No. 19-5244

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM FORD,)
)
Petitioner-Appellant,)
)
v.) ORDER
)
MIKE PARRIS, Warden,)
)
Respondent-Appellee.)

William Ford, a Tennessee prisoner proceeding pro se, appeals the district court's judgment denying his 28 U.S.C. § 2254 petition for a writ of habeas corpus. Ford has applied for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b)(1). He has also moved for leave to proceed in forma pauperis ("IFP") on appeal. *See* Fed. R. App. P. 24(a)(5).

In 1999, Ford shot and killed Dilanthious Drumwright as Drumwright was walking home from school with a group of other young people. A grand jury indicted Ford for first-degree murder, and the State elected to seek the death penalty. The evidence presented at trial established that Ford had shot the unarmed victim in the back, and a witness indicated that Ford had said "LMGK" and "VLK" before firing the weapon. *State v. Ford*, No. W2000-01205-CCA-R3CD, 2002 WL 1592746, at *3 (Tenn. Crim. App. July 12, 2002). "LMGK" was established to mean "Lemoyne Garden Killer" and "VLK" was established to mean "Vice Lord Killer." *Id.*[1] The jury convicted Ford as charged and sentenced him to life imprisonment without the possibility of

[1] According to evidence presented at a subsequent post-conviction hearing, Ford was a member of the Crips gang, and the victim was a member of the rival Vice Lords gang. *See Ford v. State*, No. W2014-02105-CCA-R3-PC, 2015 WL 6942508, at *2 (Tenn. Crim. App. Nov. 10, 2015).

parole. *Id.* at *2. The Tennessee Court of Criminal Appeals affirmed, *id.* at *13, and the Tennessee Supreme Court denied leave to appeal. Ford later moved unsuccessfully for state post-conviction relief. *See Ford v. State*, W2014-02105-CCA-R3PC, 2015 WL 6942508, at *6 (Tenn. Crim. App. Nov. 10, 2015).

Ford then filed this federal habeas petition, arguing that: (1) trial counsel was ineffective for failing to present witnesses in support of a theory of self-defense and for telling the jury that a witness would testify; (2) trial counsel was ineffective for failing to request the pattern jury instruction on the burden of proof; (3) trial counsel was ineffective for failing to move to withdraw based on her apparent bias against him; (4) post-conviction counsel was ineffective for failing to present proof that trial counsel was ineffective for failing to move to withdraw; and (5) post-conviction counsel was ineffective for failing to present several ineffective-assistance claims. After the warden filed a response, Ford filed a motion to stay the case while he sought newly discovered evidence of his actual innocence. The district court denied the motion for a stay, and Ford then filed a reply to the warden's response. In 2019, the district court denied Ford's habeas petition in part on the merits and in part for unexcused procedural default.

In his COA application, Ford argues that the district court erred in denying relief on his first, second, and third grounds. He has forfeited review of his remaining grounds by failing to argue them in his COA application. *See Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000); *see also Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002) (per curiam).

A COA may issue only if a petitioner makes "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). When the district court has denied a § 2254 petition on procedural grounds, a petitioner must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a

constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

I.

Ford first argues that his trial counsel was ineffective for failing to present a theory of self-defense when counsel: (1) failed to call Lori Smith, who Ford says would have testified that other people were firing weapons at the scene ("subclaim (i)"); (2) told the jury that Lori Smith would testify but never called her as a witness ("subclaim (ii)"); and (3) failed to call Ford, who had no prior felony convictions, to testify on his own behalf ("subclaim (iii)").

Subclaim (i). Ford faults trial counsel for failing to call Lori Smith, who he claims would have testified "that 'it was four people out there shooting' when the victim was struck and killed." At trial, Ford's counsel similarly told the jury during his opening statement, "Lori Smith will testify, I believe, that several people were armed and several fired weapons." *Ford*, 2002 WL 1592746, at *11. Ford argues that Smith's testimony would have helped to establish his claim of self-defense. But Smith was not called to testify, and "a defense theory involving other shooters . . . never manifested itself in proof." *Id.* at *12. The defense instead called only one witness, Derrick Lewis, who testified to Ford's intoxication on the day of the offense. In his petition for state post-conviction relief, Ford challenged defense counsels' failure to present testimony from five other witnesses but did not challenge counsels' failure to call witness Lori Smith.[2] Because Ford failed to exhaust available state remedies, Ford's claim was procedurally defaulted. *See Hodges v. Colson*, 727 F.3d 517, 529 (6th Cir. 2013) ("The exhaustion doctrine requires the petitioner to present the same claim under the same theory to the state courts before raising it on federal habeas review.") (citation omitted).

[2] In his brief to the Tennessee Court of Criminal Appeals, Ford challenged trial counsels' failure to present the testimony of Venus Jones, Demond Gardner, Randy Bennett, Lonnie Maclin, and Eric Lewis to support his claim of self-defense. At the post-conviction hearing, post-conviction counsel called these five witnesses to support Ford's self-defense theory. *See Ford*, 2015 WL 6942508, at *3.

As cause to excuse the default of this subclaim, Ford argues that he received ineffective assistance of post-conviction counsel. Ineffective assistance of post-conviction counsel may establish cause to excuse a procedural default under two circumstances: First, the complete abandonment by counsel during state post-conviction proceedings without notice to the petitioner may establish cause. *Maples v. Thomas*, 565 U.S. 266, 288-89 (2012). Second, the ineffective assistance of post-conviction counsel may establish cause—but only as to a petitioner's "substantial" claim of ineffective assistance of trial counsel—where a state procedural law or design prohibits defendants from raising ineffective assistance of trial counsel claims on direct appeal. *See Trevino v. Thaler*, 569 U.S. 413, 429 (2013); *Martinez v. Ryan*, 566 U.S. 1, 17 (2012); *see also Abdur'Rahman v. Carpenter*, 805 F.3d 710, 713 (6th Cir. 2015) ("*Martinez* and *Trevino* apply in Tennessee."). Ford seeks to avail himself of the second circumstance.

To be "substantial," a claim must have some merit under the standard for ineffective assistance of counsel set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Martinez*, 566 U.S. at 14. To prevail on an ineffective-assistance claim, a petitioner must establish that counsel's performance was deficient and that he suffered prejudice as a result. *Strickland*, 466 U.S. at 687. There is "a strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." *Id.* at 689.

The district court concluded that Ford could not avail himself of the *Martinez/Trevino* exception because this subclaim is not "substantial." The court explained that Ford did not offer any proof of what Smith would have said had she been called as a witness. All we know is that trial counsel's opening statement suggested that "Lori Smith will testify . . . that several people were armed and several fired weapons." Even if we presume that Smith would have so testified, that is insufficient to make out a substantial claim that Ford's trial attorney "fell below an objective standard of reasonableness" or to demonstrate a "reasonable probability that, but for counsel's [failure to call this witness], the result of the proceeding would have been different." *Strickland*, 466 U.S. at 687-88, 694.

