

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

Appellee

/s/ Michael E. Gans

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

Appeal from U.S. District Court for the Western District of Missouri - Joplin  
(3:23-cv-05044-MDH)

## JUDGMENT

Before ERICKSON, GRASZ, and KOBES, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

The motions to proceed in forma pauperis are denied as moot.

December 26, 2023

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

/s/ Michael E. Gans

~~XXXXXXXXXXXX~~

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

BARRY GAHAGAN,

Petitioner,

vs.

BILL STANGE,

Respondent.

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Case No. 23-05044-CV-SW-MDH-P

**ORDER**

Petitioner, a convicted state prisoner currently confined at the Southeast Correctional Center in Charleston, Missouri, has filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his conviction and sentence for first-degree assault, which was entered in the Circuit Court of Lawrence County, Missouri. Doc. 1 at 1. Respondent contends Petitioner's petition should be dismissed as procedurally defaulted and without merit. Doc. 5. Petitioner has filed a reply thereto. Doc. 12. For the reasons set forth below, the petition for writ of habeas corpus is **DENIED**; a certificate of appealability is **DENIED**; and this case is **DISMISSED**.

**I. Background**

Petitioner entered an *Alford* plea and was found guilty on January 26, 2017, to the charge of first-degree assault. Doc. 5-5 at 131-149. Petitioner was sentenced to 15 years' imprisonment, with a suspended execution of sentence in the Circuit Court of Lawrence County, Missouri. *Id.* at 131, 142, 146-150. Petitioner was placed on supervised probation. *Id.* at 157. On July 26, 2018, Petitioner's probation was revoked, and his sentence was ordered executed. *Id.* Petitioner did not file a direct appeal.

Pursuant to Mo. Sup. Ct. R. 24.035, Petitioner filed an amended motion to vacate, set aside or correct judgment and sentence, alleging (1) counsel failed to investigate Petitioner's mental health and advise Petitioner based on such investigation; (2) counsel failed to adequately advise Petitioner what an *Alford* plea entails; (3) the Court did not specifically inquire Petitioner or his counsel as to Petitioner's mental health; and (4) the Court misadvised Petitioner of the law concerning the Court's options if Petitioner entered an *Alford* plea. Doc. 5-5 at 132-136; *see also*

*id.* at 67-77. On October 18, 2022, the Circuit Court of Lawrence County, Missouri denied Petitioner's Rule 24.035 motion. *Id.* at 130-137. While Petitioner appealed the Circuit Court's Order denying the motion for post-conviction relief, he later filed a voluntary dismissal, which the Missouri Court of Appeals, Southern District, granted. *See* Doc. 5-7.

Before the state court findings may be set aside, a federal court must conclude that the state court's findings of fact lack even fair support in the record. *Marshall v. Lonberger*, 459 U.S. 422, 432 (1983). Credibility determinations are left for the state court to decide. *Graham v. Solem*, 728 F.2d 1533, 1540 (8th Cir. en banc), *cert. denied*, 469 U.S. 842 (1984). It is Petitioner's burden to establish by clear and convincing evidence that the state court findings are erroneous. 28 U.S.C. § 2254(e)(1).<sup>1</sup> 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.

## II. Discussion

Petitioner raises three grounds for relief: (1) defense counsel was ineffective in advising Petitioner to make an *Alford* plea to first-degree assault when the crime was a misdemeanor and post-conviction counsel erred in refusing to transfer this claim from his pro se motion to the amended motion for post-conviction relief; (2) Petitioner's probation revocation was improper and post-conviction counsel erred in failing to transfer this claim from his pro se motion to the amended motion for post-conviction relief; and (3) post-conviction counsel was ineffective for refusing place Grounds 1 and 2 in the amended post-conviction relief motion. Doc.1 at 5-8.

