

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 16-5951

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 21, 2017
DEBORAH S. HUNT, Clerk

CARL J. WAGNER,

Petitioner-Appellant,

v.

TAMMY FORD, Warden,

Respondent-Appellee.

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) ON APPEAL FROM THE UNITED
) STATES DISTRICT COURT FOR
) THE MIDDLE DISTRICT OF
) TENNESSEE
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ORDER

Before: SILER, GRIFFIN, and STRANCH, Circuit Judges.

Carl J. Wagner, a pro se Tennessee prisoner, appeals the district court's judgment denying his petition for a writ of habeas corpus under 28 U.S.C. § 2254. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See Fed. R. App. P. 34(a)*.

In 2009, a jury convicted Wagner of first-degree felony murder committed during the perpetration of aggravated robbery, second-degree murder, and especially aggravated robbery. Wagner's first-degree murder and aggravated-robbery convictions were based on evidence that showed that Wagner shot and killed Adriel Powell during a drug deal and then took Powell's backpack containing marijuana as he left the scene. The trial court merged the second-degree murder conviction into the first-degree murder conviction and sentenced Wagner to a term of life imprisonment for first-degree murder and a concurrent 22-year term of imprisonment for especially aggravated robbery.

In his appeal in the Tennessee Court of Criminal Appeals, Wagner argued that the evidence was insufficient to support his convictions. The court of appeals held that under Tennessee's corpus delicti rule, which specifies that a conviction cannot be founded solely on a defendant's confession and that corroborating evidence must be offered to support the confession, the evidence was insufficient for the jury to convict Wagner of first-degree felony murder and aggravated robbery because the only evidence that Powell possessed a backpack was Wagner's confession. *See State v. Wagner*, No. M2010-00992-CCA-R3-CD, 2011 WL 2893098, at *5 (Tenn. Crim. App. July 20, 2011); *see also State v. Smith*, 24 S.W.3d 274, 281 (Tenn. 2000). The court therefore reversed Wagner's first-degree murder and aggravated-robbery convictions but affirmed Wagner's second-degree murder conviction. *See id.* at *6. The Tennessee Supreme Court, however, found that the prosecution presented evidence to corroborate Wagner's statements indicating that Powell had a backpack. The court therefore reinstated Wagner's first-degree murder and aggravated-robbery convictions. *State v. Wagner*, 382 S.W.3d 289 (Tenn. 2012).

In September 2013, Wagner filed a petition for post-conviction relief in the trial court. The trial court denied the petition, the Tennessee Court of Criminal Appeals affirmed, and the Tennessee Supreme Court denied permission to appeal. *See Wagner v. State*, No. M2014-01086-CCA-R3-PC, 2015 WL 739608 (Tenn. Crim. App. Feb. 20, 2015).

In September 2015, Wagner filed a petition for a writ of habeas corpus under § 2254 in the district court, raising sufficiency of the evidence, ineffective assistance of counsel, and Fifth Amendment claims. The district court denied Wagner's petition but granted him a certificate of appealability on his claim that the evidence was insufficient to convict him of first-degree felony murder and especially aggravated robbery. We denied Wagner's application to expand the certificate of appealability granted by the district court.

We review de novo a district court's judgment denying a petition for a writ of habeas corpus. *See Burton v. Renico*, 391 F.3d 764, 770 (6th Cir. 2004). To obtain relief under § 2254, Wagner must demonstrate that the Tennessee Supreme Court's resolution of his sufficiency claim was contrary to or an unreasonable application of *Jackson v. Virginia*, 443 U.S. 307 (1979), or 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). In reviewing sufficiency of the evidence claims under the Antiterrorism and Effective Death Penalty Act, we give the state court's judgment a double layer of deference. *See Brown v. Konteh*, 567 F.3d 191, 204-05 (6th Cir. 2009). First, we must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See id.* at 205 (citing *Jackson*, 443 U.S. at 319). Second, even if we conclude that a rational trier of fact could not have found the petitioner guilty beyond a reasonable doubt, we must defer to the state court's sufficiency determination as long as it is not unreasonable. *See id.* (citing 28 U.S.C. § 2254(d)(2)). Wagner's sufficiency claim is based on the alleged absence of evidence proving that Powell had a backpack.

Tennessee's felony-murder statute requires the prosecution to prove beyond a reasonable doubt that the defendant killed another during the perpetration of a robbery. *See Wagner*, 382 S.W.3d at 289 (citing Tenn. Code Ann. § 39-13-202(a)(2)). "Robbery" is "the intentional or knowing theft of property from the person of another by violence or putting the person in fear." *Id.* at 297 (quoting Tenn. Code Ann. § 39-13-401(a)). "Especially aggravated robbery" is a robbery with the use of a deadly weapon where the victim suffers serious bodily injury. *Id.* at 297 (citing Tenn. Code Ann. § 39-13-403(a)). Although Wagner claimed self-defense, he admitted that he shot Powell twice as Powell was trying to escape from the apartment laundry room where the drug deal was taking place. *See id.* at 294. Wagner also admitted that he did not know whether Powell had a gun when he shot him. *See id.* Accordingly, a rational juror could have concluded that Wagner did not shoot Powell in self-defense. Therefore, both of Wagner's convictions depended on whether the evidence was sufficient to conclude that Wagner robbed Powell by stealing his backpack.

Although the police did not recover a backpack and Wagner did not admit taking one, Wagner did tell the police that Powell had a backpack with him. *See id.* at 294. Crime scene investigators found Powell's blood smeared on the railing outside of the laundry room along the same path Wagner took leaving the scene. *See id.* at 292, 298. Since the medical examiner's testimony indicated that Powell's injuries eliminated the possibility that he could have left the laundry room after being shot, *see id.* at 295, 298, the evidence suggested that Powell's blood

was transferred from the backpack to the railing as Wagner fled. *See id.* at 298. The court also cited Wagner's admission that he went to the laundry room to buy marijuana from Powell, evidence that no marijuana was found on Powell in the laundry room, and evidence that police found marijuana in Wagner's belongings shortly after the shooting, as sufficient proof that Wagner took Powell's backpack containing marijuana. *See id.* at 298-99. The court concluded therefore that the evidence was sufficient for the jury to find beyond a reasonable doubt that Wagner committed felony murder and especially aggravated robbery. *See id.* at 298-300.

Although the case against Wagner was largely circumstantial, viewed in the light most favorable to the prosecution, the evidence was sufficient for the jury to find beyond a reasonable doubt that Wagner killed Powell in the course of robbing him of his backpack. Thus, the Tennessee Supreme Court's decision affirming Wagner's convictions was not contrary to or an unreasonable application of *Jackson*. Wagner has not proved by clear and convincing evidence that the Tennessee Supreme Court's decision was based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(e)(1).

Accordingly, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

Decision From Carl J. Wagner v. Tammy Ford, United States Court of Appeals
for the Sixth Circuit, No. 16-5951, rehearing en banc.

Appendix F

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CARL J. WAGNER

v.

TAMMY FORD

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NO. 3:15-0948
JUDGE TRAUGER

ENTRY OF JUDGMENT

Judgment is hereby entered for purposes of Rule 58(a) and/or Rule 79(a) of the Federal Rules of Civil Procedure on 5/25/2016 as to the order entered 5/25/2016 at DE#19.

