United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted November 2, 2020
Decided November 19, 2020

Before

FRANK H. EASTERBROOK, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

No. 20-1518

KEVIN L. MARTIN,
Petitioner-Appellant,

v.

RICHARD BROWN,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division.

No. 2:18-cv-00441-JRS-MJD

James R. Sweeney II,
Judge.

ORDER

On the same day Kevin Martin filed a notice of appeal from the denial of his petition under 28 U.S.C. § 2254, he also timely moved under Federal Rule of Civil Procedure 59(e) to alter or amend the judgment. After the district court denied the Rule 59 motion, Martin filed a second notice of appeal, encompassing both the denial of the 59(e) motion and the underlying denial of § 2254 relief. Accordingly, we **DISMISS** this first appeal as unnecessary.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted November 2, 2020
Decided November 19, 2020

Before

FRANK H. EASTERBROOK, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

No. 20-1722

KEVIN L. MARTIN,
Petitioner-Appellant,

v.

RICHARD BROWN,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division.

No. 2:18-cv-00441-JRS-MJD

James R. Sweeney II,
Judge.

ORDER

Kevin Martin has filed a notice of appeal from a decision not to alter or amend the denial of his petition under 28 U.S.C. § 2254, as well as an application for a certificate of appealability. We have reviewed the orders of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED. We also DENY Martin's motion to proceed in forma pauperis.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

KEVIN L. MARTIN,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 2:18-cv-00441-JRS-MJD
	)	
STATE OF INDIANA,	)	
	)	
Respondent.	)	

ORDER DENYING PETITION FOR A WRIT OF HABEAS CORUPUS

Petitioner Kevin L. Martin brings the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his Indiana conviction for murder. Mr. Martin alleges violations of due process at trial and on post-conviction review, ineffective assistance of trial and appellate counsel, and due process violations pursuant to *Brady v. Maryland*. Mr. Martin's claims are procedurally defaulted or otherwise meritless. Therefore, Mr. Martin's petition for a writ of habeas corpus is **denied** and a certificate of appealability will not issue.

I. Background

Federal habeas review requires the Court to "presume that the state court's factual determinations are correct unless the petitioner rebuts the presumption by clear and convincing evidence." *Perez-Gonzalez v. Lashbrook*, 904 F.3d 557, 562 (7th Cir. 2018); *see* 28 U.S.C. § 2254(e)(1). On direct appeal, the Indiana Court of Appeals summarized the relevant facts and procedural history as follows:

> Martin lived with his girlfriend, Pearlie Dickerson, and her children in Dickerson's apartment. The apartment had two bedrooms. Martin and Dickerson shared one bedroom, and the children shared the other bedroom. On the morning of July 19, 2006, four of the children, J.D. (age sixteen), L.J. (age thirteen), A.D. (age twelve),

and E.D. (age seven), were at home. Martin went into the children's bedroom to ask J.D. for a phone number. Martin became angry when J.D. said she did not know the number.

Dickerson intervened in the argument. She told J.D. to go take a shower and told A.D. to close the door to the children's room. While J.D. was in the shower, she could hear Martin and Dickerson yelling. The three other children also heard them yelling. After J.D. returned to her bedroom, the children heard three gunshots. They ran into the hallway, where they saw Dickerson knocking on the neighbor's door and asking for help. Three of the children saw Martin run away. E.D. did not see Martin, but he heard someone running down the stairs.

Gerald Cotton lived in the apartment next door. His goddaughter Siobhan McFadden was visiting him that morning. They heard the gunshots, and a few seconds later, they heard Dickerson knocking on Cotton's door. When McFadden opened the door, Dickerson said, "help me," and collapsed. (Tr. at 461.) McFadden also saw Martin standing behind Dickerson with something in his hand. Other neighbors called 911. The police were dispatched to the scene at 11:45 a.m.

Dickerson had been shot three times. Bullets traveled through her heart, liver, and right lung. Dickerson died from these wounds.

J.D. found Martin's cell phone on the couch. At 11:59 a.m., Martin called his own phone from Emmitt Hinkle's apartment, and J.D. answered. She knew the caller was Martin because he asked how she had gotten his phone and because she recognized his voice. He hung up and then called a second time. Martin asked J.D. if Dickerson was "okay." (*Id.* at 526.) Martin called a third time and asked to which hospital Dickerson had been taken. An officer took the phone from J.D. and directed Martin to go to the police station. Martin told the officer he was in the area of Lincolnway West and Bendix and was on his way to work. In fact, this area was in a different part of town than Hinkle's apartment, and Martin's place of employment was not open that day.

Martin eventually did go to the police station, where he was arrested. He told police he had left Dickerson's apartment early in the morning, spent time walking around, and then went to Hinkle's apartment.

Police found a .38 magnum bullet near the place where Dickerson collapsed and two more in Dickerson's apartment. They also found a nine-millimeter Beretta handgun in Dickerson's apartment. J.D. testified the gun belonged to Martin. Officer Thomas Cameron testified the gun was registered to someone with the last name Martin, but he could not remember the owner's first name. Martin had left his cell phone, wallet, and work identification at Dickerson's apartment.

> The police searched Hinkle's apartment and found a toolbox belonging to Martin. The toolbox contained .38 caliber bullets, although of a different type than was used in the shooting.
>
> At trial, Martin testified he left Dickerson's apartment around 10:20 a.m. and walked toward Hinkle's apartment. He claimed he stopped at a shopping center on the way. He denied telling an officer he was in a different part of town and on his way to work. He also denied he had been in an argument with Dickerson earlier that morning.
>
> After a three-day trial, the jury found Martin guilty of murder. He was sentenced to sixty-five years, which is the maximum penalty for murder when the State does not seek the death penalty or a life sentence.

Martin v. State, 2007 WL 4563906 at *1-2 (Ind. Ct. App. Dec. 21, 2007); dkt. 11-7.

On direct appeal, Mr. Martin raised five issues: 1) the trial court improperly admitted handgun evidence; 2) the trial court improperly denied his motion to separate witnesses; 3) the prosecutor committed misconduct when he cross-examined Mr. Martin; 4) Mr. Martin received ineffective assistance from his trial counsel; and 5) the trial court abused its sentencing discretion and his sentence was inappropriate. Dkt. 11-4. The Indiana Court of Appeals affirmed Mr. Martin's conviction and sentence. Dkt. 11-7. On petition to transfer to the Indiana Supreme Court, Mr. Martin raised the first three issues raised in front of the Court of Appeals and abandoned the remaining two. Dkt. 11-8. The Indiana Supreme Court denied the petition to transfer. Dkt.11-3.

Mr. Martin raised three issues in a state petition for post-conviction relief: 1) ineffective assistance of trial counsel; 2) ineffective assistance of appellate counsel; and 3) the State suppressed exculpatory evidence. The state post-conviction court held that his first claim was barred by *res judicata* because he had raised it on direct appeal and denied his other two claims. Dkt. 11-10 at 10-12. The Indiana Court of Appeals dismissed Mr. Martin's post-conviction relief appeal with prejudice when he failed to timely file a defect-free brief. Dkt. 11-12. Nevertheless, Mr. Martin filed a petition for transfer to the Indiana Supreme Court raising the same three issues

(4)

he had raised before the state post-conviction trial court and asserting three additional errors made by that court. The Indiana Supreme Court denied his petition to transfer. Dkt. 11-11.

Mr. Martin's claims in his habeas petition relate to claims he raised on post-conviction review rather than his direct appeal. Mr. Martin raises eight issues:

1) The post-conviction court violated his right to due process when it denied his discovery requests;
2) The post-conviction court violated his Sixth Amendment rights by denying subpoenas;
3) Mr. Martin's trial counsel was ineffective for not challenging his arrest due to an invalid probable cause affidavit;
4) Mr. Martin's trial counsel was ineffective for not objecting to evidence found in the apartment due to an invalid search warrant;
5) Mr. Martin's appellate counsel was ineffective for not raising ineffective assistance of trial counsel for various reasons;
6) The State violated Mr. Martin's due process rights by suppressing material evidence;
7) The prosecution knowingly used perjured testimony;
8) Mr. Martin has overcome any procedural default because he suffered a miscarriage of justice; and
9) The evidence was insufficient to convict Mr. Martin.