Respondent argues Petitioner's Grounds One and Two are procedurally barred, unexhausted, and otherwise lack merit and Ground Three is not cognizable. Doc. 5. In reply, Petitioner reasserts his petition's argument and maintains he is entitled to relief. Doc. 12.

For the reasons set forth below, the Court finds Petitioner is not entitled to habeas corpus relief.

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<sup>1</sup> In a proceeding instituted by an application for writ of habeas corpus by a person in custody pursuant to a judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

### ***Applicable Standards***

Pursuant to the Antiterrorism and Effective Death Penalty Act, (“AEDPA”), a writ of habeas corpus shall not be issued on a claim litigated on the merits in state court unless the state court’s decision

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

28 U.S.C. § 2254(d). The “contrary to” and “unreasonable application” provisions in the first subsection have independent meaning. The “contrary to” provision applies “if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or reached a decision contrary to Supreme Court precedent when confronting facts that were materially indistinguishable.” *Jackson v. Norris*, 651 F.3d 923, 925 (8th Cir. 2011). “A federal court may grant relief under the ‘unreasonable’ application clause if the state court correctly identified the governing legal principle, but unreasonably applied it to the facts of the particular case.” *Id.*

Insofar as Movant alleges ineffective assistance of counsel, such claims are evaluated under the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), which requires the movant to “show that his lawyer’s performance fell below the minimum standards of professional competence (deficient performance) and that there is a reasonable probability that the result of the proceedings would have been different if his lawyer had performed competently (prejudice).” *Hamberg v. United States*, 675 F.3d 1170, 1172 (8th Cir. 2012) (quotation omitted).

With respect to the performance prong, there is a “strong presumption that counsel’s conduct falls within the wide range of professional assistance,” *Charboneau v. United States*, 702 F.3d 1132, 1136 (8th Cir. 2013) (quotation omitted), so the Court’s scrutiny of counsel’s performance must be deferential. *E.g., Hamberg*, 675 F.3d at 1172. The Court’s scrutiny is even more deferential with respect to the performance of appellate counsel because appellate counsel is expected to “winnow[ ] out weaker arguments on appeal.” *Charboneau*, 702 F.3d at 1136-37. The prejudice prong’s requirement of a “reasonable probability” of a different outcome means there must be a “substantial, not just conceivable, likelihood of a different result. *Cullen v. Pinholster*,

563 U.S. 170, 189 (2011). “A court need not address both prongs of the *Strickland* test if the petitioner cannot meet one of them.” *Garcia v. United States*, 679 F.3d 1013, 1014 (8th Cir. 2012).

Finally, a claim that is not presented to the state courts is procedurally defaulted and cannot be considered. *E.g.*, *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991). However, in narrow circumstances, an attorney’s ineffectiveness in the post-conviction proceeding can excuse the default and permit consideration of a defaulted claim of ineffective assistance of counsel at trial. These circumstances occur when “(1) the claim of ineffective assistance of trial counsel was a substantial claim; (2) the cause consisted of there being . . . 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) (citing *Martinez v. Ryan*, 566 U.S. 1, 13-17 (2012) (cleaned up). With respect to the first requirement, “[a] ‘substantial’ ineffective-assistance claim is one that has some merit.” *Dansby v. Hobbs*, 766 F.3d 809, 834 (8th Cir. 2014), cert. denied, 577 U.S. 828 (2015) (citing *Martinez*, 566 U.S. at 14). Thus, the issue of whether the procedural default can be excused is closely related to the merits of the underlying claim of ineffective assistance. Moreover, “judicial economy sometimes dictates reaching the merits if the merits are easily resolvable against a petitioner while the procedural bar issues are complicated.” *Barrett v. Acevedo*, 169 F.3d 1155, 1162 (8th Cir. 1999) (en banc); *see also Iromuanya v. Frakes*, 866 F.3d 872, 877 (8th Cir. 2017).

