

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 22-3145

Shallon Hawkins

Appellant

v.

David Vandergriff

Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:22-cv-00167-GAF)

ORDER

The petition for rehearing by the panel is denied.

January 12, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 22-3145

Shallon Hawkins

Petitioner - Appellant

v.

David Vandergriff

Respondent - Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:22-cv-00167-GAF)

JUDGMENT

Before ERICKSON, MELLOY, and STRAS, Circuit Judges.

The court has carefully reviewed the original file of the United States District Court and orders that this appeal be dismissed for lack of jurisdiction. Appellant's pending motions are denied as moot.

December 05, 2022

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 22-3145

Shallon Hawkins

Appellant

v.

David Vandergriff

Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:22-cv-00167-GAF)

ORDER

Appellant's motion for extension of time to file a petition for rehearing is denied as moot
in light of his filing of a timely petition.

December 15, 2022

Order Entered Under Rule 27A(a):
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 22-3145

Shallon Hawkins

Appellant

v.

David Vandergriff

Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:22-cv-00167-GAF)

ORDER

This appeal is stayed pending a limited remand to the district court. The case is remanded to the United States District Court for the Western District of Missouri for the limited purpose of allowing the district court to rule on a request for an extension of time to file a notice of appeal. Upon an entry of an order in connection with that issue the district court shall certify the order to the Court of Appeals for further action in connection with this pending appeal.

November 14, 2022

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 22-3145

Shallon Hawkins

Appellant

v.

David Vandergriff

Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:22-cv-00167-GAF)

MANDATE

In accordance with the judgment of December 5, 2022, and pursuant to the provisions of Federal Rule of Appellate Procedure 41(a), the formal mandate is hereby issued in the above-styled matter.

January 19, 2023

Clerk, U.S. Court of Appeals, Eighth Circuit

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 22-3145

Shallon Hawkins

Appellant

v.

David Vandergriff

Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:22-cv-00167-GAF)

ORDER

Appellant's motion for statement of facts and conclusions of law is denied.

January 31, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

SHALLON HAWKINS,

Petitioner,

vs.

DAVID VANDERGRIFF,

Respondent.

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Case No. 4:22-cv-00167-GAF-P

ORDER

This pro se matter was filed pursuant to 28 U.S.C. § 2254. On October 14, 2022, the Court denied Petitioner's motion to stay the action, for a Certificate of Appealability, and leave to appeal in forma pauperis. Doc. 28. The case was electronically forwarded to the United States Court of Appeals for the Eighth Circuit for further processing of Petitioner's appeal. *Id.* On November 16, 2022, the Eighth Circuit stayed the appeal pending a limited remand to this Court for the "limited purpose of allowing the district court to rule on a request for an extension of time to file a notice of appeal. *Id.*

However, because an appeal is currently pending in the United States Court of Appeals for the Eighth Circuit and a Certificate of Appealability was previously denied by this Court in the October 14, 2022, Order (Doc. 28), the Court does not find an extension of time to file a notice of appeal is warranted as requested in his pending motion (Doc. 33).

Accordingly, it is ORDERED that Petitioner's motion for extension of time (Doc. 33) is DENIED, and this case is transferred back to the United States Court of Appeals for the Eighth Circuit for further action in connection with the pending appeal.

IT IS SO ORDERED.

/s/ Gary A. Fenner
GARY A. FENNER, JUDGE
UNITED STATES DISTRICT COURT

Dated: November 29, 2022

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

SHALLON HAWKINS,

Petitioner,

vs.

DAVID VANDERGRIFF,

Respondent.

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) Case No. 4:22-cv-00167-GAF-P
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ORDER

This *pro se* matter was filed pursuant to 28 U.S.C. § 2254. On August 9, 2022, this Court entered an Order and Judgment dismissing Petitioner's petition. Docs. 25, 26. Petitioner has now filed a motion requesting a Certificate of Appealability, stay and abeyance of this case, and a Notice of Appeal. Doc. 27. Although Petitioner did not also submit a request for leave to proceed *in forma pauperis* on appeal, this Court assumes he intended to do so.