Ford claims that Smith's testimony would have helped to establish a claim of self-defense. At the post-conviction hearing, trial counsel testified that she had spoken to Smith before trial and that she and her co-counsel had talked about pursuing a self-defense theory but had decided against it because they "couldn't find anyone that said that the victim had a gun" "or that he looked as if he was pulling a weapon." Ford does not refute that point. He argues instead that "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 [Ford] did not know the victim was unarmed." Ford, who did not testify at trial, claims that he "reasonably believed that danger from the victim or one of the victim's gang members was imminent." Ford claims this point would have been bolstered if Smith had testified as counsel promised, "that several people were armed and several fired weapons." But that is not the question; the question is whether counsel behaved unreasonably in failing to call Smith and whether there is a reasonable probability that her testimony would have changed the outcome of the trial. The answer is no.

First, five eyewitnesses testified at trial. "All five witnesses identified the defendant as the shooter and recalled that multiple shots had been fired." *Ford*, 2002 WL 1592746, at *1. No one testified that others were armed or took shots. Smith's testimony would have been inconsistent with the testimony of these five.

Second, had Smith testified favorably to Ford, her testimony would have been impeached with Ford's own words. Devon Gardner testified at trial that after Ford was arrested, Ford had written letters to him instructing him to threaten Smith so that she would *not* testify at his trial. Those letters were admitted into evidence. The threats were severe. In one letter, for example, Ford wrote, "Scare them girls and threaten[] them so they wont [sic] show up in court . . . . Take care of that ASAP. There [sic] names are Shavaughn Flemings, Lori Smith, and Tiffany White." Ford then provided Gardner with Smith's address, so he could "threaten them not to show up in court." In another letter, Ford instructed Gardner to "take care of them females" because "[t]hem females got to go man. . . . Do it the smart way."

These letters surely suggest that, at least before trial, Ford believed that Smith's testimony would not have been favorable to him. This is what the district court concluded, stating that "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." Defense counsel, however, may have initially concluded that Smith's testimony could have helped. Counsel both spoke to Smith and told the jury, in the opening statement, that Smith would testify that there were multiple shooters. Counsel apparently changed course. We cannot say that the change of heart was either unreasonable or prejudicial. If Smith had been called, and if she had actually testified favorably to Ford, her testimony would have been impeached with the damning evidence that Ford had instructed Gardner to "take care of" Smith. It stretches credulity to think that the jury would have believed that Smith, once thought by Ford to be such a threat to his case that she had to be "scared and threatened" *not* to appear, was suddenly testifying in Ford's *favor*—truthfully, and in response to no threat at all.

Ford cannot overcome the strong presumption that defense counsels' decision not to call Smith was sound trial strategy. *See Towns v. Smith*, 395 F.3d 251, 258 (6th Cir. 2005) ("We '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 conduct might be considered sound trial strategy.'") (quoting *Strickland*, 446 U.S. at 689)). Nor can he show that, had Smith testified, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687. Accordingly, he cannot show that his ineffective-assistance-of-trial counsel claim "is a substantial one" or "has some merit." *Martinez*, 566 U.S. at 14.

Thus, reasonable jurists could not debate the district court's conclusion that Ford failed to establish cause to excuse his procedural default of this subclaim. A COA is not warranted as to this subclaim.

Subclaim (ii). Ford argues that trial counsel was ineffective for telling the jury in his opening statement, falsely, that Smith would testify in his defense. The district court concluded

that this subclaim was procedurally defaulted but chose to address it on the merits. This court may do so as well. *See Linscott v. Rose*, 436 F.3d 587, 592 (6th Cir. 2006). But Ford has not alleged, much less established, that counsel was aware at the time of his opening statement that Smith would not be called to testify. This subclaim therefore does not deserve encouragement to proceed further.

Subclaim (iii). Ford argues that trial counsel was ineffective for failing to call him to testify in his own defense. Again, the district court concluded that this subclaim was procedurally defaulted but chose to address it on the merits, and this court may do so as well. *See Linscott*, 436 F.3d at 592. As the district court explained, "during a *voir dire* examination at trial, Ford testified that he understood that he had the right to testify and that he made the decision not to testify." Moreover, at his post-conviction hearing, Ford testified that he "just shot the gun into the air to scare [the group of Vice Lords] off." *Ford*, 2015 WL 6942508, at *2. The Tennessee Court of Criminal Appeals determined that Ford's "testimony that he fired shots 'in the air' is inconsistent with . . . the self-defense statute." *Id.* at *6 (citing Tenn. Code Ann. § 39-11-611(a); *State v. Blackwood*, No. W1999-01221-CCA-R3-CD, 2000 WL 1672343, at *9 (Tenn. Crim. App. Nov. 2, 2000)). "[A] state court's interpretation of state law . . . binds a federal court sitting in habeas corpus." *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005). Under these circumstances, reasonable jurists could not debate the district court's determination that Ford can show neither deficient performance nor prejudice as to this subclaim.

II.

Ford argues that trial counsel was ineffective for failing to request the pattern jury instruction on the burden of proof. As the district court explained, however, the trial court instructed the jury on the presumption of innocence and reasonable doubt. *See Ford*, 2015 WL 6942508, at *6. "[W]e must presume that juries follow their instructions." *Washington v. Hofbauer*, 228 F.3d 689, 706 (6th Cir. 2000). Reasonable jurists therefore could not disagree that Ford cannot make the required showing of prejudice as to this claim.

III.

Ford argues that trial counsel was ineffective for failing to move to withdraw based on her apparent bias against him.[3] On post-conviction review, Ford "testified that the lead attorney told him that she was going to get him electrocuted because he was 'acting like a little dick.'" *Ford*, 2015 WL 6942508, at *2. At a pretrial hearing, the trial court asked the same attorney whether she had "talked harshly to [Ford], called him a, quote, little dick, unquote." Counsel responded, "Oh, I admit it, Judge," but indicated that she thought that she and Ford were "communicating okay as far as the trial."

