. State*, 183 S.W.3d 317 (Tenn. 2006)(ineffective assistance of counsel for failure to submit self-defense evidence and/or request instructions thereon).

With evidence of self-defense from Lori Smith's testimony, there is a reasonable probability that the jury would have found the Petitioner used force in accord with Tennessee's self-defense statute. Tenn. Code Ann. § 39-11-611(b). *Anthony and Wiley, supra.*

Lori Smith's testimony would have negated the State's claim to the jury that the Petitioner "was the only person shooting." But because of trial counsel's conduct, the jury never had an opportunity to hear her testimony. Because defense counsel failed to present any evidence that would corroborate Petitioner's claim that he acted in self-defense, the Petitioner did not testify at his trial. But Lori Smith was not the only eyewitness to the gang shootout. Obviously, the Petitioner was an eyewitness; and at the post-conviction hearing he testified to the events leading up to the shootout, and exactly what happened in the parking lot of the liquor store:

According to the Petitioner, the defense team never discussed a self-defense strategy, even though Petitioner told them about altercations between himself and the gang in which the victim was a member in the days leading up to the murder. Petitioner, a member of the Crips gang, explained that he had been involved in four or five fights with members of the rival Vice Lords gang. Petitioner said that a guy named Fred threatened his life. Petitioner stopped going to school during this time because of the fights.

On the day of the shooting, Petitioner said that Fred and the victim were in a group of ten to fifteen Vice Lords that were threatening Petitioner and his friends. Petitioner did not see any guns, but he did see people reaching towards their waistbands. Petitioner explained that the gesture signified that the person was armed and was reaching for a weapon. Petitioner testified that he was afraid because he had seen some of these people armed before. Petitioner claimed that he just shot the gun into the air to scare them off.

William Ford v. State, 2015 WL 6942508, at *2. Several witnesses testified at the post-conviction hearing as to the events leading up to the shootout, and exactly what happened in the parking lot of the liquor store. Their testimonies confirmed the Petitioner's account of the events leading up to the shootout, including the shootout itself:

Petitioner also presented the testimony of several witnesses that he claimed would substantiate his self-defense theory, including Venus Jones, Eric Lewis, Demond Gardner, Lonnie Maclin, and Randy Bennett. These witnesses generally confirmed the tensions between members of the Vice Lords and Petitioner in the days leading up to the shooting, including the fact that the Petitioner was involved in several fights in which he was often outnumbered. According to Mr. Bennett, the Vice Lords threatened "if [Petitioner] come back to school or [they] catch [him] up here again, they were going to kill him." Petitioner was in and out of school because of the threats, and he was absent on the day of the shooting.

Ms. Jones, Mr. Gardner, and Mr. Maclin testified regarding an incident occurring at a tire shop shortly before the shooting. Petitioner accompanied Ms. Jones as she was walking home from school. At the tire shop, a group of fifteen Vice Lords yelled obscenities and threatened Petitioner. However, no fight took place. Ms. Jones testified that Petitioner appeared scared when they parted ways.

The shooting occurred in the parking lot of a liquor store just a few streets over from the tire shop. According to Mr. Gardner and Mr. Maclin, there were up to fifteen Vice Lords and about five Crips at the liquor store. The witnesses indicated that the Vice Lords were advancing on the Crips, threatening to kill them. Some members of the Vice Lords were moving their hands as if to pull up their shirts, which the witnesses explained was a threatening gesture. According to Mr. Maclin, lifting one's shirt indicates "I'm fixing to pull out my gun or it's fixing to go down." Mr. Gardner testified that he did not see a gun. Mr. Maclin testified that he thought he saw a Vice Lord with a gun at the moment Petitioner began shooting.

William Ford v. State, 2015 WL 6942508, at *3. It is reasonable to believe that, as an eyewitness to these events, Lori Smith's testimony would have corroborated the foregoing testimonies.

Had Lori Smith testified at trial, as defense counsel had promised the jury, the question for the jury to determine was whether it appeared to the Petitioner that he was in danger of great bodily harm or death when he entered the parking lot of the liquor store, a place he had every right to be in. It is clear from the foregoing testimonies from multiple eyewitnesses at the post-conviction hearing that under the circumstances in which he found himself, Petitioner knew he was in danger of great bodily harm or death. *See Cruz v. State*, 63 S.W.2d 550, 551 (Tex. Crim. Rep., 1933) ("Where there is more than one assailant, the defendant has the right to act upon the hostile demonstration of either or all of them and to kill either of them *if it reasonably appears to him* that they are present and acting together to take his life or to do him serious bodily injury") (emphasis added). The witnesses testified that fifteen Vice Lords were *advancing on the Petitioner, threatening to kill him*, and threats were made several times in the days leading up to the shootout. Some members of the Vice Lords were moving their hands as if to pull up their shirts, which the witnesses explained was a threatening gesture. According to the witnesses, lifting one's shirt indicates "I'm fixing to pull out my gun or it's fixing to go down."

A rational jury could have concluded that the Petitioner had a reasonable belief that he was in imminent danger of serious bodily injury or death. *See State v. Pruitt*, 510 S.W.3d 398, 420 (Tenn., 2016) (concluding that the jury's determination encompasses "whether the defendant's belief in imminent danger was reasonable") (quotation marks omitted).