KEITH THROCKMORTON, CLERK
s/Dalaina Thompson, Deputy Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

CARL J. WAGNER, #463060,

Petitioner,

v.

TAMMY FORD, WARDEN,

Respondent.

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Case No. 3:15-cv-00948

Judge Trauger

MEMORANDUM OPINION

Petitioner Carl Wagner, a prisoner in state custody, filed a timely *pro se* petition under 28 U.S.C. § 2254 for the writ of habeas corpus, an amended petition, and a supplemental petition (ECF Nos. 1, 7, and 8), challenging the 2009 judgment of the Davidson County Circuit Court convicting him on one count of first-degree felony murder, one count of second-degree murder, and one count of especially aggravated robbery. The respondent filed an answer (ECF No. 17) in opposition to the petition, along with a copy of the underlying state-court record (ECF No. 16).

The matter is ripe for review, and this court has jurisdiction. 28 U.S.C. § 2241(d). Upon consideration of the record as a whole, the court finds for the reasons set forth herein that the petitioner is not entitled to relief on the grounds asserted. Because a federal court must presume the correctness of a state court's factual findings unless the petitioner rebuts this presumption with "clear and convincing evidence," 28 U.S.C. § 2254(e)(1), and because the issues presented can be resolved with reference to the state-court record, the court further finds that an evidentiary hearing is not necessary. See *Schriro v. Landrigan*, 550 U.S. 464, 474 (2007) (holding that if the record refutes a petitioner's factual allegations or otherwise precludes habeas relief, the district court is not required to hold an evidentiary hearing (citing *Totten v. Merkle*, 137 F.3d 1172, 1176 (9th Cir. 1998))). Mr. Wagner's petition will be denied and this matter dismissed.

I. PROCEDURAL BACKGROUND

On November 5, 2009, a Davidson County jury found the petitioner guilty of first-degree felony murder, second-degree murder, and especially aggravated robbery. (Trial Tr., ECF No. 16-7, at 51–52.)

The trial court noted at that time that the petitioner would receive an automatic life sentence for first-degree murder and that the second-degree murder conviction would merge into the conviction for first-degree murder. (*Id.* at 53.) The court formally sentenced the petitioner on December 18, 2009 to life with the possibility of parole on the first-degree murder count and a concurrent sentence of 22 years for the especially aggravated robbery conviction. (Sentencing Order, ECF No. 16-1, at 24–25.)

On direct appeal, the Tennessee Court of Criminal Appeals affirmed the petitioner's conviction for second-degree murder but reversed the convictions for first-degree felony murder and especially aggravated robbery, finding that the evidence did not support those convictions. *State v. Wagner* (“*Wagner I*”), No. M2010-00992-CCA-R3-CD, 2011 WL 2893098, at *1 (Tenn. Crim. App. July 20, 2011), perm. app. granted (Tenn. Jan. 11, 2012). The Tennessee Supreme Court granted the state's application to appeal, however, and that court reversed the intermediate court's decision and reinstated all three convictions. *State v. Wagner* (“*Wagner II*”), 382 S.W.3d 289 (Tenn. 2012).

On September 23, 2013, the petitioner filed a *pro se* petition for post-conviction relief in the state trial court. (ECF No. 16-21, at 27–48.) The court appointed counsel, who filed an amended petition. (ECF No. 16-21, at 52–55.) After conducting a hearing at which the petitioner and his trial attorney testified, the trial court entered an order denying the petition. (ECF No. 16-21, at 59.) That decision was affirmed. *Wagner v. State* (“*Wagner III*”), No. M2014-01086-CCA-R3-PC, 2015 WL 739608 (Tenn. Ct. Crim. App. Feb. 20, 2015), perm. app. denied (Tenn. June 12, 2015).

The petitioner filed his federal habeas petition in this court around August 28, 2015. (ECF No. 1-1.)

II. FACTUAL SUMMARIES

The Tennessee Supreme Court summarized the evidence presented at trial as follows:

Officer William McKay of the Metropolitan Nashville Police Department (“Metro”) arrived at the scene of the shooting [the laundry room of a Nashville apartment complex located at 1601 Herman Street] shortly after a 3:25 p.m. report of “shots fired.” Four bystanders in an outdoor courtyard told Officer McKay of a “dead person in the laundry room.” Another bystander told Officer McKay of “a guy [inside the laundry room] with his brains out.” As he approached the laundry room, Officer McKay noticed a bullet hole in the shattered window next to the door. Because the door was closed and locked, Officer McKay did not enter the laundry room, but he saw the victim, whom he described as obviously dead, lying on the floor just inside the door. After securing the scene, Officer McKay called for homicide detectives and remained at the scene until other officers arrived.

Metro Detective Michael Moss was on his way to the scene of the shooting when he was redirected to the emergency room of Vanderbilt Children's Hospital to investigate a report of a person with gunshot wounds, later identified as the defendant. When he arrived, Detective Moss spoke briefly with Thalys Smith, who had driven the defendant to the hospital and assisted him into the emergency room. Detective Moss then interviewed the defendant who said that he had been standing in a grassy area of the apartment complex when he heard gunshots and fled. Realizing that he had been shot, the defendant ran to Mr. Smith, who helped him into a vehicle and drove him to the hospital. According to Detective Moss, the defendant said he knew Mr. Smith prior to the shooting and described Mr. Smith as "my boy," but the defendant denied any involvement in or knowledge of the shooting.

Before he left the hospital, Detective Moss collected several items from the defendant's belongings, including money totaling \$51.25, a holster, Nike tennis shoes, clothing, a lighter, and a bag of "green plant material," which scientific testing later identified as marijuana.

Detective Moss also arranged for Mr. Smith to return to the scene of the shooting, where Metro Detective James Capps, the lead detective on the case, interviewed him. According to Detective Capps, Mr. Smith was "very anxious" during the interview and repeatedly denied any knowledge of the shooting. Mr. Smith said he "didn't want to be there" and just happened to be standing on the street smoking a cigarette when the defendant ran up and asked for help. Seeing the defendant had been shot, Mr. Smith drove him to the hospital. Mr. Smith said nothing about knowing the defendant prior to the shooting.

As detectives conducted interviews, Metro Sergeant Danny Orr and Metro Crime Scene Investigator Felicia Evans collected evidence and prepared detailed diagrams documenting the location of the evidence found in the laundry room, the outdoor courtyard, and the parking lot of the apartment complex. Investigator Evans swabbed thirteen distinct "reddish-brown stains" at the scene, which DNA analysis later confirmed were bloodstains. The first bloodstain, found on a vehicle in the parking lot, the second and third bloodstains, found on the ground near the vehicle, a fourth bloodstain, found on top of the shattered window glass in front of the laundry room door, and a fifth bloodstain, found on the interior of the laundry room door, all matched the defendant's DNA. A sixth bloodstain, found on the interior laundry room door frame, a seventh bloodstain, found on the interior wall of the laundry room, and an eighth bloodstain, found on the circular metal plate surrounding the interior laundry room door knob, all matched the victim's DNA.

Five other bloodstains, numbered nine through thirteen at trial, were found on the railing next to the walkway outside the laundry room. The bloodstains numbered nine through twelve at trial matched the defendant's DNA and were drop-pattern stains. The bloodstain numbered thirteen at trial matched the victim's DNA and was described as a transfer pattern stain, meaning the blood had been transferred from fabric onto the railing.

