

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
ROCK ISLAND DIVISION

LORENZO DAVIS, JR.,

Petitioner,

v.

KIMBERLY BUTLER,

Respondent.

Case No. 4:14-cv-04050-SLD

ORDER

Before the Court is Lorenzo Davis, Jr.'s Petition for a Writ of Habeas Corpus ("Petition"), pursuant to 28 U.S.C. § 2254. ECF No. 1. For the reasons that follow, the Petition is denied.

BACKGROUND¹**I. Factual History**

Sometime after midnight on October 1, 2004, Susan Burge was shot and killed in her home. She was shot once in the neck and once in the head. Davis admitted at trial that he shot Burge, but contended that it was in response to serious provocation. Davis and Burge had dated on and off. At times during their relationship, including the day Burge was killed, they lived together at Burge's house with her children. But Burge was supposed to move to Utah on October 1, and her daughter said it was to get away from Davis. On September 30, a going-away

¹ Pursuant to 28 U.S.C. § 2254(e)(1), the state courts' recitations of fact are presumptively correct in habeas proceedings. *Sumner v. Mata*, 449 U.S. 539, 547 (1981). The petitioner has "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Except as noted below, Davis has not attempted to rebut this presumption, so the Court adopts the factual account as provided in the Illinois Appellate Court's Order affirming his conviction. See *People v. Davis*, No. 3-06-0279 (Ill. App. Ct. Oct. 3, 2007), Answer Ex. A, ECF No. 13-1.

barbecue was held at her house. Davis attended. At around 3:00 PM, the party died down and Burge left. According to Burge's daughter, Burge was mad at Davis when she left. When Burge returned home at about 10:30 PM, Davis was there. Burge's daughter, who had returned home at 9 or 9:30 PM, was also there. She could hear Burge and Davis arguing in Burge's room for about ten or fifteen minutes. Burge told Davis to leave and Burge's daughter heard footsteps going downstairs. After hearing keys jingling, Burge's daughter heard two gunshots. She then found her mother lying at the bottom of the stairs near the door and called the police.

Davis was arrested in Tennessee. He was interviewed and admitted that he shot and killed Burge. He told the police that he had been arguing with Burge the day before the shooting about whether he was moving to Utah with her. At some point on that day, he said, Burge had told Davis to get in her car and that she was taking him to the apartment where his wife lived. According to Davis, an argument ensued, to the extent that Burge drove to the police station and had Davis removed from her car. Davis said that later, he went back to the apartment where his wife lived, where he picked up bullets for a .22 caliber pistol that he carried in his pocket. He said that after having some drinks with a friend, he went back to Burge's house at around 9:00 PM. When Burge got home, they started arguing again. Davis said that they went to sleep after this, but that at around 1:00 AM, Burge woke Davis up and told him to get out. According to Davis he then got dressed; the gun was still in his pocket. As they moved toward the door, Burge told Davis she was going to call the cops. He shot her twice, then fled.

At trial, Davis testified that just before he shot Burge, he grabbed her and tried to kiss her, attempting to end their fight, but that Burge refused and as he turned to leave, punched him in the back of the head. He testified that he had tender spots on the back of his head filled with pus and blood and that Burge's punch hit one of those spots, causing pain and bleeding. He was

wearing a “do-rag” at the time, which was confiscated by police who confirmed that his blood was on the do-rag. He said that after Burge punched him, he snapped, blacked out, and then shot Burge. The next thing he remembered after being punched was being in the woods. He did not tell police that Burge had punched him because “he thought it would make things worse for him and make it look like he killed Burge during a knock-down, drag-out fight.” *People v. Davis*, No. 3-06-0279, at 4 (Ill. App. Ct. Oct. 3, 2007), Answer Ex. A, ECF No. 13-1. He was “also concerned that the police might purposefully lose the test results showing that his blood was on the do-rag where Burge had struck him in the back of the head.” *Id.*²

✱ During the jury trial, Davis’s counsel requested that the jury be given a second degree murder instruction based on evidence that Davis shot Burge in response to serious provocation. The trial judge denied the request.

