No. 24-5318

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL JOHN STITTS,

Petitioner-Appellant,

v.

BRIAN ELLER, Warden,

Respondent-Appellee.

ORDER

Before: LARSEN, Circuit Judge.

Michael John Stitts, a Tennessee prisoner proceeding pro se, appeals the district court's judgment denying his petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. He applies for a certificate of appealability (COA). *See* Fed. R. App. P. 22(b). He also moves to proceed in forma pauperis. Because reasonable jurists could not disagree with the district court's decision, the application for a COA is denied.

In 2016, a jury convicted Stitts of attempted first-degree murder, aggravated assault, aggravated burglary, and employing a firearm during the commission of a dangerous felony. The trial court imposed an effective sentence of 61 years of imprisonment. The Tennessee Court of Criminal Appeals affirmed. *State v. Stitts*, No. W2017-00209-CCA-R3-CD, 2018 WL 2065043 (Tenn. Crim. App. Apr. 27, 2018), *perm. app. denied*, (Tenn. Aug. 8, 2018).

The convictions stem from Stitts's assault and shooting of Mary Ann Greer, his ex-girlfriend. Greer was at her boyfriend's house early in the morning after he had left for work when she heard a knock at the door. When she realized that it was Stitts, she called 911. The 911 operator told her to lock herself in a room, but the bathroom she fled to did not have a lock. Stitts broke into the home and shot her in the chest and arm, stating that if he could not have her, nobody else could. Greer survived, but she had fifteen surgeries and her arm was amputated. *Id.* at *1.

Stitts was lying in the grass behind the residence when the police arrived and was apprehended after a short chase. A shotgun and ammunition were found nearby. *Id.* at *1–2.

Stitts filed a pro se petition for state postconviction relief. Counsel was appointed and filed an amended petition raising claims of ineffective assistance of counsel. The trial court held an evidentiary hearing and denied relief. The Tennessee Court of Criminal Appeals affirmed. *Stitts v. State*, No. 2019-00867-CCA-R3-PC, 2020 WL 2563470 (Tenn. Crim. App. May 20, 2020), *perm. app. denied*, (Tenn. Sept. 21, 2020).

Stitts then filed this pro se § 2254 petition. He claimed that the trial court erred by (1) denying his motion to suppress his confession and (2) allowing the prosecution to belatedly amend the offense date of one of the counts; (3) trial counsel performed ineffectively by failing to properly investigate, object to improper testimony, adequately cross-examine a witness, file pre-trial motions, and ensure juror impartiality; and (4) his sentence violates the Double Jeopardy Clause. Stitts raised several additional claims in a supporting memorandum, including that counsel should have moved to sequester Investigator John Chew during trial, that Chew fabricated evidence, that the prosecution failed to preserve exculpatory evidence, and that the trial court ignored his request for new counsel. The district court denied the petition, finding Stitts's claims to be without merit or procedurally defaulted. It also denied a COA.

Stitts now moves for a COA in this court. To obtain a COA, an applicant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When relief is denied on the merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). This court asks if reasonable jurists could debate whether the district court erred in concluding that the state-court adjudication neither (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," nor (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *see Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

When relief is denied on procedural grounds, the petitioner must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

Stitts first claimed, as he did on direct appeal, that the trial court erred by denying his motion to suppress his written statement to the police admitting that he was the shooter. He asserts that he had been drugged against his will before the shooting, that his statement was not voluntarily or knowingly made, and that the police noted his strange behavior but failed to have him medically evaluated. The Tennessee Court of Criminal Appeals rejected this claim, explaining that courts look to the totality of the circumstances to determine whether a confession is voluntary. It found no error in the trial court's findings, made after an evidentiary hearing, that Stitts was advised of his rights and not subject to any threats or abuse, that the interviews were not unduly long, that there was no proof of alcohol or drug use or sleep deprivation, and that the circumstances of his interviews with law enforcement were otherwise not coercive. *See Stitts*, 2018 WL 2065043, at *10–11.