Investigators also recovered a pair of Nike flip flops outside the laundry room—finding one sandal on the courtyard walkway and the other in the parking lot near the vehicle where the defendant's blood had been found.

Additionally, investigators found three nine-millimeter cartridge casings in the courtyard—two on the walkway and one in the bushes in front of the laundry room. Investigators also recovered a nine-millimeter magazine with six unspent Winchester cartridges next to the walkway in the courtyard. A copper bullet jacket fragment was found outside as well, near the shattered glass of the shot-out window.

Inside the laundry room, next to the victim's body, investigators found two Federal .45 caliber cartridge casings. A baseball cap located near the victim's body was marked by a

bullet hole, and beneath the cap investigators found an intact .45 caliber bullet and a lead fragment, likely from a bullet but lacking exterior identifying characteristics. Investigators also recovered bullet fragments from the wooden laundry room door frame.

Special Agent Steve Scott of the Tennessee Bureau of Investigation ("TBI") examined the ballistics evidence and testified that the two .45 caliber cartridge casings and the intact bullet found beneath the cap were fired from the same .45 caliber weapon. Agent Scott determined that the bullet, bullet jacket, and bullet fragment recovered from the victim's body also had been fired from the same .45 caliber weapon.

Agent Scott testified that the three nine-millimeter cartridge casings were fired from the same nine-millimeter weapon. With respect to the nine-millimeter magazine found outside the laundry room, Agent Scott opined that it was designed for use with a Smith and Wesson nine-millimeter semi-automatic pistol of the Sigma series. Agent Scott further opined that the copper bullet jacket fragment and the bullet fragments recovered from the laundry room door frame had rifling consistent with that type of Smith and Wesson handgun.

Despite the lack of exterior identifying characteristics, Agent Scott testified that the fragment found beneath the cap was a copper-washed lead fragment "that is almost exclusively seen in twenty-two caliber ammunition." According to Agent Scott, the bullet that passed through the window next to the laundry room door had been fired toward the courtyard from a gun inside the laundry room, while the bullet recovered from the laundry room door frame had been fired toward the laundry room from a gun in the courtyard.

At approximately 7:25 p.m. on the day of the shooting, Mr. Smith, the victim, and the defendant were tested for gunshot residue. TBI Special Agent Laura Hodge testified that Mr. Smith tested negative; the victim tested positive; and the defendant tested inconclusive. Agent Hodge explained that gunshot residue consists of antimony, barium, and lead, and that an inconclusive test result indicates the presence of one or more of those elements, but in concentrations not consistent with gunshot residue. Because gunshot residue is "very fragile evidence," deposited "just on the surface of an individual's hands" and can be easily rubbed off or washed away, an inconclusive result does not rule out the possibility that the person tested fired a gun. According to Agent Hodge, the likelihood of finding gunshot residue is greater if the testing occurs soon after the firing, and she also explained that semi-automatic handguns discharge gunshot residue down range, away from the shooter, leaving less residue than other handguns.

The day after the shooting, August 28, 2008, Detective Capps interviewed the defendant at Vanderbilt Hospital, where he remained for treatment of his injuries. The jury heard an audio recording of the interview, and the State also introduced a transcript of the interview as an exhibit. The defendant initially denied any involvement in the shooting, telling Detective Capps that he lived in Clarksville and had been at the Herman Street apartments visiting a female friend, "Rita," and was shot while standing in the courtyard outside the laundry room. However, as the interview progressed, the defendant changed his story. While he initially claimed that he used the holster found among his belongings to store coins and other items, the defendant eventually admitted that he had carried a .45 caliber semi-automatic handgun in the holster on the day of the shooting. The defendant said he purchased the weapon some years earlier at "Grandpa's," a gun shop in Clarksville. The defendant admitted that he frequently smoked marijuana, explaining that he had "picked up the habit like bad" while serving in the military. The defendant claimed that he had bought expensive, premium-quality marijuana in Clarksville and had brought it with him to Nashville on the day of the shooting, but he had been reluctant to share it with Mr. Smith, who came with him to Nashville, or Rita. When he learned from Rita that he could buy drugs at the laundry room, he went there with approximately forty dollars, intending to buy less-expensive marijuana to share with his friends.

The defendant said he met the victim and a second man outside the laundry room. According to the defendant, the victim was carrying "a bag on his back," and the defendant believed the bag contained drugs. After opening the locked laundry room door with a key, the victim entered, followed by the defendant, who was followed by the second man. The victim walked into a separate room near the back of the laundry room with the backpack, while the defendant and the second man remained near the door—the only means of entering and exiting the laundry room. The defendant sat on a "ledge" to the right of the door, while the second man stood nearby. They had waited only a few minutes when, according to the defendant, the second man suddenly began shooting at him and then ran out the door into the courtyard. The second man continued shooting, and the defendant fired back, shooting through the window next to the door at least once.

When the shooting began, the defendant saw the victim run from the room at the rear of the laundry room toward the door. As the victim approached the door, the defendant shot him, but the victim continued toward the door, so the defendant shot the victim a second time. The victim then fell to the floor in front of the door, and the defendant fled the scene, losing his Nike flip flops as he ran.

Although the defendant could not recall seeing the victim with a gun and said the victim did not threaten him, the defendant said he shot the victim because he feared the victim would shoot him. The defendant saw the second man run away from the courtyard, but the defendant did not know whether the second man had been shot[.] The defendant repeatedly said the victim had a backpack. The defendant was not asked directly whether he took the victim's backpack. When asked whether he and the victim had a physical altercation that would explain the victim's torn shirt, the defendant denied touching the victim and said he fled the scene immediately after shooting the victim, stating on one occasion that he fled the scene before the victim fell to the floor. The defendant also denied purchasing or stealing marijuana from the victim and explained that the marijuana found among his belongings had been purchased in Clarksville before he came to Nashville. The defendant said that he was "just trying to get some weed," but the second man "was trying to kill [him]." Although the defendant remembered Rita, Mr. Smith, and another man driving him to the hospital and also recalled the two men physically carrying him into the emergency room, he could not remember where he dropped the gun used in the shooting. He suggested that Mr. Smith could possibly locate the gun, however.

Detective Capps testified that investigators were unable to locate anyone other than the defendant willing to admit to firsthand knowledge of the shooting. Rita refused to cooperate in the investigation, and the police were unable to locate Mr. Smith, despite searching for him in the vicinity of both Clarksville, Tennessee, and Oak Grove, Kentucky.

Still photographs obtained from video surveillance at Vanderbilt Children's Hospital confirmed the defendant's statement that Mr. Smith and another man, whom investigators were never able to identify, physically carried the defendant into the emergency room.

Investigators recovered neither the gun the defendant used in the shooting nor the victim's backpack containing drugs. However, investigators confirmed the defendant's statement that the defendant was the registered owner of a .45 caliber semi-automatic handgun that he had purchased from "Grandpa's" gun shop in Clarksville.

Dr. Bruce Levy, Chief Medical Examiner for the State of Tennessee and Medical Examiner for Davidson County, performed the victim's autopsy on August 28, 2008. Dr. Levy ruled the victim's death a homicide caused by at least two gunshots. Dr. Levy opined that a single bullet likely entered the left side of the victim's neck, exited on the right side, re-entered the victim's shoulder, and exited the top part of his right arm. Dr. Levy opined that these wounds did not penetrate the victim's spinal cord or impact any

significant blood vessels. However, Dr. Levy said the other bullet that entered the left side of the victim's head would have produced "immediate unconsciousness rapidly progressing to death . . . within a m[a]tter of . . . a few minutes at most."