II. Procedural History

Davis was convicted by a jury of first degree murder and was sentenced to 40 years of imprisonment. Because the jury also found that he personally discharged a firearm that proximately caused Burge’s death, 25 years was added to his sentence. He appealed, arguing that the trial judge abused his discretion: 1) in refusing to give a second degree murder instruction; and 2) by sentencing Davis to 65 years of imprisonment without identifying any aggravating factors other than a need for general deterrence. Def.-Appellant Br. 9, *People v.*

² In his response to the Answer, Davis seems to dispute this characterization of his reasons for not telling the police about Burge punching him. Reply 3–4, ECF No. 15. Davis claims that he gave two reasons for not telling the police about Burge punching him: first, that he did not want to further incriminate himself; and second, in a “hypothetical” statement made to the court and jury, that if had he made the statement and the forensic test results were lost or he never received them, he would not be able to prove that it happened. *Id.* This is supported by his direct examination testimony. Report of Proceedings, Vol. V, SR483:2–14, *People v. Davis*, No. 2004 CF 902 (Cir. Ct. Rock Island Cty.), Answer Ex. X, ECF No. 13-14. This evidence, however, does not establish that the appellate court’s recitation of the facts was incorrect. It is not an unreasonable determination from Davis’s testimony that he meant he was concerned that police would purposely lose the forensic test results, making it difficult for him to prove that Burge had punched him. In fact, Petitioner himself represented to the Illinois Appellate Court that “he was afraid” that if he told the police officer who interviewed him about the punch, the police officer “would see to it that no blood would be found on his ‘doo rag.’” Def.-Appellant Br. 9, *People v. Davis*, No. 3-06-0279 (Ill. App. Ct. 2007), Answer Ex. B, ECF No. 13-1.

Davis, No. 3-06-0279 (Ill. App. Ct. 2007), Answer Ex. B, ECF No. 13-1. The Illinois Appellate Court affirmed his conviction. *People v. Davis*, No. 3-06-0279, at 9 (Ill. App. Ct. Oct. 3, 2007). Davis then filed a petition for leave to appeal before the Illinois Supreme Court, making the same two claims as in his original appeal. Pet. Leave Appeal 2, *People v. Davis*, No. 105585 (Ill. 2008), Answer Ex. E, ECF No. 13-2. The court denied Davis's petition on January 30, 2008. Denial of Pet. Leave Appeal, *People v. Davis*, No. 105585 (Ill. 2008), Answer Ex. F, ECF No. 13-3.

On August 8, 2008, Davis filed a pro se postconviction petition. See Common Law Record, Vol. II, SC180–99, *People v. Davis*, No. 2004 CF 902 (Cir. Ct. Rock Island Cty.), Answer Ex. P, ECF No. 13-6; Common Law Record, Vol. III, SC200–36, *People v. Davis*, No. 2004 CF 902 (Cir. Ct. Rock Island Cty.), Answer Ex. Q, ECF No. 13-7. On October 21, 2011, he filed an amended postconviction petition with the help of counsel. Common Law Record, Vol. IV, SC318–23, 337, *People v. Davis*, No. 2004 CF 902 (Cir. Ct. Rock Island Cty.), Answer Ex. R, ECF No. 13-8. In this petition, he made a number of claims. First, he claimed ineffective assistance of counsel based on his trial counsel's failure to move to suppress statements made to law enforcement and failure to call his dermatologist as a witness to testify about his skin condition, and because his overall representation fell below an objective standard of reasonableness. *Id.* at SC319. Second, he argued that he was denied the right to a jury pool comprised of a fair cross section of the community. *Id.* Third, he argued that the trial court erred in sua sponte issuing an instruction on the meaning of "intended" when the jury asked for a definition. *Id.* at SC320. Fourth, he argued that his appellate counsel was ineffective for failing to raise the preceding issues in his direct appeal. *Id.* Fifth, he argued that a special prosecutor should have been appointed, due to a conflict of interest between the State's Attorney, Jeff

Terronez, and the victim, who Davis alleges were related by blood. *Id.* at SC337. The petition was denied in its entirety on June 1, 2012. *Id.* at SC338.