II. Applicable Law

A federal court may grant habeas relief only if the petitioner demonstrates that he is in custody "in violation of the Constitution or laws . . . of the United States." 28 U.S.C. § 2254(a). The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") directs how the Court must consider petitions for habeas relief under § 2254. "In considering habeas corpus petitions

challenging state court convictions, [the Court's] review is governed (and greatly limited) by AEDPA." *Dassey v. Dittmann*, 877 F.3d 297, 301 (7th Cir. 2017) (en banc) (citation and quotation marks omitted). "The standards in 28 U.S.C. § 2254(d) were designed to prevent federal habeas retrials and to ensure that state-court convictions are given effect to the extent possible under law." *Id.* (citation and quotation marks omitted).

A federal habeas court cannot grant relief unless the state court's adjudication of a federal claim on the merits:

> (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).

"The decision federal courts look to is the last reasoned state-court decision to decide the merits of the case, even if the state's supreme court then denied discretionary review." *Dassey*, 877 F.3d at 302. "Deciding whether a state court's decision 'involved' an unreasonable application of federal law or 'was based on' an unreasonable determination of fact requires the federal habeas court to train its attention on the particular reasons—both legal and factual—why state courts rejected a state prisoner's federal claims, and to give appropriate deference to that decision[.]" *Wilson v. Sellers*, 138 S. Ct. 1188, 1191-92 (2018) (citation and quotation marks omitted). "This is a straightforward inquiry when the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion." *Id.* "In that case, a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." *Id.*

"For purposes of § 2254(d)(1), an unreasonable application of federal law is different from an incorrect application of federal law." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Id.* "The issue is not whether federal judges agree with the state court decision or even whether the state court decision was correct. The issue is whether the decision was unreasonably wrong under an objective standard." *Dassey*, 877 F.3d at 302.

III. Discussion

A. Procedural Default

"Procedural defaults take several forms, but two are paradigmatic." *Richardson v. Lane*, 745 F.3d 258, 268 (7th Cir. 2014). One occurs when "the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Walker v. Martin*, 562 U.S. 307, 315 (2011) (citation and internal quotation marks omitted). "[W]hen a state court refuses to reach the merits of a petitioner's federal claims because they were not raised in accord with the state's procedural rules ..., that decision rests on independent and adequate state procedural grounds." *Kaczmarek v. Rednour*, 627 F.3d 586, 591 (7th Cir. 2010).

The other occurs when a petitioner fails to "fairly present his federal claim to the state courts so that they have a 'fair opportunity' to consider and, if needed, correct the constitutional problem." *Schmidt v. Foster*, 911 F.3d 469, 486 (7th Cir. 2018) (en banc).

Both forms of procedural default are implicated in Mr. Martin's petition.

i. Miscarriage of Justice Exception

Before addressing the respondent's procedural default arguments, the Court first reviews Ground Eight of Mr. Martin's habeas petition, which asks whether Mr. Martin has overcome

procedural default by demonstrating that "the court's failure to consider the defaulted claim would result in a fundamental miscarriage of justice." *McDowell v. Lemke*, 737 F.3d 476, 483 (7th Cir. 2013). As the Seventh Circuit has explained,

> The fundamental miscarriage of justice standard erects an extremely high bar for the habeas petitioner to clear. It applies only in the rare case where the petitioner can prove that he is actually innocent of the crime of which he has been convicted. Such proof must take the form of new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial. The petitioner must prove, based on this evidence, that it was more likely than not that no jury would have convicted him at trial were the new, exculpatory evidence available.

Id. (internal citations omitted). Mr. Martin presents no such evidence, and none is apparent from the record before the Court.

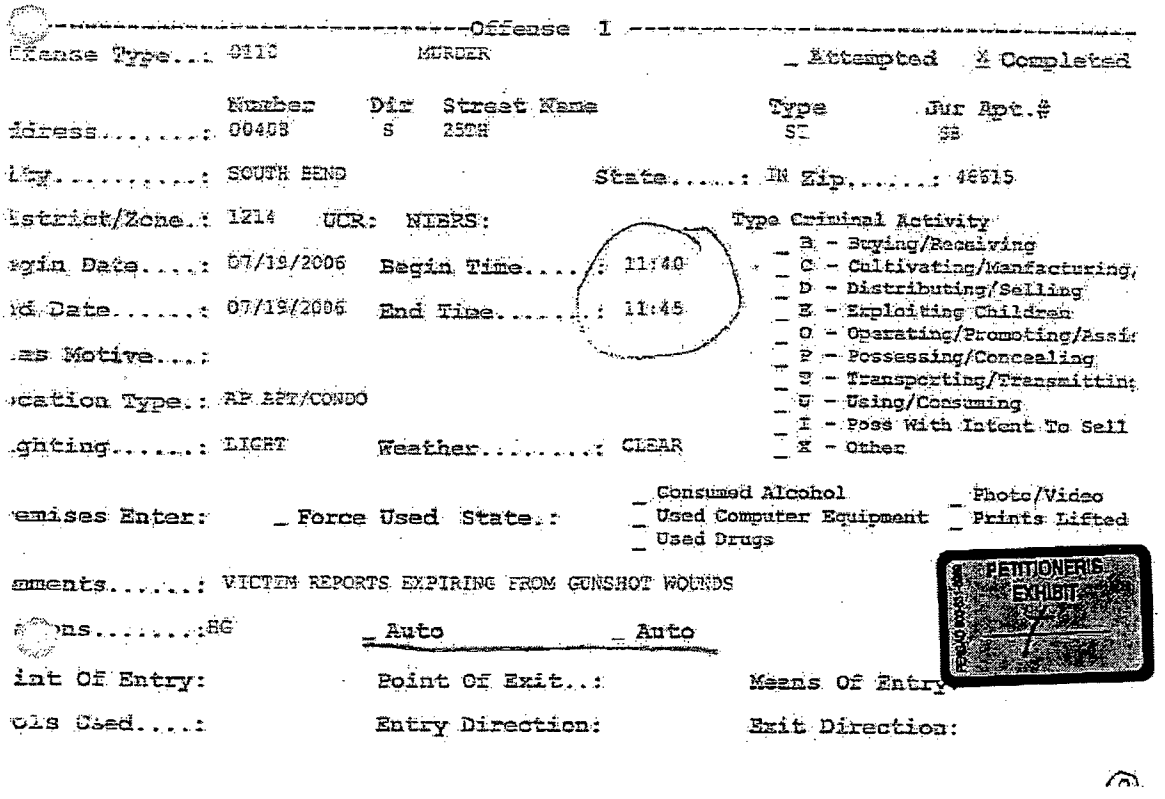
Indeed, the evidence against Mr. Martin was overwhelming. Four of the victim's children testified that they heard Mr. Martin and their mother arguing immediately before hearing gunshots, and three of them saw Mr. Martin in the hallway near their mother immediately after the shooting. Dkt. 38-4[1] at 169-170 (E.D.); dkt. 38-4 at 201-05. (J.D.); dkt. 38-5 at 16-19 (L.J.); dkt. 38-5 at 40-44 (A.D.). Shortly after the shooting, Mr. Martin called his cellphone that he had left at the apartment and spoke to J.D. several times. During one call, he asked "Is your momma dead yet?," laughed, and said, "That's what you all get." Dkt. 38-4 at 221-22. Mr. Martin also spoke to a police officer on the phone. He informed the officer that he was in a different part of town on his way to work, dkt. 38-4 at 15-16, despite the fact that his workplace was closed, dkt. 38-5 at 139, and he had placed the call from his friend's apartment that was close to the scene of the crime. Siobhan McFadden was familiar with Mr. Martin and also saw him standing in the hallway of the apartment complex immediately after the shooting with an object in his hand. Dkt. 38-4 at 146-50. The police

[1] When the Court cites to the trial record, it refers to the page number of the PDF of the electronic exhibit rather than relying on the original record's pagination.

searched a toolbox belonging to Mr. Martin and found a box of .38 caliber hollow-point bullets inside. Dkt. 38-5 at 135. Although not the same type of .38 ammunition found at the crime scene (which were full metal jacket projectiles), *see id.* at 171, the ammunition was still probative to show that Mr. Martin might own a gun capable of shooting .38 caliber bullets. Mr. Martin admitted the toolbox was his, though he denied owning the ammunition. Dkt. 38-5 at 258.