The State introduced photographs showing the position of the victim's body, blood smears on the victim's hands and arms and on the floor nearby, and the victim's torn shirt, which had been ripped at the shoulder area.

[T]he defendant elected not to testify and rested without presenting any evidence.

Wagner II, 382 S.W.3d at 291–95 (footnotes omitted; most alterations in the original).

The state appellate court summarized the evidence presented at the post-conviction evidentiary hearing as follows:

The Petitioner testified that he was serving a life sentence. He stated that he retained Counsel before his jury trial and that he and Counsel met three or four times to discuss the Petitioner's case. The Petitioner agreed that the State offered him a plea bargain that Counsel conveyed to him by mail. The Petitioner rejected the offer. Counsel explained to the Petitioner before his trial that the defense's theory would be self-defense. The Petitioner agreed with this defense theory. The Petitioner stated that Counsel did not call any witnesses for him at trial. The Petitioner testified that the State's expert witnesses should have been called by Counsel to testify. Counsel did not hire any ballistics experts or other investigators to rebut the State's case.

The Petitioner stated that the State's theory was that he had taken a backpack full of the victim's things, amounting to a robbery and thus making him guilty of felony murder. The Petitioner stated that there was no proof presented at trial that he had stolen the backpack. The Petitioner testified that the evidence used to convict him also could have been used to "help [him] out" but that the evidence was not presented to the jury in a light favorable to the Petitioner.

The Petitioner agreed that he had two bullet wounds as a result of the crime. He agreed that the victim also had two bullet wounds, one of which was a .45 caliber bullet. The Petitioner agreed that he had a .45 caliber gun, but stated that the victim's bullet wound "had to" have come from a third person. The Petitioner could not remember if Counsel brought this out in front of the jury.

The Petitioner testified that Counsel presented several alternative theories about how the victim died during closing argument. The Petitioner stated that the "version of events" to his recollection was as follows:

Basically I was in the laundry room sitting on the ledge to the right side of—it's a ledge to the—there is a door coming in this way. There is a right—ledge to the right side. I was sitting on the ledge.

The individual at the door pulled his gun out and shot me. The tracks of—the bullets inside my body can prove that I was shot sitting at that [ledge]. I got shot again on my left shoulder. I really can't remember exactly where I was at when I got shot. But everything occurred inside this laundry.

The Petitioner testified that, to his knowledge, the "trajectory of the bullet" that went into him was "consistent with somebody standing at the door and shooting [him]." The Petitioner did not recall if Counsel presented this in front of the jury. The Petitioner did not know if the victim's backpack was ever recovered, or if there was ever marijuana in the backpack. He agreed that a sandwich bag of marijuana was found on his person at the

hospital, but he stated that no fingerprint analysis was done on the sandwich bag to prove his claim that the marijuana was his.

The Petitioner testified that Counsel did not adequately communicate with him or go over the case in sufficient detail. The Petitioner stated that Counsel should have presented the facts and used the State's evidence in his favor. He stated that the victim's DNA was not found on him, and Counsel did not "drive home" to the jury the fact that he could not be placed anywhere close to the victim because the victim's blood was not found on him.

The Petitioner testified that the victim's girlfriend had seen the third individual, and she was subpoenaed as a witness. The Petitioner could not recall if she showed up for trial or whether "she actually took the stand." He also reiterated that the gunshot residue test revealed that the victim had fired a weapon but did not show the same for the Petitioner. He did not know if that was something the jury heard or considered.

On cross-examination, the Petitioner stated that the State's evidence that should have been used in his favor was the gunshot residue test and the crime scene photographs. The Petitioner agreed that there were no other witnesses to the incident other than himself and the third individual. He stated that he decided not to testify based on Counsel's guidance.

Counsel testified that he was a licensed attorney for twenty-five years and that ninety percent of his practice was dedicated to criminal defense work. He estimated that he had participated in almost 100 jury trials at the time of the Petitioner's trial, including trials for first degree murder. Counsel agreed that he represented the Petitioner at his preliminary hearing and that he visited the Petitioner in jail five or six times. They discussed Counsel's "assessment of the evidence," as well as possible defenses and whether the Petitioner wanted to testify. Counsel stated that the Petitioner's statement given at the hospital "implicated" him in the crime when, about halfway through the Petitioner's statement, the Petitioner said words to the effect that if he was being shot at he was going to shoot back.

Counsel recalled that the Petitioner "early on" decided not to testify but could not recall his reasons. Counsel said that the Petitioner was "pretty consistent" throughout their discussions that he did not want to testify. Counsel stated that the defense theory he presented throughout the trial was self-defense and that "someone pulled a gun on [the Petitioner] during a drug deal and they started shooting at him. And [the Petitioner's] response was to shoot back in self-defense." This was communicated to the jury through Counsel's cross-examination of witnesses to the extent that Counsel could elicit favorable testimony from the witnesses. Counsel did not cross-examine the witnesses he felt would not provide favorable testimony. Counsel stated, "every question I would have asked [the State's witness] would have been intended to be in [the Petitioner's] favor."

On cross-examination, Counsel agreed that he did not hire an investigator for this case. Counsel viewed the crime scene and spoke to all the witnesses listed by the State. Counsel agreed that he did not hire any independent experts to testify to the ballistics or DNA evidence. He stated that the evidence "could have gone [the Petitioner's] way or it could have gone the State's way. It went the State's way." He stated that the Petitioner had given a statement to police that he acted in self-defense, and "the witnesses for the State didn't really impeach that."

Counsel could not recall the facts or the Petitioner's statements about the victim's backpack. He agreed that the backpack was a pivotal fact at trial because, "without the fact of the backpack, there is no felony murder[.]" Counsel stated that in closing arguments he argued that if the Petitioner took the backpack, it was at most a misdemeanor theft.

Counsel reiterated that he did not tell the Petitioner whether or not to testify, but he advised the Petitioner that he "didn't think he would make a good witness" because "his story that he gave the police wasn't good" and there were "nuggets" in it that the State would exploit, including the Petitioner's statement at the hospital. Counsel filed a motion to suppress the Petitioner's statement made at the hospital. Counsel stated that he later withdrew the motion because he could not provide an argument that the Petitioner was "in custody" when he gave the statement at the hospital. He stated that the Petitioner seemed to understand that, because the interview at the hospital was not a "custodial interrogation," his statement would not be suppressed. Counsel agreed that without the Petitioner's statement, the State would not have been able to link him to the crimes.

On redirect-examination, Counsel stated that he felt it was more effective to cross-examine the State's witnesses and experts than call them to testify on the Petitioner's behalf, because studies show that "juries for some reason [] believe the State's experts a little more than they do defense experts." Counsel believed that he could introduce the self-defense theory through the State's witnesses which would be more effective in persuading the jury that the Petitioner acted in self-defense.

Wagner III, 2015 WL 739608, at *5–7.