As to Petitioner's request for a Certificate of Appealability, the request is denied for the reasons explained in this Court's August 9, 2022, Order. Doc. 25. As to Petitioner's request to stay this action, the motion is denied as this case has already been dismissed. Lastly, to the extent Petitioner seeks to appeal this Court's decision, this case will be forwarded to the United States Court of Appeals for the Eighth Circuit for further processing.

Under 28 U.S.C. § 1915, an appeal *in forma pauperis* may be permitted if an affidavit, including a statement of all assets possessed, and a certified copy of the inmate account statement for the preceding six months are submitted and if the appeal is taken in good faith. See Fed. R. App. P. 24(a). Good faith requires that Petitioner's argument on appeal not be frivolous. *Coppedge v. United States*, 369 U.S. 438, 445 (1962). Because Petitioner has presented no non-frivolous issues deserving of appellate review, Petitioner is denied leave to proceed *in forma pauperis* on appeal. Petitioner may renew his request with the United States Court of Appeals for the Eighth Circuit.

Accordingly, it is **ORDERED** that Petitioner's motion (Doc. 27) is DENIED without prejudice as to his request to stay this action and a Certificate of Appealability.

It is further **ORDERED** that Plaintiff is denied leave to appeal *in forma pauperis* and that the Clerk of the Court electronically forward this case to the United States Court of Appeals for the Eighth Circuit for further processing of Petitioner's appeal.

IT IS SO ORDERED.

/s/ Gary A. Fenner
GARY A. FENNER, JUDGE
UNITED STATES DISTRICT COURT

Dated: October 14, 2022

Mr. Morrow immediately backed out of the driveway, and Mr. Hawkins drove his truck across Mr. Kirkpatrick's yard and a neighbor's yard, leaving ruts and divots. As C.M. screamed and cried, Mr. Morrow stopped the car in the middle of the cul-de-sac to put it in drive and heard the truck's V-8 engine revving. Mr. Hawkins rammed his truck into the rear of the Morrows' vehicle with such force that it lifted the Volkswagen off the ground and spun it. The truck continued to push the car, traveling some 50 to 60 feet across the cul-de-sac until Mr. Morrow's car was forced at an angle sideways into a neighbor's garage door. The structure was actually off set several inches, stucco was damaged, and the garage door had to be re-aligned.

Mr. Morrow tried to accelerate the car as his daughter continued to scream and beg for him to get her out of there, but it would not respond. Mr. Hawkins drove partly out of the driveway and stopped his truck across it, blocking Mr. Morrow in. When Mr. Morrow opened his window to ask what was going on, Mr. Hawkins reached out of his truck a second time and said "I told you, I'm going to give you to the count of . . ." and started to count again. At this point, neighbors had come out of their homes because of the loud noises and yelling—Mr. Kirkpatrick had a gun, was yelling to attract neighbors' attention, and demanded that Mr. Hawkins leave the neighborhood; Mr. Alan Fashion demanded that Mr. Hawkins stay until police arrived and attempted to remove the key from the truck's ignition. Mr. Kirkpatrick heard Mr. Hawkins claim that Mr. Morrow had hit him first and that he had good insurance. Mr. Kirkpatrick observed that Mr. Hawkins's speech was slurred, and Mr. Fashion testified that he seemed disoriented or intoxicated. While Mr. Fashion could not smell alcohol, he testified that something was impeding Mr. Hawkins's motions and movements and he seemed to have a delayed reaction, which gave Mr. Fashion the opportunity to reach across him and turn the truck's engine off. Mr. Hawkins then re-started the truck and sped off, again driving across yards and leaving skid marks. The truck finally reached pavement, but another neighbor from just outside the cul-de-sac testified that it then veered six to eight feet over a lawn apparently in a deliberate attempt to hit him as he came running in response to the yelling and loud noises. None of the witnesses had seen the truck or Mr. Hawkins before.

