No. 19-6323

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TERRANCE HEARD,

Petitioner-Appellant,

v.

GRADY PERRY,

Respondent-Appellee.

ORDER

Before: WHITE, Circuit Judge.

Terrance Heard, a Tennessee prisoner proceeding pro se, appeals a district court judgment dismissing his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Heard requests a certificate of appealability. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). He also requests leave to proceed in forma pauperis.

A jury found Heard guilty of first-degree murder and two counts of especially aggravated kidnapping. He was sentenced to serve life in prison for murder and twenty-five years in prison for each kidnapping conviction. All sentences were ordered to run consecutively. The Tennessee Court of Criminal Appeals affirmed Heard's convictions. *State v. Heard*, No. W2001-02605-CCA-R3-CD, 2003 WL 22718439 (Tenn. Crim. App. Nov. 6, 2003). The Tennessee Supreme Court denied permission to appeal.

Heard filed a state petition for post-conviction relief. Following multiple appointments of counsel and an evidentiary hearing, the trial court denied Heard's petition. The Tennessee Court of Criminal Appeals affirmed the denial of post-conviction relief. *Heard v. State*, No. W2015-00447-CCA-R3-PC, 2016 WL 1055381 (Tenn. Crim. App. Mar. 16, 2016). The Tennessee Supreme Court dismissed Heard's application for permission to appeal.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
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Filed: November 17, 2020

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Mr. Terrance Heard
South Central Correctional Center
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Re: Case No. 19-6323, *Terrance Heard v. Grady Perry*
Originating Case No. : 2:16-cv-02373

Dear Counsel and Mr. Heard,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Briston S. Mitchell
Case Manager
Direct Dial No. 513-564-7082

cc: Mr. Thomas M. Gould

Enclosure

No mandate to issue

Heard filed a habeas corpus petition, alleging four grounds for relief. Heard subsequently filed an amended habeas corpus petition, alleging the first two grounds for relief from his initial petition and twenty-nine more. Heard's amended petition alleged that: (1) trial and appellate counsel, C. Anne Tipton, was ineffective for failing to properly investigate the case and present viable defense theories, adequately represent him during trial and appeal, and interview Carlos Bean, Ervin Brooks, and other co-defendants who would have testified favorably for the defense; (2) the prosecutor engaged in misconduct by knowingly allowing Ricky and Timothy Aldridge to testify falsely at his trial after both had testified inconsistently "regarding the same subject matter" in a prior trial and provided statements that were inconsistent with their testimony at his trial; (3) post-conviction counsel, Eric Mogy, was ineffective because he failed to file the record for appeal, which caused the procedural default of "every single viable [ineffective-assistance-of-counsel] claim" against Tipton; and Tipton (5) "was ineffective for failing to: (a) properly cross examine witnesses Ricky and Timothy Aldridge and (b) impeach them with their prior inconsistent statements; (7) properly object to the perjured testimony of Timothy Aldridge; (9) present testimony from Bean, Brooks, and Smith; (11) []properly support the defenses of duress/coercion and "unavoidable necessity[]"; (13) request a jury instruction on the lesser included offense of criminal responsibility for facilitation of conduct of another; (15) to properly argue that he was entitled to the lesser included offense instructions under Tennessee law; (17) present the fact that co-defendant Anwar Proby had confessed to being the driver; (19) call any witnesses other than the defendant; (21) to investigate the case "and develop a proper [trial] strategy"; (23) to challenge the "reliability of the photo array used by the State"; (25) to challenge "the admissibility of the photo array used by the State during his [trial]"; (27) object to the prosecution's claim that it would prove he was criminally responsible for the victim's murder; (29) argue that the State knowingly suborned perjury and presented false testimony from Ricky and Timothy Aldridge; or (31) argue that the State knowingly withheld *Brady* material. In his fourth, sixth, eighth, tenth, twelfth, fourteenth, sixteenth, eighteenth, twentieth, twenty-second, twenty-fourth, twenty-sixth, twenty-eighth, and thirtieth claims, Heard argued that Mogy was ineffective for failing to raise the

ineffective assistance of trial counsel claims raised in Heard's fifth, seventh, ninth, eleventh, thirteenth, fifteenth, seventeenth, nineteenth, twenty-first, twenty-third, twenty-fifth, twenty-seventh, twenty-ninth, and thirty-first claims.

The district court dismissed Heard's habeas corpus petition and denied a certificate of appealability. The district court concluded that Heard's claims lacked merit, were non-cognizable, and/or were procedurally defaulted.

A certificate of appealability may issue only if a petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a habeas corpus petition is denied on procedural grounds, the 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).

Heard has abandoned his third claim because he does not request a certificate of appealability for it. *See Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002) (per curiam).

The district court concluded that part (b) of Heard's fifth claim, alleging ineffective assistance of trial counsel based on Tipton's failure to impeach Ricky and Timothy Aldridge "with their prior inconsistent statements," lacked merit. The district court found that the Tennessee Courts applied the correct standard for analyzing ineffective-assistance-of-counsel claims on post-conviction review and that Heard failed to show that the Tennessee appellate courts ultimate decision "was objectively unreasonable."

However, the Tennessee Court of Criminal Appeals did not consider the merits of this claim on post-conviction review; instead, that court's decision rested on a procedural bar—Heard's failure to file the appellate record. *Heard*, 2016 WL 1055381, at *1, 3. The Tennessee Court of Criminal Appeals presumed correct the trial court's denial of post-conviction relief and did not independently discuss the merits of the ineffective-assistance-of-trial-counsel claim presented by Heard in his post-conviction appeal because, contrary to Tennessee Rule of Appellate Procedure

24(b), he failed "to file an adequate record," including the evidentiary hearing transcript. *Id.* at *3. On this record, the opinion of the Tennessee Court of Criminal Appeals rests on a procedural bar. *Harris v. Reed*, 489 U.S. 255, 263 (1989) (a federal claim may be procedurally defaulted when a state court "'clearly and expressly' states that its judgment rests on a state procedural bar" (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985))).

A habeas corpus petitioner procedurally defaults a federal claim in state court when "(1) [the petitioner] failed to comply with a state procedural rule; (2) the [] state courts enforced the rule; (3) the [state] procedural rule is an adequate and independent state ground for denying review of [the petitioner's] federal constitutional claim; and (4) [the petitioner] cannot show cause and prejudice excusing the default." *Williams v. Burt*, 949 F.3d 966, 972-73 (6th Cir. 2020) (citing *Guilmette v. Howes*, 624 F.3d 286, 290 (6th Cir. 2010) (en banc)) *pet. for cert. filed*, (U.S. Apr. 13, 2020). The Tennessee Court of Criminal Appeals invoked Rule 24(b) to affirm in Heard's post-conviction appeal without reaching the merits of the ineffective-assistance-of-trial-counsel claim presented. *Heard*, 2016 WL 1055381, at *3. Rule 24(b) "is an adequate and independent state ground to support a finding of procedural default." *Ray v. Holland*, No. 98-6255, 2000 WL 1290219, at *5 (6th Cir. Sept. 5, 2000). Because Heard failed to comply with a state procedural rule and the state appellate court enforced the rule, part (b) of his fifth claim is procedurally defaulted and "does not deserve encouragement to proceed further." *See Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Habeas corpus review of procedurally defaulted claims "is barred unless the prisoner can demonstrate cause for the default and actual prejudice . . . or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). To establish cause, a habeas corpus petitioner ordinarily must "show that some objective factor external to the defense" prevented the petitioner's compliance with a state procedural rule. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Heard concedes that the ineffective-assistance-of-trial-counsel claim presented on post-conviction review to the Tennessee Court of Criminal Appeals is procedurally defaulted, yet he offers no cause or prejudice to excuse

the default. Assuming that Heard would assert the ineffectiveness of his post-conviction appellate counsel for failing to prepare the record for appeal as cause to excuse the default, that assertion is unpersuasive. "[A] claim of ineffective assistance of state *appellate* collateral counsel does not provide cause to excuse the procedural default of the claims [the petitioner] raised below during initial collateral proceeding . . . ." *Atkins v. Holloway*, 792 F.3d 654, 661 (6th Cir. 2015); *see also Martinez v. Ryan*, 566 U.S. 1, 16 (2012) ("The holding in this case [that ineffective assistance of initial-review collateral counsel in some circumstances can constitute cause to excuse the procedural default of a substantial ineffective-assistance-of-trial-counsel claim] does not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings . . . ."). Additionally, Heard did not demonstrate that the failure to consider his procedurally defaulted claim would result in a fundamental miscarriage of justice. *See McCleskey v. Zant*, 499 U.S. 467, 494-95 (1991); *Murray*, 477 U.S. at 496.

The district court concluded that Heard's first, second, part (a) of his fifth, seventh, ninth, eleventh, seventeenth, nineteenth, twenty-first, and twenty-seventh grounds for relief were procedurally defaulted because they were presented in his post-conviction petitions but were not presented in his state post-conviction appeal. Reasonable jurists would not disagree with the district court's conclusion. Heard presented these claims to the trial court in his post-conviction petitions, as amended. But post-conviction counsel did not present these claims to the state appellate court on post-conviction appeal. Heard now has no available avenue to present these claims to the state courts due to Tennessee's limitation on the filing of multiple post-conviction petitions. *See* Tenn. Code Ann. § 40-30-102(c). An unexhausted claim is procedurally defaulted if there is no available state court forum in which to raise that claim. *See Gray v. Netherland*, 518 U.S. 152, 161-62 (1996); *Pudelski v. Wilson*, 576 F.3d 595, 606 (6th Cir. 2009).

Reasonable jurists would not debate the district court's conclusion that post-conviction appellate counsel's ineffectiveness could not establish cause to excuse the procedural default of Heard's first, second, part (a) of his fifth, seventh, ninth, eleventh, seventeenth, nineteenth, twenty-first, and twenty-seventh claims. *See Martinez*, 566 U.S. at 16. Additionally, Heard did not

demonstrate that the failure to consider his procedurally defaulted claims would result in a fundamental miscarriage of justice. *See McCleskey*, 499 U.S. at 494-95; *Murray*, 477 U.S. at 496. Reasonable jurists would not debate the district court's procedural ruling as to these claims.

The district court concluded that Heard's remaining ineffective-assistance-of-trial-counsel claims—claims thirteen, fifteen, twenty-three, twenty-five, twenty-nine, and thirty-one—were procedurally defaulted because post-conviction counsel did not present them on post-conviction review and the claims were not substantial. Reasonable jurists would not debate the district court's conclusions. To establish ineffective assistance of counsel, a defendant must show deficient performance and resulting prejudice. *Strickland*, 466 U.S. at 687. The performance inquiry requires the defendant to "show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. The prejudice inquiry requires the defendant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "The standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Harrington*, 562 U.S. at 105 (citations omitted).