### ***Ground One***

In Ground One, Petitioner alleges counsel was ineffective for advising him to make an *Alford* plea to first-degree assault as Petitioner believes that the crime should have been a misdemeanor assault because he did not use a weapon and the victim suffered only a minor injury. Doc. 1 at 5. Petitioner further alleges that post-conviction counsel was ineffective in refusing to transfer the claim from Petitioner’s pro se motion for post-conviction relief to the amended motion filed by counsel, thereby waiving the claim. *Id.*

Respondent argues Ground One is procedurally defaulted and otherwise, lacks merit. Doc. 5 at 14-16.

The record shows that Petitioner raised this claim in his pro se post-conviction motion. Doc. 5-5 at 51. However, Petitioner's counsel did not raise said claim in the amended motion. *Id.* at 65-77. Therefore, the claim is procedurally defaulted.

Insofar as Petitioner alleges that he can overcome the procedural defaulting by demonstrating cause and prejudice under *Martinez* due to post-conviction counsel's failure to advance the claim in Petitioner's amended motion for post-conviction relief, as previously explained, “[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*, 566 U.S. at 9. To overcome Petitioner's procedural default, Petitioner must establish that counsel on collateral review was ineffective under *Strickland* and that the ineffective assistance of trial counsel claim is meritorious.

The Court concludes, however, that Petitioner is unable to demonstrate cause sufficient to overcome the default. As stated above, to establish ineffective assistance of counsel, Petitioner must demonstrate that counsel's performance was “deficient” and that such deficient performance “prejudiced” his defense. *Strickland*, 466 U.S. at 687. “‘Judicial scrutiny of counsel's performance is highly deferential, indulging a strong presumption that counsel's conduct falls within the wide range of reasonable professional judgment.’” *McAllister v. Redington*, No. 4:16CV558 RLW, 2019 WL 4261455, at \*8 (E.D. Mo. Sept. 6, 2019) (quoting *Bucklew v. Luebbers*, 436 F.3d 1010, 1015 (8th Cir. 2006) (citing *Strickland*, 466 U.S. at 689)).

Petitioner is unable to establish that post-conviction counsel's performance was deficient. In the amended Rule 24.035 motion, counsel raised two claims of ineffective assistance of trial counsel. Doc. 5-5 at 66-72. “If, as with appellate counsel, ‘one of [post-conviction] counsel's important duties is to focus on those arguments that are more likely to succeed, [then] counsel will not be held to be ineffective for failure to raise every conceivable issue.’” *McAllister*, 2019 WL 4261455, at \*9 (citing *Sutton v. Wallace*, No. 4:13-CV-1285, 2016 WL 4720452, at \*10 (E.D. Mo. Sept. 9, 2016) (quoting *Link v. Luebbers*, 469 F.3d 1197, 1205 (8th Cir. 2006)) (internal quotations omitted). “Only where stronger issues are ignored is a petitioner able to overcome the presumption of effective assistance of counsel.” *Id.* (citing *Sutton*, 2016 WL 4720452, at \*10) (citations and quotations omitted in original).

Post-conviction counsel's decision to focus on the two ineffective assistance of counsel claims was reasonable trial strategy. Petitioner makes no attempt to argue that the defaulted claim

is stronger than those advanced by post-conviction counsel. *See id.* (citing *Muhammad v. Cassady*, No. 4:13-CV-1816-SPM, 2016 WL 4493682, at \*9 (E.D. Mo. Aug. 26, 2016) (“It appears that post-conviction counsel determined that the claims presented were the most meritorious claims and the ones that could be supported with evidence, and Petitioner offers no argument or evidence to overcome the presumption that counsel's decision to focus on these five claims was a reasonable strategy.”)).