Several individuals had called 9-1-1 to report the incident, including Mr. Morrow and the woman whose garage had been damaged. Mr. Morrow was able to tell the dispatcher the number on the truck's license plate as Mr. Hawkins drove it away. Thomas Prout, the police officer who responded to the incident, interviewed Mr. Morrow and the owner of the damaged home and returned to the station to write his report. Less than an hour after Mr. Hawkins left the cul-de-sac, he was arrested about two miles away, following another alleged incident. Responding officers reported his license plate information. Because the information matched the truck involved in the cul-de-sac incident, Officer Prout went to the second scene to confirm the match and then called Mr. Morrow to ask him to join the officer there. Mr. Morrow identified the truck and driver. Mr. Kirkpatrick later confirmed the identification of Mr. Hawkins in a photo lineup; a running board that he had

recovered from the cul-de-sac was missing from and matched Mr. Hawkins's pickup truck. Neither Mr. Morrow nor his daughter was seriously injured during this incident, although Mr. Morrow testified at the sentencing hearing that his daughter had been so traumatized that counseling had been required and she still takes anti-anxiety medication and fears that Mr. Hawkins will come and kill her. The Morrow vehicle was deemed a total loss; the passenger's side door was so badly damaged that it could not be opened.

Mr. Hawkins was charged by information with two counts of the class B felony of first-degree assault as to the victims Mr. Morrow and C.M. for ramming his truck into the Morrow vehicle. He was also charged with two counts of armed criminal action "by, with and through, the knowing use, assistance and aid of a dangerous instrument."

Mr. Hawkins filed two motions in limine to prohibit reference to or the admission of any evidence relating to the circumstances of his arrest. The circuit court granted the motions in part, ruling that no evidence could be introduced about the summonses issued for Mr. Hawkins's subsequent bad acts or a poorly conducted horizontal gaze nystagmus test at the arrest scene. He did not rule on whether evidence about Mr. Hawkins's demeanor when arrested would be admissible, pending receipt of other evidence during trial. After a number of witnesses had testified about Mr. Hawkins's purported anger and aggressive actions during the cul-de-sac incident and the State sought to introduce Officer Prout's testimony as to Mr. Hawkins's demeanor at the arrest scene, the circuit court overruled Mr. Hawkins's objection. In this regard, the circuit court stated, "All right. I'll allow limited inquiry into it. A few questions. I don't want to dwell on it. I think that it's perhaps barely relevant, maybe. I'll allow limited inquiry into it." The State asked three questions, and Officer Prout testified that Mr. Hawkins was "verbally belligerent" at the subsequent scene, he was "using obscene language," "yelling quite loudly," and "[h]is speech appeared to be slurred." The officer also stated, "In my judgment he was intoxicated," although he admitted that he had not conducted any field sobriety tests to confirm his opinion. After Officer Prout testified, Mr. Hawkins moved for a mistrial, contending that the evidence was extremely prejudicial and would require followup questions. The circuit court denied the motion, although the court again observed that it found the evidence "barely relevant." Mr. Hawkins's counsel asked several questions on cross-examination that elaborated on the arrest scene, eliciting testimony from Officer Prout that Mr. Hawkins had been in handcuffs, was taken to the ground, and had been yelling during the encounter with police officers at the second scene.

Mr. Hawkins testified in his own defense and said that he was in the cul-de-sac looking for the home of a woman he claimed to have met at a gas station, and he told Mr. Morrow the numbers of the address, which he could no longer recall, thinking Mr. Morrow could give him directions. For some unknown reason, according to Mr. Hawkins, Mr. Morrow became upset, backed up his car, and blocked his truck from leaving the Kirkpatrick driveway. Mr. Hawkins speculated

that Mr. Morrow might have a concealed weapon and might have been stopping to leave his car and confront him. This was apparently what prompted Mr. Hawkins to drive through several yards in an effort to exit the cul-de-sac. He also testified that when he pulled back into the cul-de-sac, he expected the Morrow car to drive in a certain direction, but that it stopped, rendering the truck's maneuver to go around it a mistake, because his truck hit the car instead. Mr. Morrow's car continued to move, and, because the vehicles were locked together, that was what caused contact with a neighbor's garage. Mr. Hawkins claimed that he fled the neighborhood because someone was threatening him with a gun, someone had reached into his truck, and he felt he was in a hostile situation. He further testified that any mud on his truck's tires, visible in photos taken after his arrest, came from his own yard.