Heard argued, in claims twelve, fourteen, twenty-two, twenty-four, twenty-eight, and thirty, that post-conviction counsel's ineffectiveness in failing to present these ineffective-assistance-of-trial-counsel claims in his post-conviction petitions should excuse his default. The "ineffective assistance of post-conviction counsel can establish cause to excuse a Tennessee defendant's procedural default of a substantial claim of ineffective assistance at trial." *Sutton v. Carpenter*, 745 F.3d 787, 795-96 (6th Cir. 2014). But for ineffective assistance of post-conviction counsel to serve as cause to excuse the procedural default of an ineffective-assistance-of-trial-counsel claim, the petitioner must show that the ineffective-assistance-of-trial-counsel claim is "substantial"—i.e., that it "has some merit." *Martinez*, 566 U.S. at 14. Moreover, to obtain a certificate of appealability, Heard must also show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." *Slack*, 529 U.S. at 484. To meet this standard, "it is not enough for a petitioner to allege claims that are arguably

constitutional; those claims must also be arguably *valid* or *meritorious*." *Dufresne v. Palmer*, 876 F.3d 248, 254 (6th Cir. 2017) (per curiam).

In claims twelve and thirteen, Heard argued that Tipton was ineffective for failing to request a jury instruction "on the lesser included offense of criminal responsibility for facilitation" and that Mogy was ineffective for failing to present that argument on post-conviction review. The district court concluded that this underlying ineffective-assistance-of-trial-counsel claim was not substantial because Tipton requested a jury instruction on criminal responsibility for facilitation of a felony.

The record supports the district court's conclusion—Tipton unsuccessfully requested the jury instruction at issue during Heard's trial. Because Tipton requested the jury instruction, Mogy was not ineffective for failing to pursue a frivolous claim that Tipton was ineffective for failing to do so. *See Sutton v. Bell*, 645 F.3d 752, 755 (6th Cir. 2011) (noting that counsel is not ineffective for failing to pursue a meritless issue or argument). Reasonable jurists would not debate the district court's conclusion that Heard's twelfth and thirteenth claims, alleging ineffective assistance of post-conviction and trial counsel, are meritless and insubstantial, respectively. *See Martinez*, 566 U.S. at 16; *Sutton*, 645 F.3d at 755.

In claims fourteen and fifteen, Heard argued that Tipton was ineffective for failing to argue that the jury should be instructed on the lesser-included offenses of criminally negligent homicide and reckless homicide and that Mogy was ineffective for failing to present that argument on post-conviction review. The district court concluded that this underlying ineffective-assistance-of-trial-counsel claim was not substantial because the evidence did not support jury instructions on the lesser-included offenses of criminally negligent homicide and reckless homicide.

Under Tennessee law, "[c]riminally negligent conduct that results in death constitutes criminally negligent homicide." Tenn. Code Ann. § 39-13-213(a). "Reckless homicide is a reckless killing of another." Tenn. Code Ann. § 39-13-215. Here: (1) Ricky Aldridge testified that (a) Heard was present and voted at a gang meeting in favor of inflicting a beating punishment on the decedent and himself for violating gang rules, (b) Heard held the decedent while other gang

members beat him with "iron crowbars, baseball bats" and fists, and (c) Heard also beat the decedent with his fists before grabbing the decedent and holding him while other gang members beat him; (2) Timothy Aldridge testified that (a) Heard attended a gang meeting at which gang members discussed inflicting a beating punishment on the decedent and Ricky Aldridge for violating gang rules, (b) Heard drove one of the vehicles, a black truck, to the location where the beatings occurred, and (c) Heard participated in the beating of the decedent that led to his death; and (3) Walker testified that (a) he held the position of chief of security in the gang, and (b) the only punishment imposed for a violation of gang rules that involved weapons was a death punishment.

Assuming arguendo that Heard was entitled to the criminally negligent homicide and reckless homicide instructions, he has failed to show that, had the jury been given these instructions, he would have been acquitted of the more serious charge of first-degree murder. Notably, the jury found Heard guilty of first-degree murder despite having the option of finding him guilty of the lesser-included offense of second-degree murder. Reasonable jurists would not debate the district court's conclusion that Heard's fourteenth and fifteenth ineffective-assistance-of-post-conviction-and-trial-counsel claims are meritless and insubstantial, respectively. *See Martinez*, 566 U.S. at 16; *Sutton*, 645 F.3d at 755.

In claims twenty-two and twenty-three, Heard argued that Tipton was ineffective for failing to challenge the "reliability of the photo array used by the State" and that Mogy was ineffective for failing to present that argument on post-conviction review. In claims twenty-four and twenty-five, Heard argued that Tipton was ineffective for failing to challenge "the admissibility of the photo array used by the State" and that Mogy was ineffective for failing to present that argument on post-conviction review. The district court concluded that these underlying ineffective-assistance-of-trial-counsel claims were not substantial because Tipton filed a pre-trial motion to suppress the photo array used by the State on grounds of suggestiveness and inadmissibility and also challenged the trial court's denial of the motion on direct appeal. The district court noted that,

beyond speculation, Heard did not present any "facts, argument, affidavits, or evidence" that, had Tipton presented them to either the trial or appellate court, "would have led to a different outcome."

The record supports the district court's conclusions. Tipton challenged the photo array used by the State through a motion to suppress but was unsuccessful in both the trial and appellate courts. *Heard*, 2003 WL 22718439, at *12-16. Thus, Mogy was not ineffective for failing to pursue a meritless claim that Tipton was ineffective for failing to challenge the State's photo array. *See Sutton*, 645 F.3d at 755. Because Tipton challenged the photo array used by the State, and speculation is "insufficient to support an ineffective-assistance claim," *Fautenberry v. Mitchell*, 515 F.3d 614, 634 (6th Cir. 2008), reasonable jurists would not debate the district court's conclusion that these claims are not substantial. *See Martinez*, 566 U.S. at 16.

In his twenty-eighth and twenty-ninth claims, Heard argued that Tipton was ineffective for failing to argue that the State knowingly suborned perjury and presented false testimony from Ricky and Timothy Aldridge and that Mogy was ineffective for failing to present that argument on post-conviction review. In claims thirty and thirty-one, Heard reiterated the arguments in claims twenty-eight and twenty-nine and also argued that the State knowingly withheld *Brady* material. Heard argued that Ricky Aldridge, Timothy Aldridge, and Robert Walker falsely testified that they did not receive any leniency or benefit in exchange for their testimony at his trial and that the State knew their testimony was false but did not disclose the "documented non-prosecution agreement[s] with Ricky Aldridge and Robert Walker" to Tipton.

The district court concluded that these underlying ineffective-assistance-of-trial-counsel and *Brady* claims were not substantial because they were based on pure speculation rather than facts and evidence. The district court concluded that Heard failed to show "that the State had non-prosecution agreements with" Ricky Aldridge or Timothy Aldridge. The district court also pointed out that Heard's claims were belied by the record.

The record supports the district court's conclusions. Timothy Aldridge testified that the police contacted him after the crimes but he was neither arrested nor charged with any crimes. Walker testified that, while he was incarcerated on an aggravated robbery charge, he testified on

several previous occasions in criminal proceedings both related and unrelated to Heard's case. Walker stated that he was advised that his testimony on those previous occasions would be considered when his aggravated robbery charge was resolved but he did not receive any specific promises.

Heard's claims that Ricky Aldridge, Timothy Aldridge, and Walker had non-prosecution agreements were speculative; he presented no evidence to support them. And because those claims were speculative, Heard could not show that the prosecution presented false testimony when Timothy Aldridge and Walker testified concerning their expectations regarding leniency. Similarly, because Heard's claims that Ricky Aldridge, Timothy Aldridge, and Walker had non-prosecution agreements were speculative, Heard could not show that the State violated *Brady* by failing to disclose the purported non-prosecution agreements. Because Tipton did not have a reason to argue that the State knowingly suborned perjury or presented false testimony at Heard's trial, and Heard's claim that she did is based on pure speculation, no reasonable jurist could debate the district court's conclusion that the underlying ineffective-assistance-of-trial-counsel claims are not substantial. *See id.* Heard failed to establish ineffective assistance of trial counsel and ineffective assistance of post-conviction counsel for failing to present a meritless ineffective-assistance-of-trial-counsel claim. *See Sutton*, 645 F.3d at 755.

In his fourth, sixth, eighth, tenth, sixteenth, eighteenth, twentieth, and twenty-sixth claims, Heard argues that Mogy was ineffective for failing to present in his post-conviction appeal the ineffective-assistance-of-trial-counsel claims identified in claims five, seven, nine, eleven, seventeen, nineteen, twenty-one, and twenty-seven of his amended habeas corpus petition. But because "[t]here is no constitutional right to an attorney in state post-conviction proceedings," *Coleman*, 501 U.S. at 752, no reasonable jurist could debate the district court's rejection of these claims.

Accordingly, the application for a certificate of appealability is **DENIED**, and the motion to proceed in forma pauperis is **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

TERRANCE HEARD, Petitioner, v. CHERRY LINDAMOOD, Respondent.	)	No. 2:16-cv-02373-TLP-tmp

ORDER OF DISMISSAL
ORDER DENYING CERTIFICATE OF APPEALABILITY
ORDER CERTIFYING APPEAL NOT TAKEN IN GOOD FAITH
AND
ORDER DENYING LEAVE TO PROCEED *IN FORMA PAUPERIS* ON APPEAL

Petitioner Terrance Heard is a state prisoner at the South Central Correctional Facility ("SCCF") in Clifton, Tennessee.[1] He petitions the Court for a writ of habeas corpus under 28 U.S.C. § 2254 ("§ 2254 Petition ("Pet.") and the Amended ("Am.") § 2254 Petition. (ECF Nos. 1, 14, and 14-1) Respondent answered and Petitioner replied. (ECF Nos. 16 and 17.)

As discussed more fully below, the issues Petitioner raises in the habeas petition fall into three categories: 1) whether the state court identified and applied the correct federal legal principles, 2) whether he is barred from bringing the claim by procedural default, and 3) whether his claim presents a question of federal law. For the reasons discussed below, the petition is **DISMISSED**.

I. STATE COURT PROCEDURAL HISTORY

[1] His Tennessee Department of Correction ("TDOC") prisoner number is 337117.

In early 1998, a Shelby County grand jury returned indictments charging Terrance Heard and fourteen codefendants for the kidnapping and murder of Marshall Shipp and the kidnapping and beating of Ricky Aldridge. (R., Indictments, ECF No. 15-1 at PageID 201-09.) The indictment charged each defendant with one count of first-degree premeditated murder, two counts of felony murder, and two counts of especially aggravated kidnapping. (*Id.*) Petitioner went to trial over three years later. The jury returned a verdict of guilty on all counts. (R., Minutes ("Mins."), ECF No. 15-1 at PageID 254-55.) The trial court merged the murder convictions. (R., Judgment ("J."), ECF No. 15-1 at PageID 280.)

The trial court sentenced Heard to life in prison for the first-degree premeditated murder conviction and plus a consecutive sentence of twenty-five years in prison for each especially aggravated kidnapping conviction. (R., J., ECF No. 15-1 at PageID 280-82.) Heard appealed. (R., Notice of Appeal, ECF No. 15-1 at PageID 289.) The Tennessee Court of Criminal Appeals ("TCCA") affirmed. *State v. Heard*, No. W2001-02605-CCA-R3-CD, 2003 WL 22718439 (Tenn. Crim. App. Nov. 6, 2003), *perm. app. denied* (Tenn. March. 22, 2004).