Further, the Court finds that the underlying defaulted claim of ineffective assistance of counsel is not substantial and lacks merit. Petitioner made an *Alford* plea to Count I of the Information. Doc. 5-5 at 150. Count I charged Petitioner

in violation of Section 565.050, RSMo, commit[ing] the class B felony of assault in the first degree, punishable upon conviction under Section 558.011, RSMo, in that on or about October 22, 2015, in the County of Lawrence, State of Missouri, [Petitioner] stated he was going to kill her and then grabbed her and punched her in the face, and such conduct was a substantial step toward the commission of the crime of attempting to kill Morgana Hazell and was done for the purpose of committing such assault. Charge Code 1302099.0.

*Id.* at 138. At the hearing in which Petitioner entered an *Alford* plea, counsel for the State of Missouri asserted that:

If this case were to go to trial, we would anticipate calling all endorsed witnesses and that they would collectively testify that on October 22, 2015, at the Clark Center at 1701 North Central in Monett, Missouri, in Lawrence County, [Petitioner], had failed to attend an appointment with Dr. Morgana Hazell, at which time she called him to inform him of his failure to make that appointment and, subsequently, he told her that he was going to kill her, and then he showed up later that day at the Clark Center and tried to get in, in a couple of different locations tried to get into the building, and ultimately crawled through the Reception window where Ms. Hazell was located, grabbed her, pulled her hair.

She was able to escape from that hold, at which time he hit her in the right side of her face, and then chased her into another hallway. Ultimately, during that time, he continued to tell her that he was going to kill her during the encounter, and he was ultimately subdued by other individuals there at the Clark Center until law enforcement arrived.

That's the evidence we would anticipate at trial, and we'd anticipate a guilty verdict.

Doc. 5-2 at 10-11. Petitioner thereafter confirmed that he heard the statement of facts from the prosecutor and that he would assert no corrections to the statement. *Id.* at 11.



As explained by Respondent, serious physical injury was not an element of the offense charged. *See* Doc. 5-5 at 138. Defense counsel also testified that Count I did not include the element of serious physical injury, but rather, the charge was an “attempt to cause” and that he explained this to Petitioner. Doc. 5-3 at 30-31. Counsel further testified that he went over the charges with Petitioner, along with the elements. *Id.* at 31. After hearing the testimony, the state court found counsel’s testimony to be credible and concluded that there was no probable cause to believe there was ineffective assistance of counsel. *Id.* at 39. As explained above, credibility determinations are left for the state court to decide. *Graham*, 728 F.2d at 1540.

Because Petitioner could not succeed on a meritless claim, post-conviction counsel was not ineffective for failing to bring this unsubstantial claim on post-conviction review. In short, Petitioner has failed to demonstrate that the procedurally defaulted ineffective assistance of counsel claim was substantial or that post-conviction counsel was deficient for failing to raise said claim. Ground One is **DENIED**.

### ***Ground Two***

In Ground Two, Petitioner alleges that his probation revocation was improper because he was revoked for another assault for which he was only held for 24 hours and not ultimately prosecuted, and for not paying court costs, which he alleges was imprisonment for debt. Doc. 1 at 6. Petitioner further alleges that post-conviction counsel was ineffective in refusing to transfer this claim from his pro se motion for post-conviction relief to the amended motion filed by counsel, thereby waiving the claim. *Id.*

Respondent argues Ground Two is not exhausted and otherwise, lacks merit. Doc. 5 at 16-17.

To exhaust a challenge to probation revocation proceedings in Missouri, Petitioner must first file a state habeas corpus petition under Missouri Supreme Court Rule 91 in the circuit or associate circuit court of the county where he is in custody. Mo. S. Ct. R. 91.01(a). *See Romano v. Wyrick*, 681 F.2d 555, 556-57 (8th Cir. 1982); *see also Brown v. Missouri Bd. of Prob. & Parole*, 727 F. Supp. 524, 531 (W.D. Mo. 1989). Indeed, “to be considered exhausted for purposes of federal habeas relief, the claims must be presented in a Rule 91 state habeas petition to either the Missouri Court of Appeals or the Missouri Supreme Court.” *Robinson v. Redington*, No. 2:23-CV-0003 NCC, 2023 WL 2941616, at \*2 (E.D. Mo. Mar. 21, 2023) (citing *Romano*, 681 F.2d at

556-57). “There is no time limit for filing a Rule 91 state habeas petition.” *Id.* (citing *Davis v. Purkett*, 296 F. Supp. 2d 1027, 1030 (E.D. Mo. 2003)).