Mr. Hawkins filed boilerplate motions for judgment of acquittal at the close of the State's evidence and at the close of all evidence. In arguing the first motion, he renewed his objection to the court's admission of the police officer's demeanor testimony, orally adding it to the motion, and referred to the same objection in arguing the second motion. The court denied both motions. Following a four-day trial, Mr. Hawkins was convicted on all counts. In his motion for judgment of acquittal or in the alternative for a new trial, Mr. Hawkins specifically challenged the circuit court's ruling that allowed, over objection, "testimony from witness Officer Prout concerning his observations of the Defendant's demeanor at the arrest scene which occurred at a different location and some 30 to 50 minutes after the alleged actions that were the subject of this trial." The circuit court denied the motion and sentenced Mr. Hawkins to thirty-five years' imprisonment.

Doc. 11-6 at 2-8 (footnotes omitted).

Petitioner raised one claim on direct appeal. Doc. 11-5. He alleged that the trial court erred in admitting evidence of his demeanor at the time of his arrest. *Id.* The Missouri Court of Appeals found the claim to be without merit holding that the probative value of the evidence outweighed any prejudicial effect. *Id.*

Petitioner filed a timely pro se Rule 29.15 motion. Doc. 11-12 at 5. The motion court appointed counsel, but Petitioner directed counsel not to file an amended motion but to file a statement in lieu of an amended motion so that the court would consider the claims in the pro se motion as opposed to amendments by counsel. *Id.* at 6. Counsel then filed a motion to strike the letter, and to be allowed to file an amended motion for Petitioner. The court granted this motion and gave counsel time to file an amended motion for Petitioner. *Id.* But Petitioner again insisted that counsel not file an amended motion. *Id.* Counsel filed a second letter in lieu of an amended motion, but this time include an index to the approximately eighty claims counsel found were

raised in the pro se motion. *Id.* at 6. The motion court denied the claims following an evidentiary hearing. *Id.* at 6–7.

Petitioner raised three points in his post-conviction appeal. Petitioner’s first claim in the post-conviction appeal was that trial counsel was ineffective for not objecting to testimony of Detective Littlejohn as hearsay and as improper opinion testimony, and for cross-examining in a way that opened the door to testimony that undermined the defense. Doc. 11-12 at 13–14. The second claim alleged that cross-examination of Detective Littlejohn was ineffective because it opened the door to testimony that Petitioner exercised his right to remain silent. *Id.* at 14. The Court of Appeals found that the claim that counsel ineffectively did not object to opinion testimony by Detective Littlejohn was waived because Petitioner did not raise that claim in his Rule 29.15 motion. *Id.* at 15. The Court of Appeals found that the claim in the second point claiming that cross-examination opened the door to testimony that Petitioner asserted his right to remain silent was waived because it was also not raised in the post-conviction relief motion. *Id.* The Court of Appeals found that the claims in the first point that counsel was ineffective for failing to object to hearsay, and that counsel opened the door to testimony that undermined the defense were without merit. *Id.* at 15–18.

Petitioner filed his timely petition pursuant to 28 U.S.C. § 2254. Doc. 1.

II. Legal Standard

State prisoners who believe that they are incarcerated in violation of the Constitution or laws of the United States may file a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. “[H]abeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal.” *Harrington v. Richter*, 562 U.S. 86, 102-03 (2011) (internal quotation and citation omitted). When a petitioner seeks federal habeas relief raising a claim that was adjudicated on the merits in the state court proceedings, the federal habeas court’s inquiry is limited to whether (1) the state proceedings resulted in a decision that is contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or (2) the state proceedings resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d).