In his habeas petition, Mr. Martin offers no new evidence that would change the mind of any juror. Mr. Martin first cites Exhibit 4, a police report introduced at his post-conviction relief hearing. Mr. Martin believes that the document shows that police officer Keith Vergon determined that an automatic weapon was used in the shooting rather than a revolver. PCR Tr. 34. Officer Vergon testified at the post-conviction hearing, where he explained that the document was a "computer-generated form" that gives "brief information on the incident but it's not a report" that would supply a detailed narrative. PCR Tr. 35-36.

A review of that exhibit, dkt. 38-9 at 6, corroborates Mr. Vergon's testimony. The form has certain information populated in plain type that uses upper- and lower-case letters. The information on the form specific to the incident appears in all capital letters in lighter typeface. As the screenshot below shows, next to the word "weapons," someone typed "HG," presumably meaning "handgun." But the words "_Auto _Auto" appear to be part of the form, and the space before each word lacks a checkmark of any type. In fact, then, the preprinted "Auto" option was never selected.



Offense 1

Offense Type...: 0110 MURDER _ Attempted X Completed

	Number	Dir	Street Name	Type	Apt.#
Address.....:	00403	S	25TH	ST	

City.....: SOUTH BEND State.....: IN Zip.....: 46615

District/Zone.: 1214 UCR: NIBRS:

Begin Date....: 07/19/2006 Begin Time....: 11:40

End Date.....: 07/19/2006 End Time.....: 11:45

Bias Motive...:

Location Type.: AP ART/CONDO

Lighting.....: LIGHT Weather.....: CLEAR

Type Criminal Activity
_ B - Buying/Receiving
_ C - Cultivating/Manfacturing/
_ D - Distributing/Selling
_ E - Exploiting Children
_ O - Operating/Promoting/Assis
_ P - Possessing/Concealing
_ T - Transporting/Transmittin
_ U - Using/Consuming
_ I - Poss With Intent To Sell
_ X - Other

Premises Enter: _ Force Used State.: _ Consumed Alcohol _ Used Computer Equipment _ Used Drugs _ Photo/Video _ Prints Lifted

Comments.....: VICTIM REPORTS EXPIRING FROM GUNSHOT WOUNDS

Actions.....:HC _ Auto _ Auto

Point Of Entry: Point Of Exit..: Means Of Entry:

Tools Used....: Entry Direction: Exit Direction:

PETITIONER'S EXHIBIT

Thus, this form is in no way exculpatory.

Mr. Martin next lists nine pieces of evidence but does not explain how they would have made a difference in his trial. He names two "interview witness[es]" but does not say if they are significant because of what they said during an interview or because of what he would expect them to say. Dkt. 1 at 18. He points to the arresting officer, the employees of the music store, and "[t]he witness in the letter" without any context. *Id.* He claims that "Teresa Patterson bought the wrong caliber ammunition" but does not explain who she is or why that matters. *Id.* at 19. He asserts that "Chavonne Fox was inside the apartment at the time of the shooting" but does not suggest that she was the shooter or that she could somehow exonerate him. *Id.* And he points to a witness who "would testify why the victim and Martin [were being] evicted because the victim waved a gun at people in the apartment complex" without explaining how that proves his innocence. Dkt. 1 at 19. Further, Mr. Martin stated during his recorded police interview, which was played to the jury, that

Ex 10

the victim was being evicted because she waved a gun at someone at the apartment, dkt. 38-5 at 111, so this information was not new. In short, Mr. Martin has not cleared the very high bar set by this procedural hurdle.

ii. Procedural Default Due to Independent State Grounds

The respondent argues that Mr. Martin procedurally defaulted all claims because he failed to comply with the procedural requirements of the Indiana Court of Appeals, which led to the dismissal of his post-conviction appeal with prejudice.

The Indiana Court of Appeals dismissed Mr. Martin's appeal with prejudice because he did not file a defect-free brief by its due date, April 13, 2018. Dkt. 11-12. Under Indiana Appellate Rule 45(D), "The appellant's failure to file timely the appellant's brief may subject the appeal to summary dismissal." Before the court dismissed Mr. Martin's appeal it warned him twice that failing to follow the court's order could result in the dismissal of his appeal. Dkt. 11-11 at 6. A federal habeas court "shall not address a question of federal law raised in a habeas petition if the decision of the state court 'rests on a state law ground that is independent of the federal question and adequate to support the judgment.'" *Szabo v. Walls*, 313 F.3d 392, 400 (7th Cir. 2002). "Under this principle, if a state court did not reach a federal issue because it applied, evenhandedly, a state procedural rule, the matter is closed to the federal habeas court absent a showing of cause and prejudice." *Willis v. Aiken*, 8 F.3d 556, 561 (7th Cir. 1993). Here, the Indiana Court of Appeals clearly relied on state procedural rules—namely, Mr. Martin's failure to timely file his appellate brief—to dismiss his appeal with prejudice.

However, Mr. Martin vigorously disputes that he failed to timely mail his brief pursuant to the prisoner mailbox rule, and he argues he has proven cause and prejudice to overcome the procedural default. A petitioner may overcome a procedural default if he can "demonstrate cause

for the default and actual prejudice as a result of the alleged violation of federal law." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Cause "must be something *external* to the petitioner, something that cannot fairly be attributed to him." *Id.* at 752. Mr. Martin alleges that he gave his case worker Mr. Dugan a copy of his brief and appendix on April 11, 2018, but the documents "never [made] it to court." Dkt. 30-1. Mr. Martin has filed several motions to obtain more evidence that he provided Mr. Dugan his brief. *See* dkt. [53] ("Special Motion"); dkt. [56] (motion to incorporate cases); dkt. [57] (motion for evidentiary proceeding); dkt. [59] (motion for appointment of counsel); and dkt. [60] (motion for handwriting expert). And when Mr. Martin filed his petition to transfer to the Indiana Supreme Court, he asked that the Indiana Supreme Court find that the Indiana Court of Appeals erroneously dismissed his post-conviction appeal because he had provided his brief to Mr. Dugan for mailing on April 11, 2018. Dkt. 11-13 at 7. Mr. Martin has also filed a civil rights action against Mr. Dugan alleging First Amendment access-to-courts and retaliation claims for Mr. Dugan's alleged failure to mail Mr. Martin's appellate documents. *See Kevin Martin v. Charles Dugan*, 2:19-cv-134-JRS-DLP.

Rather than expend judicial resources to investigate Mr. Martin's claims about Mr. Dugan and the mailing of the brief, the Court will address Mr. Martin's underlying claims because it is clear that they lack merit. *See Washington v. Boughton*, 884 F.3d 692, 698 (7th Cir. 2018) ("Rather than work our way through the maze of these procedural arguments, however, we think it best to cut to the chase and deny [the petitioner's] due process claim on the merits."); *id.* at 698 (explaining why bypassing a question of procedural default to deny a claim on the merits is "consistent with the interests of comity, finality, federalism, and judicial efficiency that are at the heart of both the exhaustion requirement and the procedural default doctrine"); *see also Brown v. Watters*, 599 F.3d 602, 610 (7th Cir. 2010) (concluding that it is appropriate to bypass a "difficult" procedural default

question and "proceed to adjudicate the merits" when it is "clear" the petition should be denied on the merits).

iii. Procedural Default Due to Lack of Fair Presentment

However, the respondent further argues that because Mr. Martin attempts to excuse his procedural default by showing that he was prevented from timely filing his post-conviction brief to the Indiana Court of Appeals, he can only overcome the default on claims that he attempted to raise in that brief. *See* dkt. 37 at 5. In other words, the respondent argues that most of Mr. Martin's remaining claims have been procedurally defaulted due to a lack of fair presentment to the state courts.

"To protect the primary role of state courts in remedying alleged constitutional errors in state criminal proceedings, federal courts will not review a habeas petition unless the prisoner has fairly presented his claims throughout at least one complete round of state-court review, whether on direct appeal of his conviction or in post-conviction proceedings." *Johnson v. Foster*, 786 F.3d 501, 504 (7th Cir. 2015) (citation and quotation marks omitted); *see* 28 U.S.C. § 2254(b)(1)(A). "Fair presentment requires . . . the petitioner [to] raise the issue at each and every level in the state court system, including levels at which review is discretionary rather than mandatory," such as the Indiana Supreme Court. *King v. Pfister*, 834 F.3d 808, 815 (7th Cir. 2016) (citation and quotation marks omitted). "A habeas petitioner who has exhausted his state court remedies without properly asserting his federal claim at each level of state court review has procedurally defaulted that claim." *Id.* (citation and quotation marks omitted).