Davis appealed and was appointed counsel. His appointed counsel filed a brief arguing only that a special prosecutor should have been appointed due to the conflict of interest between Terronez and the victim. Pet'r-Appellant Br. 2, *People v. Davis*, No. 3-12-0469 (Ill. App. Ct. 2013), Answer Ex. G, ECF No. 13-3. After the state filed its response and his appointed counsel filed a reply, Davis moved to file a pro se supplemental brief, or in the alternative a brief seeking to amend his counseled brief to add six more claims. *See* Mot. File Suppl. Pro Se Br., *People v. Davis*, No. 3-12-0469 (Ill. App. Ct. 2013), Answer Ex. J, ECF No. 13-3.³ These claims were * similar to those made in Davis's initial postconviction petition, and included: ineffective assistance of counsel for his trial counsel's failure to move to suppress his statements made to police in Tennessee, failure to call his dermatologist as a witness, and failure to put on an affirmative defense; ineffective assistance of counsel because the overall representation by his trial counsel fell below an objective standard of reasonableness; denial of his right to a jury pool from a fair cross section of the community; court error for instructing the jury on the definition of "intended"; and ineffective assistance of his direct appellate counsel for failure to raise these issues. *Id.* at 3-4. The Illinois Appellate Court denied Davis's motion. Denial Mot. File Suppl. Pro Se Br., *People v. Davis*, No. 3-12-0469 (Ill. App. Ct. September 17, 2013), Answer Ex. K, ECF No. 13-4. It then denied him relief on the remaining conflict of interest claim. *People v. Davis*, No. 3-12-0469 (Ill. App. Ct. Dec. 3, 2013), Answer Ex. L, ECF No. 13-4. He filed a petition for leave to appeal the issues raised in both his pro se brief and the brief his counsel filed

³ Although styled as "Motion on Ineffective Assistance of Counsel by Bryon Kohut Assistant Appellate Defender," in his motion Davis requested that the court "allow him to file his 6 meritorious issues in his appellant post conviction brief." Mot. File Suppl. Pro Se Br. 2. And the Illinois Appellate Court seemed to treat it as a motion to add the six claims he set out. Denial Mot. File Suppl. Pro Se Br., *People v. Davis*, No. 3-12-0469 (Ill. App. Ct. September 17, 2013), Answer Ex. K, ECF No. 13-4.

to the Illinois Supreme Court. Pet. Leave Appeal, *People v. Davis*, No. 117111 (Ill. 2014), Answer Ex. M, ECF No. 13-4. The petition was denied on March 26, 2014. Denial Pet. Leave Appeal, *People v. Davis*, No. 11711 (Ill. 2014), Answer Ex. N, ECF No. 13-5.

Davis then filed a petition for a writ of habeas corpus in this Court on May 14, 2014, pursuant to 28 U.S.C. § 2254. Pet. He alleges that: 1) he was denied effective assistance of counsel at all levels because his trial counsel failed to put on an affirmative defense and all other attorneys failed to raise this issue; 2) he was denied effective assistance of counsel because his trial counsel failed to file a motion to suppress statements he made to the police; 3) he was denied effective assistance of counsel because trial counsel failed to call his dermatologist as a witness; 4) his right to trial by an impartial and properly instructed jury was denied by the trial judge giving the jury the wrong definition of “intended”; 5) his right to trial by an impartial and properly instructed jury was denied because the trial judge failed to instruct the jury on second degree murder; 6) his right to a jury of his peers was denied because the jury pool did not represent a fair cross section of the community; 7) he was denied due process because the State’s Attorney was related to the victim and a special prosecutor was not appointed; and 8) he was denied effective assistance of counsel at all levels because his attorneys’ representations fell below an objective standard of reasonableness. *Id.* at 5–18, ECF No. 1.⁴

DISCUSSION

This case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) and the Rules Governing Section 2254 cases. AEDPA establishes a deferential standard, *Stechnauer v. Smith*, 852 F.3d 708, 714 (7th Cir. 2017), so courts cannot “lightly conclude” that habeas relief is necessary, *Burt v. Titlow*, 134 S. Ct. 10, 16 (2013). When a state

⁴ The Court uses the ECF page numbers of the Petition to avoid confusion because the page numbers originally on the Petition start at page two.

court has adjudicated a claim on the merits, a federal court can issue a writ of habeas corpus only if the state decision was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” 28 U.S.C. § 2254(d), or if the decision was “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,” *id.* § 2254(d)(2). Respondent argues that many of Davis’s claims are procedurally defaulted, and that therefore this Court cannot review their merits. For the remaining claims, and in the alternative for the allegedly defaulted claims, Respondent argues that Davis’s claims have no merit.

I. Procedurally Defaulted Claims

* “Procedural default is a defense to federal habeas corpus review.” *Oaks v. Pfister*, 863 F.3d 723, 726 (7th Cir. 2017). A claim is procedurally defaulted if the petitioner fails to raise the claim throughout at least one complete round of state-court review. *Id.* A claim can also be “procedurally defaulted if the state court rejects it on adequate and independent state law grounds, including procedural grounds.” *Id.* (citing *Coleman v. Thompson*, 501 U.S. 722, 729–30 (1991)). States are “entitled to treat as forfeited a proposition that was not presented in the right court, in the right way, and at the right time—as state rules define those courts, ways, and times.” *Szabo v. Walls*, 313 F.3d 392, 395 (7th Cir. 2002). “[W]hen a state court refuses to reach the merits of a petitioner’s federal claims because they were not raised in accord with the state’s procedural rules . . . that decision rests on independent and adequate state procedural grounds.” *Kaczmarek v. Rednour*, 627 F.3d 586, 591 (7th Cir. 2010).