A state court decision is contrary to clearly established federal law if “the state court 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.” *Jones v. Luebbbers*, 359 F.3d 1005, 1011 (8th Cir. 2004) (quoting *Williams v. Taylor*, 529 U.S. 362, 413 (2000)) (alteration in original). A state court decision unreasonably applies clearly established federal law if “the state court identifies the correct governing legal principle from [the] Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* (quoting *Williams*, 529 U.S. at 413) (alteration in original). Finally, a state court decision involves an unreasonable determination of the facts only if Petitioner shows the state court’s factual findings lack even fair support in the record. *Marshall v. Lonberger*, 459 U.S. 422, 432 (1983); see *Jones*, 359 F.3d at 1011; § 2254(e)(1) (Petitioner bears the burden to rebut the presumption of correctness applied to state determinations of factual issues by “clear and convincing evidence”). Credibility determinations are left for the state court to decide. *Graham v. Solem*, 728 F.2d 1533, 1540 (8th Cir. 1984) (en banc), cert. denied, 469 U.S. 842 (1984). Because the state court’s findings of fact have fair support in the record and because Petitioner has failed to establish by clear and convincing evidence that the state court findings are erroneous, the Court defers to and adopts those factual conclusions.

III. Analysis

Petitioner raises eleven claims for habeas relief. Doc. 1. In response, Respondent argues Grounds Six and Seven are the only claims preserved for federal habeas review and are entitled to state court deference. As for Petitioner’s nine other claims, Respondent argues these claims are procedurally defaulted.

A. Ground Six

In Ground Six, Petitioner argues that trial counsel “failed to object to or argue points for objection and or in trial regarding Detective Littlejohn’s and Officer Prout’s testimony.” Doc. 1 at 8 – 9. In response, Respondent notes that part of this claim was preserved and rejected on the merits by the Missouri Court of Appeals and the other part of the claim is procedurally barred. Doc. 11 at 22-23.

As summarized by the Missouri Court of Appeals, Petitioner previously argued in his post-conviction appeal as follows:

Hawkins’s first point on appeal asserts that the motion court clearly erred in denying Hawkins’s claim that his late trial counsel was ineffective in failing to object to portions of Detective Littlejohn’s testimony that constituted inadmissible hearsay and impermissible opinion testimony involving facts outside the

detective's personal knowledge, and in eliciting testimony during cross-examination that undermined the theory of defense. Hawkins's second point on appeal claims that the motion court clearly erred in denying Hawkins's claim that his late trial counsel was ineffective during his cross-examination of Detective Littlejohn because he asked the detective a question that opened the door to the State introducing evidence that Hawkins asserted his right to remain silent during a police interview.

Doc. 11-14 at 15-16.

At the outset, the Court notes that the post-conviction record does not address any testimony presented by Officer Prout. *See* Doc. 11-14. The Missouri Court of Appeals only reviewed the testimony of Detective Littlejohn. The Missouri Court of Appeals finds that Petitioner had waived both his first point on appeal concerning counsel's alleged failure to object to Detective Littlejohn's testimony as impermissible opinion testimony and his ineffectiveness claim presented as his second point. *Id.* at 17. Thus, the Missouri Court of Appeals was left to review "whether the motion court clearly erred in denying [Petitioner's] claims that his late trial counsel was ineffective for failing to object to hearsay during Detective Littlejohn's testimony and for eliciting testimony from Detective Littlejohn's testimony that undermined the defense's theory." *Id.*

Upon review of the record, the Missouri Court of Appeals recited the evidence leveled against Petitioner at trial as set forth in the Judgment:

1) that shortly after Thomas Morrow and his nine-year-old daughter dropped a friend of hers at the friend's house, [Hawkins] pulled his truck up close to the Morrows' vehicle, 2) [Hawkins] appeared to be intoxicated, was slurring his words and pointing at the Morrows, 3) Mr. Morrow attempted to drive his vehicle away[,] 4) [Hawkins] drove his truck in an arc through at least one neighbor's yard, then drove directly at the Morrows' vehicle at a high rate of speed, 5) [Hawkins] struck the Morrows' vehicle with such force that the Morrows' vehicle as knocked off the roadway[,] 6) [t]hat [Hawkins] maintained contact with the Morrows' vehicle, forcing it up the driveway of a residence until it struck the garage of the residence, further damaging the Morrow[s'] vehicle as well as causing significant damage to the residence, and 7) [Hawkins], after being confronted by multiple additional witnesses, then fled the scene at a high rate of speed, driving through at least one more yard, and was apprehended less than an hour later a short distance from the scene.