The Court agrees with respondent that several of Mr. Martin's claims—Ground Five: ineffective assistance of appellate counsel, Ground Seven: that the prosecution knowingly used

perjured testimony; and Ground Nine: that the evidence was insufficient—were not properly presented below and are therefore procedurally defaulted.

For Ground Five, Mr. Martin alleges that his appellate counsel rendered ineffective assistance of counsel when he failed to include the following allegations of ineffective assistance of trial counsel in his direct appeal argument: failure to move to suppress evidence discovered in the apartment, failure to introduce ballistics test results, and failure to challenge Mr. Martin's arrest. The post-conviction court found that Mr. Martin had waived any claim of appellate ineffective assistance because he specifically disavowed it at his post-conviction hearing, PCR Tr. 4, and failed to elicit any testimony from his appellate counsel that would support an appellate ineffectiveness claim. Dkt. 11-10 at 12. Further, the particular allegations of appellate ineffectiveness were not included in his appellate brief. *See* dkt. 27-1 at 141-44. Because there was no fair presentment of an ineffective assistance of appellate counsel claim in the state proceedings below, it is procedurally defaulted.

For Ground Seven, Mr. Martin alleges that the prosecutor violated his right to due process by eliciting false testimony. For Ground Nine, Mr. Martin alleges that the State failed to prove beyond a reasonable doubt that he murdered Ms. Dickerson because one of the witnesses testified that he thought the gunshots came from the hallway, not inside the apartment. Mr. Martin did not present these issues to the post-conviction court or in his brief to the Indiana Court of Appeals. They are therefore procedurally defaulted. *Johnson*, 786 F.3d at 504.

B. Mr. Martin's Remaining Claims

Mr. Martin represented himself throughout his state post-conviction proceedings and in the instant petition. Dkt. 38-8. His filings are lengthy, and his arguments often overlap. Thus, where the Court finds there was some ambiguity as to whether the claim was sufficiently presented in

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Mr. Martin's post-conviction brief, the Court addresses the merits of the argument. The last reasoned decision was the post-conviction court's order denying Mr. Martin's petition, dkt. 11-10, to which the Court defers where applicable.

i. Ground One—PCR Court's Denial of Discovery

Mr. Martin alleges that the post-conviction court denied him due process by not compelling the State to provide him with discovery. When Mr. Martin proceeded to his post-conviction hearing nearly ten years after the offense, neither Mr. Martin's trial counsel nor appellate counsel could locate Mr. Martin's file. Dkt. 38-9 at 9. Mr. Martin attempted to obtain his discovery from the State, but the post-conviction court denied his request. Dkt. 11-9 at 3.

This claim is not cognizable under 28 U.S.C. § 2254(a) because it targets an aspect of the post-conviction relief proceeding, not the criminal prosecution itself. *See Quince v. Crosby*, 360 F.3d 1259, 1262 (11th Cir. 2004) ("[W]hile habeas relief is available to address defects in a criminal defendant's conviction and sentence, an alleged defect in a collateral proceeding does not state a basis for habeas relief."); *see also Montgomery v. Melo*, 90 F.3d 1200, 1206 (7th Cir. 1996) ("Unless state collateral review violates some independent constitutional right, such as the Equal Protection Clause, ... errors in state collateral review cannot form the basis for federal habeas corpus relief."), *cert. denied*, 519 U.S. 907 (1996). Because Ground 1 seeks habeas relief based on an error at post-conviction, it cannot form the basis for federal habeas relief.

ii. Ground Two—PCR Court's Denial of Subpoenas for Witnesses

In Ground Two, Mr. Martin alleges that the post-conviction court violated his due process and Sixth Amendment rights by not subpoenaing eight witnesses at his post-conviction hearing. The Respondent argues that Mr. Martin has procedurally defaulted this claim because he did not raise it in his appellate brief. But in his brief, Mr. Martin alleged that the post-conviction court

violated his due process by not subpoenaing two witnesses. Dkt. 27-1 at 146. Regardless, this claim fails for the same reason ground one failed: errors in post-conviction proceedings do not present a cognizable basis for relief under § 2254 where they do not violate an independent constitutional right. S*ee Montgomery*, 90 F.3d at 1206. Although Mr. Martin invokes the Sixth Amendment right to compulsory process and to confront witnesses, this right pertains to criminal trials, not collateral proceedings. *See, e.g. Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987) (noting "[t]he opinions of this Court show that the right to confrontation is a *trial* right); *Oken v. Warden, MSP*, 233 F.3d 86, 93 (1st Cir. 2000) (petitioner has no constitutional right under the compulsory process clause of the Sixth Amendment to testify at post-conviction proceedings).

iii. Grounds Three and Four—Ineffective Assistance of Trial Counsel

In Grounds Three and Four of his petition, Mr. Martin alleges ineffective assistance of trial counsel. To succeed on a claim that trial counsel was ineffective, a petitioner must show that counsel's performance was deficient and prejudicial. *Maier v. Smith*, 912 F.3d 1064, 1070 (7th Cir. 2019) (citing *Strickland v. Washington*, 466 U.S. 668, 689–92 (1984)). Deficient performance means that counsel's actions "fell below an objective standard of reasonableness," and prejudice requires "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688, 694.

Mr. Martin alleged on direct appeal that his trial counsel was ineffective for (1) failing to object to the admission of a handgun and bullets from a toolbox that were unrelated to the murder, (2) failing to object to the prosecutor's statement that he believed Mr. Martin shot Ms. Dickerson, and (3) eliciting testimony that Mr. Martin had previously physically abused an ex-girlfriend. *Martin*, 2007 WL 4563906 at *6. The Court of Appeals rejected these claims, *id.*, and Mr. Martin did not raise ineffective assistance of counsel in his petition to transfer, dkt. 11-8.

Mr. Martin raised ineffective assistance of trial counsel again in his state post-conviction proceedings. Mr. Martin's post-conviction petition is not in the record, but at the post-conviction hearing, Mr. Martin questioned his trial attorney Arvil Howe about his review of discovery with Mr. Martin, PCR Tr. 8-9, his investigation of the ballistic evidence, PCR Tr. 9-11, his investigation of witnesses suggested by Mr. Martin, PCR Tr. 13-15, and why he did not move to suppress the probable cause affidavit or the search warrant for the apartment, PCR Tr. 18-28.

In its order, the post-conviction court correctly identified the standard for ineffective assistance of counsel as established by *Strickland v. Washington*, 466 U.S. 668 (1984). Dkt. 11-10 at 7. The post-conviction court rejected his claims, making the following rulings:

> 1. Martin has not met his burden of proof to show that Mr. Howe was ineffective. His questioning of Mr. Howe at the PCR hearing did not develop any fact supporting this issue and he offered no other evidence[] supporting his claim.
>
> 2. Even assuming that Martin has proven Mr. Howe's trial performance was deficient, which he has not, Martin has failed to prove any prejudice.
>
> 3. The issue of ineffectiveness of trial counsel was raised on direct appeal and therefore the Court of Appeals finding that trial counsel was not ineffective is res judicata as to this issue and he may not re-litigate it in a PCR proceeding. *See, Timberlake v. State*, 753 N.E.2d 591, 602 (Ind. 2001)

Dkt. 11-10 at 10-11.

In his brief to the Indiana Court of Appeals, Mr. Martin raised the following allegations of ineffective assistance of counsel: (1) failure to challenge Mr. Martin's competency; (2) failure to investigate Mr. Martin's alibi defense; (3) failure to provide Mr. Martin with a copy of discovery; (4) failure to impeach witness' testimony with the probable cause affidavit to show inconsistencies; (5) failure to object to prosecutorial misconduct; and (6) failure to impeach a witness with test results from the three projectiles discovered at the scene. Dkt. 27-1 at 8.