Respondent argues that all but two of Davis’s claims are procedurally defaulted. Answer 11–18, ECF No. 13. The allegedly procedurally defaulted claims include all of the ineffective assistance of counsel claims (claims 1, 2, 3, and 8 of the Petition), the claim that Davis was

denied the right to a properly instructed and impartial jury when the court instructed the jury on the meaning of “intended” (claim 4 of the Petition), and the claim that he was denied the right to a jury pool comprised of a fair cross section of the community (claim 6 of the Petition). Davis raised these issues in his counseled postconviction petition.⁵ Davis appealed the denial of his postconviction petition, but his appellate postconviction counsel raised only one claim: his conflict of interest claim. In a motion to file a pro se supplemental brief, Davis attempted to raise the rest of the claims he asserts now. Respondent argues that by failing to include these claims in the brief his counsel filed, the claims were procedurally defaulted. Essentially,

✱ Respondent argues that the appellate court denied Davis’s motion to add the claims to the brief on procedural grounds and that those procedural grounds are independent and adequate state grounds that block federal review. Answer 12.

✱ Although the Illinois Appellate Court did not note its reasons for denying Davis’s motion to add six additional claims to his brief, Respondent asserts that the decision rested on two procedural grounds: Illinois Supreme Court Rule 341, which prohibits a party from filing more than one brief; and Illinois’s rule against a represented party also representing himself pro se—a

⁵ Two of the claims appear slightly different in the postconviction petition than in the pro se motion to file a supplemental brief and the Petition. First, in his counseled postconviction petition Davis never explicitly raised an argument of ineffective assistance of counsel based on trial counsel’s failure to put on an affirmative defense. See Common Law Record, Vol. IV, SC319. But from his motion to file a supplemental pro se brief, it seems that this claim and the failure to call his dermatologist as a witness are largely similar claims. See Mot. File Suppl. Pro Se Br. 3. Although a petitioner must present the same claims to the state and federal courts, “hypertechnical congruence between the claims” is not required. *Anderson v. Benik*, 471 F.3d 811, 814 (7th Cir. 2006). Here, Davis made various ineffective assistance claims based on the failure to pursue a provocation defense theory, so this Court construes the claim as fairly presented. Second, in his counseled postconviction petition Davis only asserted that “appellate counsel was generally ineffective for failing to raise” the other issues in his petition on direct appeal. Common Law Record, Vol. IV, SC320. Now Davis argues that all of his counsel—trial, direct appeal, postconviction, and appellate postconviction—were ineffective and their representations fell below an objective standard of reasonableness. Pet. 17. The ineffectiveness of postconviction counsel is not a ground for relief in a habeas proceeding. 28 U.S.C. § 2254(i). And Davis’s claim that his initial postconviction counsel was ineffective is only relevant to whether he has cause to excuse a procedural default. The Court will not consider the ineffectiveness of postconviction counsel as an independent claim, but will construe the postconviction petition claim of general ineffectiveness as a claim that direct appeal counsel’s representation fell below an objectively reasonable standard of care. See *Anderson*, 471 F.3d at 814 (explaining that the petitioner need not use the precise language of a federal right if the claim and facts “evoke a familiar constitutional constraint”).

* rule against hybrid representation. *Id.*; see *People v. Handy*, 664 N.E.2d 1042, 1046–47 (Ill. App. Ct. 1996) (holding that a criminal defendant who has counsel generally has no authority to file pro se motions).