Heard petitioned *pro se* the trial court under the Tennessee Post-Conviction Procedure Act, Tenn. Code Ann. §§ 40-30-101-122. (R., Pet. for Post-Conviction Relief, ECF No. 15-22 at PageID 2259-93.) The court appointed counsel for Petitioner in late 2004. (R., Order, ECF No. 15-22 at PageID 2324.) Appointed counsel amended the petition in late 2005. (R., Am. Pet., ECF No. 15-22 at PageID 2330-38.)

In 2014, newly appointed counsel amended the petition again. (R., Second Am. Pet., ECF No. 15-22 at PageID 2347-52.) Later in 2014, counsel amended petition for the third time. (R., Third Am. Pet., ECF No. 15-22 at PageID 2353-62.) The post-conviction court conducted an evidentiary hearing and denied relief. (R., Order, ECF No. 15-22 at PageID 2365-79.) Heard

appealed that order. (R., Notice of Appeal, ECF No. 15-22 at PageID 2381.) The TCCA affirmed. *Heard v. State*, No. W2015-006447-CCA-R3-PC, 2016 WL 1055381 (Tenn. Crim. App. Mar. 16, 2016), *perm. app. denied* (Tenn. July 20, 2016).

On direct appeal from the conviction, the Tennessee Court of Criminal Appeals summarized the evidence presented at trial:

> **I. Facts**
>
> This case arises from the kidnapping and murder of Marshall "Pokey" Shipp and the kidnapping and beating of Ricky "Kuboo" Aldridge by several members of the Gangster Disciples street gang on September 15, 1997. On February 24, 1998, the Shelby County Grand Jury indicted the Defendant, Terrance "Mohawk" Heard, and fourteen other co-defendants, all members of the Gangster Disciples, for first degree premeditated murder, murder in the perpetration of a kidnapping, murder in the perpetration of a robbery, and multiple counts of especially aggravated kidnapping for the crimes committed against the victims Shipp and Ricky Aldridge.
>
> The Defendant was tried on August 6, 2001, in the Criminal Court of Shelby County for the following charges: (1) premeditated first degree murder of Shipp; (2) first degree murder of Shipp during the perpetration of a kidnapping; (3) especially aggravated kidnapping of Shipp; and (4) especially aggravated kidnapping of Ricky Aldridge. Following a five day trial, a Shelby County jury found the Defendant guilty of each charge, and the trial court merged the premeditated murder conviction with the felony-murder conviction, sentenced the Defendant to life imprisonment with the possibility of parole on the first degree murder conviction and twenty-five years for each count of especially aggravated kidnapping, and ordered the sentences to run consecutively. The Defendant now appeals.
>
> **A. The Gangster Disciples**
>
> Robert Walker testified for the State at the Defendant's trial regarding the Gangster Disciples organization in Memphis, including the gang's hierarchical structure, its rules, and its punishment for violations of the rules. In 1997, Walker held the position of chief of security for Memphis in the Gangster Disciples organization until he was arrested on two counts of aggravated robbery in the fall of that year. Walker later pled guilty to two counts of facilitation of robbery and agreed to cooperate with the State in this case. Walker testified that in 1996 he joined the Gangster Disciples in Memphis at the age of twenty-seven after he moved from Detroit, where he had been a member of the Black Gangster Disciples since the age of thirteen.

Walker explained that the Gangster Disciples organization is governed by a board of directors in Chicago, which appoints "overseers" in other cities. He stated that King Larry Hoover was the national leader of the Gangster Disciples. Walker testified that in 1997, the Memphis overseer was Tony "T-Money" Phillips, who had authority over all Gangster Disciple activity in the area. He stated that the overseer appointed two chiefs of security in Memphis to enforce gang rules. Walker stated that he was appointed "growth and development" chief of security, while Johnny "Jay Rock" Jefferson was appointed chief of security "enforcer." Walker testified that as "growth and development" chief of security, he was in charge of determining whether a gang member broke the rules and investigating the facts of rule infractions, while Jefferson, as the "enforcer," would administer punishments to enforce the rules. Walker testified that each chief of security had two assistants.

Walker explained that Memphis was divided into several territories, which were each controlled by a governor appointed by the overseer. Walker stated that also under the overseer was an "auxiliary governor," who acted as a middle-man between the governors and the overseer. He further explained that under the "auxiliary governor" was a "floating regent," who had authority in any territory in Memphis. He stated that the governor of the South Memphis region, where these crimes occurred, was Corey "Tombstone" Mickens. Walker explained that each regional governor had an assistant governor and a regent. Walker stated that within each Memphis region, individual neighborhoods had coordinators and chiefs of security. He testified that the remaining Gangster Disciples were "outstanding members" with no authority.

Walker explained that the Gangster Disciples had their own rules and methods of enforcing those rules. He stated that the punishments for violating Gangster Disciple rules ranged from monetary fines to death. Walker testified that other forms of punishment included various degrees of beatings, such as a mouth shot, a three-minute beating, a six-minute beating, or a "pumpkin head deluxe," depending upon the severity of the violation. All of these beating punishments involved the use of fists only, no weapons. The "pumpkin head deluxe" involved putting the victim in a full nelson and allowing other members to beat his head for six minutes until his head was the size of a pumpkin. Walker explained that these beatings could be ordered by the overseer, the chiefs of security, the floating regent, the governors, or the neighborhood coordinators. Walker testified that the punishment of death was referred to as "eradication" in Gangster Disciple terminology and could only be ordered by the overseer. Walker stated that a governor may ask the overseer for permission to kill a member in his region, and if he receives permission, the governor may carry out the "eradication." He explained that death punishments were reserved for more serious violations of Gangster Disciple rules, such as shooting at other Gangster Disciples, not following orders,

disrespecting an authority figure within the gang, and breaking "19/19," the code of silence, by talking with police or testifying.

Walker further explained that Gangster Disciples use different methods of killing in order to convey messages to other Gangster Disciples and deter them from violating gang rules. He testified that some of the symbolic methods of "eradication" included "[s]even times in the chest, one time up the butt, . . . cut your penis off." Walker explained that these symbolic methods were used:

> Just to let a person know, you know, he did this so if you do it, this is what's going to happen to you, you know. Shoot him up the butt and let everybody know, you know, he was disobedient to this organization. So he a punk in this organization. He a punk in his death. You know, cut his penis off, you know, he did something wrong, he told on this organization. So you tell on this organization, this what's going to happen to you.

Walker explained that death sentences were carried out in remote locations and that any Gangster Disciple, regardless of rank, may take part in the death sentence. He stated that outstanding members would often want to participate in "eradications" in order to impress higher ranking Gangster Disciples and advance in rank themselves. Walker also explained that an "OG," or "Original Gangster," was a Gangster Disciple member who had "been in it is so long he know everything about it just by-so it ain't no way for him to get out." He stated that the only way for an "Original Gangster" to get out of the Gangster Disciple organization was by death.

B. Shipp's and Ricky Aldridge's Violations of the Gangster Disciple Rules

Veronica Johnson, a Gangster Disciple member in 1997, testified that Shipp was an "Original Gangster" member of the Gangster Disciples because, at thirty-one years old, he was older than most Gangster Disciples. She explained that "it's an older crowd and it's a younger crowd. . . . The older crowd [is] level headed, they're level heads. The younger crowd is about robbing, stealing, killing, and beating people." Johnson testified that Shipp, as an "OG" Gangster Disciple, attempted to teach the younger Gangster Disciples and "tried to tell them right from wrong." Sharon Grafton, a childhood friend of Shipp, testified that she got reacquainted with Shipp in March of 1997 because she began dating Shipp's best friend, Patrick Owens. Grafton testified that she had a "social conversation" with Shipp about a month prior to his murder, and the Defendant's counsel immediately asked for a bench conference and objected to this testimony as hearsay. During the bench conference, the State argued that Grafton's testimony "clearly [went] to [Shipp's] state of mind," and defense counsel countered by arguing that there was

not "a close enough nexus" between the statement and the incidents leading up to the murder. The trial court allowed the testimony, explaining:

> I think given the sort of regularity of these incidents, this statement made on one day, two weeks later one incident, a week after that a second incident, a week after he's killed. That is all, I think, very consistent with his state of mind and sort of underscores his overall frame of mind. . . ."

Following this ruling, Grafton testified that Shipp told her that "he was tired of the lifestyle and the environment that he was in" and that "[h]e wanted to get out" of the Gangster Disciples.

Johnson testified about an altercation between the Gangster Disciples and Shipp that occurred at the L & B Lounge during her birthday party on August 29, 1997, which was attended by some Gangster Disciples, including Shipp and his girlfriend, Cheryl Patrick. Patrick, a Gangster Disciple, was also Johnson's roommate and close friend. In addition to Gangster Disciples, Johnson stated that Devin Haywood, a mentally handicapped man whom "neighborhood people looked after all the time," also attended her birthday party.

Johnson testified that at some point during the evening, she saw Haywood on his knees in the middle of Third Street being held at gunpoint by nine or ten Gangster Disciple members. She stated that the Gangster Disciples started to beat Haywood with their guns. She reported that the Defendant associated with several of the Gangster Disciples involved in the beating, though the Defendant was not present at this incident. Johnson testified that once Shipp saw Haywood getting severely beaten, Shipp ran out to the group of Gangster Disciples and attempted to push them off Haywood. Johnson stated that Christopher Smith, assistant governor of the Gangster Disciples of South Memphis, "told [Shipp] that he was interfering in GD business." Johnson testified that Shipp "kept telling them to get off [Haywood] and pushing them off of him." She stated that in response to Shipp's actions, Smith "told [Shipp] he just signed his death certificate." Johnson testified that once the group of Gangster Disciples surrounding Haywood dispersed, she knelt down beside Haywood and held his hand as they waited for the ambulance. Johnson explained, "[Haywood's] face was real swollen. His eye was like, you know, huge like it was going to burst or something." Johnson testified that she quit the Gangster Disciples, or "dropped her flag," in September of 1997.

Cheryl Patrick testified that she was living with her friend Veronica Johnson and dating Shipp in 1997. Patrick stated that on September 11, 1997, she and a friend walked to meet Shipp at the L & B Lounge. She reported that once they arrived at the lounge, she saw Shipp and Carlos Bean, another Gangster Disciple, arguing in front of the lounge. Patrick testified that "[Bean] was telling [Shipp] he wasn't GD no more and he had some guys that wanted to do him. . . ." She stated

that Shipp replied, "Just go on," and then he crossed the street. Patrick testified that Bean followed Shipp across the street, and "[Bean] was just cussing, calling out his name, telling [Shipp] that he wasn't GD . . . and [saying,] 'I got some nigger that want to do you anyway.'" Patrick reported that Shipp did not respond to Bean except to tell him, "Go on Carlos. I don't want to hear that." She stated that Bean then shoved Shipp, and Shipp responded by grabbing Bean and pushing him away, telling him to "go on." Thereafter, Patrick testified that the altercation escalated and Bean and several others holding pool sticks surrounded Shipp. She stated that the Defendant was not present during this altercation. Patrick testified that Shipp's sister then pulled up in her car with Shipp's cousin Ricky Aldridge and another cousin, Marcus "Scutt" Aldridge. She reported that Ricky Aldridge got out of the car and began shooting into the air, which immediately dispersed the crowd.