Petitioner has not shown that he exhausted his state remedies prior to filing this claim, which amounts to procedural default. *Id.* (citing *Williamson v. Minor*, 2010 WL 681376, at \*4 (E.D. Mo. Feb. 22, 2010) (petitioner's failure to file a state habeas petition to contest his probation revocation is procedural default and subject to dismissal)).

Further, insofar as Petitioner alleges ineffective assistance of post-conviction counsel for counsel's failure to assert this claim in the amended Rule 24.035 motion, this claim is without merit. Because Petitioner never challenged the court's jurisdiction to revoke his probation, post-conviction counsel was not ineffective in failing to assert this claim in the amended motion. *Fisher v. Gammon*, No. 4:03CV01569 AGF, 2007 WL 80963, at \*2 (E.D. Mo. Jan. 8, 2007) (citing *Stelljes v. State*, 72 S.W.3d 196, 199 (Mo.Ct.App.2002) (holding that Rule 24.035 permits a claim that the trial court lacked jurisdiction to revoke probation because the probationary term ended; *Williams v. State*, 927 S.W.2d 903, 906 (Mo.Ct.App.1996))). Because Petitioner's Ground Two is unexhausted, this claim will be **DISMISSED** without prejudice to Petitioner pursuing his state court remedies.

### ***Ground Three***

In Ground Three, Petitioner argues that post-conviction counsel was ineffective in failing to transfer the claims discussed above to the amended motion for post-conviction relief. Doc. 1 at 8. Insofar as Petitioner is realleging the arguments asserted in Grounds One and Two, the Court denies his claim for the reasons set forth above.

Insofar as Petitioner attempts to assert independent claims that his post-conviction counsel was ineffective for abandoning claims during the post-conviction proceeding, such claims are not cognizable in a federal habeas proceeding. *Jennings v. Groose*, No. 4:94CV1349 CDP, 2015 WL 1475663, at \*3 (E.D. Mo. Mar. 31, 2015) (citing *Reed v. Norman*, 2014 WL 1413536, at \*2 n. 2 (E.D. Mo. April 11, 2014) (“The Court [in *Martinez* ] did not hold, as Petitioner appears to argue, that a claim for ineffectiveness of postconviction-relief counsel is an independently cognizable claim.”) (internal quotation marks and citation omitted); *Yarberry v. Sachse*, 2013 WL 3231539, at \*5 (W.D. Mo. Jun.26, 2013) (“If petitioner intends to assert an independent claim of ineffective assistance of post-conviction counsel, petitioner's claim is not cognizable in federal habeas.”); 28 U.S.C. § 2254(i) (“The ineffectiveness or incompetence of counsel during Federal or State

collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.”). Petitioner’s Ground Three is **DENIED**.

### **III. A Certificate of Appealability is Denied**

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, a petitioner must show that a “reasonable jurist” 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 will be denied.

### **IV. Conclusion**

For the foregoing reasons, it is **ORDERED** that:

- (1) Petitioner’s Ground Two is **DISMISSED WITHOUT PREJUDICE** for failure to exhaust available state law remedies;
- (2) Petitioner’s remaining Grounds for relief and his petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 are **DENIED**;
- (3) a certificate appealability is **DENIED**; and
- (4) this case is **DISMISSED**.

/s/ M. Douglas Harpool  
M. DOUGLAS HARPOOL, JUDGE  
UNITED STATES DISTRICT COURT

Dated: September 25, 2023.

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

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**JUDGMENT IN A CIVIL CASE**

BARRY GAHAGAN,

Petitioner,

v.