In the instant petition, Mr. Martin raises the following allegations of ineffective assistance of counsel: Ground Three—failure to challenge Mr. Martin's warrantless arrest and detainment

for over 48 hours due to lack of probable cause; Ground Four—failure to challenge the search warrant of the victim's apartment. Dkt. 1 at 10-12.

The respondent argues that Mr. Martin has procedurally defaulted these two claims of ineffective assistance of counsel by not raising them in his brief. Dkt. 37 at 5. It is true that Mr. Martin did not present these exact claims in his brief, but some of his arguments overlap with other arguments made in his brief, *see, e.g.* dkt. 27-1 at 139. And Mr. Martin presented these claims to the post-conviction court which decided them on the merits.[2] Because denying these claims on the merits is more efficient than trying to decipher Mr. Martin's arguments in his brief to determine the procedural default issue, the Court will proceed to the merits.

Mr. Martin alleges that his trial counsel should have challenged his arrest and detainment due to an inconsistency in the probable cause affidavit. Dkt. 1 at 10-11; *see also* PCR. Tr. 24-27. The probable cause affidavit stated that three of the victim's children saw Mr. Martin carrying a handgun as he fled the apartment. Dkt. 38-9 at 3. At trial, however, none of the children testified to seeing Mr. Martin with a gun that day. Mr. Martin believes that without the probable cause affidavit, there would have been no basis to arrest him and all evidence against him would have been suppressed. PCR Tr. 25. At the post-conviction hearing, Mr. Howe testified that there was no basis to challenge the probable cause affidavit, because "what they put in this probable cause affidavit is what they believe is the evidence in order to get an arrest warrant... I mean that's all it is is allegations. It is not anything to do with proof or anything," so there was no basis to move to suppress it. PCR Tr. 24-25. The post-conviction court also explained to Mr. Martin that the

[2] The post-conviction court stated that Mr. Martin's claims were *res judicata* because they had already been raised and decided against him on direct appeal. But res judicata is not an adequate and independent state law ground that gives rise to procedural default. *See, e.g., Daniels v. Knight*, 476 F.3d 426, 431 (7th Cir. 2007).

charging information alone could have been used to bring Mr. Martin to trial, and a successful motion challenging the probable cause affidavit would have affected only his pretrial bond. PCR Tr. 26. Thus, any motion to suppress would have been denied as meritless, or would have had no impact on the outcome at trial.

Mr. Martin's other ground for ineffective assistance is that his trial counsel should have moved to suppress the evidence found in the apartment due to defects in the search warrant (a copy of which Mr. Martin did not have). At the post-conviction hearing, Mr. Howe testified that he did not remember the specifics of the search warrant for the apartment where the murder occurred; however, he was sure there was no basis to challenge it. He testified, "They were looking for where they believed that you had been involved in a shooting, and they therefore were looking for guns or whatever. There wouldn't be any reason to suppress that at that point based on if they had reason to believe that you were involved in a shooting and they looked for a gun." PCR Tr. 20. Anthony Bontrager, the police officer who obtained the search warrant, Dkt. 38-4 at 80, also testified at the post-conviction hearing. Mr. Bontrager did not remember the specifics of this search warrant either, but he stated in the event of a shooting in an apartment, it was standard practice to search the entire apartment for any firearm or ballistic type evidence. PCR Tr. 47, 49, 51 ("[I]f I would do a warrant for an apartment like that, I'd ask to search the apartment. If there's a shooting involved, I'd ask to look for any firearms, projectiles, casings, and things like that in that apartment, which any place that item could be, I could check.").

The post-conviction court reasonably determined that Mr. Martin did not prove that Mr. Howe performed deficiently with respect to the probable cause affidavit and the search warrant. To succeed on an ineffective assistance of counsel claim for failing to file a motion to suppress, the petitioner "must show that such a motion would have succeeded." *Craigg v. U.S.*,

400 Fed. App'x. 73, 74 (7th Cir. 2010) (citing *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986)). Mr. Martin has made no such showing with respect to either the probable cause affidavit or the search warrant.

The post-conviction court also found that Mr. Martin failed to prove he suffered any prejudice as a result of any errors made by trial counsel. The Court agrees. As described above, the evidence against Mr. Martin was overwhelming, and there is no reasonable probability that these alleged errors would have produced a different outcome.

The post-conviction court reasonably applied *Strickland* when it found that Mr. Martin did not prove that Mr. Howe was ineffective with respect to the grounds raised in the instant petition.

iv. Ground Six—Suppression of Material Information

Ground Six of Mr. Martin's petition is that the State suppressed material evidence—namely test results of the projectiles found at the crime scene, a previous statement by Gerald Cotton that he opened the door to his apartment rather than his goddaughter, and unspecified information from the search warrant—in violation of his due process rights. In *Brady v. Maryland*, the Supreme Court held "that the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). The prosecution suppresses evidence only when it "fail[s] to disclose evidence not otherwise available to a reasonably diligent defendant." *Jardine v. Dittmann*, 658 F.3d 772, 776 (7th Cir. 2011) (citing *United States v. Gray*, 648 F.3d 562, 566–67 (7th Cir. 2011); *Harris v. Kuba*, 486 F.3d 1010, 1015 (7th Cir. 2007)). And "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

The post-conviction court correctly identified *Brady* as the controlling precedent. Dkt. 11-10 at 11. The post-conviction court found that Mr. Martin failed to prove that the State suppressed any material evidence, and he failed to prove that he was prejudiced if any evidence had been suppressed. *Id.* at 11-12. This was a reasonably application of *Brady*.

At the post-conviction hearing, Mr. Martin's trial counsel testified about the ballistics evidence and the probable cause affidavit for the search warrant, but he did not testify that the State suppressed any evidence. PCR Tr. 11-12, 27-28. Mr. Martin called two police officers, but neither of them remembered the crime with any detail. PCR Tr. 32-36, 47-48. None of Mr. Martin's exhibits indicated that the State suppressed any evidence. Dkt. 38-9. As the Court previously discussed, Mr. Martin's exhibit showing the words "auto" did not indicate that an automatic weapon was used. Mr. Martin produced no evidence that the State suppressed material, exculpatory evidence.

In summary, habeas relief is not warranted on any of Mr. Martin's issues. Bypassing the procedural default related to Mr. Martin's post-conviction appellate brief, Grounds One, Two, Three, Four, and Six failed on the merits. Grounds Five, Seven, and Nine failed due to procedural default for lack of fair presentment to the state courts. Ground Eight was the miscarriage of justice exemption to procedural default, and Mr. Martin produced no compelling evidence of innocence to overcome that default.

IV. Certificate of Appealability

"A state prisoner whose petition for a writ of habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Instead, a state prisoner must first obtain a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1). "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.'" 28 U.S.C. § 2253(c)(2). In deciding whether a certificate

of appealability should issue, "the only question is whether the applicant has shown 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." *Buck*, 137 S. Ct. at 773 (citation and quotation marks omitted).

Further, where a claim is resolved on procedural grounds (such as procedural default), a certificate of appealability should issue only if reasonable jurists could disagree about the merits of the underlying constitutional claim *and* about whether the procedural ruling was correct. *Flores-Ramirez v. Foster*, 811 F.3d 861, 865 (7th Cir. 2016).

Rule 11(a) of the Rules Governing Section 2254 Proceedings in the United States District Courts requires the district court to "issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Mr. Martin's claims are procedurally defaulted or meritless. Jurists of reason would not disagree with this Court's resolution of his claims, and nothing about the claims deserves encouragement to proceed further.

The Court therefore **denies** a certificate of appealability.

V. Pending Motions

Because some of Mr. Martin's legal documents were lost in his transfer to another facility, his motion for copies, dkt. [47], is **granted to the extent that the clerk is directed** to include docket 40-2 and docket 41, as well as a copy of the docket sheet, with Mr. Martin's copy of this Order. Mr. Martin's request for docket 40 is **denied as moot**, as a copy was previously provided to Mr. Martin. Dkt. 44. To conserve resources, the clerk may print the documents on both sides of the paper or implement other resource-saving measures.

The Court bypassed the procedural issue involving Mr. Martin's brief, so his motion for an evidentiary hearing, dkt. [57], and motion to appoint counsel, dkt. [59], to resolve that issue are **denied as moot**.