The Judgment then concluded:

given the overwhelming amount of highly competent evidence presented at trial by the State against [Hawkins], [none] of [the claims Hawkins asserts in his first and second points on appeal], nor any combination of them, indeed, no combination of any of the complaints [Hawkins] levels against [his late trial counsel's] performance, even if true, would have made any difference at all in the outcome of the trial. As such, the Judgment concluded that, "[o]n that basis alone, each and every one of the claims [Hawkins] makes against his [late] trial counsel must fail, and thus, the Court hereby denies them all."

Doc. 11-14 at 18-19.

Overturing a state court decision requires satisfaction of a high standard, which Petitioner has failed to do. The Supreme Court has "articulated a narrow standard of review for questions of sufficiency of the evidence," stating that "a habeas petitioner is entitled to relief if we conclude 'that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.'" *Nash v. Russell*, 807 F.3d 892, 897 (8th Cir. 2015) (quoting *Jackson*, 443 U.S. at 324 (1979)). As explained in § 2254(e)(1), the Court must assume that any facts found by the state court are correct, and the petitioner bears the burden to show by clear and convincing evidence that such factual conclusions were incorrect. This Court "take[s] only a limited and deferential review of the underlying state court decisions." *Worthington v. Roper*, 631 F.3d 487, 495 (8th Cir. 2011).

In denying Petitioner's claim, the Court finds the state court reasonably determined that Petitioner failed to demonstrate that his counsel's failure to object constituted ineffective performance. The Court also finds that the Missouri courts' adjudication of this claim was not contrary to or involved an unreasonable application of clearly established federal law or was based on an unreasonable determination of the facts in light of the evidence presented to the state court. §§ 2254(d)(1) and (2). Therefore, because Petitioner has failed to provide clear and convincing evidence that the state court's findings are erroneous, Petitioner is not entitled to habeas relief on this basis. Ground Six is denied.

B. Ground Seven

In Ground Seven, Petitioner argued the "State of Missouri decided contrary to or applied an unreasonable application of clearly established federal law denying my Miranda rights claim and court error claim ... by allowing state inquiry and testimony of defendant invoking his right to remain silent." Doc. 2 at 13. In response, Respondent noted that the Court of Appeals found that the claim in the second point in the post-conviction appeal claiming that cross-examination opened

the door to testimony that Petitioner asserted his right to remain silent was waived because it was also not raised in the post-conviction relief motion. Doc. 11-14 at 15.

The Missouri Court of Appeals explained that “the pro se motion alleged that Petitioner’s late trial counsel was ineffective for failing to object to evidence offered by the State that Petitioner asserted his right to remain silent during a police interview, a claim that is materially distinct from that raised in the pro se motion.” *Id.* at 17. As such, the Court of Appeals rejected Petitioner’s claim as procedurally defaulted. *Id.*

Therefore, as argued by Respondent, insofar as Petitioner challenges the decision that claims cannot be raised for the first time on appeal, the claim is without merit. *See McLemore v. State*, 635 S.W.3d 554, 563 n.3 (Mo. 2022) (quoting *Heifetz v. Apex Clayton, Inc.*, 554 S.W.3d 389, 397 n.10 (Mo. banc 2018) “[i]ssues raised for the first time on appeal are not preserved for appellate review.”). If Petitioner is attempting to raise some other claim presenting his Miranda rights that was not presented on appeal, the claim is procedurally barred. Ground Seven is denied.

C. Remaining Nine Grounds

In Grounds One through Five and Eight through Eleven, Petitioner asserts the following claims:

Ground One: Trial counsel ineffectively failed to request or receive instructions that Petitioner alleges are mandatory, specifically instructions on self-defense. Doc. 1 at 4.

Ground Two: The State failed to provide Petitioner with a breathalyzer test taken at the time of his arrest, which he alleges would have shown he was either not intoxicated or possibly below the legal limit. *Id.* at 6.