Case No. 23-05044-CV-MDH

BILL STANGE,

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 Ground Two is DISMISSED WITHOUT PREJUDICE for failure to exhaust available state law remedies; (2) Petitioner's remaining Grounds for relief and his petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 are DENIED; (3) a certificate appealability is DENIED; and (4) this case is DISMISSED.

Entered on: September 25, 2023.

PAIGE WYMORE-WYNN  
CLERK OF COURT

/s/ K. Willis  
(By) Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF MISSOURI  
SOUTHWESTERN DIVISION

BARRY GAHAGAN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 23-05044-CV-SW-MDH-P
	)	
BILL STANGE,	)	
	)	
Respondent.	)	

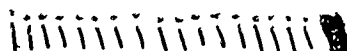
**ORDER**

Petitioner, a convicted state prisoner currently confined at the Southeast Correctional Center in Charleston, Missouri, has filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his conviction and sentence for first-degree assault, which was entered in the Circuit Court of Lawrence County, Missouri. Doc. 1 at 1. Respondent contends Petitioner's petition should be dismissed as procedurally defaulted and without merit. Doc. 5. Petitioner has filed a reply thereto. Doc. 12. For the reasons set forth below, the petition for writ of habeas corpus is **DENIED**; a certificate of appealability is **DENIED**; and this case is **DISMISSED**.

**I. Background**

Petitioner entered an *Alford* plea and was found guilty on January 26, 2017, to the charge of first-degree assault. Doc. 5-5 at 131-149. Petitioner was sentenced to 15 years' imprisonment, with a suspended execution of sentence in the Circuit Court of Lawrence County, Missouri. *Id.* at 131, 142, 146-150. Petitioner was placed on supervised probation. *Id.* at 157. On July 26, 2018, Petitioner's probation was revoked, and his sentence was ordered executed. *Id.* Petitioner did not file a direct appeal.

Pursuant to Mo. Sup. Ct. R. 24.035, Petitioner filed an amended motion to vacate, set aside or correct judgment and sentence, alleging (1) counsel failed to investigate Petitioner's mental health and advise Petitioner based on such investigation; (2) counsel failed to adequately advise Petitioner what an *Alford* plea entails; (3) the Court did not specifically inquire Petitioner or his counsel as to Petitioner's mental health; and (4) the Court misadvised Petitioner of the law concerning the Court's options if Petitioner entered an *Alford* plea. Doc. 5-5 at 132-136; *see also*



## APPENDIX B

collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.”). Petitioner’s Ground Three is **DENIED**.

### III. A Certificate of Appealability is Denied

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, a petitioner must show that a “reasonable jurist” 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 will be denied.

### IV. Conclusion

For the foregoing reasons, it is **ORDERED** that:

- (1) Petitioner’s Ground Two is **DISMISSED WITHOUT PREJUDICE** for failure to exhaust available state law remedies;
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- (3) a certificate appealability is **DENIED**; and
- (4) this case is **DISMISSED**.

/s/ M. Douglas Harpool  
M. DOUGLAS HARPOOL, JUDGE  
UNITED STATES DISTRICT COURT

Dated: September 25, 2023.

**Missouri Court of Appeals**  
Southern District

No. SD36379

IN RE: BARRY STEVEN GAHAGAN,

Petitioner,

vs.

JEFF NORMAN, SOUTH CENTRAL  
CORRECTIONAL CENTER,

Respondent.

**FILED**

OCT 28 2019

CRAIG A. STREET  
MISSOURI COURT OF APPEALS  
SOUTHERN DISTRICT

**ORDER**

On this 28<sup>th</sup> day of October, 2019, the Court takes up for consideration petitioner's "Petition for Writ of Habeas Corpus by a Person in State Custody," filed October 25, 2019. Having seen and examined said application and having been advised in the premises, the Court does deny the petition.

cc: Barry Steven Gahagan – mailed  
Attorneys of Record

MONETT POLICE DEPT.