All other pending motions—dkt. [48], dkt. [53], dkt. [56], and dkt. [60], are **denied as moot.**

VI. Conclusion

Mr. Martin's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is **denied** and a certificate of appealability shall not issue.

Final Judgment in accordance with this decision shall issue.

Mr. Martin's motion for copies, dkt. [47], is **granted** to the extent described in section V. All other pending motions—dkt. [48], dkt. [53], dkt. [56], dkt. [57], dkt. [59], and dkt. [60], are **denied as moot**.

IT IS SO ORDERED.

Date: 3/9/2020

JAMES R. SWEENEY II, JUDGE
United States District Court
Southern District of Indiana

Distribution:

KEVIN L. MARTIN
169789
WESTVILLE - CF
WESTVILLE CORRECTIONAL FACILITY
Electronic Service Participant – Court Only

Jesse R. Drum
INDIANA ATTORNEY GENERAL
jesse.drum@atg.in.gov

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

KEVIN L. MARTIN,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 2:18-cv-00441-JRS-MJD
	)	
STATE OF INDIANA,	)	
	)	
Respondent.	)	

FINAL JUDGMENT

The Court now enters final judgment. The petitioner's petition for a writ of habeas corpus is denied, and the action is dismissed with prejudice.

Date: 3/9/2020

James R. Sweeney II

JAMES R. SWEENEY II, JUDGE
United States District Court
Southern District of Indiana

Laura A. Briggs, Clerk

BY: _____
Deputy Clerk, U.S. District Court

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24.

STATE OF INDIANA	)	IN THE ST. JOSEPH SUPERIOR COURT
	)SS:	
COUNTY OF ST. JOSEPH	)	PCR CAUSE NO. 71D03-0806-PC-000022 (Trial Cause No. 71D03- 0707-CR-000012)

KEVIN MARTIN Petitioner,	)	- FILED -
vs.	)	DEC 01 2017
STATE OF INDIANA, Respondent	)	Clerk St. Joseph Superior Court

ORDER DENYING PETITION FOR POST-CONVICTION RELIEF

TRIAL AND APPELLATE HISTORY

On July 24, 2006, the petitioner, Kevin Martin, (hereinafter referred to as "Martin") was charged, by way of an Information, with Murder.

Martin's jury trial commenced on February 12, 2007, and concluded on February 16, 2007, with the jury finding Martin guilty of Murder, as charged. On March 14, 2007, Martin was sentenced to the Indiana Department of Corrections for a period of sixty-five (65) years.

St. Joseph Superior Court Cause No. 71D03-0707-CR-000012 was assigned to and presided over by Hon. Jerome Frese, now retired.

At trial and sentencing, Martin was represented by Mr. Arvil Howe, as public defender. On appeal, Martin was represented by Mr. Charles Lahey, as public defender.

Martin's appeal, before the Indiana Court of Appeals, was docketed as 71A03-0707-CR-323. On appeal, Martin challenged the admission, at trial, of certain evidence, namely a handgun and bullets found in a toolbox; that the trial court erred in its ruling on a defense motion for

separation of witnesses; that there was prosecutorial misconduct; that his trial counsel was ineffective; and that his sentence was inappropriate. On December 31, 2007, in a memorandum decision, the Indiana Court of Appeals affirmed Martin's conviction and sentence as to all issues raised.

POST-CONVICTION RELIEF HISTORY

On June 3, 2008, Martin filed his pro se Petition for Post-Conviction Relief; on June 12, 2008 the State Public Defender was appointed to represent him. On July 14, 2008, the State Public Defender (by way of Gregory Lewis, Deputy Public Defender) entered her appearance. The court granted Martin's counsel's request for an indefinite stay of proceedings and on September 1, 2011, the court granted the State Public Defender's Motion to Withdraw. After that date, Martin proceeded pro se.

This cause was reassigned to Judge Freese's successor, the Hon. Jeffery Sanford, who, on August 10, 2017 and after the evidentiary hearing in this cause recused himself.[1] On August 21, 2017, the Hon. David C. Chapleau, as chief judge of the St. Joseph Superior Court, reassigned this cause to the undersigned judge.

In his original Petition for Post-Conviction Relief, Benson raised numerous issues in a rambling twenty (20) page handwritten supplement to paragraphs numbered 8 and 9 of the petition. However, at the evidentiary hearing held by Judge Sanford on December 2, 2016, those issues were reduced by Martin to two, which the court restates as follows:

1. Martin's trial counsel was ineffective as a matter of law; and

[1] Judge Sanford's recusal was the result of Martin filing a "Tort Claim Notice" indicating his intent to sue Judge Sanford.

2. The State failed to disclose exculpatory evidence.

At the evidentiary hearing held before Judge Sanford, Martin specifically rescinded his claim of ineffectiveness of appellate counsel. (PCR Transcript, p. 5).

After an evidentiary hearing, Judge Sanford took the matter under advisement and requested that the parties submit proposed findings of fact and conclusions of law. On August 15, 2017[2], Martin submitted his proposed findings and conclusions, including a secondary filing entitled "Martin Trial Counsel Should Filed a Motion to Suppress the Evidence Out of Apt A-3 Because the Affidavit was Defective and Challenged Those Part of the State Evidence[3]," which was followed by a pleading entitled "Motion to Clarify," as filed on August 21, 2017 and again on August 29, 2017; and a filing entitled "Martin Correct his Proposed Finding of Fact and Conclusions of Law with the St. Joseph Superior Court," on August 21, 2017. The State submitted its Proposed Findings of fact and Conclusions of Law on July 25, 2017.

On September 7, 2017, after assuming jurisdiction over this case, the undersigned entered an Order for Supplemental Argument, inviting the parties to submit any supplemental authority and argument within thirty days and limited the submissions to 15 pages. The State filed its **2 page** Supplemental Argument on September 11, 2017; Martin responded as follows:

1. September 11, 2017: "Request for Access to Public Record"s - **4 pages**;

2. September 11, 2017: "Motion to Support Martin Proposed Finding of Fact and Conclusions of Law Argues deal With Martin Appellate Counsel Ineffective Assistance

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[2] On May 30, 2017 (pre-hearing) Martin also filed a document entitled "Proposed Finding of Fact and Conclusions of Law?."

[3] The Court will make no (sic) indications with respect to Martin's filings.

on the Direct Appellate for Raise Martin Trial Counsel was Ineffective on Direct Appellate" - **40 pages;**

3. September 27, 2017: "Letter Request the. Hon. Marnocha John M to Reading the Discovery and Compare it to the Trial Transcript and PC-1 Transcript in This Case" - **1 page.**

In reaching its decision, the court has considered the evidence adduced at the post-conviction hearing and relevant portions of Martin's trial transcript. The Court, further, has taken judicial notice of the court files in this cause and in Joseph Superior Court Cause Number 71D03-0607-MR-000012, including the decision of the Indiana Court of Appeals in Appeal No. 71A03-1311-CR-469 as it related to procedural matters and facts of the case. The Court, however, does not regard any argument made, affidavits submitted, or "exhibits" attached to any pleading, filing, or letter, as evidence.

To the extent that any of Martin's filings are to be regarded as motions to be ruled upon, the court, in issuing this order, regards those as either moot or as being denied. The Court views this Order as resolving all pending issues and motions.

Further, any conclusion of law, as made herein, which is are more appropriately a finding of fact, is deemed a finding of fact; any finding of fact , made herein, that is more appropriately a conclusion of law, is deemed a conclusion of law. If any part of the parties' proposed findings of fact and conclusions of law appear to have been adopted herein, the Court represents that any such finding or conclusion has been reviewed by the Court and represents the Court's independent determination as to those issues.