In his post-conviction petition, Ford argued that trial counsel was ineffective for calling him slang names. But Ford failed to raise this claim in his post-conviction brief to the Tennessee Court of Criminal Appeals; he instead raised a claim for the trial court's denial of counsel of his choice based on trial counsel's alleged verbal abuse. The district court determined that Ford procedurally defaulted his ineffective-assistance bias claim by failing to raise it in his post-conviction appellate proceedings. Reasonable jurists could not disagree. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). As cause to excuse his procedural default, Ford argues that he received ineffective assistance of post-conviction appellate counsel. But the *Martinez/Trevino* "exception '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.'" *West v. Carpenter*, 790 F.3d 693, 698 (6th Cir. 2015) (quoting *Martinez*, 566 U.S. at 16). Finally, "[t]he 'fundamental miscarriage of justice' gateway is open to a petitioner who submits new evidence showing that 'a constitutional violation has probably resulted in the conviction of one who is actually innocent.'" *Williams v. Bagley*, 380 F.3d 932, 973 (6th Cir. 2004) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). In his motion for a stay, Ford claimed to have newly discovered evidence that the State overcharged him. But "'actual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523

[3] In his habeas petition, Ford also argued that the trial court erred in "condoning" trial counsel's actions "and/or for acting in concert with counsel." Ford has forfeited this subclaim by failing to argue it in his COA application. *See Elzy*, 205 F.3d at 886.

U.S. 614, 624 (1998). Reasonable jurists therefore could not debate the district court's procedural ruling as to either Ford's third ground or his motion for a stay.

Accordingly, the COA application is **DENIED**. The IFP motions are **DENIED as moot.**

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

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

WILLIAM FORD,	)	
Petitioner,	)	
v.	)	Case No. 2:16-cv-01077-JTF-dkv
MIKE PARRIS,	)	
Respondent.	)	

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

Before the Court are the Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody ("§ 2254 Petition") filed by Petitioner, William Ford, Tennessee Department of Correction prisoner number 319577, who is currently incarcerated at the Morgan County Correctional Complex ("MCCX") in Wartburg, Tennessee (ECF No. 1), Respondent's Answer to the Federal Habeas Petition ("Answer"), filed by MCCX Warden Kevin Genovese (ECF No. 14); and Ford's Reply to Respondent's Answer ("Reply") (ECF No. 21).[1] For the reasons stated below, the Court **DENIES** the § 2254 Petition.

[1] The Clerk is directed to substitute current MCCX Warden Mike Parris for Genovese as respondent. *See* Fed. R. Civ. P. 25(d).

I. BACKGROUND

A. State Court Procedural History

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 Demond Drumwright. (ECF No. 13-1 at PageID 40-41.) The State sought the death penalty.

A jury trial commenced in the Shelby County Criminal Court on April 10, 2000. (*Id.* at PageID 47.) On April 13, 2000, the jury returned a guilty verdict. (*Id.* at PageID 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 PageID 51.) The Tennessee Court of Criminal Appeals ("TCCA") affirmed. *State v. Ford*, No. W2000-01205-CCA-R3CD, 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 at PageID 1144-59.) The State filed its response on or about October 20, 2003. (*Id.* at PageID 1187-88.) After counsel was appointed to represent Ford (*id.* at PageID 1193), an amended petition was filed on February 11, 2004 (*id.* at PageID 1160-64). The State responded on or about March 1, 2004. (*Id.* at PageID 1189-90.) An Amended and Supplemental Petition for Post-Conviction Relief was filed on November 4, 2009 by a different attorney who had been appointed to represent Ford. (Id. at PageID 1165-74.)[2]

[2] 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

The State responded on June 17, 2010. (*Id.* at PageID 1191-92.) A Supplement to Amended Petition for Post-Conviction Relief was filed on December 16, 2013. (*Id.* at PageID 1175-78.) Hearings on the post-conviction petition were held on November 14 and 15, 2013, December 16, 2013, January 24, 2014, February 25, 2014, and February 26, 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 at PageID 1208-19.) The TCCA affirmed. *Ford v. State*, 2015 WL 6942508 (Tenn. Crim. App. Nov. 10, 2015), *appeal denied* (Tenn. Feb. 18, 2016).

In its opinion on direct appeal, the TCCA summarized 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.

B. Ford's § 2254 Petition, Case Number 2:16-cv-01077

On April 18, 2016, Ford filed his *pro se* § 2254 Petition in the Eastern Division of this district. (ECF No. 1.) On December 12, 2016, Chief United States District Judge J. Daniel Breen transferred the § 2254 Petition to this division, where the convicting court is located. (ECF No. 7.) The matter was reassigned to the undersigned judge on December 12, 2016. (ECF No. 8.) The § 2254 Petition presents the following claims:

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case, the assigned judge recused himself, and Ford had a serious medical issue. (*Id.* at PageID 1194-95, 1198-1203.)

1. "THE PETITIONER'S 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 HER SELF FROM THE PETITIONER'S CASE" (*id.* at 8); and

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.* at 8-9).

In an order issued on January 10, 2017, the Court ordered Genovese to file the state-court record and a response to the § 2254 Petition. (ECF No. 9.) On March 9, 2017, Genovese filed the state-court record and his Answer. (ECF Nos. 13, 14.) On November 27, 2017, Ford filed a motion asking the Court to set a date for him to reply to the Answer. (ECF No. 19.) In an order issued on December 1, 2017, the Court noted that the January 10, 2017 order had directed that any reply be filed within twenty-eight days after service of the Answer, which, in this case, would have made the reply due on April 10, 2017. (ECF No. 20 at 2.) Nonetheless, the Court granted the

motion and extended Ford's time to reply until January 23, 2018. (*Id.* at 3.) The Clerk docketed Ford's Reply on January 25, 2018. (ECF No. 21.)[3]

On July 27, 2017, Ford filed a motion to hold this matter in abeyance on the ground that he had unspecified newly discovered evidence that he had been overcharged. (ECF No. 16.) The Court denied the motion on October 31, 2017. (ECF No. 18.)

II. ANALYSIS OF PETITIONER'S CLAIMS

A. Trial Counsel's Failure to Request a Jury Instruction (Claim 2)[4]

In Claim 2, Ford argues that his trial counsel rendered ineffective assistance by failing to request the pattern jury instruction on burden of proof. (ECF No. 1 at 6.) That instruction provides that "the state has the burden of proving the guilt[] of the defendant beyond a reasonable doubt, and this burden never shirts [sic] but remains on the state throughout the trial of the case. The defendant is not required to prove his innocence." (ECF No. 13-27 at PageID 2314 (quoting Tenn. Pattern Jury Instructions, Crim., 2.02)). The trial judge failed to instruct the jury on burden of proof. The jury was, however, given the following instructions on the presumption of innocence and reasonable doubt:

> PRESUMPTION OF INNOCENCE
>
> 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

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[3] Ford signed his Reply on January 22, 2018 (*id.* at 17), making it timely. *Houston v. Lack*, 487 U.S. 266, 270-71 (1988).

[4] In the interest of clarity, the Court will address Claim 2, which was exhausted in state court, before Claim 1, which was not.

> bar committed the crime in such manner that would make him guilty under the law heretofore defined and explained to you.
>
> REASONABLE DOUBT
>
> Reasonable double 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 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.