The record supports these findings. At the evidentiary hearing on the suppression motion, Investigator Isaiah Thompson, who first interviewed Stitts on the morning of the shooting, testified that Stitts had appeared alert when he walked into the room but began acting sleepy when the interview began, which Thompson interpreted as disingenuous. Because Stitts was not being cooperative, he was returned to the jail. Later that day, however, he asked to speak to Thompson again and, after again being advised of his rights, gave the statement in question, which another officer reduced to writing. Noting that Stitts did not raise his involuntary-intoxication argument until trial, the Tennessee Court of Criminal Appeals rejected it, pointing to Thompson's testimony that Stitts did not appear to be intoxicated and appeared to be "playing possum." *Id.* at *11. The state appellate court found no error in the trial court's determination that Thompson's testimony was credible. *Id.* Given the deference owed to the state appellate court's findings of fact and legal conclusions on federal habeas review, *see* 28 U.S.C. § 2254(d), reasonable jurists could not

conclude that it unreasonably weighed the totality of the circumstances to conclude that Stitts's statement was knowing and voluntary.

Stitts next claimed that the trial court erred by allowing the prosecution to amend the offense date of one count of the indictment the week before trial. The Tennessee Court of Criminal Appeals rejected this claim because the other counts of the indictment, all arising from the same incident, had the correct date, and Stitts did not show any prejudice from the correction of this apparent clerical error. *See id.* at *11; *see also* Tenn. R. Crim. P. 7(b) (allowing non-prejudicial amendments without the defendant's consent). As noted by the district court, an alleged error of state law is not cognizable on federal habeas review absent a showing of fundamental unfairness rising to the level of a due process violation. *See Moreland v. Bradshaw*, 699 F.3d 908, 923 (6th Cir. 2011). Because Stitts did not make that showing, reasonable jurists could not debate the denial of this claim.

Stitts also asserted that trial counsel performed ineffectively in various ways. A defendant claiming ineffective assistance of counsel must establish that (1) counsel performed deficiently and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel's performance is considered deficient if it falls "below an objective standard of reasonableness." *Id.* at 687–88. To establish prejudice, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

Stitts first alleged that trial counsel failed to meaningfully investigate several issues, including his claim that he had been drugged by an acquaintance, Phillip Taylor, prior to the attack. According to Stitts, he was in Taylor's van when Taylor lit a marijuana blunt "laced with what appeared to be angel dust." He testified at trial that he "blanked out" shortly thereafter, did not remember going to see the victim, and was "intoxicated" when talking to the police. *Stitts*, 2020

WL 2563470, at *2. The Tennessee Court of Criminal Appeals rejected this claim because Stitts did not show that counsel performed deficiently or that he was prejudiced. *See id.* at *6. Reasonable jurists would agree that this was a reasonable application of *Strickland*. Trial counsel testified at the postconviction hearing that he declined to interview Taylor because, when Taylor was interviewed by the public defender's office, he denied drugging Stitts and said that Stitts had behaved violently toward other women, testimony that would be damaging to the defense. *Id.* at *5. And counsel concluded that testimony from a toxicology expert was unnecessary because there was no evidence, other than Stitts's own allegation, that he had been drugged. The Tennessee Court of Criminal Appeals also rejected Stitts's claims that counsel should have investigated a discrepancy regarding the number of shotgun shells recovered from the scene, the fact that mud was found in the shotgun barrel, and fingerprint and blood evidence, and should have obtained a blood-spatter expert. *Id.* at *6. That decision was reasonable because Stitts did not show that such investigations would have produced evidence creating a reasonable probability of a different result. Reasonable jurists could not debate the denial of these claims.

Stitts next claimed that trial counsel performed ineffectively by failing to object to Agent Christie Smith's testimony that she could not collect both fingerprints and DNA from the shotgun found at the scene of the crime and to the testimony of 911 operator Lanonda Jernigan, who was not the operator on the call with the victim. Reasonable jurists would not disagree with the district court's conclusion that the Tennessee Court of Criminal Appeals reasonably rejected both claims. Stitts presented no evidence that Smith had committed perjury. *Id.* at *7. And Jernigan testified merely as a record keeper authenticating the recording of the 911 call. *Id.*

Stitts next challenged counsel's cross-examination of Greer. The Tennessee Court of Criminal Appeals concluded that trial counsel did not perform deficiently by declining to aggressively cross-examine Greer about the disability that she suffered as a result of the shooting or to argue that Stitts had "moved on" to another girlfriend. *Id.* The court reasoned that it was sound trial strategy for counsel not to do so because of the negative effect that could have on the jury. *Id.* It also noted that evidence about a new girlfriend would not have refuted Greer's

testimony that Stitts had been stalking her, which was corroborated by other evidence. *Id.* Reasonable jurists could not debate the denial of this claim.