III. ISSUES PRESENTED FOR REVIEW

The petitioner raises the following grounds for relief in the amended and supplemented petition:

Ground One: that the evidence was insufficient to sustain the convictions for first-degree felony murder and especially aggravated robbery (ECF No. 7, at 5);

Ground Two: that petitioner's statement, given to the police when he was at Vanderbilt Hospital, was taken without the petitioner's being advised of his constitutional rights, including the right not to incriminate himself (ECF No. 7, at 6);

Ground Four:¹ that the petitioner's trial, appellate, and post-conviction counsel were ineffective for the following reasons:

(1) trial counsel failed to complete a thorough investigation of case #2009-A-305, as a result of which the petitioner faced trial without notice of the specific charges against him and was unable to be adequately prepared (ECF No. 7, at 11);

(2) trial counsel failed to file a motion to dismiss the indictment on the basis that there was no victim as to Count 2, for which the petitioner received a life sentence (ECF No. 7, at 12);

(3) trial counsel incorrectly told the petitioner that his statement to the police, made while he was in the hospital, would not be introduced unless the petitioner testified; the petitioner based his decision not to testify on this representation, but the statement was introduced anyway (ECF No. 7, at 12);

(4) trial counsel refused to file a motion to suppress evidence including the marijuana seized from the petitioner without a warrant while he was at the hospital, as a result of which the jury heard contaminated evidence (*id.*);

¹ The petitioner's claim of ineffective-assistance of counsel is identified in his habeas petition as "Ground Four." Under "Ground Three," however, the petitioner states only: "See Ground four." (ECF No. 4, at 9.)

(5) trial counsel refused to object to the change of the indictment language regarding Count 2, changing “especially aggravated robbery” to “robbery,” without submitting the indictment back to the Grand Jury (*id.*);

(6) trial counsel erred in failing to bring to the trial judge’s attention at sentencing that the court lacked jurisdiction over indictment counts 2 and 3, because there was no victim for count 2 (*id.*), and Tennessee statute does not permit a life sentence for second-degree murder;

(7) trial counsel failed to call expert witnesses or to ask the correct questions to support a theory of self-defense (*id.* at 13);

(8) trial counsel failed to call expert witnesses to prove that the bag of marijuana taken from the petitioner when he was at the hospital did in fact belong to the plaintiff (*id.*);

(9) trial counsel failed to ask the state’s witness, Special Agent Steve Scott, whether the two .45-caliber cartridges come from the gun that was purchased at Grandpa’s gun store in Clarksville and how could he verify that without being in possession of the weapon (*id.*);

(10) trial counsel should have hired an expert witness or used the state’s expert witness, TBI Agent Hodge, to establish, based on the gunshot residue test that “it would be more probable that the victim fired a weapon than the [petitioner]” (*id.*);

(11) trial counsel erred in not calling an expert witness or questioning the state’s expert witness, Dr. Bruce Levy, about which bullet, from what type of gun, caused the victim’s death, to show that the gun that caused the victim’s death was not the gun that the petitioner bought at Grandpa’s gun store (*id.*);

(12) trial counsel refused to raise an insanity defense based on the petitioner’s post-traumatic stress disorder, erroneously telling his client that this defense was not necessary because the Vanderbilt statement would not be used against him at trial (*id.* at 14);

(13) trial counsel erred in not bringing to the sentencing judge’s attention at sentencing that the court lacked jurisdiction to sentence the petitioner on counts 2 and 3 because there was no victim, causing the petitioner to be sentenced for a crime he did not commit (*id.*);

(14) direct-appeal counsel was ineffective for not filing a petition for the writ of certiorari to the United States Supreme Court (*id.*);

(15) post-conviction counsel was ineffective for failing to call expert witnesses to testify, failing to communicate with the petitioner, and failing to “position [the petitioner’s] claim properly” before the trial court, and failing to consult with the petitioner during the appeal process (*id.*);

(16) trial counsel was ineffective for failing to put the victim’s girlfriend on the stand for the defense, because the statement she gave the detective supported the petitioner’s self-defense theory (ECF No. 8, at 1);

(17) trial counsel erred in not explaining to the petitioner that he had a right to have the jury fix the punishment for Count 1 (first-degree murder), instead of the trial judge (*id.*); and

(18) trial counsel was ineffective for allowing the petitioner to be convicted under “an incorrect/invalid jury instruction” (*id.*).

IV. STANDARD OF REVIEW

A. Exhaustion and Procedural Default

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal district court may not entertain a petition for the writ of habeas corpus unless the petitioner has first exhausted all available state-court remedies for each claim in his petition. 28 U.S.C. § 2254(b)(1). While exhaustion is not a jurisdictional requirement, it is a strictly enforced doctrine designed to promote comity between the states and the federal government by giving the state an initial opportunity to pass upon and correct alleged violations of its prisoners' federal rights. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). Consequently, as a condition precedent to seeking federal habeas corpus relief, the petitioner is required to fairly present his claims to every available level of the state court system. *Rose v. Lundy*, 455 U.S. 509, 518–20 (1982); *see also Duncan v. Henry*, 513 U.S. 364, 365–66 (1995) ("[A] federal habeas petitioner . . . [must] provide the state courts with a 'fair opportunity' to apply controlling legal principles to the facts bearing upon his constitutional claim."). Moreover, "the doctrine of exhaustion requires that a claim be presented to the state courts under the same theory in which it is later presented in federal court." *Wong v. Money*, 142 F.3d 313, 322 (6th Cir. 1998). Once a petitioner's federal claims have been raised in the highest state court available,² the exhaustion requirement is satisfied, even if that court refused to consider the claims. *Manning v. Alexander*, 912 F.2d 878, 883 (6th Cir. 1990).

A habeas petitioner bears the burden of demonstrating that he has properly and fully exhausted his available state court remedies with respect to the claims he presents for federal habeas review. *Prather v. Rees*, 822 F.2d 1418, 1420 n.3 (6th Cir. 1987) (citation omitted). Moreover, if a habeas petitioner retains the right under state law to raise a claim by any available procedure, he has not exhausted that claim. 28 U.S.C. § 2254(c). Ordinarily, habeas petitions containing unexhausted claims are dismissed without prejudice in order to permit the petitioner the opportunity to pursue them in state court. *Alley v. Bell*, 307 F.3d 380, 385 (6th Cir. 2002) (citing *Rose v. Lundy*, 455 U.S. at 518, 520–22);

² In Tennessee, review by the state Supreme Court is not required for exhaustion. Instead, "once the Court of Criminal Appeals has denied a claim of error, 'the litigant shall be deemed to have exhausted all available state remedies available for that claim.'" *Adams v. Holland*, 330 F.3d 398, 402 (6th Cir. 2003) (quoting Tenn. S. Ct. R. 39).

see also *Rhines v. Weber*, 544 U.S. 269 (2005) (reconfirming the continued relevance of *Rose* under AEDPA).

If, however, an unexhausted claim would be procedurally barred under state law, for instance by a statute of limitations or a state rule barring successive petitions, then the claim is deemed exhausted (because no further state review is available) but procedurally defaulted (because it was not presented to a state court for review), and may not be considered by the federal court on habeas review except under extraordinary circumstances. *Alley v. Bell*, 307 F.3d 380, 385–86 (6th Cir. 2002) (citations omitted); *In re Cook*, 215 F.3d 606, 607–08 (6th Cir. 2000). Specifically, in order to obtain consideration of a claim that is procedurally defaulted, a petitioner must demonstrate both “cause” for the procedural default and actual prejudice resulting from the alleged constitutional errors, or alternatively that failure to consider the claims would result in a “fundamental miscarriage of justice.” *Wogenstahl v. Mitchell*, 668 F.3d 307, 321 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 311 (2012) (citing *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)).