Ricky Aldridge, Shipp's cousin, testified that he joined the Gangster Disciples while at the Shelby County Correctional Center in 1996 and continued his affiliation with the gang when he was released in March of 1997. Ricky Aldridge testified that in 1997, Shipp was not interacting with the younger members of the Gangster Disciples and did not attend gang meetings. He testified that on September 11, 1997, he was at his cousin's house a block away from the L & B Lounge when Shipp's sister came by the house and told him that "[Shipp] was into it with some guys up on the hill." Ricky Aldridge reported that he got in the car with Shipp's sister and his cousin Marcus Aldridge and drove up the hill to see what was going on at the lounge. Ricky Aldridge stated, "we made it up there and we seen some guys have [Shipp] surrounded. So I jumped out of the car and shot up in the air two times and broke the crowd up and everybody just scattered." He testified that after the crowd dispersed, he got back into the car and they drove away from the lounge. Ricky Aldridge stated that Shipp ran away from the scene after the shots were fired.

C. Gangster Disciples' Punishment of Shipp and Ricky Aldridge

Following the two incidents at the L & B Lounge involving Shipp and Ricky Aldridge, Walker testified that various Gangster Disciple leaders discussed what should be done with Shipp and Ricky Aldridge regarding these violations of gang rules. Walker testified that following the incident at the L & B Lounge on August 29, 1997, Mickens, governor of South Memphis, visited Phillips, the overseer, at his residence to discuss Shipp. Walker stated that as chief of security, he was present during this meeting and heard Mickens tell Phillips that "he got a brother being rebellious, you know, and he asked [Phillips] what to do. [Phillips] told him to deal with it." Walker stated that Mickens returned to Phillips's residence after the September 11, 1997 incident in front of the L & B Lounge. Walker testified that Mickens again expressed concern over Shipp being a "rebellious brother." Walker reported that Phillips "asked [Mickens] why [Shipp] was still here, you know. He already told him to deal with it. So, you know, [Mickens] can do whatever he sees fit to do with it."

Walker stated that Mickens returned to Phillips's residence a third time on September 15, 1997, the date Shipp suffered the beating which led to his death. Walker testified that at this meeting, Phillips was upset with Mickens because Mickens had failed to take care of the "rebellious brother" Shipp. Walker stated that Phillips "asked [Mickens] why [Shipp was] still living. [Phillips] already gave [Mickens] the authority to do whatever he wanted to do. If this brother being rebellious, why is he still around?" Walker testified that Phillips received a phone call during this meeting with Mickens from a Gangster Disciple in South Memphis. Walker stated that he heard Phillips say "go ahead and kill him but hold up." Walker reported that Phillips looked at Mickens, and then Mickens got up and left to go to South Memphis, where the killing was to take place. Walker explained, "If [the execution is] carried out, you know, [Mickens] got to be there. He can either stop it or he can let it be carried out. You know, that's his land. He just got to approve it to do what he wanted to do." Also at this third meeting, Walker testified that Mickens and Phillips discussed whether to kill Shipp's cousins, Ricky Aldridge and Marcus Aldridge. Walker explained that they had planned on killing Shipp's cousins, but Mickens refused to approve the killings because he believed that they would not say anything to police.

Ricky Aldridge testified that after the incident on August 29, 1997, the Gangster Disciples of South Memphis held a meeting at Mickens's residence to discuss Shipp because he had "disrespect[ed] the assistant governor." Ricky Aldridge stated that Mickens asked him if knew about this particular incident, and he replied that he did not know anything about it. Ricky Aldridge testified that Mickens said "he was going to have to get a hold of [Shipp] and see what was going on." Ricky Aldridge further testified that on September 15, 1997, he walked to Mickens's apartment because Mickens wanted to talk with him. He stated that he met with Mickens, Matrin Becton, Carlos Bean, and another Gangster Disciple in the parking lot of the apartment complex. Ricky Aldridge testified that Mickens said, "I got a incident report on you from Third and Parkway that you were shooting at another gangster." Ricky Aldridge denied the incident and told him that he did not do it. He testified that Becton then told him that if he was found guilty of these charges, he could "be put in violation." Ricky Aldridge stated that Mickens told him that they would "get back with me later on. They [were] fixing to go catch up with [Shipp]." He testified that after talking with Mickens and the others, he "knew it could be some trouble so I called over [to] my cousin's house trying to catch up with [Shipp]. I couldn't catch up with him." Ricky Aldridge testified that he then went to a friend's front porch and drank a beer as he waited.

Patrick testified that on September 15, 1997, Shipp drove his car to the L & B Lounge with Patrick and two of her friends, Samantha and "Wolf," as passengers. Patrick stated that when Shipp parked his car near the lounge, "[t]wo people was running to [Shipp's] car telling him that some niggers wanted to talk to him." She testified that when Shipp asked them where these individuals were located, they

pointed across the street to a group of about fifteen people. Patrick stated that as Shipp walked across the street to the group of people, Matrin Becton, the regent for the South Memphis Gangster Disciples, told Shipp, "We need to holler at you for a minute about a small little incident that happened." Johnson stated that Shipp responded, "Like you need to holler at me about what? About what?" She reported that Becton replied, "We can't talk right here. We need to go somewhere else and talk." Patrick stated that when Shipp objected and asked why they could not talk right there, another Gangster Disciple, Choncey Jones, stepped in and said, "Well, this is what we're going to do. You're going to ride in this car right here," pointing to Jones's 1998 burnt orange Oldsmobile. Patrick testified that Shipp responded, "I'm not fixing to ride in that car with you. I've got my own car. No, I'm not fixing to ride. You know, they was cussing and there was a lot of commotion."

She stated that Becton told Shipp to pick two people to ride with him in his car, and Shipp picked Becton and Matthew Dixon, another Gangster Disciple. Patrick stated that Jones told Dixon to ride with him, so Becton and another Gangster Disciple walked with Shipp, Patrick, and Patrick's friend over to Shipp's car. Patrick testified that she saw that Becton had a black automatic handgun tucked into the back of the waistband of his pants. She stated that they all got into Shipp's car, with Shipp in the driver's seat, Patrick in the front passenger seat, Becton behind the passenger seat, Patrick's friend Samantha in the middle, and the other Gangster Disciple behind Shipp. Patrick testified that once they got into the car, Becton reached in the back of his pants and put his gun in his lap. Patrick reported that as Shipp drove away from the L & B Lounge, he appeared to be scared. Patrick stated that Shipp drove to her home, and she and Samantha got out of the car. Thereafter, Patrick testified that Becton got into the front seat next to Shipp and then Shipp drove off. She stated that Jones's orange Oldsmobile was following Shipp's car. Patrick testified that she was concerned about Shipp "[b]ecause I didn't feel right. Then I had seen that gun. Then I'm like, all of these guys, I just didn't feel right. I had a funny feeling." She stated that because of her fears, she woke up Patrick Owens, Grafton's boyfriend and Shipp's best friend, who was sleeping at her residence when Shipp dropped them off. Patrick testified that Owens and Grafton left in Grafton's car to go look for Shipp.

Ricky Aldridge testified that he waited on his friend's porch "[f]or some hours" until four Gangster Disciples approached him in the early evening and told him that Mickens "needed to holler at me." Ricky Aldridge stated that at least one of the Gangster Disciples who approached him was carrying a gun under his shirt. He reported that he and his older brother, Timothy "Pill" Aldridge, left with the four men to go to Mickens's apartment. Ricky Aldridge testified that once they arrived at Mickens's apartment, he saw about twenty South Memphis Gangster Disciples sitting around and talking in the living room, including Shipp, his cousin. He reported that several of the Gangster Disciples were carrying weapons such as automatic handguns and pistols. Ricky Aldridge testified that he walked into the room and "sat down in the corner on a bucket." He testified that Shipp was wearing

a yellow shirt, a herringbone necklace, and a ring. Ricky Aldridge stated that he saw the Defendant at this Gangster Disciple meeting, though he did not know the Defendant personally that night. He testified that once he entered the room and sat down, the conversation changed:

> Well, somebody said, 'Let's get down to the business, folks,' and then jumped on-the conversation jumped to . . . talking about what kind of violation we should get. Some said everybody in the room voice their opinions and say something whether it was a three-minute violation or a six-minute violation. They was talking about what kind of violation they think we should get. And some said three-minute and some said six-minutes.

Ricky Aldridge testified that everyone in the room, including the Defendant, stated their opinions as to what his and Shipp's punishment should be. He stated that after these opinions were given, Mickens, Smith, and Becton started to discuss what should be done with him and Shipp. Ricky Aldridge reported that Mickens "said he knew me, he knew [Shipp], he wasn't going to show no favoritism. Since it happened on [Smith and Becton's] land, he going to let them handle it." Following this conversation, Ricky Aldridge stated that one of them said, "That's the business, folks . . . Let's roll," and then everybody in the room left Mickens's apartment. Ricky Aldridge stated that he and Shipp had to go with the other Gangster Disciples. He explained, "I [didn't] want to-I was in fear for my life. I didn't want to jeopardize my family. I didn't want to bring no heat to [their] house. That's why I went." Ricky Aldridge testified that the Gangster Disciples had determined that he was in violation of gang rules and should be punished. He stated that all the Gangster Disciples left Mickens's apartment except Mickens and a few others. Ricky Aldridge testified that he got into the back of the orange Oldsmobile with Jones, Dixon, and another Gangster Disciple. Ricky Aldridge stated that Shipp returned to his car along with Timothy Aldridge and some other Gangster Disciples, while other Gangster Disciples got into a black Ford F-150 pickup truck. He testified that the black pickup led the caravan, followed by Shipp's car and Jones's car. Timothy Aldridge testified that he drove Shipp's car after another Gangster Disciple ordered him to. Timothy Aldridge stated that the Defendant drove the black pickup while other Gangster Disciples rode in the cab and in the back of it.

Ricky Aldridge explained that while he and Shipp were in their respective cars, they were under "Gangster Disciple arrest" and were not allowed to leave the cars. He stated that the caravan pulled into an Amoco Station and everybody but Ricky Aldridge and Shipp exited the vehicles. Timothy Aldridge testified that Antonio "T-Murder" Sykes, a Gangster Disciple, "came to the back door where my cousin [Shipp] was sitting in the back seat and told him, 'Take off your jewelry,'. . . . My cousin [Shipp] took off his jewelry and handed it to him." Ricky Aldridge testified that Sykes approached the Oldsmobile he was riding in and "said he needed everything out of my pockets." He stated that he emptied his pockets of some

money and handed it to Sykes, who placed the money into his pocket. Ricky Aldridge noticed that Sykes was wearing Shipp's herringbone necklace and ring. Both Ricky Aldridge and Timothy Aldridge testified that the caravan of Gangster Disciples left the Amoco station and went to DeSoto Park in Memphis, with the black pickup driven by the Defendant leading the way.

Officer D.H. Rowe, a crime scene investigator of the Memphis Police Department, testified that he was assigned to investigate Shipp's murder. Officer Rowe stated that he inspected the crime scene at DeSoto Park on September 16, 1997, the day after the murder. He described the crime scene as an "Indian" mound overlooking the Mississippi River, and the State introduced several aerial photographs of the crime scene. He explained, "It's a very secluded location. The actual scene when you drive up is just a high mound from the street." Officer Rowe testified that the "Indian" mound had a large hollowed-out depression in the middle of it which gradually dropped eight to ten feet from the outer rim of the mound and contained a tree in the middle of this depression. Officer Rowe stated that the inside of the mound could not be seen from the street level because the outer rim of the mound concealed it. He also stated that he could not hear what people were saying on the inside of the mound when he was standing at the street level.