Ground Three: Counsel ineffectively failed to object Petitioner having to wear non-visible restraints. *Id.* at 7.

Ground Four: Counsel ineffectively failed to call Richard Thomas. *Id.* at 9.

Ground Five: Counsel acted ineffectively in allowing Exhibit 5, a blowup of a map, and 5A, a map with markings. Doc. 2 at 11.

Ground Eight: The Court of Appeals erred in rejecting a claim concerning prior bad acts evidence. *Id.* at 13-14.

Ground Nine: The Court of Appeals erred in rejecting a claim concerning a voluntary intoxication instruction. *Id.* at 14-15.

Ground Ten: Trial error and ineffective assistance of counsel assistance in allowing emotional testimony by the minor victim. *Id.* at 15.

Ground Eleven: Ineffective assistance of counsel for failing to explain to Petitioner all the definitions of first, second, and third degree assault during plea bargaining. *Id.* at 17.

In response, Respondent argues each of these claims is procedurally defaulted because he failed to present them in state court as required by Missouri's procedural rules.

Generally, federal habeas review for a state prisoner is permitted only after a petitioner has "exhaust[ed] the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). "A habeas petitioner is required to pursue all available avenues of relief in the state courts before the federal courts will consider a claim." *Sloan v. Delo*, 54 F.3d 1371, 1381 (8th Cir. 1995), *cert. denied*, 516 U.S. 1056 (1996). "[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process" before presenting those issues in an application for habeas relief in federal court. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). "If a petitioner fails to exhaust state remedies and the court to which he should have presented his claim would now find it procedurally barred, there is a procedural default." *Sloan*, 54 F.3d at 1381.

As evidenced by the record before this Court, Petitioner failed to present these issues to the Missouri courts. As a result, his claims are procedurally defaulted. *Sweet v. Delo*, 125 F.3d 1144, 1149 (8th Cir. 1997) (recognizing that failure to present claims in the Missouri Courts at any stage of direct appeal or post-conviction proceedings is a procedural default), *cert. denied*, 523 U.S. 1010 (1998). A federal court may not review procedurally defaulted claims "unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Under the cause and prejudice test, cause "must be something *external* to the petitioner, something that cannot fairly be attributed to him." *Id.* at 753 (emphasis in original).

Here, Petitioner argues "ignorance of the law" for failing to fully develop his meritorious issues on direct appeal and in his 29.15 motion, and claims that counsel refused to raise the issues. Doc. 17. As to Petitioner's ignorance of the law claim, this is not sufficient to overcome the default and Petitioner's claims are barred from review.

To the extent Petitioner attributes his default to ineffective legal assistance by the attorneys who represented him on appeal and asserts a *Martinez* claim, this claim also fails. *Martinez v. Ryan*, 132 S. Ct. 1309, 1315 (2012). Originally, in *Coleman*, the United States Supreme Court held that, because there is no constitutional right to counsel in a state post-conviction proceeding, an attorney's ignorance or inadvertence in a post-conviction proceeding does not qualify as cause to excuse a procedural default. *Coleman*, 501 U.S. at 752-54. In *Martinez*, however, the Court recognized a "narrow exception" to *Coleman* by holding that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Martinez*, 132 S. Ct. at 1315.

However, "[j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance[.]" *Strickland v. Washington*, 466 U.S. 668, 689 (1984). There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* Furthermore, Petitioner has no constitutional right to effective legal assistance on appeal from the denial of his motion for post-conviction relief. *Martinez*, 132 S. Ct. at 1320 (no constitutional right to effective legal assistance during "appeals from initial-review collateral proceedings"). In *Dansby v. Hobbs*, the Eighth Circuit reasoned that "there is no logical necessity to expand *Martinez* from the ineffectiveness claim itself to the underlying claims" because "[a]s a practical matter, a petitioner in federal habeas needs only one winning claim to gain relief—if he's got a winning ineffectiveness claim he doesn't need another." 766 F.3d 809, 833-34 (8th Cir. 2014) (internal quotation omitted).