B. Fully Exhausted Claims

Even when a petitioner’s application for a writ of habeas corpus under 28 U.S.C. § 2254 raises claims that have been properly exhausted in the state courts, this court’s review of the state court’s resolution of those issues remains quite limited. First, this court may “entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). Thus, a claim asserting only a violation of state law, even if fully exhausted, is not cognizable in federal habeas corpus. *Pulley v. Harris*, 465 U.S. 37, 41 (1984).

Further, under § 2254(d), the federal court cannot grant a habeas petition with respect to a fully exhausted federal claim unless the state court’s adjudication of that claim

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Id. The United States Supreme Court has explained the proper application of the “contrary to” clause as follows:

A state-court decision will certainly be contrary to [the Supreme Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. . . . A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [this Court's] precedent.

Williams v. Taylor, 529 U.S. 362, 405–06 (2000) (citation omitted).

With respect to the “unreasonable application” clause of § 2254(d)(1), the Supreme Court has held that a federal court should analyze a claim for habeas corpus relief under the “unreasonable application” clause when “a state-court decision unreasonably applies the law of this Court to the facts of a prisoner’s case.” *Williams*, 529 U.S. at 409. The Court defined “unreasonable application” as follows:

[A] federal habeas court making the “unreasonable application” inquiry should ask whether the state court’s application of clearly established federal law was objectively unreasonable. . . .

. . . . [A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law. . . . Under § 2254(d)(1)’s “unreasonable application” clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Id. at 409–11 (emphasis original). Finally, even while considering whether a state court’s decision was based on an unreasonable factual determination, this court must presume the correctness of state-court factual determinations, and the petitioner has the burden of rebutting that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *see also Cremeans v. Chapleau*, 62 F.3d 167, 169 (6th Cir. 1995) (“We give complete deference to state court findings unless they are clearly erroneous.”), *abrogated on other grounds by Thompson v. Keohane*, 516 U.S. 99, 111 (1995).

With these principles in mind, the court will turn to the examination of the claims raised in Mr. Wagner’s petition for habeas relief.

V. DISCUSSION

A. Ground One: Sufficiency of the Evidence

The petitioner here asserts that the evidence was insufficient to support the verdicts for first-degree felony murder and especially aggravated robbery. He fully exhausted this claim by raising it in his direct appeal.

A claim that the evidence was insufficient to support the verdict requires the reviewing court to ask “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). This standard of review recognizes that the trier of fact has the responsibility “fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.” *Id.*; see also *Cavazos v. Smith*, 132 S. Ct. 2, 3–4 (2011) (per curiam) (“*Jackson v. Virginia* . . . makes clear that it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial.”). Because this is a habeas proceeding, however, the court does not apply the governing standard *de novo*. Rather, the court must “review [the state court’s] sufficiency-of-the-evidence decision under the highly deferential standard of AEDPA.” *Pinchon v. Myers*, 615 F.3d 631, 643–44 (6th Cir. 2010). See also *Getsy v. Mitchell*, 495 F.3d 295, 315–16 (6th Cir. 2007) (en banc) (“Whether [the petitioner] is entitled to habeas relief ultimately depends on whether the [state court]’s denial was based on an unreasonable application of clearly established federal law regarding the sufficiency of the evidence.”).

On direct appeal, the Tennessee Court of Criminal Appeals found that the only evidence supporting the jury’s finding that the defendant took the victim’s backpack from him—the basis for the especially aggravated robbery conviction—was the defendant’s confession. Relying upon the rule that “a conviction cannot be based solely on a defendant’s confession,” the intermediate appellate court held that the evidence was insufficient to support the conviction for especially aggravated robbery. *Wagner I*, 2011 WL 2893098, at *5. Because the evidence was insufficient to support the robbery conviction, the court found that the evidence was “ipso facto” insufficient to support the felony-murder conviction. *Id.* The court found that the evidence was sufficient to support the second-degree murder conviction and remanded for resentencing on that conviction. The Tennessee Supreme Court granted the state’s application to appeal and then reversed and reinstated the convictions. *Wagner II*, 382 S.W.3d at 291.

In making its determination, the Tennessee Supreme Court first set forth the standard articulated by the United States Supreme Court in *Jackson v. Virginia*. *Wagner*, 382 S.W.3d at 297. The court then noted that to prove especially aggravated robbery, the government had to establish a robbery, defined as the “intentional or knowing theft of property from the person of another by violence or putting the person

in fear,” that was “[a]ccomplished with a deadly weapon” and in which “the victim suffers serious bodily injury.” *Wagner II*, 382 S.W.3d at 297 (quoting Tenn. Code Ann. §§ 39-13-401(a), 39-13-403(a)). The court found that a substantial amount of circumstantial evidence, and not solely the petitioner’s confession, supported the conviction, including “photographs showing the position of the victim’s body, the tearing of the shoulder-area of the victim’s shirt, and blood smears on the victim’s hands and arms as well as on the floor near his body.” *Id.* at 298. The court found that this evidence, in conjunction with the petitioner’s statement, was “sufficient to support the jury’s finding that the victim had a backpack that someone removed from the victim’s body after the shooting.” *Id.*

In addition, the court observed that additional evidence supported the jury’s conclusion that the petitioner, and not some other person, took the victim’s backpack, specifically that

the victim’s blood had been transferred from fabric to the walkway railing outside the laundry room. The medical examiner testified that the nature of the victim’s injuries eliminated the possibility that the victim left the laundry room after the shooting and transferred his own blood to the railing. The prosecution also showed that the victim’s blood on the railing was near the drop-pattern stains of the defendant’s blood and along the path the defendant said he fled after the shooting. No proof was offered to show that the victim’s blood was on the defendant’s clothing. The first officer at the scene of the shooting testified that the laundry room door had been locked when he arrived. This testimony supported the prosecution’s theory that the victim’s blood had been transferred to the railing by the perpetrator of the crime.

As further proof that the defendant stole the victim’s backpack containing drugs, the prosecution relied upon the defendant’s admission that he frequently smoked marijuana, the defendant’s statement that he went to the laundry room to buy drugs from the victim, the defendant’s statement that the victim’s backpack contained drugs, the absence of drugs from the victim’s person and the laundry room after the shooting, and the marijuana found among the defendant’s belongings at the hospital shortly after the shooting. This proof supported the prosecution’s theory that the defendant removed the victim’s backpack containing drugs after the shooting.

Id.

Finally, the court held that the evidence was sufficient to support the jury’s finding that the theft was accomplished with the use of a deadly weapon and resulted in serious bodily injury. A firearm, it noted, is by definition a deadly weapon, and the petitioner actually confessed to shooting the victim at least twice with a .45-caliber semi-automatic revolver. The victim was obviously seriously injured and, in fact, died from the gunshot wounds. Thus, the court concluded that the evidence, “[v]iewed in the light most favorable to the prosecution, . . . sufficiently supports the jury’s verdict finding the defendant guilty of especially aggravated robbery.” *Id.* at 299.

This court has reviewed the entire trial transcript and finds that the Tennessee Supreme Court's statement of the evidence supporting the conviction for especially aggravated robbery is supported by the record. More to the point, based on the evidence before it, both direct and circumstantial, and the conclusions that could be drawn from such evidence, the state court was not unreasonable in concluding that a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. at 319.