Ricky Aldridge testified that the three Gangster Disciple vehicles parked on the opposite side of the street from DeSoto Park. He stated that it was dark when they arrived, with "no light but a street light . . . wasn't nothing but the reflection of the moon shining." Once the vehicles parked, Ricky Aldridge testified that everybody got out and walked across the street to the park. Timothy Aldridge testified that once the group reached the "Indian" mound, "[w]e was lining up around the hill, the top of the hill and . . . one guy had my cousin [Shipp] by the back of his pants and one guy had my little brother [Ricky Aldridge] by the back of his pants." Ricky Aldridge stated that Dixon grabbed the back of his pants and walked him up the "Indian" mound and then down into the center of the mound. He stated that another Gangster Disciple was holding Shipp in a similar fashion as he walked Shipp into the center of the "Indian" mound. Ricky Aldridge stated that he stood right next to Shipp once they were in the center of the mound, and the rest of the Gangster Disciples, approximately fifteen, surrounded them. Ricky Aldridge stated that the Defendant was one of the Gangster Disciples who surrounded them. He testified that Jones came down into the mound holding some iron crowbars, baseball bats, and some other items. At that point, Ricky Aldridge stated that Shipp asked Becton, "'Can I holler at you, man?' And [Becton] said, 'Ain't nothing else to talk about. I'm fixing to take your G,'" which meant that he was going to end Shipp's membership in the Gangster Disciples. Ricky Aldridge testified that when he saw Jones carrying all those weapons down into the mound, "I seen my life. I thought I was fixing to die. I thought we was going to die."

Ricky Aldridge stated that they then told him to come out of the center of the mound. He stated that once he reached the rim of the mound, "then they started

serving [Shipp] violation and he started fighting back. And that's when that big dude right there [the Defendant] grabbed him from behind." Ricky Aldridge stated that when Shipp started to fight back, the Defendant grabbed Shipp and held him as the other Gangster Disciples beat him. He testified that "[w]hen [the Defendant] grabbed [Shipp] somebody hit him with something and that's when he went down. And they was just beating him, beating him with them irons and bats and stuff. Just beating him." Ricky Aldridge stated that the Gangster Disciples who were beating Shipp "act[ed] like they was enthused about it. . . . They was laughing." Timothy Aldridge stated that he did not want to beat either Shipp or his little brother, so he pretended like he was hitting Shipp after being pressured by Smith. Timothy Aldridge testified that he saw the Defendant beating Shipp and that the Defendant had "something" in his hand as he beat Shipp. Ricky Aldridge stated that it was hard to look at Shipp being beaten, so he would look for a minute and then put his head back down. He testified that after a few minutes of beating Shipp, the Gangster Disciples told Ricky Aldridge to "come in the circle." Once he got into the circle, Ricky Aldridge testified that "[t]hey started serving my violation." He stated that six Gangster Disciples beat him with fists only, no weapons. Ricky Aldridge testified that while he was getting beaten with fists, other Gangster Disciples continued to beat Shipp with tire irons and bats. Ricky Aldridge stated that his fists-only beating lasted six minutes and then stopped. After the beating ended, Ricky Aldridge testified that he saw Shipp laying under the tree in the middle of the "Indian" mound, and he thought Shipp was dead. He stated that Sykes then went up to Shipp, "ripped his clothes off of him, took his shoes off his feet, and then shot him." He explained that he did not actually witness Sykes shoot Shipp, but he heard the shot once he climbed down the mound. Ricky Aldridge stated that Timothy Aldridge helped him walk out of the mound towards Shipp's car. Timothy Aldridge testified that he drove Shipp's car away from the crime scene with Ricky Aldridge in the passenger seat and another Gangster Disciple, Joe Brown, in the back.

Ricky Aldridge testified that after the beating at DeSoto Park, he met with Patrick Owens, and Owens drove Grafton's car back to the park. Ricky Aldridge explained:

> We parked on the same side of the street the park on, went back in the mound, picked [Shipp] up and he was mumbling some words, so we picked him up. [Shipp] was trying to walk a little bit and then he fell as we were going up the hill. So I grabbed him from the back and [Owens] had his legs and we tote him over the hill and down the hill and put him on the back seat of the car.

He stated that Shipp was still alive but he looked "[b]ad. Beat up. . . . Wounds on his head, eyes and back of his head, blood all over." Ricky Aldridge testified that he was covered in Shipp's blood after carrying him to the car with Owens. Ricky Aldridge stated that once Owens drove to Patrick and Johnson's

house, he ran away from car. Patrick testified that when Owens pulled up in the car with Shipp, "[Owens] was hollering and crying, 'Call-dial 9-1-1. He alive. I got Pokey. I got Marshall. He alive. He alive. . . .'" Patrick stated that Johnson called 9-1-1. She reported that Shipp did not respond to her when she tried to speak to him. Wilma Shipp, Shipp's mother, testified that she received several phone calls on the night of September 15, 1997 at around 11:30 P.M., and the female voices said, "Pokey is dead, Pokey is dead." Wilma Shipp stated that she and her daughter Kimberly Shipp started driving and looking for Shipp. She testified that she found her son in the back of a gray car in front of Patrick and Johnson's house. She stated that Shipp was "beat very badly. He was bloody and beat all in his head, all in his face, all in his arm, and on his leg." Wilma Shipp stated that every time she tried to talk to her son, he would moan and kick. She testified that the ambulance came and took Shipp to the hospital. She reported that she stayed with her son in the hospital until he died on September 17, 1997, and that during those two days, he never regained consciousness.

Dr. Thomas Deering, Assistant Medical Examiner for the Shelby County Forensic Center, testified as an expert in forensic pathology at the Defendant's trial. Dr. Deering testified that he performed the autopsy of Shipp's body and found multiple lacerations over various places on the head, including the back of the head, the front, the ears, the mouth, and over the eyes. He stated that there was a gunshot wound in the left buttock and multiple lacerations and abrasions all over the body. Dr. Deering testified "that death was due to severe blunt trauma to the head with multiple skin lacerations and injury, swelling and bleeding of the brain. And this was aggravated by a gunshot wound to the pelvis with bleeding and blunt trauma to the lower legs."

Following the State's proof, the Defendant's counsel made a motion for judgment of acquittal, which the trial court denied. Thereafter, the Defendant testified in his own behalf. The Defendant testified that he joined the South Memphis Gangster Disciples in March of 1997 and quit the gang in September of that same year. He stated that when he joined the Gangster Disciples, he was an outstanding member and did not hold a position of rank. He explained that he joined the Lauderdale neighborhood Gangster Disciples and was not familiar with Gangster Disciples from other neighborhoods. The Defendant stated that he became aware of the September 11, 1997 incident between Shipp, Bean and Ricky Aldridge on September 15, 1997 at the afternoon meeting at Mickens's apartment. He testified that at the meeting at Mickens's apartment, Bean explained to the group what happened on September 11, 1997, and then Ricky Aldridge told his side of the story. The Defendant stated that Mickens decided that the Gangster Disciples should not decide anything until Shipp was present at the meeting. The Defendant testified that later that evening, at about 11:00 P.M., he received a call from Irvin Brooks, the coordinator for the Lauderdale neighborhood Gangster Disciples. The Defendant stated that "Irvin said that they had found [Shipp] and they were ready to get up with us." After receiving the call, the Defendant testified that

"unfortunately" he found a ride to pick up Brooks and then they went to Mickens's apartment complex for the meeting about Shipp and Ricky Aldridge.

The Defendant stated that he did not attend the meeting at Mickens's apartment, rather he stayed outside the apartment complex. He testified that once the meeting adjourned, he got into the back of a black pickup truck with "a lot of people" and did not drive the pickup. The Defendant testified that he did not know either Shipp or Ricky Aldridge and did not speak to them that night. He explained that the caravan left Mickens's apartment complex, with the black truck in front, followed by the two cars. The Defendant stated that the Gangster Disciple caravan drove first to Carlos Bean's house, but when they could not find him, they went to an Amoco station on Elvis Presley Boulevard. At the Amoco station, the Defendant said he jumped out of the truck and then stood next to it. He stated that he did not have a gun that night and was not standing guard to make sure Shipp or Ricky Aldridge did not get out of their vehicles. The Defendant testified that he and the other Gangster Disciples got back into the bed of the pickup, and the three vehicles drove to DeSoto Park. The Defendant explained what he thought the group was going to do at the park:

> Well, evidently we was coming to discuss the incident about Carlos [Bean], but seeing how Carlos wasn't there and they had some business to take care of, some personal issues on their own count and that was our only ride back home, we had to go for the ride. We had to roll with them until they get through taking care of their business. . . . I was familiar about the incident with [Ricky Aldridge], but I guess they had some personal business about [Shipp] which they didn't never discuss with us. . . . They had never came to a conclusion about a violation yet because [Shipp] was not present the first time. The second time we went we was going to talk about a violation, not saying that a violation was going to be served, because Irvin didn't have to agree to it. But we was going to talk about it, about what they are planning to do about Carlos.

The Defendant stated that once the group got to the "Indian" mound, he heard Becton tell Shipp, "I'm going to take your G." The Defendant explained that Becton meant that "[h]e was taking [Shipp's] membership" from the Gangster Disciples. He stated that he did not see any bats or tire irons at first, but "[n]ext thing I know they coming over the hill with-all I seen was a bat. The other objects was black." The Defendant testified that he did not know most of the other Gangster Disciples in the park. He stated that Ricky Aldridge was served a "two-minute violation" with fists only, but Shipp was served a violation using the various bats and irons. The Defendant denied that he held Shipp as the group beat him and denied that he ever hit Shipp during the beating. Asked whether he ever hit Shipp, he stated, "No, ma'am. I'm not a monster." The Defendant testified that he saw

other Gangster Disciples beating Shipp with "something," but he did not attempt to stop them from beating Shipp. He explained:

> I couldn't. . . . For one, . . . I don't have any rank. I can't-for one, that's called interrupting the organization structure and I don't have no kind of rank to stop any individual-and plus he was-that was a individual off another count. Me or Irvin couldn't have did nothing about what they were doing to them. That was something personal.

The Defendant testified that he could have walked away, "but it would have been some consequences behind it," such as a beating similar to the ones Ricky Aldridge or Shipp received. He explained that if he walked away, it would have been a breach of trust, which he could be punished for. He stated that after the beating, he returned to the truck, heard two gunshots, and then saw Sykes come out of the Indian mound. The Defendant testified that after everybody got back into the pickup, they left the crime scene and went to Texas Court apartments. The Defendant stated that he did not go to DeSoto Park to punish Shipp or Ricky Aldridge, he did not participate in the beatings, and he did not drive the pickup.