FACTUAL BACKGROUND PRECEDING POST-CONVICTION

The court adopts the Indiana Court of Appeals' recitation of facts as stated in its Memorandum Decision, as follows:

> Martin lived with his girlfriend, Pearlie Dickerson, and her children in Dickerson's apartment. The apartment had two bedrooms. Martin and Dickerson shared one bedroom, and the children shared the other bedroom. On the morning of July 19, 2006, four of the children, J.D. (age sixteen), L.J. (age thirteen), A.D. (age twelve), and E.D. (age seven), were at home. Martin went into the children's bedroom to ask J.D. for a phone number. Martin became angry when J.D. said she did not know the number.
>
> Dickerson intervened in the argument. She told J.D. to go take a shower and told A.D. to close the door to the children's room. While J.D. was in the shower, she could hear Martin and Dickerson yelling. The three other children also heard them yelling. After J.D. returned to her bedroom, the children heard three gunshots. They ran into the hallway, where they saw Dickerson knocking on the neighbor's door and asking for help. Three of the children saw Martin run away. E.D. did not see Martin, but he heard someone running down the stairs.
>
> Gerald Cotton lived in the apartment next door. His goddaughter Siobhan McFadden was visiting him that morning. They heard the gunshots, and a few seconds later, they heard Dickerson knocking on Cotton's door. When McFadden opened the door, Dickerson said, "help me," and collapsed. (Tr. at 461.) McFadden also saw Martin standing behind Dickerson with something in his hand. Other neighbors called 911. The police were dispatched to the scene at 11:45 a.m.
>
> Dickerson had been shot three times. Bullets traveled through her heart, liver, and right lung. Dickerson died from these wounds.
>
> J.D. found Martin's cell phone on the couch. At 11:59 a.m., Martin called his own phone from Emmitt Hinkle's apartment, and J.D. answered. She knew the caller was Martin because he asked how she had gotten his phone and because she recognized his voice. He hung up and then called a second time. Martin asked J.D. if Dickerson was "okay." (Id. at 526.) Martin called a third time and asked to which hospital Dickerson had been taken. An officer took the phone from J.D. and directed Martin to go to the police station. Martin told the officer he was in the area of Lincolnway West and Bendix and was on his way to work. In fact, this area was in a different part of town than Hinkle's apartment, and Martin's place of employment was not open that day.
>
> Martin eventually did go to the police station, where he was arrested. He told police he had left Dickerson's apartment early in the morning, spent time walking

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around, and then went to Hinkle's apartment.

Police found a .38 magnum bullet near the place where Dickerson collapsed and two more in Dickerson's apartment. They also found a nine-millimeter Beretta handgun in Dickerson's apartment. J.D. testified the gun belonged to Martin. Officer Thomas Cameron testified the gun was registered to someone with the last name Martin, but he could not remember the owner's first name. Martin had left his cell phone, wallet, and work identification at Dickerson's apartment.

The police searched Hinkle's apartment and found a toolbox belonging to Martin. The toolbox contained .38 caliber bullets, although of a different type than was used in the shooting.

At trial, Martin testified he left Dickerson's apartment around 10:20 a.m. and walked toward Hinkle's apartment. He claimed he stopped at a shopping center on the way. He denied telling an officer he was in a different part of town and on his way to work. He also denied he had been in an argument with Dickerson earlier that morning.

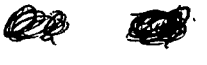
(Ct. Of Appeals, memorandum Decision p. 2 - 4)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Standard of Post-Conviction Review

Post-conviction proceedings are civil proceedings that provide defendants the opportunity to raise issues not known or available at the time of the original trial or direct appeal. *Stephenson v. State*, 864 N.E.2d 1022, 1028 (Ind. 2007) (citing *Conner v. State*, 711 N.E.2d 1238, 1244 (Ind. 1999). Thus, if an issue were known and available but not raised on direct appeal, the issue is procedurally foreclosed. *Id.* (citing *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001)). If an issue was raised and decided on direct appeal, it is res judicata. *Id.* If a claim of ineffective assistance of trial counsel was not raised on direct appeal, that claim is properly raised at a post-conviction proceeding. *Id.*

The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. *Overstreet v. State*, 877 N.E.2d 144, 151 (Ind.



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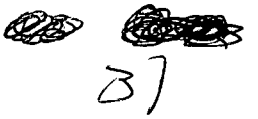
2007) (citing *Fisher v. State,* 810 N.E.2d 674, 679 (Ind. 2004)); *Ind. Post-Conviction Rule 1(5).*

Standard for Gauging Trial Performance

The standard for gauging trial performance was first enunciated in *Strickland v. Washington,* 466 US 668,104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), *Allen v. State,* 749 N.E.2d 1158, 1166-67 (Ind.2001). To prevail on a claim of ineffective assistance of counsel, the petitioner must demonstrate both deficient performance and resulting prejudice. Deficient performance requires a showing that Counsel's representation fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of the petitioner's Sixth Amendment rights. Then, if that first prong of the *Strickland* test is met, the petitioner must show that there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *Dawson v. State,* 810 N.E.2d 1165, 1173 (Ind. App.2004) *trans. denied.* A reasonable probability exists if confidence in the outcome of the case has been undermined by counsel's performance. *Douglas v. State,* 800 N.E.2d 599, 607 (Ind. App.2003) *trans.denied.*

There is a strong presumption that counsel rendered effective assistance and made all significant decisions in the exercise of reasonable professional judgment. *Walker v. State,* 779 N.E.2d 1158, 1161 (Ind. App.2002). Considerable deference is given to counsel's discretion in choosing strategy and tactics. *Id.* Accordingly, a petitioner must show more than isolated poor strategy, bad tactics, a mistake, carelessness or inexperience; the defense as a whole must be inadequate. *Law v. State,* 797 N.E.2d 1157, 162 (Ind. App.2003). Prejudice occurs when the conviction or sentence has resulted from a breakdown of the adversarial process that rendered the result unjust or unreliable. *Law,* 797 N.E.2d at 1162.



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Standard for Appellate Counsel.

The standard for reviewing "a claim of ineffective assistance of appellate counsel is the same as for trial counsel; that is, the defendant must show that appellate counsel was deficient in his performance and that this deficiency resulted in prejudice." *Wrinkles v. State*, 749 N.E.2d 1179, 1203 (Ind. 2001). The "resulting prejudice" occurs when "there is a reasonable probability that the result of the proceeding would have been different but for [the]...inadequate performance." *Cook v. State*, 675 N.E.2d 687, 692 (Ind. 1996).

There are three categories of ineffective assistance of appellate counsel claims, namely: (1) denial of access to appeal; (2) failure to raise issues that should have been raised; and (3) failure to present issues well. *Wrinkles*, 749 N.E.2d at 1203. "When a petitioner claims the denial appellate counsel was ineffective for raising a claim of effective assistance of appellate counsel because counsel did not raise issues the petitioner argues should have been raised, reviewing courts should be particularly deferential to counsel's strategic decision to exclude certain issues in favor of others, unless such a decision was unquestionably unreasonable." *Taylor v. State*, 840 N.E.2d 324, 338 (Ind. 2006).

As stated in *Ben-Yisrayl v. State*, 738 N.E.2d 253 (Ind. 2000):

> The Sixth Amendment entitles a criminal defendant to the effective assistance of counsel not only at trial, but during his first appeal as of right. *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S.Ct. 830, 836, 83 L.Ed.2d 821, 830 (1985). To prevail on his claim that he was deprived of his right to the effective assistance of appellate counsel in presenting the claim of ineffective assistance of trial counsel, the defendant had to establish to the post-conviction court the two components set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See Williams v. Taylor*, 529 U.S. 362, 389–391, 120 S.Ct. 1495, 1511–12, 146 L.Ed.2d 389, 416 (2000); *Roe v. Flores Ortega*, 528 U.S. 470, 474–476, 120 S.Ct. 1029, 1034, 145 L.Ed.2d 985, 994 (2000). First, the defendant had to show that appellate counsel's performance was deficient. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693. This required showing that counsel's representation fell below an objective standard of

reasonableness. Id. at 688, 104 S.Ct. at 2064, 80 L.Ed.2d at 693. Second, the defendant had to show that the deficient performance actually prejudiced the defense, that is, that his appellate counsel's errors were so serious as to deprive the defendant of a fair proceeding, one whose result is reliable. *Id.* at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693. In other words, to establish the element of prejudice, the defendant had to show that there is a reasonable probability that, but for his appellate counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

Although we have generally considered claims of ineffective assistance of appellate counsel as analogous to claims of trial counsel ineffectiveness, *Taylor v. State*, 717 N.E.2d 90, 94 (Ind.1999); *Lowery*, 640 N.E.2d at 1048, there are significant and important differences between the roles of appellate counsel and trial counsel. In *Woods*, this Court observed:

> [E]xpecting appellate lawyers to look outside the record for error is unreasonable in light of the realities of appellate practice. Direct appeal counsel should not be forced to become a second trial counsel. Appellate lawyers may have neither the skills nor the resources nor the time to investigate extra-record claims, much less to present them coherently and persuasively to the trial court.