Likewise, having concluded that the evidence supported the conviction for especially aggravated robbery, the state Supreme Court's reinstatement of the felony-murder conviction was not unreasonable in light of the evidence before it. As the court stated:

As relevant to this appeal, felony murder is defined as "[a] killing of another committed in the perpetration of or attempt to perpetrate . . . robbery." Tenn. Code Ann. § 39-13-202(a)(2) (2010). The culpable mental state required for conviction is the intent to commit the underlying felony, in this case, robbery or attempted robbery, not the intent to commit murder. Tenn. Code Ann. § 39-13-202(b). A killing that precedes, coincides with, or follows the commission of an underlying felony will be considered "in the perpetration of" the underlying felony, so long as there is a connection in time, place, and continuity of action. Determining whether a defendant intended to commit the underlying felony, and at what point the intent existed, is a question of fact to be decided by the jury after consideration of all the facts and circumstances.

Viewed in the light most favorable to the prosecution, the proof established that the defendant and a friend traveled to Nashville from Clarksville to obtain drugs at the Herman Street apartment complex. The defendant armed himself with a weapon before leaving Clarksville, although, according to his own statement, he ordinarily did not carry a gun. The defendant admitted entering the laundry room with the victim and said the victim had a backpack containing drugs. The defendant also admitted shooting the victim more than once with the weapon he brought to the drug buy, and the prosecution's proof fully corroborates this admission. Although the defendant claimed that he shot the victim in self-defense, the defendant admitted shooting the victim as the victim ran toward the door of the laundry room, and the defendant conceded that the victim did not threaten him and that he did not see the victim with a gun. As was its prerogative, the jury rejected the defendant's claim of self-defense and accredited the prosecution's theory and proof that the defendant shot the victim during the perpetration of, or attempt to perpetrate, robbery. Again, this Court neither re-weighs the evidence nor substitutes its inferences for those drawn by the jury. The defendant's challenge to the sufficiency of the evidence is without merit.

Wagner II, 382 S.W.3d at 299–300 (internal citations omitted).

Again, the petitioner has not refuted the facts as set forth by the state court with clear and convincing evidence and has not shown that the state court's decision was based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d)(2). He also has not established that the decision "was contrary to, or involved an unreasonable application of, clearly

established Federal law, as determined by the Supreme Court.” 28 U.S.C. § 2254(d)(1). The petitioner is not entitled to relief on the basis of this claim.

B. Ground Two: Admissibility of the Petitioner’s Statement

In Ground Two, the petitioner argues that the admission at trial of the statement he gave to detectives while he was at Vanderbilt Hospital violated his constitutional rights, because he was never advised about his “right against self-incrimination” or his right to counsel. He also asserts that the detectives “tricked” him into making “an involuntary statement” while he was hospitalized, in pain, and under the influence of pain medications. As a result, his statement was “unknowingly, unintelligently, and involuntarily taken/given.” (ECF No. 7, at 7–8.)

The petitioner appears to be arguing that he should have been given warnings consistent with *Miranda v. Arizona*, 384 U.S. 436 (1966), prior to being questioned by police while he was hospitalized. The procedural safeguards set forth in *Miranda*, however, apply only to suspects who are subject to “custodial interrogation,” which is defined as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” *Hart v. Stewart*, 623 F. App’x 739, 745 (6th Cir. 2015) (quoting *Miranda*, 384 U.S. at 444). In this case, the petitioner was in the hospital, but he was not in police custody or restrained in any way by the police. His trial attorney, in fact, testified that he filed a motion to suppress the statement but ultimately withdrew it as unsupportable. (Post-conviction Hr’g Tr., ECF No. 16-22, at 40 (“I could never figure out a way to argue to the judge that Mr. Wagner was in custody. He was in the hospital, he had been shot It was an interrogation but not custodial[.]”). There is no evidence in the record suggesting that pursuit of a motion to suppress in this case would have been successful.

Regardless, because the petitioner’s counsel did not follow through with his motion to suppress and did not raise the issue in the petitioner’s direct appeal, the petitioner did not fully and fairly present this claim to the highest available state court, as required by 28 U.S.C. § 2254(b). The petitioner also did not raise the claim in his state post-conviction petition, whether as a stand-alone claim or as a claim based on the ineffective assistance of trial counsel. The improperly exhausted claim is now barred from presentation in a state post-conviction petition by Tennessee’s one-petition rule, Tenn. Code Ann. § 40-30-102(c) (“This part contemplates the filing of only one (1) petition for post-conviction relief. In no event

may more than one (1) petition for post-conviction relief be filed attacking a single judgment.”), and by the state’s one-year statute of limitations, Tenn. Code Ann. § 40-30-102(a). The petitioner has not presented any basis for overcoming these restrictions on his ability to further exhaust the claim in state court. The claim is therefore procedurally defaulted.

As set forth above, to obtain consideration of a defaulted claim, a petitioner must demonstrate both “cause” for the procedural default and actual prejudice resulting from the alleged constitutional errors, or alternatively that failure to consider the claims would result in a “fundamental miscarriage of justice.” *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)). In this case, the petitioner does not acknowledge that his claim is defaulted or assert cause to excuse the default. As suggested above, the claim is without merit, so the petitioner could not establish prejudice resulting from the default, even if he had tried. In sum, this claim is barred from review in this court and subject to dismissal on that basis. *Coleman*, 501 U.S. at 749.

C. Ground Four: Ineffective Assistance of Counsel

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court held that, in order to successfully claim that a lawyer’s assistance was so ineffective as to violate the Sixth Amendment, a defendant must meet two requirements. “First, the defendant must show that counsel’s performance was deficient.” *Strickland*, 466 U.S. at 687. “Second, the defendant must show that the deficient performance prejudiced the defense.” *Id.* As discussed above, however, federal habeas relief may not be granted under 28 U.S.C. § 2254 unless the petitioner shows, first, that he fully exhausted his claim in the state court. 28 U.S.C. § 2254(b). If he fails to make this threshold showing, his claim is procedurally defaulted and not subject to review in this court at all, unless the petitioner establishes cause to overcome the procedural default. *Coleman*, 501 U.S. at 749.

If a claim was properly exhausted, the petitioner may be entitled to relief only if he shows that the earlier state court’s decision “was contrary to” federal law then clearly established in the holdings of the United States Supreme Court, “involved an unreasonable application of” such law, or “was based on an unreasonable determination of the facts” in light of the record before the state court. 28 U.S.C. § 2254(d)(1)–(2). That is, when a properly exhausted claim of ineffective assistance of counsel is raised in a federal habeas petition, the question to be resolved is *not* whether the petitioner’s counsel was

ineffective. Rather, “[t]he pivotal question is whether the state court’s application of the *Strickland* standard was unreasonable.” *Harrington v. Richter*, 562 U.S. 86, 101 (2011).

In his post-conviction appellate brief, the petitioner argued only that

[t]rial counsel failed to mount any meaningful defense in this case. His failure to call expert witnesses to rebut the State’s investigators or to present an alternative theory amounts to ineffective counsel and was prejudicial to the outcome of Appellant’s case. . . . There was no proof presented to establish an alternate theory, and trial counsel even failed to call the Appellant to testify knowing that this was a self-defense trial, and the Appellant had no prior criminal history.