The idea that self-defense would be inapplicable because an unarmed victim could not inflict serious bodily injury or death wholly misses the point that the Petitioner did not know the victim was unarmed. Under the facts and circumstances of this case, the Petitioner reasonably believed that danger from the victim or one of the victim's gang members was imminent. Had Lori Smith testified at trial, the jury's burden would be to determine if the State negated the Petitioner's reasonable belief that he was in imminent danger from the victim and the victim's gang, not whether the victim was armed.

The deficient performances of Mr. Nance and Ms. Thackery rendered the result of the trial unreliable. Had Mr. Nance and Ms. Thackery presented the testimony of Lori Smith, there is a reasonable probability that the State would fail to carry its burden to negate the claim of self-defense beyond a reasonable doubt, and the jury would have properly rendered a not guilty verdict as to first degree murder. Tenn. Code Ann. § 39-11-201(b). The jury would then have proceeded to consider lesser-included offenses. The Petitioner was prejudiced by his trial attorneys' conduct. An IATC claim is a "substantial one [if] ... the prisoner ... demonstrate[s] that the claim has some merit." *Martinez*, 566 U.S. at 16. The Petitioner has presented a substantial IATC claim. *Anthony v. State*, 2004 WL 1947811 (Tenn. Crim. App. 2004); *Wiley v. State*, 183 S.W.3d 317 (Tenn. 2006).

Mr. Ford next reminds the court that, as it relates to the ineffective of post-conviction counsel cause analysis, the federal court can conduct an evidentiary hearing thereon. *Brown v. Brown*, 847 F.3d 502, 508 (7th Cir. 2017) (We next hold that Brown has offered some evidence of deficient performance by his post-conviction relief counsel and has asserted a substantial claim of ineffective assistance of trial counsel. We reverse and remand the case to the district

court for an evidentiary hearing on both claims for ineffective assistance, first on the procedural default issue and then, if the default is excused, on the merits of the trial-based claim); *Sutton v. Carpenter*, 745 F.3d 787, 795-795 (6th Cir. 2014) (ineffective assistance of post-conviction counsel can establish cause to excuse a Tennessee defendant's procedural default of a substantial claim of ineffective assistance of counsel at trial). This did not happen in his case.

Ford further adds that the showing as to whether a post-conviction attorney has reached the level of ineffectiveness for having failed to raise a substantial ineffective assistance of counsel claim is merely a threshold inquiry, however, and does not require full consideration of the merits thereof at the initial stage. *Brown, supra*, at 514-515. Additionally, for the most part, a post-conviction attorney can and should use professional judgment in selecting which claims and issues to raise, just as is expected from attorneys handling direct appeals. *Brown*, at 514.

As set forth, the Petitioner's underlying claim is that trial counsel was ineffective for failing to raise the claim that the Petitioner acted in self-defense and failing to call Lori Smith to testify in support of that claim. As demonstrated, the Petitioner's underlying IATC claim has merit.

Post-conviction counsel was ineffective for failing to raise the issue of trial counsel's failure to call Lori Smith to the witness stand – or Venus Jones, Eric Lewis, Demond Gardner, Lonnie Maclin, or Randy Bennett for that matter – as proof the teenage Petitioner lived under the constant threat of death from a large gang that controlled the entire neighborhood.

A finding of ineffective assistance of post-conviction counsel will result when counsel's conduct "so undermined the proper functioning of the adversarial process" that the proceedings below "cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. The Sixth Amendment requires that post-conviction counsel act "in the role of an

advocate." *United States v. Cronic*, 466 U.S. 648, 656 (1984). That did not happen in Petitioner's post-conviction hearing. True, post-conviction counsel called several witnesses to the stand to testify in support of Petitioner's claim of self-defense. But it was Lori Smith who trial counsel told the jury would testify in support of the Petitioner's claim that he acted in self-defense, not the witnesses that post-conviction counsel brought to the post-conviction hearing. And it was trial counsel's failure to place Lori Smith's testimony into the record that the State's attorney referred to when he told the jury that "you better make sure what you say is going to happen or it's going to come back to haunt you. Isn't it?"

The above analysis used to prove Petitioner's IATC claim relies almost entirely on the appellate court's decision in the Petitioner's direct appeal. Marty McAfee was Petitioner's post-conviction counsel. Had Mr. Mcafee read that appellate decision, he would have understood that this case is about the failure of Petitioner's trial attorneys to secure the testimony of Lori Smith. Mr. McAfee's "ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance." *Hinton v. Alabama*, 134 S.Ct. 1081, 1089 (2014) (per curiam).

Mr. McAfee was ineffective in representing the Petitioner in post-conviction, thus establishing cause for the Petitioner's default of his claim of ineffective assistance at trial.

The district court decision is thus reasonably debatable and deserving of encouragement to proceed further through the grant of a COA of which the Sixth Circuit denied. Herein this Honorable Court is now asked to review.

CONCLUSION

For the foregoing reasons, Mr. William Ford respectfully requests that the petition for writ of certiorari is granted and that the appropriate relief is granted relative the important issues raised herein whether in the form of summary remand, GVR and/or a merits determination.

Respectfully Submitted,

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