* This Court finds that Rule 341 could not have provided the appellate court's basis. Even if Rule 341 prohibits a party from filing more than one brief, Davis was not seeking to file a second brief. Rather, he was seeking to amend the brief his counsel filed on his behalf. But the rule against hybrid representation, if relied upon by the appellate court, would be an adequate and independent state ground of decision. See *Metlock v. Pfister*, No. 15 C 6157, 2016 WL 1746164, at *5 (N.D. Ill. May 3, 2016) ("The state procedural rule against hybrid representation (i.e., filing pro se documents while represented by counsel), is an independent and adequate state law ground barring federal habeas review."); *Harvey v. Lemke*, No. 13-1362, 2014 WL 2598843, at *3 (C.D. Ill. June 10, 2014) ("Illinois courts have a well-established rule that prohibits defendants that are represented by counsel from filing pro se supplemental pleadings or motions, otherwise known as hybrid representation."); *People v. Trotter*, 36 N.E.3d 918, 929 (Ill. App. Ct. 2015); *People v. Hampton*, 959 N.E.2d 1158, 1160–61 (Ill. App. Ct. 2011). But see *Payton v. Pfister*, No. 11 C 6610, 2015 WL 5829749, at *8 (N.D. Ill. Oct. 1, 2015) ("Courts in this District are split as to whether the Illinois rule against hybrid representation is sufficiently consistent to constitute an independent and adequate state law ground resulting in procedural default of a habeas claim."). Even if a rule is not strictly followed, if it is well established and not applied "infrequently, unexpectedly, or freakishly," it can be an adequate basis for a state court's decision to abstain from deciding the merits of a claim. *Miranda v. Leibach*, 394 F.3d 984, 995 (7th Cir. 2005) (quoting *Prihoda v. McCaughtry*, 910 F.2d 1379, 1383 (7th Cir. 1990)).

* But even if the rule against hybrid representation is an adequate and independent ground that would preclude federal review of Davis's claims, there is another wrinkle in Respondent's procedural default defense—the Illinois Appellate Court did not note its reasoning for denying Davis's motion to add six additional claims to his brief. The record of the order denying Davis's motion indicates that the appellate court said, "Appellant's pro se motion to add six (6) issues his counsel did not raise is DENIED." Denial Mot. File Suppl. Pro Se Br. So the question is whether the Illinois Appellate Court actually relied on procedural grounds. Respondent argues that context makes this clear. In cases "where on the face of the order it is unclear on what basis the state court disposed of a claim," courts must "look to the nature of the disposition and the surrounding circumstances to determine whether the state court relied on an independent and adequate state law ground in disposing of the claim" *Woods v. Schwartz*, 589 F.3d 368, 375 (7th Cir. 2009). The Supreme Court has held that "[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington v. Richter*, 562 U.S. 86, 99 (2011). But this presumption can be "overcome when there is reason to think some other explanation for the state court's decision is more likely." *Id.* at 99–100.

* Seventh Circuit case law from cases with similar facts does not provide a clear answer.* In one case, the Illinois Appellate Court "summarily dismissed" pro se motions from a petitioner to discharge his counsel and file a supplemental brief. *Smith v. Pfister*, No. 09 C 01356, 2013 WL 1568063, at *10 (N.D. Ill. Apr. 11, 2013). The respondent argued that the court should infer from the circumstances that the rule against hybrid representation was the basis for the denial, but the court found that the circumstances did not warrant such an inference. *Id.* Because the

petitioner had filed a motion to discharge his counsel, he was not seeking to have an attorney represent him and to also represent himself. *Id.* In other cases, courts have suggested that the failure to provide reasoning in cases like this means they cannot find procedural default. See *Lesure v. Atchison*, 891 F. Supp. 2d 920, 927 (N.D. Ill. 2012); *Parker v. Chandler*, No. 09 C 4231, 2011 WL 221834, at *8 (N.D. Ill. 2011); *Duncan v. Hathaway*, 740 F. Supp. 2d 940, 947 (N.D. Ill. 2010).

* These last cases seem to rely on a requirement of a “clear and express” statement from the state court. *See, e.g., Duncan*, 740 F. Supp. 2d at 947. This language comes from *Harris v. Reed*, 489 U.S. 255, 263 (1989). In *Harris*, the Supreme Court addressed the problem of ambiguous state court decisions that discuss both federal and state law. The Court held that “a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case ‘clearly and expressly’ states that its judgment rests on a state procedural bar.” *Id.* (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985)). Later Supreme Court cases make clear that this rule “applies only when it fairly appears that a state court judgment rested primarily on federal law or was interwoven with federal law.” *Coleman*, 501 U.S. at 739 (explaining that the petitioner, in arguing that *Harris* applies to all cases, “read the rule [that a state court clearly and expressly state that it is basing its decision on a state rule] out of context.”).