(Post-Conviction App. Br., ECF No. 16-23, at 8.) This claim was articulated as subclaim (7) in his federal habeas petition, in which the petitioner asserts that trial counsel failed to call expert witnesses “and/or to ask the correct questions, to support a theory of self defense.” (ECF No. 7, at 13.)

In addressing this claim, the Tennessee Court of Criminal Appeals summarized the testimony presented by the petitioner and his trial attorney at the post-conviction hearing (as set forth above) and properly articulated the federal standard of review governing claims of ineffective assistance of counsel. *Wagner III*, 2015 WL 739608, at *8–9. Based on the applicable standard, the court found that the “evidence presented at the hearing supports the post-conviction court’s finding that the petitioner did not prove by clear and convincing evidence that Counsel’s representation was deficient.” *Id.* at 9. The court explained:

Counsel’s strategy, to cross-examine the State’s witnesses to develop his theory of self-defense, rather than to call the witnesses on behalf of the Petitioner, was an informed decision based on Counsel’s experience in criminal defense work that juries tended to believe the State’s experts, rather than those called to testify on behalf of the defense. Counsel has discretion in conducting the defense and is entitled to use his best judgment in matters of trial strategy or tactics. We further conclude that Counsel sufficiently prepared for trial through multiple meetings with the Petitioner and their discussions about Counsel’s strategy and the theory of self-defense which Counsel argued in front of the jury. The Petitioner has failed to show that Counsel’s services fell outside the range of competence normally required of attorneys in criminal trials. Having failed to show the first prong of the *Strickland* standard, the Petitioner has not met his burden of showing that he is entitled to post-conviction relief based upon Counsel’s performance.

Id. (internal citations omitted). Having concluded that the petitioner failed to establish that counsel’s performance was deficient, the court had no need to consider the element of prejudice under *Strickland*, but it did so nonetheless, finding that the petitioner was not prejudiced by any purported failing on the part of his trial attorney:

Furthermore, we conclude that the Petitioner did not prove that he was prejudiced by Counsel’s representation of him. The Petitioner did not present any evidence at the post-

conviction hearing to demonstrate that had Counsel called the State's witnesses to testify on his behalf, the outcome of his trial would have been different. The Petitioner also failed to present any evidence linking a third individual to this crime or any evidence that the Petitioner's alternative theory is credible. Without such evidence, the Petitioner has failed to meet his burden of proof.

Wagner III, 2015 WL 739608, at *9.

As indicated above, the only question before this court is whether the Tennessee court's application of *Strickland* was unreasonable. It was not. The petitioner has failed to show that the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "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)(1) and (2). The petitioner is not entitled to relief on the basis of this claim.

The respondent conceded—generously but erroneously—that subclaims (9), (10), and (11) were also exhausted. The respondent characterized these claims as asserting that trial counsel was ineffective for failing to refute the testimony of Special Agent Scott (subclaim (9)); failing to hire a weapons expert (subclaim (10)); and failing to call a bullet expert (subclaim (11)). In fact, the petitioner himself characterized these claims as follows:

(a) 9) Expert Witness, Special Agent Steve Scott, testimony about victim was shot by a .45 caliber gun could have been refuted and/or the question that should have been asked by defense counsel is "Did these two (2) .45 cartridges come from the gun that was purchased from Grandpa's – a gun shop in Clarksville?, and if so, How could it be verified without the weapon?"

(a) 10) Defense counsel should have hired an expert witness and/or used the State's expert witness Hodge, TBI Agent, to refute the fact that if it didn't rule out all possibility of client shooting a gun, but it would be more probable that the victim fired a weapon than the client, according to the GSR Test (Gun Shot Residue Test). This trial counsel error prejudice the defense theory of self-defense and state was not held to it's burden.

(a) 11) Defense counsel erred in not calling expert witness and/or question State's witness, Dr. Bruce Levy, Chief Medical Examiner for State of Tennessee to the following defense counsel should have asked Dr. Levy which bullet, such as was it bullet #1 or #2 that caused the victim's death, and what type of gun, specifically caused the victim's death.

Expert witness could refute State's witness on the fact that the gun that caused victim's death was not the gun that was purchased from Grandpa's store, by client.

(ECF No. 7, at 13.) A petitioner must exhaust his claims, before seeking habeas relief, by "fairly presenting" all his claims to the state courts. 28 U.S.C. § 2254(b), (c); *Rhines v. Weber*, 544 U.S. 269, 274 (2005); *Wilson v. Mitchell*, 498 F.3d 491, 498 (6th Cir. 2007). Both the factual and legal basis for a

claim must have been presented to the state courts in order to be considered “fairly presented.” *Fulcher v. Motley*, 444 F.3d 791, 798 (6th Cir. 2006). With regard to subclaims (9), (10), and (11), although the petitioner argued in post-conviction proceedings very generally that his attorney erred in failing to call expert witnesses to testify on behalf of the petitioner, he did not present these very specific arguments about verifying whether the .45 cartridges were shot from the gun that was purchased at Grandpa’s, refuting agent Hodge’s testimony about the GSR test, or questioning Dr. Levy about which bullet from which gun caused the victim’s death. The petitioner testified at the post-conviction hearing that he believed his attorney should have done a better job questioning the state’s expert witnesses, and he articulated some of the questions he thought should have been asked, but these questions do not mirror the claims set forth in his habeas petition. And, more to the point, the petitioner did not present these claims to the Tennessee Court of Criminal Appeals.

These claims, along with the fourteen³ other separate subclaims of ineffective assistance of counsel were not fully exhausted by being raised at every available level of the state post-conviction proceedings. Because the petitioner is now barred from presenting these claims to the state court by the state statute of limitations and prohibition on filing more than one post-conviction petition, Tenn. Code Ann. § 40-30-102(a) and (c), the claims are procedurally defaulted and not subject to review by this court. They are instead subject to summary dismissal.

In addition, subclaim (15), which alleges the ineffective assistance of post-conviction counsel for failing to call expert witnesses to testify, failing to communicate with the petitioner, failing to “position [the petitioner’s] claim properly” before the trial court, and failing to consult with the petitioner during the appeal process (ECF No. 7, at 14), is not a cognizable claim in a federal habeas corpus action, because there is no constitutional right to post-conviction counsel. *Coleman*, 501 U.S. at 752. Because the claim is not cognizable, relief is precluded by 28 U.S.C. § 2254(a).

The petitioner is not entitled to relief on the basis of any of his claims of ineffective assistance of counsel.

³ The respondent recognizes only fifteen subclaims of ineffective assistance of counsel, apparently having failed to consider the three claims asserted in the petitioner’s supplemental pleading (ECF No. 8), filed just a few days after his amended petition.

VI. CONCLUSION

For the reasons set forth herein, the court will deny relief.

Federal Rule of Appellate Procedure 22 provides that an appeal of the denial of a habeas petition may not proceed unless a certificate of appealability (COA) is issued under 28 U.S.C. § 2253. Rule 11 of the Rules Governing § 2254 Cases requires that a district court issue or deny a COA when it enters a final order. A COA may issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). “A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). The district court must either issue a COA indicating which issues satisfy the required showing or provide reasons why such a certificate should not issue. 28 U.S.C. § 2253(c)(3); Fed. R. App. P. 22(b).

The court will grant a COA as to Ground One, that the state court erred in concluding that the petitioner’s convictions were supported by sufficient evidence. The court will deny a COA as to the remaining claims

An appropriate order is filed herewith.



ALET A. TRAUGER
United States District Judge

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