On cross-examination, the Defendant denied seeing Sykes taking Shipp's necklace and ring from him at the Amoco station. Asked why he accompanied the other Gangster Disciples to DeSoto Park, the Defendant responded, "That was my ride. I mean, what I suppose to do, just start walking? . . . I mean, I never even thought-I mean, I never even imagined they were fixing to go to the park and do what they did. I mean, that thought never came to my head." However, the Defendant admitted that he knew the group was going to serve violations on Ricky Aldridge and Shipp, because "they always go to somewhere that's open and away from everybody else" to serve violations. The Defendant testified that he witnessed the beatings from the top of the mound near the rim and never left that area during the beatings. He stated that he walked around the rim during the beatings "because I didn't want to see what they was doing." The Defendant explained that he did not leave the "Indian" mound and return to the pickup truck "[b]ecause that's called breaking the circle. . . . If-if I would have broke it-I mean, I was scared. I was afraid that night. . . . I mean, I'm around brothers that I . . . never knew before and they start acting like they crazy or losing their mind." The Defendant stated that the beating of Shipp "was terrible." He stated that he walked around the mound with his head down during the beating, looking up occasionally. Following the Defendant's testimony, the Defendant rested his case.

State v. Heard, 2003 WL 22718439, at *1-*12.

When the trial court ruled against him at the post-conviction stage, Petitioner appealed to the TCCA without filing a transcript. *Heard v. State*, 2016 WL 1055381, *1-*3. The TCCA

repeated the summary of the evidence from the decision of the post-conviction trial court. It then held:

> [The petitioner] complained that his attorney had not spoken to [State's witness and victim] Ricky Aldridge and [State's witness] Timothy Aldridge prior to trial and did not subpoena Carlos Bean and Ervin Brooks as witnesses. According to [the petitioner], Mr. Bean and Mr. Brooks would have testified that the [p]etitioner had attended the meetings discussing the conflicts between Mr. Bean and the murder victim, because [the p]etitioner was from the same "deck" as Mr. Bean and was there in his support. [The p]etitioner also testified that he asked [trial counsel] to subpoena some of his co-defendants to testify in [his] trial, but she failed to do so.
>
> [The petitioner] further testified that he had obtained a transcript of the trial of his co-defendants Antonio Sykes and Matrin Becton and had compared the testimony of Ricky and Timothy Aldridge in that trial [which took place prior to the [p]etitioner's trial] with their testimony in [his] trial and found many significant inconsistencies which he alleges should have been utilized by [trial counsel] for impeachment purposes. . . .
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> . . . .
>
> [The petitioner] also testified that [trial counsel] had failed to develop a proper trial strategy, neither he nor his post-conviction counsel offered any better trial strategy. In this regard, [the p]etitioner's principal theory of defense was that he was acting under "duress." [The p]etitioner testified that he voluntarily joined the "Gangster Disciples" street gang and that he knew the rules of the organization, including the fact that punishments included the commission of aggravated assaults and murder. . . . Thus, the [p]etitioner contends that under his version of the events he did not know that a murder was going to take place and he could do nothing to prevent it or walk away as it would have been in violation of gang rules. Therefore, he concludes that if his version of the events had been properly established the jury would have found he acted under duress.
>
> [The petitioner] also testified that [trial counsel] failed to bring before the jury the fact that Ricky Aldridge had admitted to perjury in another trial. He also complained that [trial counsel] did not subpoena the police officer who conducted the photo lineup in which Ricky Aldridge identified the [p]etitioner. . . .

> Finally, [the petitioner] testified that he believed the prosecutor had committed prosecutorial misconduct by presenting the testimony of Ricky and Timothy Aldridge because of the inconsistencies in their testimony cataloged above. His theory was that the State was presenting known false testimony.
>
> . . . . [Trial counsel] testified that she met with the [p]etitioner many times prior to trial and since he was going to be placed on the scene and did not have an alibi, they decided to go with some form of duress defense. Either she or her investigator spoke with Carlos Bean and Ervin Brooks. She could not speak to any co-defendants because they were privileged not to speak with her. She testified that she obtained the transcripts of the two prior trials and the preliminary hearing, and she thought she also had all of the witnesses pre-trial statements. With these she made a chart of all the different versions or inconsistencies and then selected which ones to use for effective cross-examination. She testified further that if she did not bring out an inconsistency it could have been for several reasons. They may have been minor. They may not have been material. They may not have helped the defense. As far as whether [the p]etitioner was driving the truck[,] [trial counsel] did not have any witnesses to testify otherwise and believed it really did not matter whether he was driving or in the back of the truck.

(eleventh alteration in original). The post-conviction court concluded that the petitioner had failed to establish that his trial counsel performed deficiently. The court

> want[ed] to make it abundantly clear that even if, for sake of argument, trial counsel was 'deficient' in any or all of these matters, based on the particular facts of this case, there is not a reasonable probability that the outcome of the proceedings would have been different. [The petitioner] has failed to establish 'prejudice' with regard to any and all of the various allegations he has raised.

In this appeal, the petitioner, without a single citation to the record, contends that he was deprived of the effective assistance of counsel at trial "when trial counsel failed to properly impeach the State's eyewitnesses."

Unfortunately for the petitioner, the record on appeal contains neither the transcript of the evidentiary hearing nor any exhibits thereto. *See* Tenn. R. App. P. 24(b), (c). The record indicates that despite being given ample time and opportunity, the petitioner failed to ensure that the transcript was included for our review. The appellant bears the burden of preparing an adequate record on appeal,

> *see State v. Ballard*, 855 S.W.2d 557, 560 (Tenn. 1993), which includes the duty to "have prepared a transcript of such part of the evidence or proceedings as is necessary to convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal," Tenn. R. App. P. 24(b). If the appellant fails to file an adequate record, this court must presume the trial court's ruling was correct. *See State v. Richardson*, 875 S.W.2d 671, 674 (Tenn. Crim. App. 1993). Because the petitioner failed to include the transcript of the evidentiary hearing, we must presume that the ruling of the post-conviction court denying relief was correct.
>
> Accordingly, the judgment of the post-conviction court is affirmed.

Heard v. State, 2016 WL 1055381, at *2-*3.

After that decision, Petitioner turned his attention here.

II. LEGAL STANDARDS

This case raises a question often asked—should this federal court issue a writ of habeas corpus to a state prisoner based on alleged defects with the state prosecution. Petitioner asserts that the state authorities have violated his constitutional rights and this Court should do something about it. Federal courts have authority to issue habeas corpus relief for persons in state custody under 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). But the authority of this Court is limited. A federal court may grant habeas relief to a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

So to address Petitioner's allegations, the Court turns first to the law of exhaustion and procedural default.

A. Exhaustion and Procedural Default

Because this case originated in state court, a state prisoner can rarely obtain federal relief unless he first tried to get (or exhausted) all available state remedies. 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 the prisoner wants the federal habeas court to address to the state courts under 28 U.S.C. § 2254(b) and (c). *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). Indeed, the petitioner must "fairly present"[2] each claim to all levels of state court review, up to the state's highest court on discretionary review, *Baldwin v. Reese*, 541 U.S. 27, 29 (2004), unless 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). Following this directive, Tennessee eliminated the need to seek review in the Tennessee Supreme Court to meet the requirements of exhausting all available state remedies. Tenn. Sup. Ct. R. 39; *see also*, *Adams v. Holland*, 330 F.3d 398, 402 (6th Cir. 2003); *Smith v. Morgan*, 371 F. App'x 575, 579 (6th Cir. 2010).

The procedural default doctrine is ancillary to the exhaustion requirement. *See Edwards v. Carpenter*, 529 U.S. 446, 452–53 (2000) (noting the interplay between the exhaustion rule and the procedural default doctrine). If the state court decides a claim on an independent and adequate state ground, like a procedural rule prohibiting the state court from deciding the merits of the constitutional claim, the procedural default doctrine ordinarily bars a petitioner from seeking federal habeas review of that claim. *Wainwright v. Sykes*, 433 U.S. 72, 81–82 (1977); *see Walker v. Martin*, 562 U.S. 307, 315 (2011) ("A federal habeas court will not review a claim rejected by a state court 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") (internal quotation

[2] For a claim to be exhausted, "[i]t is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made." *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam) (internal citation omitted). Nor is it enough to make a general appeal to a broad constitutional guarantee. *Gray v. Netherland*, 518 U.S. 152, 163 (1996).

marks and citation omitted).[3] In general, a federal court "may only treat a state court order as enforcing the procedural default rule when it unambiguously relied on that rule." *Peoples v. Lafler*, 734 F.3d 503, 512 (6th Cir. 2013).

If a petitioner is barred from asserting a claim under the procedural default doctrine, the petitioner must show cause to excuse his failure to present the claim and actual prejudice stemming from the constitutional violation or that a failure to review the claim would lead to a fundamental miscarriage of justice. *Schlup v. Delo*, 513 U.S. 298, 320–21 (1995); *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). The latter showing requires a petitioner to establish that a constitutional error has probably caused the conviction of a person who is innocent of the crime. *Schlup*, 513 U.S. at 321; *see also House v. Bell*, 547 U.S. 518, 536–539 (2006) (restating the ways to overcome procedural default and further explaining the actual innocence exception).

For claims that survive the procedural default bar, the Court may conduct a merits review.

B. Merits Review

Under Section 2254(d), where a state court addressed a claim on the merits, a federal court should grant a habeas petition only if the state court resolution of the claim:

> (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.

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[3] The state-law ground may be a substantive rule dispositive of the case, or a procedural barrier to adjudication of the claim on the merits. *Walker*, 562 U.S. at 315. A state rule is an "adequate" procedural ground if it is "firmly established and regularly followed." *Id.* at 316 (quoting *Beard v. Kindler*, 558 U.S. at 60-61 (2009)). "A discretionary state procedural rule . . . can serve as an adequate ground to bar federal habeas review . . . even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others." *Id.* (quoting *Kindler*, 558 U.S. at 54.) (internal quotation marks and citations omitted).

28 U.S.C. § 2254(d)(1)–(2). Petitioner carries the burden of proof on this "difficult to meet" and "highly deferential [AEDPA] standard," which "demands that state-court decisions be given the benefit of the doubt." *Cullen*, 563 U.S. at 181 (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011), and *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam)).

Review under § 2254(d)(1) is limited to the record before the state court that adjudicated the claim on the merits. *Cullen*, 563 U.S. at 182. 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). A state court makes an "unreasonable application" of federal law when it "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 412–13. The state court's application of clearly established federal law must be more than just mistaken—it must be "objectively unreasonable" for the writ to issue. *Id.* at 409. The federal court may not issue a writ just because 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).

There is minimal case law addressing whether, under § 2254(d)(2), a state court based its decision on "an unreasonable determination of the facts." In *Wood v. Allen*, 558 U.S. 290, 301 (2010), the Supreme Court noted that a state-court's factual determination is not "unreasonable" just because the federal habeas court would have reached a different conclusion.[4] In *Rice v.*

[4] In *Wood*, the Supreme Court granted certiorari to resolve whether, to satisfy § 2254(d)(2), "a petitioner must establish only that the state-court factual determination on which the decision

Collins, 546 U.S. 333 (2006), the Court explained that "[r]easonable 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." *Rice*, 546 U.S. at 341–42.

The Sixth Circuit described the § 2254(d)(2) standard as "demanding but not insatiable" and even emphasized that, under § 2254(e)(1), the federal court presumes that the state court's factual determination is correct absent clear and convincing evidence to the contrary. *Ayers v. Hudson*, 623 F.3d 301, 308 (6th Cir. 2010). In the end, a federal court will not overturn a state court adjudication on factual grounds unless it is objectively unreasonable given the evidence presented during the state court proceeding. *Id.*; *see also Hudson v. Lafler*, 421 F. App'x 619, 624 (6th Cir. 2011).