VOID

UNIFORM CITATION

N<sup>o</sup> 151054328

STATE OF MISSOURI		BARRY		DIVISION MUNI.	
IN THE CIRCUIT COURT OF		COUNTY			
COURT ADDRESS (STREET, CITY, ZIP) 1901 E. CLEVELAND AVE., MONETT, MO 65708					
COURT DATE 11-10-15		COURT TIME 4:00 PM		COURT PHONE NO. (417) 235-4677	
I, KNOWING THAT FALSE STATEMENTS ON THIS FORM ARE PUNISHABLE BY LAW, STATE THAT I HAVE PROBABLE CAUSE TO BELIEVE THAT:					
ON/ABOUT (DATE) AT TIME 10-22-15 1140 HRS		HWY CLASS 1701 N Central		UPON/AT OR NEAR (LOCATION)	
WITHIN CITY/COUNTY AND STATE AFORESAID,					
NAME (LAST, FIRST, MIDDLE) Gahagan, Barry S					
STREET ADDRESS 602 Dayton					
CITY monett		STATE mo		ZIP CODE 65708	
DATE OF BIRTH 4-26-94		RACE W		SEX M	
HEIGHT 5'11"		WEIGHT 170			
DRIVER'S LIC. NO. V202287012		CDL <input type="checkbox"/> YES <input type="checkbox"/> NO		STATE MO	
EMPLOYER					
ADDRESS (STREET, CITY, STATE, ZIP) 15-01558					
DID UNLAWFULLY		<input type="checkbox"/> OPERATE/DRIVE <input type="checkbox"/> PARK		<input type="checkbox"/> C.M.V. <input type="checkbox"/> WITH HAZ MAT	
VEHICLE		MAKE		MODEL	
REGISTERED WEIGHT		L C		NUMBER	
STATE		YEAR			
DID THEN AND THERE COMMIT THE FOLLOWING OFFENSE. THE FACTS SUPPORTING THIS BELIEF ARE AS FOLLOWS:					
Hit M. Hazell in the face ASSAULT 3rd					
<input type="checkbox"/> Subject taken into custody. (Complete "For Issuance of a Warrant" section on reverse side.)					
DRIVING		POSTED SPEED LIMIT		DETECTION METHOD	
MPH		MPH		<input type="checkbox"/> STATIONARY RADAR <input type="checkbox"/> WATCH (AIR) <input type="checkbox"/> PACE	
				<input type="checkbox"/> MOVING RADAR <input type="checkbox"/> WATCH (GROUND) <input type="checkbox"/> OTHER	
IN VIOLATION OF: STATUTE/ORDINANCE - CHARGE CODE					
<input type="checkbox"/> RSMo <input type="checkbox"/> ORB 215.120 - 9051099.0					
SEAT BELT VIOLATION: STATUTE/ORDINANCE - CHARGE CODE					
<input type="checkbox"/> RSMo <input type="checkbox"/> ORD					
<input type="checkbox"/> IN FATAL CRASH		<input type="checkbox"/> IN CRASH		<input type="checkbox"/> DWI/BAC	
OFFICER Camp		BADGE 311		TRP/ZONE 102215	
ON INFORMATION, UNDERSIGNED PROSECUTOR CHARGES THE DEFENDANT AND INFORMS THE COURT THAT ABOVE FACTS ARE TRUE AND PUNISHABLE BY:					
<input type="checkbox"/> RSMo <input type="checkbox"/> ORD					
PROSECUTOR'S SIGNATURE				DATE	
I PROMISE TO DISPOSE OF THE CHARGES OF WHICH I AM ACCUSED THROUGH COURT APPEARANCE OR PREPAYMENT OF FINE AND COURT COSTS.				DR. LIC. POSTED	
SIGNATURE X				<input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	

MO 100-0051 (2-15)

ABSTRACT OF COURT RECORD

MONETT POLICE DEPT.