(ECF No. 13-9 at PageID 842; *see also* ECF No. 13-23 at PageID 1473-74 (same).)

Ford raised this issue during the post-conviction proceeding. (ECF No. 13-17 at PageID 1170-72.) The post-conviction court denied relief on the merits. (*Id.* at PageID 1214.) Ford preserved this issue by raising it in his brief to the TCCA on the post-conviction appeal. (ECF No. 13-27 at PageID 2296, 2314-15.) The TCCA denied relief on the merits. *Ford v. State*, 2015 WL 6942508, at *6.

Ford's claim that his attorney rendered ineffective assistance of counsel is controlled by the standards stated in *Strickland v. Washington*, 466 U.S. 668 (1984). Those standards require a showing that "counsel's performance was deficient" and that "the deficient performance prejudiced the defense." *Id.* at 687. To establish deficient performance, a person challenging a conviction "must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. A court considering a claim of ineffective assistance must apply a "strong presumption" that counsel's representation was within the "wide range of reasonable professional assistance." *Id.* at 689. The challenger's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. "The question is whether an attorney's representation amounted

to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quoting *Strickland*, 466 U.S. at 690).

To demonstrate prejudice, a prisoner must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding. Counsel's errors must be so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Richter*, 562 U.S. at 104 (internal quotation marks and citation omitted); *see also id.* at 111-12 ("In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. . . . The likelihood of a different result must be substantial, not just conceivable.") (citations omitted); *Wong v. Belmontes*, 558 U.S. 15, 27 (2009) (per curiam) ("But *Strickland* does not require the State to 'rule out' [a more favorable outcome] to prevail. Rather, *Strickland* places the burden on the defendant, not the State, to show a 'reasonable probability' that the result would have been different.").

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

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)-(2). The petitioner carries the burden of proof for this "difficult to meet" and "highly deferential standard," which "demands that state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (internal quotation marks and citations omitted). The deference to be accorded a state-court decision under *Strickland* is magnified when reviewing an ineffective assistance claim under 28 U.S.C. § 2254(d):

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

Richter, 562 U.S. at 105.

Ford cannot establish that the TCCA's decision was contrary to *Strickland*. A state court's decision is "contrary" to federal law when it "arrives at a conclusion opposite to that reached" by the Supreme Court on a question of law or "decides a case differently than" the Supreme Court has "on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). The TCCA cited the correct legal rule from *Strickland* and from Tennessee cases applying *Strickland*. *Ford v. State*, 2015 WL 6942508, at *5. This is "a run-of-the-mill state-court decision applying the correct legal rule . . . to the facts of a prisoner's case" and, therefore, it does not "fit comfortably within § 2254(d)(1)'s 'contrary to' clause." *Williams*, 529 U.S. at 406.

Ford also has failed to demonstrate that the TCCA's decision was an unreasonable application of clearly established federal law or that it was based on an unreasonable factual finding. An "unreasonable application" of federal law occurs when the state court "identifies the correct governing legal principle from" the Supreme Court's decisions "but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. The state court's application of federal law must be "objectively unreasonable" for the writ to issue. *Id.* at 409. It is not sufficient that the habeas court, in its independent judgment, determines that the state court decision applied clearly established federal law erroneously or incorrectly. *Renico v. Lett*, 559 U.S. 766, 773 (2010) (citing *Williams*, 529 U.S. at 411).

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

Richter, 562 U.S. at 103.

Likewise, "when a federal habeas petitioner challenges the factual basis for a prior state-court decision rejecting a claim, . . . [t]he prisoner bears the burden of rebutting the state court's factual findings 'by clear and convincing evidence.'" *Burt v. Titlow*, 571 U.S. 12, 18 (2013) (quoting 28 U.S.C. § 2254(e)(1)). A state court factual determination is not "unreasonable" merely because the federal habeas court would have reached a different conclusion. *Wood v. Allen*, 558 U.S. 290, 301 (2010); *see also Rice v. Collins*, 546 U.S. 333, 341-42 (2006) ("Reasonable minds reviewing the record might disagree" about the factual finding in question, "but on habeas review that does not suffice to supersede the trial court's . . . determination.").

The TCCA explained why it denied relief on this claim:

> [Ford] also argues that trial counsel was ineffective for failing to request a pattern jury instruction on the burden of proof. This Court has previously held that trial counsel is not ineffective for failing to request a pattern jury instruction so long as the "trial court 'sufficiently described the degree of doubt necessary for acquittal and the degree of proof necessary for conviction.'" *John Michael Bane*, 2011 WL 2937350, at *38 (quoting *Pettyjohn v. State*, 885 S.W.2d 364, 365 (Tenn. Crim. App. 1994)). The post-conviction court found that the jury instructions given by the trial court were nearly identical to those given in *John Michael Bane*. Therefore, trial counsel was not ineffective for failing to request the specific pattern jury instruction on the burden of proof. [Ford] has not proven by clear and convincing evidence that he received the ineffective assistance of counsel and is not entitled to relief.

Ford v. State, 2015 WL 6942508, at *6 (footnote omitted).

It is 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 its decision in *Bane v. State*, No. W2009-01653-CCA-R3-PD, 2011 WL 2937350, at *37-38 (Tenn. Crim. App. July 21, 2011), *appeal denied* (Tenn. Mar. 7, 2012), which upheld a virtually identical instruction. The TCCA's opinion in *Bane* was issued eleven years after Ford's trial and, therefore, his attorney could not have relied on that decision in evaluating the proposed jury instructions.

Even if the Court were to evaluate Claim 2 *de novo*, Ford has not shown deficient performance or prejudice. The strongest argument that trial counsels' performance was deficient is that use of the omitted instruction was mandatory at the time of Ford's trial. (*See* ECF No. 13-27 at PageID 2314.) To her credit, Diane Thackery, Ford's lead trial counsel, testified at the post-conviction hearing that she did not make a strategic decision not to object to the omission of the instruction. (ECF No. 13-21 at PageID 1425-26.)

There was no clearly established legal duty for an attorney to ensure that the trial judge gave each of the required pattern jury instructions. 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. *Bishop v. State*, 287 S.W.2d 49, 50 (Tenn. 1956). The law at the time of Ford's trial was clear that "[t]he beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course." *Victor v. Nebraska*, 511 U.S. 1, 5 (1994). Instead, "so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof." *Id.* (citation omitted). "Rather, taken as a whole, the instructions must correctly convey the concept of reasonable doubt to the jury." *Id.* (internal quotation marks and brackets omitted). In 1994, the TCCA, applying *Victor*, upheld an instruction that was substantially similar—albeit not completely identical—to the instruction given in Ford's case. *Pettyjohn v. State*, 885 S.W.2d 364, 365-66 (Tenn. Crim. App. 1994), *appeal denied* (Tenn. Sept. 12, 1994). In so holding, the TCCA explained that the challenged instruction "sufficiently described the degree of doubt necessary for acquittal and the degree of proof necessary for conviction," *id.* at 365, 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," *id.* at 366.