Petitioner also argues that his lawyers were not effective in their representation of him. That claim leads this Court to analyze and discuss yet more case law.

C. Ineffective Assistance of Counsel

In *Strickland v. Washington*, the Supreme Court established the standard by which courts analyze a claim that ineffective assistance of counsel has deprived a defendant of his Sixth Amendment right to counsel. See 466 U.S. 668, 687 (1984). To succeed on this claim, a petitioner must prove two elements: 1) that counsel's performance was deficient, and 2) "that the deficient performance prejudiced the defense." *Id.* "The benchmark for judging any claim of

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was based was 'unreasonable,' or whether § 2254(e)(1) additionally requires a petitioner to rebut a presumption that the determination was correct with clear and convincing evidence." *Wood*, 558 U.S. at 299. The Court found it unnecessary to reach that issue, and left it open "for another day". *Id.* at 300–01, 303 (citing *Rice v. Collins*, 546 U.S. 333, 339 (2006), in which the Court recognized that it is unsettled whether there are some factual disputes to which § 2254(e)(1) is inapplicable).

ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

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.

To show prejudice, a petitioner must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.[5] "A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 694. It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.' [*Strickland*,] at 693. Counsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' *Id.*, at 687." *Harrington*, 562 U.S. at 104 (citing *Strickland*); *see also 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.").

Even more, federal courts reviewing an ineffective assistance claim accord a state-court decision higher deference under 28 U.S.C. § 2254(d). The Supreme Court made this point emphatically.

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[5] If a reviewing court finds a lack of prejudice, it need not determine whether, in fact, counsel's performance was deficient. *Strickland*, 466 U.S. at 697.

> 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.

Harrington, 562 U.S. at 105.

"There is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." *Coleman*, 501 U.S. at 752 (internal citations omitted). Attorney error cannot constitute "cause" for a procedural default "because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must bear the risk of attorney error." *Id.* at 753 (internal quotation marks omitted). When the State has no constitutional obligation to ensure that competent counsel represents a prisoner, the petitioner bears the risk of attorney error. *Id.* at 754.

In 2012, the Supreme Court decided *Martinez v. Ryan*, 566 U.S. 1 (2012) which recognized a narrow exception to the rule in *Coleman*, "[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding . . . ." *Martinez*, 566 U.S. at 17. In those cases, "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance [of counsel] at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Id.* What is more, the Supreme Court emphasized that "[t]he rule of *Coleman* governs in all but the limited circumstances recognized here. . . . It 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, even though that initial-review collateral proceeding may be deficient for other reasons." *Id.* The requirements that a petitioner must satisfy 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."

Trevino v. Thaler, 569 U.S. 413, 423 (2013) (emphasis and alterations in original).

In *Martinez*, the Supreme Court considered an Arizona law that did not permit petitioners to raise ineffective assistance claims on direct appeal. *Martinez*, 566 U.S. at 4. Later in *Trevino*, 569 U.S. at 429, the Supreme Court extended its holding in *Martinez* to states with a "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 . . . ." *Trevino* modified the fourth *Martinez* requirement for overcoming a procedural default. The holdings in *Martinez* and *Trevino* apply to Tennessee prisoners. *Sutton v. Carpenter*, 745 F.3d 787, 790 (6th Cir. 2014).

Now the Court will turn to the analysis of Petitioner's claims here.

III. PETITIONER'S FEDERAL HABEAS CLAIMS

In Petitioner's § 2254 petition and amended petition he raises some issues and then repeats his claims. (§ 2254 Pet., ECF No. 1, Am. § 2254 Pet., ECF Nos. 14, 14-1.) He concedes

that he brings many issues here that he did not first present to the TCCA for determination. So he frames his requests for relief under *Martinez* as separate issues for each claim that would otherwise be barred under the procedural default doctrine. (*Id.*) The Court's determination of whether *Martinez* offers a basis for relief from the default does not require that Petitioner repeat the argument as separate issues each time.

To better organize this decision, the Court has consolidated those *Martinez* arguments with the analysis of underlying issues and renumbers those issues below:

1. Trial counsel was ineffective by failing to perform a reasonable investigation and prepare a viable strategy and defense (Am. § 2254 Pet., ECF No. 14 at PageID 126);

2. The State committed prosecutorial misconduct by permitting Ricky and Timothy Aldridge to testify falsely (§ 2254 Pet., ECF No. 1 at PageID 5);

3. Post-conviction counsel was ineffective by failing to prepare and transmit a proper copy of the post-conviction record to the TCCA for the post-conviction appeal (Am. § 2254 Pet., ECF No. 14 at PageID 124);

4. Trial counsel was ineffective for failing to perform a proper cross-examination of Ricky and Timothy Aldridge (*id.*);

5. Trial counsel was ineffective for failing to impeach Ricky and Timothy Aldridge with their prior inconsistent statements (*id.*);

6. Trial counsel was ineffective by failing to object to the perjured testimony of Timothy Aldridge (*id.* at PageID 125);

7. Trial counsel was ineffective by failing to present the testimony of Carlos Bean, Ervin Brooks, and Chris Smith (*id.*);

8. Trial counsel was ineffective by failing to properly support the defenses of duress/coercion and unavoidable necessity at trial (*id.*);

9. Trial counsel was ineffective by failing to request a jury instruction on criminal responsibility for facilitation (*id.*);

10. Trial counsel was ineffective by failing to argue that Petitioner was entitled to an instruction on lesser-included offenses (*id.* at PageID 125-26);

11. Trial counsel was ineffective by failing to present proof that Anwar Proby drove the black truck (*id.* at PageID 126);

12. Trial counsel was ineffective by failing to call a single defense witness other than Petitioner (*id.*);

13. Trial counsel was ineffective for failing to challenge the indicia of reliability of the photograph array used by the State (*id.*);

14. Trial counsel was ineffective for failing to challenge the admissibility of the photographic array used by the State during trial (*id.*);

15. Trial counsel was ineffective by failing to object to the prosecution's claim that they would prove the Petitioner was criminally responsible for the victim's murder (*id.* at PageID 126-27);

16. Trial counsel was ineffective by failing to object when the State suborned perjury and/or presented the false testimony of Timothy and Ricky Aldridge (*id.* at PageID 127); and

17. Trial counsel was ineffective for failing to properly challenge the State for withholding *Brady* material. (*Id.*)

Petitioner did present Issue 5 to the TCCA in the post-conviction appeal. (R., Brief ("Br." of Appellant, ECF No. 15-23 at PageID 2389.) Petitioner never presented the remaining issues listed above to the TCCA.

IV. ANALYSIS OF PETITIONER'S CLAIMS

A. Exhausted Issue

Issue 5. Was trial counsel ineffective by failing to impeach Ricky and Timothy Aldridge with their prior inconsistent statements? (Am. § 2254 Pet., ECF No. 14 at PageID 124.)

Heard contends that trial counsel was ineffective because counsel failed to impeach Ricky and Timothy Aldridge with their prior inconsistent statements. (*Id.*) Petitioner brought this claim before the TCCA and that court, relying on the *Strickland* decision, rejected his claim. Respondent

replies that this claim lacks merit because the TCCA's conclusion was not based on an unreasonable determination of the facts. (Answer, ECF No. 15 at PageID 2470.)

The post-conviction trial court identified the proper standard for analyzing claims of ineffective assistance, *Strickland*, 466 U.S. at 689-94. (R., Order, ECF No. 15-22 at PageID 2369.) After reviewing the evidence presented at the post-conviction hearing and the post-conviction court's determination, the TCCA affirmed the post-conviction court's ruling. *Heard v. State*, 2016 WL 1055381, at *3.

Heard contends that trial counsel should have impeached the Aldridges with transcripts of their testimonies from other defendants' trials. (Am. § 2254 Pet., ECF No. 14 at PageID. 137-49.) In the post-conviction appeal, Heard argued that

> Both witnesses previously testified in trials for other co-defendants. As such, trial counsel had an appropriate record with which to impeach these witnesses with. In consistencies included but were not limited to: the number of people around earlier in the day, when and where the gang meeting took place, which vehicle Mr. Heard drove in on the way to the park, what actions Mr. Heard actually took part in, and how clear the night was. Trial counsel also failed to show one witness admitted in a prior trial to committing perjury.
>
> The numerous inconsistencies would have shown a jury that neither eyewitness was reliable. Those two eyewitnesses were the only evidence raised at trial. Had the jury been shown how unreliable each witness was, Petitioner would never have been convicted. As such, trial counsel's failure to highlight such unreliability was deficient and prejudiced Petitioner's case.

(R., Appellate Brief, ECF No. 15-23 at PageID 2397-98.)

The post-conviction court decided that many of the so-called inconsistencies Petitioner cited were trivial and that others were explained because Petitioner was not in the other trials. (R., Order, ECF No. 15-22 at PageID 2378.) The post-conviction court determined that, "[a]t best, [the inconsistencies had] Petitioner not holding or hitting the victims, but [did] not negate his criminal responsibility in the matter." (*Id.*)

Based on this Court's review of the transcripts of Petitioner's trial (R., Trial Transcript ("Tr."), ECF Nos. 15-5, 15-6, 15-7, 15-8, 15-9, 15-10, & 15-11), the Tennessee courts' decision was not an unreasonable determination of the facts. The state courts concluded correctly that the inconsistencies were irrelevant to determining Petitioner's criminal responsibility. Heard has therefore failed to show "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. Petitioner has not satisfied his burden of showing that the decision was objectively unreasonable. Plus this Court presumes the factual findings from state court are correct.

A state court's factual findings are entitled to a presumption of correctness absent clear and convincing evidence to the contrary. 28 U.S.C. §§ 2254(d)(2), 2254(e)(1). Petitioner also does not provide argument or evidence that refutes the presumption of correctness this Court accords the state court's factual determination. So it is appropriate for this Court to defer to the state court decision on this issue. This Court thus finds that Issue 5 lacks merit and is **DENIED**.

B. Non-cognizable Issue

Issue 3. Was Post-conviction counsel ineffective by failing to prepare and transmit a proper copy of the post-conviction record to the TCCA for the post-conviction appeal? (Am. § 2254 Pet., ECF No. 14 at PageID 124.)

Next Petitioner alleges that his post-conviction counsel was ineffective too. He argues that post-conviction counsel's failure to prepare and transmit the record (and transcript) of his post-conviction proceedings to the TCCA deprived him of the ability to convince the TCCA to reverse the post-conviction trial court's decision. (*Id.* at PageID 134-35.) Respondent replies that Petitioner cannot bring a claim of ineffective assistance of post-conviction appellate counsel in a

federal habeas petition because that claim is not cognizable here. (Answer, ECF No. 16 at PageID 2465.)