Here, the appellate court’s order is not ambiguous in the sense that it intermixes federal and state law. The correct inquiry is whether the Court should presume that the order denying Davis’s motion was a decision on the merits or whether “there is reason to think some other explanation for the state court’s decision is more likely.” *Harrington*, 562 U.S. at 99–100. Here, from the circumstances, the Court finds that the Illinois Appellate Court declined to hear the six

additional claims Davis attempted to set forth for procedural reasons rather than by summarily dismissing them on the merits. Several facts compel this conclusion. First, Davis's motion came after the close of briefing. His counsel had already filed an opening and a reply brief on his behalf raising one issue. Although Davis seems to argue that he would not have had time to try to fire his attorney, *see* Reply 11, ECF No. 15-1, more than a month passed between when he knew that his counsel only raised one issue and when he filed his own brief. Davis received the brief his counsel filed on June 27 and the state's response on August 7; he did not file his own brief until August 14. *Id.* In this time or even with his motion, he could have filed a motion to discharge his attorney, like the petitioner in *Smith* did. Second, his motion asks for the court to "allow him to file his 6 meritorious issues." Mot. File Suppl. Pro Se Br. 2. The state never responded. One month later, the court denied his request. Denial Mot. File Suppl. Pro Se Br. Had the court made a decision on the merits of these claims, it almost certainly would have asked for a response from the state. Third, a few months after denying Davis's motion, the appellate court rendered its decision on the merits of the claim raised in Davis's counseled brief. *People v. Davis*, No. 3-12-0469 (Ill App. Ct. Dec. 3, 2013). It did not mention Davis's other claims. This is not a case where an unexplained order upholds an earlier judgment or rejects the same claim raised in an earlier reasoned decision. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991). There is nothing to suggest that the court made a merits ruling on Davis's proposed additional claims with no response from the state and then a few months later made a merits decision on Davis's other claim. From the context of the appellate court order, it is clear that the motion for leave to file the additional claims was denied on a state procedural ground, not on the merits. The claims raised in Davis's motion to supplement his counsel's brief are procedurally barred.

X A federal court can review a state court decision that has been procedurally defaulted if the petitioner shows cause for the default and prejudice from the alleged violation of the law. *Coleman*, 501 U.S. at 750; *Oaks*, 863 F.3d at 726. “Constitutionally ineffective assistance of counsel can excuse a procedural default.” *Oaks*, 863 F.3d at 726. But “[b]ecause a prisoner does not have a constitutional right to counsel in state postconviction proceedings, ineffective assistance in those proceedings does not qualify as cause to excuse a procedural default.” *Davila v. Davis*, 137 S. Ct. 2058, 2062 (2017). There is a narrow exception to this general rule: ineffective assistance of state postconviction counsel is cause excusing default of a claim that trial counsel was ineffective where the state “effectively requires a defendant to bring that claim in state postconviction proceedings.” *Id.*; see *Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2013); *Martinez v. Ryan*, 566 U.S. 1, 14–15 (2012). To excuse his failure to properly raise the defaulted claims to the appellate court, Davis seems to argue that his appellate postconviction counsel was ineffective in failing to include his desired claims. Reply 8–12, ECF Nos. 15–15-1. Even if the *Martinez* line of cases applied, this would only serve as cause to excuse his ineffective assistance of counsel claims. But because he has no right to appellate postconviction counsel and the *Martinez* exception has not been expanded to include claims of ineffective appellate postconviction counsel, Davis cannot show cause for his default in this manner. See *Davila*, 137 S. Ct. at 2066 (describing the *Martinez* exception as a “highly circumscribed, equitable” exception and declining to extend it to excuse new categories of procedurally defaulted claims); *Arnold v. Dormire*, 675 F.3d 1082, 1087 (8th Cir. 2012) (“[A]ny error by postconviction appellate counsel would not constitute cause to excuse Arnold’s procedural default.”).

II. Remaining Claims

Davis has two remaining claims that are not procedurally defaulted. First is his claim that his right to trial by an impartial and properly instructed jury was denied because the trial judge failed to instruct the jury on his provocation defense (claim 5 of the Petition). This claim was raised in his direct appeal and in his petition for leave to appeal to the Illinois Supreme Court. Second is his claim that he was denied due process because the State's Attorney was related to the victim and a special prosecutor was not appointed (claim 7 of the Petition). This claim was mostly raised in his appeal from the trial court's denial of his counseled postconviction brief and in his petition for leave to appeal to the Illinois Supreme Court. When a claim is adjudicated on the merits by a state court, a petition for a writ of habeas corpus cannot be granted unless the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

A. Failure to Instruct on Provocation Defense

In his Petition, Davis argues that the "trial court commit[ed] error in not properly instructing the jury on the elements of the charge against the Defendant." Pet. 12. He argues that the trial court erred in denying his request to submit various instructions to the jury and in allowing various of the state's proposed instructions. *Id.* In his response, he characterizes this as a due process claim. Reply 19, ECF No. 15-1. The essence of his claim seems to be that the trial court refused to give a second degree murder instruction and the instructions it did give were inconsistent with a second degree murder charge. And on direct appeal and in his petition for leave to appeal to the Illinois Supreme Court, his counsel only argued that the court erred in failing to give a second degree murder instruction based on his defense of serious provocation.