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.[5]

Because Ford cannot establish deficient performance or prejudice even under the more lenient standard of *de novo* review, Claim 2 is without merit and is **DISMISSED**.

B. Trial Counsels' Failure to Present Witnesses to Support a Theory of Self-Defense (Claim 1)

In Claim 1, Ford claims that his attorneys rendered ineffective assistance by failing to present witnesses who would testify that the killing was in self-defense. (ECF No. 1 at 5.) Specifically, Ford complains that his attorney failed to call Lori Smith, who he claims would have testified that four other people were at the scene and firing weapons ("sub-claim (i)"). Ford further complains that trial counsel told the jury in his opening statement that he intended to call Lori Smith but did not do so ("sub-claim (ii)") and that he failed to call Ford, who had no prior

[5] Ford did not argue that his appellate counsel rendered ineffective assistance in failing to raise this issue. Ford was represented by a new lawyer on direct appeal. Had the issue been raised on direct appeal, Ford's conviction might have been reversed and the case remanded for a new trial. *Bishop*, 287 S.W.2d at 50. And in evaluating a claim that appellate counsel was ineffective, prejudice is shown where there is a reasonable probability that the outcome of the appeal would have been different. *Smith v. Robbins*, 528 U.S. 259, 285-86 (2000). Ford also does not argue that trial counsel was ineffective in failing to include the absence of an instruction on burden of proof in the motion for a new trial.

felony convictions, to testify on his own behalf ("sub-claim (iii)"). (*Id.*) The Warden's Answer addresses only sub-claim (i). The Court will first address sub-claim (i) and then turn to the other two sub-claims.

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

In his Answer, Warden Genovese argues that, although Ford exhausted a claim during the post-conviction proceeding that trial counsel was ineffective in failing to call witnesses to support a self-defense claim, the claim in the § 2254 Petition is different than the claim that was exhausted in state court. (ECF No. 14 at 12-13.) The Court agrees.

A federal court may not grant a writ of habeas corpus on behalf of a state prisoner unless, with certain exceptions, the prisoner has exhausted available state remedies by presenting the same claim sought to be redressed in a federal habeas court to the state courts pursuant to 28 U.S.C. §§ 2254(b) and (c). *Pinholster*, 563 U.S. at 181. The petitioner must "fairly present" each claim to all levels of state court review, up to and including the state's highest court on discretionary review, *Baldwin v. Reese*, 541 U.S. 27, 29 (2004), except where the state has explicitly disavowed state supreme court review as an available state remedy, *O'Sullivan v. Boerckel,* 526 U.S. 838, 847-48 (1999). To avoid procedural default, a habeas petitioner in Tennessee must present his federal claims to the TCCA. *Covington v. Mills*, 110 F. App'x 663, 665 (6th Cir. 2004).

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

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

In his brief to the TCCA on the post-conviction appeal, Ford argued that his attorney rendered ineffective assistance in failing to present the testimony of Venus Jones, Demond Gardner, Randy Bennett, Lonnie Maclin, and Eric Lewis to support his claim of self-defense. (ECF No. 13-27 at PageID 2307-12.) The TCCA denied relief on the merits. *Ford v. State*, 2015 WL 6942508, at *5-6. In his brief to the TCCA, Ford made no argument that his attorney should have called Lori Smith. Therefore, he has failed to exhaust sub-claim (i) in state court. Because there is no longer any means by which Ford can exhaust sub-claim (i), it ordinarily would be barred by procedural default.

2. Ford is Not Actually Innocent

Ford appears to argue that, even if this and other claims have been procedurally defaulted, the Court can review the merits to prevent a manifest injustice. (ECF No. 1 at 9-10.) A showing of manifest injustice requires that a prisoner have new evidence of his actual innocence sufficient to overcome his procedural default. *See Murray v. Carrier*, 477 U.S. 478, 493-96 (1986) (rejecting manifest injustice standard without proof of cause and prejudice). Ford's claim of actual innocence is "not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim[s] considered on the merits." *Schlup v. Delo*, 513 U.S. 298, 315 (1995) (internal quotation marks omitted). "[P]risoners

asserting innocence as a gateway to defaulted claims must establish that, in light of new evidence, it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *House v. Bell*, 547 U.S. 518, 536-37 (2006) (internal quotation marks omitted); *see also Schlup*, 513 U.S. at 316 ("Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim. However, if a petitioner . . . presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying constitutional claims.").

In *Schlup*, the Supreme Court emphasized that "a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare." 513 U.S. at 324. "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Id.* Nonetheless, "the habeas court's analysis is not limited to such evidence." *House*, 547 U.S. at 537. The Court "must test the probative force of the newly presented evidence in connection with the evidence of guilt adduced at trial." *Schlup*, 513 U.S. at 332.

Here, the evidence at trial was that Ford was the only person who was armed and that he fired ten rounds at a group of high school students and younger children who were walking away from him. At the post-conviction hearing, Ford testified on his own behalf and his attorneys called five witnesses who testified to conflict between Ford and members of a rival gang during the

days leading up to the murder and at the scene of the murder. *See Ford v. State*, 2015 WL 6942508, at *2-3. The TCCA held that trial counsel did not render ineffective assistance by failing to call these witnesses, reasoning as follows:

> [Ford] claims that counsel was ineffective for failing to call various witnesses to testify in support of his self-defense theory. Counsel testified that the defense team attempted to contact the witnesses identified by [Ford] but were unsuccessful. Mr. Maclin's testimony indicated that he would not have cooperated with the defense team had they sought to interview him, and he equivocated on whether he would have testified truthfully had he been called as a witness. Ms. Jones and Mr. Bennett did not witness the shooting and would have provided little support to a self-defense theory. Mr. Gardner testified for the State at trial, and [Ford] has not indicated what counsel could have done to elicit more favorable testimony from him at trial. While Mr. Lewis was present at trial and available to testify, counsel's decision not to call him was a tactical decision entitled to deference. *Vaughn v. State*, 202 S.W.3d 106, 123 (Tenn. 2006).
>
> Additionally, [Ford] failed to show that he was prejudiced by counsel's failure to call these witnesses. [Ford] cites *State v. Ruane*, 912 S.W.2d 766 (Tenn. Crim. App. 1995), for the proposition that proof of prior violent acts by the victim can corroborate a claim of self-defense. However, there was no evidence presented at the post-conviction hearing of prior violent acts by the victim, but only that [Ford] had gotten into fights and been threatened by other members of the Vice Lords. While some of the witnesses at the post-conviction hearing testified that the Vice Lords were making threatening gestures and were advancing on [Ford's] group, only Mr. Maclin testified that he saw a gun. Additionally, other evidence at trial indicated that the victim's group was actually walking away before the shooting occurred. *See William J. Ford*, 2002 WL 1592746, at *4. [Ford's] testimony that he fired shots "in the air" is inconsistent with both the proof that the victim was shot in the back and the self-defense statute. *See* T.C.A. § 39-11-611(a); *State v. Stanley Blackwood*, No. W1999-01221-CCA-R3-CD, 2000 WL 1672343, at *9 (Tenn. Crim. App. Nov. 2, 2000) (holding in a case in which "the defendant claimed that he only fired his own gun in the air after he was attacked," that "notwithstanding the improbability of the defendant's testimony, he was not entitled to a self-defense instruction, because even according to his own testimony, he did not intentionally fire at anyone"), *perm. app. denied* (Tenn. May 21, 2001). [Ford] has failed to prove either deficiency or prejudice and is not entitled to relief on this basis.

Id. at *5-6.

Ford has not established that, if only the jury had heard the testimony of his post-conviction witnesses and that of Lori Smith, no reasonable jury would have convicted him. Ford has offered no proof of what Lori Smith would have testified to. 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.

Therefore, Ford has not come forward with sufficient evidence of his actual innocence to overcome his procedural default of Claim 1.

3. Ford's Procedural Default is Not Excused by the Ineffective Assistance of Post-Conviction Counsel

In his Reply, Ford argues that his procedural default should be excused by virtue of the Supreme Court's decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013). (ECF No. 21 at 1-11.) As a general rule, "[t]here is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." *Coleman v. Thompson*, 501 U.S. 722, 752 (1991) (citations omitted). Until the decision in *Martinez*, a habeas petitioner could not obtain relief when a claim was barred by procedural default due to the ineffective assistance of post-conviction counsel.

In 2012, the Supreme Court decided *Martinez v. Ryan*, 566 U.S. at 17, which recognized a narrow exception to the rule stated in *Coleman* "[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review 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." *Id.* Therefore, where post-conviction counsel was ineffective in failing to raise an issue regarding the effectiveness of trial counsel, procedural default may not apply.

Martinez addressed an Arizona law that did not permit ineffective assistance claims to be raised on direct appeal. In its subsequent decision in *Trevino*, 569 U.S. at 429, the Supreme Court extended its holding in *Martinez* to states in which a "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal . . . ." The requirements that must be satisfied to excuse a procedural default under *Martinez* are:

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

Id. at 423 (brackets and ellipses omitted). The decisions in *Martinez* and *Trevino* apply to Tennessee prisoners. *Sutton v. Carpenter*, 745 F.3d 787 (6th Cir. 2014).

The Warden has argued that *Martinez* is inapplicable because sub-claim (i) is not "substantial." (ECF No. 14 at 13-16.) "To be 'substantial' under *Martinez*, a claim must have 'some merit' under the standard for ineffective assistance of counsel stated in *Strickland v. Washington*, 466 U.S. 668 (1984)." *Henderson v. Carpenter*, 21 F. Supp. 3d 927, 935 (W.D.

Tenn. 2014) (citing *Martinez*, 566 U.S. at 14) (parallel citations omitted), *appeal docketed*, No. 14-5911 (6th Cir. July 25, 2014).

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 his trial. (ECF No. 13-5 at PageID 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.

4. The Remaining Sub-Claims are Barred by Procedural Default and are Meritless

As previously noted, *see supra* pp. 12-13, the State's Answer failed to address sub-claim (ii), trial counsel's promise to the jury that Lori Smith would testify, and sub-claim (iii), the failure to call Ford as a witness at trial. Neither of these sub-claims was properly exhausted in state court and, therefore, ordinarily would be barred by procedural default.[6] Federal courts are authorized

[6] On direct appeal, Ford argued that the prosecutor's references to Smith's failure to testify in closing arguments constituted misconduct. (ECF No. 13-12 at PageID 1012, 1030-31.) As previously noted, a claim is properly exhausted only if the same facts and legal theory were presented to the federal and state courts. *See supra* pp. 13-14. That Ford has exhausted a

to raise a procedural default *sua sponte*. *Clinkscale v. Carter*, 375 F.3d 430, 437 (6th Cir. 2004); *see also Mason v. Brunsman*, 483 F. App'x 122, 129 (6th Cir. 2012) (raising procedural default *sua sponte* on challenge to jury instruction that was presented to state courts solely as a state-law issue). Where a court proposes to decide an issue on a ground that has not been raised, it is appropriate to give the parties a chance to respond. *See Trest v. Cain*, 522 U.S. 87, 92 (1997); *see also Day v. McDonough*, 547 U.S. 198, 209-10 (2006) (authorizing district courts to raise statute of limitations *sua sponte* but requiring that parties be given opportunity to be heard).

It is unnecessary to delay the resolution of this matter. Under 28 U.S.C. § 2254(b)(2), "[a]n 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." Because no state court has addressed the merits of sub-claims (ii) and (iii), they are reviewed *de novo*. *Dando v. Yukins*, 461 F.3d 791, 796 (6th Cir. 2006); *Clinkscale*, 375 F.3d at 436; *Kircher v. Scutt*, No. 12-14477, 2014 WL 354648, at *7 n.2 (E.D. Mich. Jan. 31, 2014).

With respect to sub-claim (ii), trial counsel's promise to call Lori Smith, the record is silent as to why counsel mentioned Smith in the defense's opening statement yet failed to call her. Assuming that that remark constituted deficient performance, Ford has not established prejudice. In evaluating Ford's prosecutorial misconduct claim arising from defense counsel's promise, the TCCA concluded that the reference to Smith's anticipated testimony was harmless in light of the strength of the evidence presented at trial. *State v. Ford*, 2002 WL 1592746, at *12. Given that holding, Ford cannot show that, if only his attorney had not promised to call Smith, there is a

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prosecutorial misconduct claim does not mean that he has exhausted an ineffective assistance claim arising from the same facts.

reasonable probability that the outcome of the trial would have been different. Therefore, sub-claim (ii) is meritless.