By statute, the ineffective assistance of post-conviction counsel does not create grounds for habeas relief in federal court. 28 U.S.C. § 2254(i). Even if that were not the case, the Supreme Court has long held that "[t] here is no right to counsel in state post-conviction proceedings" and therefore no right to effective postconviction counsel. *Coleman*, 501 U.S. at 752 (citations omitted). *Martinez* and *Trevino* did not abrogate that rule. Rather, the Supreme Court recognized that a petitioner may be able to raise ineffective assistance of trial counsel for the first time in federal court under narrow circumstances. Typically those claims are barred under the procedural default doctrine. But when a petitioner either had no counsel or post-conviction counsel was ineffective, it may provide "cause" to address a claim of ineffective assistance of trial counsel. *Martinez*, 566 U.S. at 8-16. Here Petitioner's claim of ineffective assistance of post-conviction counsel is limited to the post0-conviction hearing and does not provide a cognizable ground for habeas relief. This Court thus **DENIES** this claim.

C. Procedural Default Bar

1. Issues Raised in Petitioner's Post-Conviction Petitions and During Post-Conviction Evidentiary Hearing

Petitioner raised Issues 1-2, 4, 6-8, 11-12, and 15 his post-conviction petitions. (R., Post-conviction Pet., ECF No. 15-22 at PageID 2265-87, Am. Pet., ECF No. 15-22 at PageID 2335-37, Second Am. Pet., ECF No. 15-22 at PageID 2349-50, Third Am. Pet., ECF No. 15-22 at PageID 2355-57.) The post-conviction trial court's order addressed and denied relief on these issues. (R., Order, ECF No. 15-22 at PageID 2366, 2375-77 (Issue 1), PageID 2367, 2369 (Issue 2), PageID 2377 (Issue 4), PageID 2366, 2379 (Issue 6), PageID 2376-77 (Issue 7),

PageID 2373-75 (Issue 8), PageID 2367, 2374, 2377 (Issue 11), PageID 2366, 2376-77 (Issue 12), PageID 2379 (Issue 15).) (*Id.* at PageID 166-76.) Respondent replies that Petitioner is barred from bringing these claims by procedural default because he did not raise them during the post-conviction appeal. (Answer, ECF No. 16 at PageID 2468.)

Martinez and *Trevino* cannot excuse Petitioner's default of these claims of ineffective assistance. *Martinez* does not encompass claims that post-conviction appellate counsel was ineffective. *See Martinez*, 566 U.S. at 15 ("*Coleman* held that an attorney's negligence in a postconviction proceeding does not establish cause, and this remains true except as to initial-review collateral proceedings for claims of ineffective assistance of counsel at trial.") When post-conviction counsel exercised discretion to limit Petitioner's post-conviction brief to the TCCA to the strongest available arguments, it created a procedural default of other claims of ineffective assistance of counsel. Appellate counsel has no duty to raise frivolous issues and may exercise discretion to limit a brief to the TCCA to the strongest arguments. The Court thus finds that Petitioner is barred from bringing Issues 1-2, 4, 6-8, 11-12, and 15 under the procedural default doctrine. The Court therefore **DENIES** these claims.

2. Issues Not Raised in Petitioner's Post-Conviction Proceedings

Issue 9. Was trial counsel ineffective by failing to request a jury instruction on criminal responsibility for facilitation? (Am. § 2254 Pet., ECF No. 14 at PageID 125.)

Petitioner alleges that trial counsel should have requested a jury instruction on criminal responsibility for facilitation. (*Id.* at PageID 160-165.) Respondent replies that this claim lacks merit because trial counsel did request an instruction on criminal responsibility for facilitation. (Answer, ECF No. 16 at PageID 2471.)

The record of Petitioner's trial shows that trial counsel requested that the trial court instruct the jury on criminal responsibility for facilitation of a felony. (R., ECF No. 15-1 at PageID 246.) At the end of the proof at trial, trial counsel told the trial court the she was requesting the instruction because Petitioner could "be imputed to know that something was going to happen, but he did not have the intent required for the criminal responsibility." (R., Trial Tr., ECF No. 15-12 at PageID 1846-47.) The trial court denied trial counsel's request holding that the lesser offense of facilitation of a felony did not apply based on Petitioner's testimony that he did not know that these specific felonies would be committed. (*Id.* at PageID 1853-54.)

Because trial counsel requested the instruction before and during the trial, post-conviction counsel had no reason to claim that trial counsel failed to request the instruction. Post-conviction counsel did not perform deficiently by failing to raise this frivolous claim. Petitioner cannot establish deficient performance or prejudice by counsel on this point. So he has not shown that this issue was substantial under *Martinez*. Petitioner has not satisfied the requirements to overcome the procedural default of this issue. The Court thus **DENIES** Issue 9 because it is barred by the procedural default doctrine.

Issue 10. Was trial counsel ineffective by failing to argue that Petitioner was entitled to an instruction on lesser-included offenses? (Am. § 2254 Pet., ECF No. 14 at PageID 125-26.)

Petitioner contends that trial counsel did not argue properly that the trial court should instruct the jury on lesser-included offenses. (*Id.* at 160-65.) Respondent responds that Petitioner's claim fails because he cannot show that the trial court would have given those instructions. (Answer, ECF No. 16 at PageID 2471-72.)

During trial, the lawyers and the court discussed jury instructions and the trial court noted that the evidence did not support instructing the jury on voluntary manslaughter and criminally negligent homicide. (R., Trial Tr., ECF No. 15-12 at PageID 1833.) Likewise, the transcript of Petitioner's trial shows that the testimony and evidence did not support a jury instruction on reckless homicide. (R., Trial Tr., ECF Nos. 15-5, 15-6, 15-7, 15-8, 15-9, 15-10, & 15-11.)

Trial counsel did not perform deficiently by failing to request an instruction unsupported by the proof. By extension, post-conviction counsel did not perform deficiently by failing to raise this frivolous claim during post-conviction proceedings. Because Petitioner failed to prove deficient performance and because he has not satisfied the requirements to overcome the procedural default doctrine for this issue, the Court **DENIES** Issue 10.

Issues 13 and 14. Was trial counsel ineffective by failing to challenge the indicia of reliability of the photograph array and by failing to challenge the admissibility of the photographic array used by the State during trial? (Am. § 2254 Pet., ECF No. 14 at PageID 126.)

Petitioner claims that trial counsel should have challenged the indicia of reliability and the admissibility of the photographic array that the prosecution used at trial. (*Id.*) Respondent replies that Petitioner's claims here fail because he cannot show that these claims are substantial. (Answer, ECF No. 16 at PageID 2472.)

Above all, the trial record contradicts Petitioner's allegations. Trial counsel moved to suppress the photographic array as impermissibly suggestive and inadmissible. (R., Motion ("Mot.") to Suppress, ECF No. 15-1 at PageID 241-43.) The trial court held an evidentiary hearing on that motion and Ricky Aldridge testified. (R., Suppression Tr., ECF No. 15-2.) The trial court denied the motion. (R., Mins., ECF No. 15-1 at PageID 244.) Even still, appellate counsel

challenged the denial of the motion to suppress on direct appeal. *State v. Heard*, 2003 WL 22718439, at *12-*16. The TCCA held that the pretrial identification by Aldridge was not impermissibly suggestive. *Id.* at *15.

Petitioner fails to provide this Court with facts, argument, affidavits, or evidence that trial counsel could have presented at the suppression hearing that would have led to a different outcome in either the trial court or on direct appeal. Because he has not submitted evidence to support this issue, he fails to prove that this claim is substantial. Speculation and conclusory statements are not enough to establish substantial federal habeas claims of ineffective assistance of counsel under *Martinez*. Petitioner has not satisfied the requirements to overcome the procedural default of these issues. This Court therefore **DENIES** Issues 13 and 14.

> **Issues 16 and 17. Was trial counsel ineffective by failing to object when the State suborned perjury and/or presented the false testimony of Timothy and Ricky Aldridge and by failing to properly challenge the State for withholding *Brady* material? (Am. § 2254 Pet., ECF No. 14 at PageID 127.)**

Petitioner now argues that trial counsel performed deficiently by failing to object when the State presented perjurious and false testimony by the Aldridges and Robert Walker. (Am. § 2254 Pet., ECF No. 14-1 at PageID 177-82.) What is more, he claims trial counsel did not object when the State withheld *Brady* material. (*Id.*) Respondent responds that these claims lack merit. (Answer, ECF No. 16 at PageID 2474.)

Petitioner alleges that when the Aldridge brothers and Walker testified at trial that they "received no special consideration, benefit, deal or offers or expectations of leniency" in exchange for their trial testimony, that testimony was false. (Am. § 2254 Pet., ECF No. 14-1 at PageID 178.) Petitioner has, however, failed to present facts or evidence to support his claims. He also contends

that the State improperly suppressed evidence of the deals or leniency. (*Id.* at PageID 178-79.) Petitioner speculates without factual support that the State had non-prosecution agreements with the Aldridge brothers. (*Id.* at PageID 180.)

Simply put, Robert Walker's testimony betrays Petitioner's allegations. (R. ECF No. 15-10 at PageID 1554-56.) Walker testified during trial that he expected the prosecutor to consider his trial testimony in resolving his pending aggravated robbery charge. (*Id.*) Petitioner's trial counsel cross-examined Walker about his expectation of leniency. (*Id.* at PageID 1609-11.) Plus Ricky Aldridge testified that the State did not charge him for his role in this case. (*Id.* at PageID 1516.)

Petitioner has not submitted affidavits or evidence to support his claims that the Aldridge brothers had agreements with the State for leniency other than Ricky Aldridge. Petitioner's claim lacks evidentiary support that the State withheld *Brady* material with any evidence. Petitioner's claim here lacks merit. Petitioner's speculation and conclusory statements are not enough to establish a substantial federal habeas claim of ineffective assistance of counsel under *Martinez*. Petitioner has not satisfied the requirements to overcome the procedural default doctrine for Issues 16 and 17. So the Court **DENIES** these claims.

Petitioner brings issues in this petition that lack merit, are noncognizable, and are barred by the procedural default doctrine. The petition is therefore **DISMISSED WITH PREJUDICE**. The Court will enter Judgment for Respondent.

V. APPELLATE 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). The Court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to a § 2254 petitioner. Rule 11, Rules

Governing Section 2254 Cases in the United States District Courts. 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 reflect the specific issue or issues that satisfy the required showing. 28 U.S.C. §§ 2253(c)(2)-(3). A petitioner makes a "substantial showing" when the petitioner shows 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 (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)); *Henley v. Bell*, 308 F. App'x 989, 990 (6th Cir. 2009) (per curiam) (holding a prisoner must show that reasonable jurists could disagree with the district court's resolution of his constitutional claims or that the issues presented warrant encouragement to proceed more).

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) (same). Courts should not issue a COA as a matter of course. *Bradley v. Birkett*, 156 F. App'x 771, 773 (6th Cir. 2005) (quoting *Slack*, 537 U.S. at 337).

Here, there can be no question that the claims in this petition lack merit and are barred by procedural default. Because any appeal by Petitioner on the issues raised in this petition does not deserve attention, the Court **DENIES** a certificate of appealability.

Here for the same reasons the Court denies a certificate of appealability, the Court determines that any appeal would not be taken in good faith. The Court **CERTIFIES** therefore,

under Fed. R. App. P. 24(a), that any appeal here would not be taken in good faith and **DENIES** leave to appeal in forma pauperis.[6]

IT IS SO ORDERED, this 29th day of September 2019.

s/Thomas L. Parker
THOMAS L. PARKER
UNITED STATES DISTRICT JUDGE

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