VOID

UNIFORM CITATION

N<sup>o</sup> 151054329

STATE OF MISSOURI		BARRY		DIVISION MUNI.	
IN THE CIRCUIT COURT OF		COUNTY			
COURT ADDRESS (STREET, CITY, ZIP) 1901 E. CLEVELAND AVE., MONETT, MO 65708					
COURT DATE 11-10-15		COURT TIME 4:00 PM		COURT PHONE NO. (417) 235-4677	
I, KNOWING THAT FALSE STATEMENTS ON THIS FORM ARE PUNISHABLE BY LAW, STATE THAT I HAVE PROBABLE CAUSE TO BELIEVE THAT:					
ON/ABOUT (DATE) AT TIME 10-22-15 1140 HRS		HWY CLASS 1701 N Central		UPON/AT OR NEAR (LOCATION)	
WITHIN CITY/COUNTY AND STATE AFORESAID,					
NAME (LAST, FIRST, MIDDLE) Gahagan, Barry S					
STREET ADDRESS 602 Dayton					
CITY monett		STATE mo		ZIP CODE 65708	
DATE OF BIRTH 4-26-94		RACE W		SEX M	
HEIGHT 5'11"		WEIGHT 170			
DRIVER'S LIC. NO. V202287012		CDL <input type="checkbox"/> YES <input type="checkbox"/> NO		STATE MO	
EMPLOYER					
ADDRESS (STREET, CITY, STATE, ZIP) 15-01558					
DID UNLAWFULLY		<input type="checkbox"/> OPERATE/DRIVE <input type="checkbox"/> PARK		<input type="checkbox"/> C.M.V. <input type="checkbox"/> WITH HAZ MAT	
VEHICLE		MAKE		MODEL	
REGISTERED WEIGHT		L C		NUMBER	
STATE		YEAR			
DID THEN AND THERE COMMIT THE FOLLOWING OFFENSE. THE FACTS SUPPORTING THIS BELIEF ARE AS FOLLOWS:					
Poke eye of B. R. Ridenour ASSAULT 3rd					
<input type="checkbox"/> Subject taken into custody. (Complete "For Issuance of a Warrant" section on reverse side.)					
DRIVING		POSTED SPEED LIMIT		DETECTION METHOD	
MPH		MPH		<input type="checkbox"/> STATIONARY RADAR <input type="checkbox"/> WATCH (AIR) <input type="checkbox"/> PACE	
				<input type="checkbox"/> MOVING RADAR <input type="checkbox"/> WATCH (GROUND) <input type="checkbox"/> OTHER	
IN VIOLATION OF: STATUTE/ORDINANCE - CHARGE CODE					
<input type="checkbox"/> RSMo <input type="checkbox"/> ORB 215.120 - 9051099.0					
SEAT BELT VIOLATION: STATUTE/ORDINANCE - CHARGE CODE					
<input type="checkbox"/> RSMo <input type="checkbox"/> ORD					
<input type="checkbox"/> IN FATAL CRASH		<input type="checkbox"/> IN CRASH		<input type="checkbox"/> DWI/BAC	
OFFICER Camp		BADGE 311		TRP/ZONE 102215	
ON INFORMATION, UNDERSIGNED PROSECUTOR CHARGES THE DEFENDANT AND INFORMS THE COURT THAT ABOVE FACTS ARE TRUE AND PUNISHABLE BY:					
<input type="checkbox"/> RSMo <input type="checkbox"/> ORD					
PROSECUTOR'S SIGNATURE				DATE	
I PROMISE TO DISPOSE OF THE CHARGES OF WHICH I AM ACCUSED THROUGH COURT APPEARANCE OR PREPAYMENT OF FINE AND COURT COSTS.				DR. LIC. POSTED	
SIGNATURE X				<input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	

MO 100-0051 (2-15)

ABSTRACT OF COURT RECORD

RECEIVED NOV 17 2015