As for sub-claim (iii), the failure to call Ford to testify at trial, Ford cannot show either deficient performance or prejudice. During a *voir dire* examination at trial, Ford testified that he understood that he had the right to testify and that he made the decision not to testify. (ECF No. 13-6 at PageID 575-78.) Ford has not established that his attorneys' recommendation that he not testify constituted deficient performance. "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . ." *Strickland*, 466 U.S. at 690. Here, counsel was in a position to evaluate how Ford's demeanor would have come across to the jury and how he was likely to handle cross examination. The risks of subjecting Ford to cross-examination were particularly great in this case, where Ford would be questioned about his attempts to intimidate witnesses and to get his associates to testify in accordance with scripts that he had prepared. Because Ford did not testify, his statement to police in which he falsely claimed that he was not present and did not shoot Drumwright was not admitted. (*See* ECF No. 13-20 at PageID 1375-76, 1388; *see also* ECF No. 13-6 at PageID 578.) Given Ford's reaction to being cross-examined during the sentencing phase of his trial, which included refusing to answer questions (*see* ECF No. 13-7 at PageID 727, 729, 731-32), trial counsel's recommendation that Ford not testify appears to be a reasonable strategy. Ford also has not established that, if only he had testified at trial, there is a reasonable probability that the outcome would have been different. Notably, the TCCA found that Ford's testimony that he fired his weapon in the air and did not intentionally shoot Drumwright would have precluded a self-defense

instruction. *Ford v. State*, 2015 WL 6942508, at *6. Therefore, sub-claim (iii) is also without merit.

For all the foregoing reasons, Claim 1 is **DISMISSED**.

C. Trial Counsel's Failure to Recuse Herself (Claim 3)

In Claim 3, Ford argues that his trial counsel rendered ineffective assistance by failing to seek to recuse herself because of the openly contemptuous way in which she addressed Ford. (ECF No. 1 at 6.) Ford presumably means that his attorney should have withdrawn from representing him. *See* Tenn. Sup. Ct. R. 8, Rules of Professional Conduct 1.16. According to Ford, Thackery "was ineffective for continuing to pretend to have [Ford's] best interest at heart when she knew that she did not." (ECF No. 1 at 7.) As support, Ford testified at the post-conviction hearing that Thackery told him that she was going to have him electrocuted because he was acting like a "little dick." (*Id.*) Ford asserts that "his trial attorney was ineffective and the Post Judge was in error for condoning the blatant acts of Ms. Thackery, and/or for acting in concert with counsel, which denied the Petitioner his due process and right to a fair trial." (*Id.* at 5.)

As a preliminary matter, it is unclear exactly what Ford wanted his attorneys to do. Because Ford was found to be indigent, the Public Defender's Office was appointed to represent him. (ECF No. 13-1 at PageID 42.) Lawyers who are appointed can withdraw only by leave of court upon a showing of good cause. Tenn. Code Ann. § 40-14-205(a). Here, Thackery arranged to have Ford present his complaints about her to the trial judge, who determined that no good cause existed to replace her. On the first day of the trial, Ford asked the trial judge for a continuance because his attorneys had not subpoenaed the witnesses he wanted. The trial judge

assured Ford that subpoenas would be issued and the witnesses would testify if they could be found. (ECF No. 13-4 at PageID 149-55.) Ford also said that he had a conflict with Thackery because of "the words that she say toward" him, including "[t]hat I'm a stupid little kid that either going to get life or the death penalty[.]" (*Id.* at PageID 155.) On another occasion, Thackery told Ford that he was "acting like a little dick" and was "going to get electrocuted" or "going to get executed." (*Id.* at PageID 156.) The trial judge told Ford that Thackery "has a right to talk to [him] about what she thinks [the] verdict might be and what she thinks [he] should do" but that he was not required to follow her advice. (*Id.* at PageID 156-57.) The trial judge explained that attorneys sometimes speak to their clients using very blunt language to ensure that the clients understand the reality of their situations. (*Id.* at PageID 157-59.) The trial judge also noted that sometimes, when a defendant is sentenced to death or to life without parole, he will complain that his attorney led him to believe that he was likely to prevail at trial. (*Id.* at PageID 158-59.) The trial judge ruled that he would not remove Thackery from the case because she had hurt Ford's feelings. (*Id.* at PageID 159; *see also id.* at PageID 162-63 (noting that Ford had "two excellent lawyers" who specialized in death penalty cases).)

Before the trial judge heard argument on the motion for a new trial, Ford renewed his request that Thackery be allowed to withdraw because of language she had used criticizing his conduct at trial. (ECF No. 13-11 at PageID 976.) The trial judge denied the motion, telling Ford that his behavior during the guilt phase of the trial, where he was eventually removed from the courtroom because of repeated outbursts in front of the jury, was inappropriate and counterproductive. (*Id.* at PageID 976-77.)

In his Answer, the Warden argues that Claim 3 was not properly exhausted in state court and is barred by procedural default. (ECF No. 14 at 21.) The Court agrees. In his post-conviction petition, Ford argued that his attorney rendered ineffective assistance by repeatedly calling Ford by slang names that were intended to get him not to assist his attorney. (ECF No. 13-17 at PageID 1155.) The post-conviction court denied relief on the merits, holding that, although trial counsel admitted calling Ford a "little dick," counsel was able to work with Ford at trial. (*Id.* at PageID 1218.) Ford failed to raise the issue in his brief to the TCCA on the post-conviction appeal (*see* ECF No. 13-27 at PageID 2296) and, therefore, even if this claim were deemed to be the same as Claim 3, it was not properly exhausted in state court. *See supra* pp. 13-14. Because there is no longer any means of exhausting Claim 3, it is barred by procedural default.

In his Reply, Ford cites *Martinez* and *Trevino* for the proposition that his procedural default was due to the ineffective assistance of post-conviction counsel. (ECF No. 21 at 13-15.) Although he does not directly address the failure to include the issue in the post-conviction appeal, Ford argues that his post-conviction counsel was ineffective by failing to present unspecified evidence in support of Claim 3. (ECF No. 22 at 14-15.) The Sixth Circuit Court of Appeals has rejected the view that *Martinez* applies to claims that were raised, but not properly litigated, by post-conviction counsel. The Court of Appeals reasoned that *Martinez* applies only to procedurally defaulted claims and that claims that were not properly presented have not been defaulted. *West v. Carpenter*, 790 F.3d 693, 6999 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 1456 (2017); *Dixon v. Houk*, 737 F.3d 1003, 1012 & n.2 (6th Cir. 2013); *Moore v. Mitchell*, 708 F.3d 760, 784-85 (6th Cir. 2013). In addition, *Martinez* does not apply to claims that were presented in

a post-conviction petition but not on appeal. *Middlebrooks v. Carpenter*, 843 F.3d 1127, 1136 (6th Cir. 2016), *cert. denied*, 138 S. Ct. 503 (2017); *West*, 790 F.3d at 698-99; *see also Martinez*, 566 U.S. at 11 ("While counsel's errors in [other levels of post-conviction] proceedings preclude any further review of the prisoner's claim, the claim will have been addressed by one court, whether it be the trial court, the appellate court on direct review, or the trial court in an initial-review collateral proceeding.").