Def.-Appellant Br. 2; Pet. Leave Appeal 12–15, *People v. Davis*, No. 105585 (Ill. 2008). To the extent that the Petition makes other claims, they were not raised through one full round of state-court review and are not exhausted. *See Guest v. McCann*, 474 F.3d 926, 930 (7th Cir. 2007).

* Because “[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended [postconviction] petition is waived,” 725 ILCS 5/122-3, any other claims the Petition makes are procedurally defaulted, *Guest*, 474 F.3d at 930.

As to the claim that the court erred in refusing to submit a second degree murder instruction based on a provocation defense, this Court must determine whether the Illinois Appellate Court’s decision on the matter was “contrary to, or involved an unreasonable application of” clearly established federal law. 28 U.S.C. § 2254(d)(1). A state court decision is contrary to clearly established law if the court “applies a rule that contradicts the governing law set forth in [Supreme Court] cases” or “decides a case differently than [Supreme Court] has on a set of materially indistinguishable facts.” *Williams v. Taylor*, 529 U.S. 362, 405, 413 (2000).

Here, the appellate court held that, in order to receive a second degree murder instruction under Illinois law, Davis was required to show that there was some evidence of serious provocation and he had failed to do so. *People v. Davis*, No. 3-06-0279, at 7 (Ill. App. Ct. Oct. 3, 2007). It held that being struck on a sore spot on the back of his head was “not sufficient to constitute ‘serious provocation.’” *Id.* A federal court cannot grant a petition for a writ of habeas corpus on the basis of an error in state law. *King v. Pfister*, 834 F.3d 808, 814 (7th Cir. 2016). But even if the evidence warranted a second degree murder instruction, the appellate court’s decision would not be contrary to established federal law. In *Beck v. Alabama*, 447 U.S. 625, 638 (1980), the Supreme Court held that “if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction” in a death penalty case, a state must

allow the instruction. But the Court expressly “d[id] not decide whether the Due Process Clause would require the giving of such instructions in a noncapital case.” *Id.* at 638 n.14. So as the Seventh Circuit in *Calloway v. Montgomery*, 512 F.3d 940, 944 (7th Cir. 2008), explained, “there is no clearly established Supreme Court precedent” that a defendant like Davis would be entitled to a jury instruction on a lesser offense. In *Contreras v. Butler*, No. 13 C 7306, 2015 WL 5921732, at *7 (N.D. Ill. Oct. 9, 2015), the court was presented with a similar claim. Relying on *Beck* and *Calloway*, the court held that an Illinois court decision that the petitioner had not provided sufficient evidence to warrant a second degree murder instruction was not contrary to established federal law. As in *Contreras*, the Illinois court here determined that Davis did not provide sufficient evidence for a second degree murder instruction. Accordingly, Davis’s due process claim is without merit.

B. Conflict of Interest

Davis also asserts that his substantive due process rights were violated because the State’s Attorney of Rock Island County, Jeff Terronez, was related to the victim in his case and a special prosecutor was not appointed. Pet. 15. In his counseled brief appealing the denial of his postconviction petition, and in his response to the Answer, Davis also alleges that the judge overseeing his postconviction petition hearing should have recused himself because he was a witness in a state bar disciplinary proceeding against Jeff Terronez. Pet’r-Appellant Br. 11–12; Reply 29, ECF No. 15-2. But no facts regarding the recusal of the postconviction judge were included in Davis’s petition; Respondent did not have notice that judicial recusal would be an issue with respect to Davis’s conflict of interest claim and thus this Court will not consider it. *United States v. Cruse*, 805 F.3d 795, 818 n.7 (7th Cir. 2015).