To excuse the procedural default of a claim of ineffective assistance of trial counsel under *Martinez*, Petitioner must establish that either (1) "the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial," or (2) appointed counsel in the initial-review collateral proceeding . . . was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984)." *Id.* at 1317. To satisfy the second circumstance, "the assistance rendered must have been constitutionally substandard and prejudice must have resulted therefrom." *Evans v. Luebbbers*, 371 F.3d 438, 445 (8th Cir. 2004) (citing *Strickland*, 466 U.S. at 687). Furthermore, "[t]o overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the [underlying] claim has some merit." *Martinez*, 132 S. Ct. at 1318.

Petitioner fails to establish that his post-conviction counsel's alleged failure to raise these grounds met the *Strickland* standard of ineffective assistance. Specifically, Petitioner fails to demonstrate that he was prejudiced by post-conviction counsel's failure to raise this claim or that the underlying claims of ineffective assistance of trial counsel are "substantial" ones for purposes of *Martinez*.

Here, the Court does not find that any of these issues would have been a winning ineffectiveness claim sufficient to gain relief. Petitioner has not met his burden to "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. Additionally, to the extent that Petitioner attempts to allege that his defaulted claims are attributable to his attorney, an inmate may not allege "cause" excusing the default of a claim of trial court error based on ineffective assistance of appellate counsel if he did not assert a claim of ineffective assistance of appellate counsel in state court or cannot demonstrate independent cause to excuse the default of the ineffective assistance of counsel claim. *Edwards v. Carpenter*, 529 U.S. 446, 450–54 (1999). Because grounds are claims of trial court error that were not presented in state court, *Martinez* does not extend to excuse Petitioner's procedural default. *Dansby*, 766 F.3d at 833–34.

Consequently, Petitioner has failed to demonstrate cause for his default or that the Court is obligated to consider the merits of his procedurally defaulted claim. *See Bowman v. Gammon*, 85 F.3d 1339, 1346 (8th Cir. 1996) (in order to demonstrate that a failure to consider defaulted claims will result in a fundamental miscarriage of justice, habeas petitioner must show that he is "probably actually innocent" of the crimes for which he was convicted) (citation omitted), *cert. denied*, 520 U.S. 1128 (1997). Therefore, the Court finds that further review of Petitioner's procedurally defaulted claims is not required to prevent a fundamental miscarriage of justice. As a result, the remaining grounds for relief are denied.

IV. Certificate of Appealability

Under 28 U.S.C. § 2253(c), the Court may issue a certificate of appealability only "where a petitioner has made a substantial showing of the denial of a constitutional right." To satisfy this standard, Petitioner must show that "reasonable jurists" would find the district court ruling on the constitutional claim(s) "debatable or wrong." *Tennard v. Dretke*, 542 U.S. 274, 276 (2004). Because Petitioner has not met this standard, a certificate of appealability is denied.

V. Conclusion

For the foregoing reasons, Petitioner's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is DENIED, a certificate appealability is DENIED, and this case is DISMISSED. All other pending motions are DENIED as moot.

IT IS SO ORDERED.

/s/ Gary A. Fenner
GARY A. FENNER, JUDGE
UNITED STATES DISTRICT COURT

Dated: August 9, 2022

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

JUDGMENT IN A CIVIL CASE

SHALLON HAWKINS,

Petitioner,

v.

Case No. 22-0167-CV-W-GAF-P

DAVID VANDERGRUFF,

Respondent.

- ☐ **JURY VERDICT.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- ☒ **DECISION OF THE COURT.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED: Petitioner's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is DENIED, a certificate appealability is DENIED, and this case is DISMISSED.

Entered on: August 9, 2022.

PAIGE WYMORE-WYNN
CLERK OF COURT

/s/ K. Willis
(By) Deputy Clerk

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IT IS ORDERED AND ADJUDGED: Petitioner's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is DENIED, a certificate appealability is DENIED, and this case is DISMISSED.

Entered on: August 9, 2022.

PAIGE WYMORE-WYNN
CLERK OF COURT

/s/ K. Willis
(By) Deputy Clerk

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