Finally, Ford has not established that Claim 3 is "substantial." He cites no Supreme Court decision holding that an attorney who speaks harshly to her client has a duty to withdraw. Thackery raised the issue with the trial judge, who concluded that there was not good cause to allow her to withdraw. Ford has not explained what more Thackery should have done to persuade the trial judge to rule differently. Ford also has not explained how Thackery's language affected the way she conducted his defense. Therefore, he has not established that there is a reasonable probability that, if only Thackery had been removed and new counsel appointed, the outcome of his trial would have been different.

For the foregoing reasons, Ford is unable to overcome his procedural default. Claim 3 is without merit and is **DISMISSED**.

D. Post-Conviction Counsel's Failure Properly to Present Claim 3 (Claim 4)

In Claim 4, Ford argues that his post-conviction counsel rendered ineffective assistance by failing to present proof that trial counsel was ineffective for not recusing herself from Ford's case. (ECF No. 1 at 8.) Claim 4 is not cognizable in a federal habeas petition. The law is clear that "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section

2254." 28 U.S.C. § 2254(i). Therefore, Ford is not entitled to habeas relief on the ground that his post-conviction counsel was ineffective. Claim 4 also does not excuse Ford's procedural default of Claim 3 for the reasons previously discussed. *See supra* pp. 24-25.

Claim 4 is **DISMISSED** because it is not cognizable in a § 2254 Petition.

E. Post-Conviction Counsel's Failure to Show that Trial Counsel was Ineffective in Failing to Preserve Issues for Direct Appeal (Claim 5)

In Claim 5, Ford argues that his post-conviction counsel was ineffective in failing to properly present claims that trial counsel was ineffective for failing to preserve issues for appellate review. (ECF No. 1 at 8-9.) The issues Ford contends his trial counsel should have preserved (presumably by raising them in the motion for a new trial) are as follows: (i) the evidence is insufficient to sustain a conviction; (ii) the verdict is contrary to the law and evidence; (iii) the trial court erred in overruling the motion to suppress Ford's oral statements; (iv) the trial court erred in not granting a mistrial after Ford's second and third outbursts, leaving a possibly tainted jury unable to be fair and impartial; (v) the trial court erred in not granting the defense motion *in limine* regarding the letters admitted through Demond Gardner; (vi) the trial court erred by verbally summarizing its charges to the jury prior to closing arguments; (vii) the trial court erred by partially instructing the jury on how they would reach a verdict during the examination of Pat Darden during the penalty phase; and (viii) the trial court erred in overruling the defense objection to the court further charging the jury once deliberations had begun and after the jury raised the second of two questions. (*Id.*)

To the extent that Claim 5 presents a standalone claim of ineffective assistance of post-conviction counsel, it is not cognizable in a § 2254 petition for the reasons previously stated. *See supra* pp. 25-26.

To the extent Ford relies on the claimed ineffectiveness of post-conviction counsel to excuse any procedural defaults of the substantive sub-claims, he is not entitled to relief. Ford challenged the sufficiency of the evidence on direct appeal (*see* ECF No. 13-12 at PageID 1012, 1018-20) and, therefore, sub-claims (i) and (ii) have not been procedurally defaulted. Sub-claim (iv), the failure to grant a mistrial after excluding Ford from the courtroom, was also raised on direct appeal and has not been procedurally defaulted. (*Id.* at PageID 1012, 1021-27.) Ford also challenged the trial court's denial of his motion *in limine* addressing the admissibility of the letters he wrote to Demond Gardner. (*Id.* at PageID 1012, 1028-29.) Therefore, sub-claim (v) has not been defaulted.

As for the remaining sub-claims, Ford has not demonstrated that any are "substantial." Rule 2(c)(2) of the Rules Governing Section 2254 Cases in the United States District Courts ("§ 2254 Rules") requires habeas petitioners to set forth "the facts supporting each ground" for relief. Notice pleading is not permitted in habeas litigation. *Mayle v. Felix*, 545 U.S. 644, 655-56 (2005); *Blackledge v. Allison*, 431 U.S. 63, 75-76 (1977); *Short v. United States*, 504 F.2d 63, 65 (6th Cir. 1974); *Robertson v. Turner*, Case No. 15-cv-296, 2017 WL 4296187, at *2 (N.D. Ohio Sept. 28, 2017). Ford has not set forth the facts supporting each sub-claim and has not argued that, if only Thackery had presented these issues in the motion for a new trial, there is a reasonable probability that the motion would have been granted or he would have prevailed on appeal.

Claim 5 is without merit and is **DISMISSED**.

* * * *

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

III. APPEAL ISSUES

There is no absolute entitlement to appeal a district court's denial of a § 2254 petition. *Miller-El v. Cockrell*, 537 U.S. 322, 335 (2003); *Bradley v. Birkett*, 156 F. App'x 771, 772 (6th Cir. 2005). The Court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to a § 2254 petitioner. Rule 11, § 2254 Rules. A petitioner may not take an appeal unless a circuit or district judge issues a COA. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22(b)(1).

A COA may issue only if the petitioner has made a substantial showing of the denial of a constitutional right, and the COA must indicate the specific issue or issues that satisfy the required showing. 28 U.S.C. §§ 2253(c)(2) & (3). A "substantial showing" is made when the petitioner demonstrates that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 336 (internal quotation marks omitted); *see also Henley v. Bell*, 308 F. App'x 989, 990 (6th Cir. 2009) (per curiam) (same). A COA does not require a showing that the appeal will succeed. *Miller-El*, 537 U.S. at 337; *Caldwell v. Lewis*, 414 F. App'x 809, 814-15 (6th Cir. 2011). Courts should not issue a COA as a matter of course. *Bradley*, 156 F. App'x at 773.

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

Rule 24(a)(1) of the Federal Rules of Appellate Procedure provides that a party seeking pauper status on appeal must first file a motion in the district court, along with a supporting affidavit. However, if the district court certifies that an appeal would not be taken in good faith, or otherwise denies leave to appeal *in forma pauperis*, the prisoner must file his motion to proceed *in forma pauperis* in the appellate court. *See* Fed. R. App. P. 24(a) (4)-(5). In this case, for the same reasons the Court denies a certificate of appealability, the Court determines that any appeal would not be taken in good faith. It is therefore **CERTIFIED**, pursuant to Federal Rule of Appellate Procedure 24(a), that any appeal in this matter would not be taken in good faith, and leave to appeal *in forma pauperis* is **DENIED**.[7]

IT IS SO ORDERED this 19th day of February, 2019.

s/John T. Fowlkes, Jr.
JOHN T. FOWLKES, JR.
United States District Judge

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