The Illinois Appellate Court held that Davis had “failed to alleged [sic] a disqualifying interest that would require the appointment of a special prosecutor.” *People v. Davis*, No. 3-12-0469, at 5 (Ill App. Ct. Dec. 3, 2013). It explained that when a prosecutor’s alleged interest is of a personal nature, the defendant needs to show significant emotional ties or actual and substantial prejudice. *Id.* But a familial connection does not *per se* create significant emotional ties. *Id.* And the court held that Davis did not allege any actual and substantial prejudice from the conflict of interest. *Id.* Without more, the court found there was no actual personal interest or appearance of impropriety. *Id.*

Again, violation of state law is not an appropriate ground for issuing a writ of habeas corpus. *King*, 834 F.3d at 814. There is no clearly established federal right to alternate counsel when the prosecutor and victim are related. The due process requirements for judges do not apply to prosecutors. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980). “Prosecutors need not be entirely ‘neutral and detached.’” *Id.* (quoting *Ward v. Vill. of Monroeville*, 409 U.S. 57, 62 (1972)). In *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 814 (1987), the Supreme Court held that interested parties cannot be appointed as special prosecutors in criminal contempt proceedings. But *Young* was not decided on constitutional grounds. *Id.* at 809 n.21. Where the Supreme Court has “give[n] no clear answer to the question presented” habeas relief is not available under 28 U.S.C. § 2254(d)(1). *Wright v. Van Patten*, 552 U.S. 120, 126 (2008).

Even if the judicial due process standards applied to prosecutors, the Supreme Court has explained that “matters of kinship” and “personal bias . . . would seem generally to be matters merely of legislative discretion.” *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). The Court has explained that judicial recusal is constitutionally required “only in the most extreme of cases” of bias or prejudice. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821 (1986). The main point of the

claim presented to the Illinois courts was that the State's Attorney that prosecuted Davis was a relative of the victim so he could not prosecute Davis, but such a prosecution does not clearly violate Davis's due process rights. Thus, Davis's conflict of interest claim is without merit.

Davis also asserts in the Petition that the conflict of interest led to "malicious and bias [sic] prosecution of Defendant." Pet. 15. He expands on this claim in his response to the Answer. In his postconviction petition and the appeal of its denial, however, Davis did not assert claims of malicious prosecution. He, through counsel, only argued that the State's Attorney was partial because of his family relationship and that a special prosecutor was required. Pet'r-Appellant Br. 8-12. Presentation of additional facts in a federal petition does not "evade[] the exhaustion requirement when the prisoner has presented the substance of his claim to the state courts." *Vasquez v. Hillery*, 474 U.S. 254, 257-58 (1986). But the malicious and biased prosecution argument made by Davis sounds more like a prosecutorial misconduct claim than a due process claim based on a conflict of interest. For instance, Davis argues that he was selectively prosecuted. Reply 23, ECF No. 15-2. And he argues that he was punished by the threat of an enhanced penalty. Id. But other than in his petition for leave to the Illinois Supreme Court, Davis did not raise these allegations in a state court. Pet. Leave Appeal, at Arg. 5-7, *People v. Davis*, No. 117111 (Ill. 2014). It was not fairly presented to the Illinois Appellate Court or the trial court. *Castille v. Peoples*, 489 U.S. 346, 351 (1989) ("The Court of Appeals below held, and respondent contends here, that the submission of a new claim to a State's highest court on discretionary review constitutes a fair presentation. We disagree."). As "[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended [postconviction] petition is waived," 725 ILCS 5/122-3, any claims based on prosecutorial

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misconduct or malicious and biased prosecution are procedurally defaulted and this Court will not consider their merits.

III. Certificate of Appealability

When a district court “enters a final order adverse to the applicant,” it must “issue or deny a certificate of appealability.” Rule 11(a), Rules Governing § 2254 Cases. When the district court reaches the merits of a claim, a certificate can only be issued “if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C § 2253(c)(2). As to the conflict of interest claim and the second degree murder instruction claim, the Court finds that Davis has not made such a showing. A certificate shall not issue for those claims. When the district court “denies a habeas petition on procedural grounds without reaching the prisoner’s underlying constitutional claim,” it should issue a certificate if “jurists of reason would find it debatable whether the district court was correct in its procedural ruling” and if “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right.” *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). This Court finds that jurists of reason could debate whether the Illinois Appellate Court relied on state procedural grounds when it denied Davis’s motion to add claims to the appeal of his postconviction petition. Jurists of reason could also debate whether Davis has stated valid federal claims of ineffective assistance of counsel (other than the claims of ineffective assistance of his postconviction trial and appellate counsel), jury instruction error, and denial of a jury pool comprised of a fair cross section of the community (claims 1, 2, 3, 4, 6, and 8 of the Petition). The Court certifies those claims for appeal.

CONCLUSION

For the reasons stated above, Lorenzo Davis, Jr.'s Petition, ECF No. 1, is DENIED.

Entered this 27 day of September, 2017.

s/ Sara Darrow
SARA DARROW
UNITED STATES DISTRICT JUDGE

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