In a claim that appellate counsel provided ineffective assistance regarding the selection and presentation of issues, the defendant must overcome the strongest presumption of adequate assistance, and judicial scrutiny is highly deferential. *Conner v. State*, 711 N.E.2d 1238, 1252 (Ind.1999); *Bieghler*, 690 N.E.2d at 195–96. In determining whether appellate counsel's performance was deficient, the reviewing court considers the information available in the trial record or otherwise known to appellate counsel. Because the role and function of appellate counsel on direct appeal is different from that of post-conviction counsel, however, the performance of appellate counsel should not be measured by information unknown to appellate counsel but later developed after the appeal by post-conviction counsel. A defendant may establish that his appellate counsel's performance was deficient where counsel failed to present a significant and obvious issue for reasons that cannot be explained by any strategic decision.7 See *Mason v. State*, 689 N.E.2d 1233 (Ind.1997) (describing the rationale employed in *Mason v. Hanks*, 97 F.3d 1887 (7th Cir.1996)). Appellate counsel's decision regarding "what issues to raise and what arguments to make is 'one of the most important strategic decisions to be made by appellate counsel.' " *Conner*, 711 N.E.2d at 1252 (quoting *Bieghler*, 690 N.E.2d at 193 (quoting Lissa Griffin, *The Right to Effective Assistance of Appellate Counsel*, 97 W.VA.L.REV. 1, 26 (1994)). Appellate counsel must consider various factors, including the likelihood of appellate success and the principles of res judicata and procedural default, which may foreclose future review in subsequent post-conviction proceedings.

> When assessing challenges to an appellate counsel's strategic decision to include or exclude issues, reviewing courts should be particularly deferential "unless such a decision was unquestionably unreasonable." *Bieghler*, 690 N.E.2d at 194. Appellate counsel's performance, as to the selection and presentation of issues, will thus be presumed adequate unless found unquestionably unreasonable considering the information available in the trial record or otherwise known to appellate counsel. To prevail on a claim of ineffective assistance of appellate counsel, a defendant must therefore show from the information available in the trial record or otherwise known to appellate counsel that appellate counsel failed to present a significant and obvious issue and that this failure cannot be explained by any reasonable strategy.
>
> When the claim of ineffective assistance is directed at appellate counsel for failing fully and properly to raise and support a claim of ineffective assistance of trial counsel, a defendant faces a compound burden on post-conviction. If the claim relates to issue selection, defense counsel on post-conviction must demonstrate that appellate counsel's performance was deficient and that, but for the deficiency of appellate counsel, trial counsel's performance would have been found deficient and prejudicial. Thus, the defendant's burden before the post-conviction court was to establish the two elements of ineffective assistance of counsel separately as to both trial and appellate counsel.

Ben-Yisrayl, at 260 - 262.

Findings of Fact and Conclusion of Law - Issue 1

The Court sumarizes its decision as to Martin's many claims that his trial counsel was ineffective as follows:

1. Martin has not met his burden of proof to show that Mr. Howe was ineffective. His questioning of Mr. Howe at the PCR hearing did not develop any fact supporting this issue and he offered no other evidence[4] supporting his claim.

2. Even assuming that Martin has proven Mr. Howe's trial performance was deficient, which he has not, Martin has failed to prove any resulting prejudice.

3. The issue of ineffectiveness of trial counsel was raised on direct appeal and therefore

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[4] The Court makes a distinction between "evidence" and "argument," as there certainly was a plethora of "argument" concerning ths issue.

the Court of Appeals finding that trial counsel was not ineffective is res judicata as to this issue and he may not re-litigate it in a PCR proceeding. *See, Timberlake v. State*, 753 N.E.2d 591, 602 (Ind. 2001).

Findings of Fact and Conclusion of Law - Issue 2

As to Martin's "*Brady*[5]" claim, it is difficult to decipher from his various filings and arguments whether his claim is actually a *Brady* claim or whether it is a "newly discovered evidence[6]" issue. Martin, however is insistent that it is a *Brady* claim.[7]

To prevail on a *Brady* claim, Martin must establish that the State suppressed evidence favorable to him, relating either to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); see also *United States v. Bagley*, 473 U.S. 667 (1985); and *United States v. Agurs*, 427 U.S. 97 (1976). Indiana courts have restated the *Brady* standard as follows:

> To prevail on a Brady claim, a defendant must establish:
> (1) that the evidence at issue is favorable to the accused, because it is either exculpatory or impeaching;
> (2) that the evidence was suppressed by the State, either willfully or inadvertently; and
> (3) that the evidence was material to an issue at trial.

Prewitt v. State, 819 N.E.2d 393, 401 (Ind.Ct.App. 2004); *See also, Bunch v.* State, 964 N.E.274, 283 (Ind.Ct.App. 2012).

As to this issue, the Court finds:

1. That Martin has failed to prove that the State suppressed any material evidence.

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[5] *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)

[6] The court notes that Martin argues that the evidence could have been used for **impeachment** purposes. While this assertion would preclude him from claiming that he has a State remedy because it is "newly discovered," *State v. McCraney*, 719 N.E.2d 1187 (Ind. 1999), it does not preclude his *Brady* claim.

[7] See Martin's "Motion Clarify," as filed on August 29, 2017.

whether intentionally or inadvertently; and

2. Martin has failed to prove that, if any evidence was suppressed by the State, that he was prejudiced.

Also, Martin seems to be using this issue as further "evidence" that his trial counsel was ineffective, however the Court has found that he was not.

Findings of Fact and Conclusion of Law - Issue 3

As noted above, at the PCR hearing, Martin specifically disavowed any claim that his appellate counsel was ineffective. However, in his proposed findings of fact and conclusions of law, as filed on August 15, 2017, he again raised that issue. His renewed claim is that because his appellate counsel raised ineffectiveness of counsel on direct appeal that he can not raise that same issue on post conviction.[8]

At the PCR hearing Martin did call his former appellate counsel, Charles Lahey, as a witness. His questioning of Mr. Lahey, which was brief[9] and failed to establish any issue which would have better been a subject of a PCR rather than direct appeal. That is to say, Martin has failed to prove which, if any, claims of ineffectiveness of trial counsel needed information or evidence which was outside of the record and , this should have been preserved for post conviction relief.[10] Further, Martin he has failed to prove there was resulting the resulting prejudice.

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[8] Martin's position here is interesting because he still aruges that his trial counsel was ineffective.

[9] PCR Transcript p. 53 - 55.

[10] See *Timberlake v. State*, 753 N.E.2d 591, 603 - 608.

Findings of Fact and Conclusion of Law - Issue 4

To the extent that Martin's arguments and filings are a request that the Court determine that the was insufficient evidence to support his conviction, the Court declines to do so.

OVERALL FINDING AND JUDGMENT

Accordingly, the Court finds that neither trial counsel nor appellate counsel were ineffective and finds that there was no proof of a *Brady* violation.

IT IS THEREFORE, ORDERED that Martin's Petition For Post-Conviction relief is **DENIED.**

Dated and entered on the date file-stamped above.

John M. Marnocha
Judge, St. Joseph Superior Court

RIGHT TO APPEAL

Martin is hereby advised that this Order constitutes a final and appealable Judgment of the Court. To appeal this judgment, he must, within thirty (30) days of this date, file a notice of appeal with the Clerk of the Indiana Supreme Court and Court of Appeals, as is required by Rule 9 of the Indiana Rules of Appellate Procedure.

Dated and entered on the date file-stamped above.

John M. Marnocha
Judge, St. Joseph Superior Court

Distribution:

File (Clerk)
Gregory Benson, Petitioner
Kenneth Biggins, Deputy Prosecuting Attorney

CERTIFICATION OF SERVICE

The Court certifies that on the date file-stamped hereon, it mailed a copy of this Judgment to the Petitioner, Kevin Martin, at his last known address, that being: Kevin Martin, #169789, Wabash Valley Correctional Facility, P.O. Box 1111, Carlisle, IN 47838.

John M. Marnocha,
Judge, St. Joseph Superior Court

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