Stitts also claimed that trial counsel should have moved for a change of venue because the local mayor had referenced his crimes in a political ad, potentially prejudicing the jury pool. The Tennessee Court of Criminal Appeals rejected this claim, noting that trial counsel testified that he was not able to find the ad and that Stitts failed to introduce the ad or present any evidence that any juror had seen it or been influenced by it. *Id.* at *8. Given this lack of evidence, reasonable jurists could not debate that Stitts failed to show that he was prejudiced by counsel's failure to move for a change of venue.

Stitts next argued that trial counsel performed ineffectively by failing to ask for a curative instruction when the victim's family wore t-shirts promoting domestic-violence awareness at trial. The Tennessee Court of Criminal Appeals rejected this claim as well, noting that counsel had objected to the shirts and that the trial court had ordered the shirts be turned inside out so that they could not be read. *See id.* It further concluded that the shirts were not so prejudicial as to deny a fair trial. *Id.* This conclusion was reasonable because the trial court and counsel had thoroughly examined the jury pool for potential bias. And Stitts presented no evidence that any of the jurors were influenced by the shirts, which did not explicitly advocate for Stitts's guilt. Reasonable jurists thus could not debate the district court's conclusion that the state court's decision was reasonable.

The district court denied Stitts's remaining claims based on procedural default, including additional ineffectiveness claims concerning a bill of particulars and involuntary intoxication and claims concerning double jeopardy, prosecutorial misconduct, fabricated evidence, sequestration, his desire for different counsel, and juror bias. When a petitioner has failed to fairly present his claims to the state courts and no remedy remains, his claims are considered procedurally defaulted. *See Gray v. Netherland*, 518 U.S. 152, 161–62 (1996). Although Stitts raised most of these claims in his postconviction petition, he did not raise them in his appeal to the Tennessee Court of Criminal Appeals. Reasonable jurists could not debate that they are thus procedurally defaulted

because he no longer has an available avenue to fully exhaust them. Stitts argues that this default should be excused because postconviction appellate counsel was ineffective for failing to raise them. Although the failure of postconviction counsel to raise an issue can in some instances excuse a default, *see Martinez v. Ryan*, 566 U.S. 1, 14 (2012), that principle does not extend beyond the trial court's initial postconviction review. Thus, alleged ineffective assistance on appeal from the denial of the postconviction petition cannot serve as cause for a procedural default. *See Middlebrooks v. Carpenter*, 843 F.3d 1127, 1139 (6th Cir. 2016); *West v. Carpenter*, 790 F.3d 693, 698 (6th Cir. 2015). And Stitts's reference to *Chase v. MaCauley*, 971 F.3d 582, 592 (6th Cir. 2020), does not help him because that case involved a failure to raise a claim on direct appeal, not a failure to raise a claim on the appeal from the denial of postconviction relief. Neither does he show that failing to address the claim would result in a fundamental miscarriage of justice, which requires a showing of actual innocence. *See Coleman v. Thompson*, 501 U.S. 722, 748, 750 (1991). Reasonable jurists could not debate the denial of these claims.

For these reasons, the application for a COA is **DENIED**. Stitts's motion to proceed in forma pauperis on appeal is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

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Stitts now moves for a COA in this court. To obtain a COA, an applicant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When relief is denied on the merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). This court asks if reasonable jurists could debate whether the district court erred in concluding that the state-court adjudication neither (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," nor (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *see Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

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Stitts next challenged counsel's cross-examination of Greer. The Tennessee Court of Criminal Appeals concluded that trial counsel did not perform deficiently by declining to aggressively cross-examine Greer about the disability that she suffered as a result of the shooting or to argue that Stitts had "moved on" to another girlfriend. *Id.* The court reasoned that it was sound trial strategy for counsel not to do so because of the negative effect that could have on the jury. *Id.* It also noted that evidence about a new girlfriend would not have refuted Greer's

testimony that Stitts had been stalking her, which was corroborated by other evidence. *Id.* Reasonable jurists could not debate the denial of this claim.

Stitts also claimed that trial counsel should have moved for a change of venue because the local mayor had referenced his crimes in a political ad, potentially prejudicing the jury pool. The Tennessee Court of Criminal Appeals rejected this claim, noting that trial counsel testified that he was not able to find the ad and that Stitts failed to introduce the ad or present any evidence that any juror had seen it or been influenced by it. *Id.* at *8. Given this lack of evidence, reasonable jurists could not debate that Stitts failed to show that he was prejudiced by counsel's failure to move for a change of venue.

Stitts next argued that trial counsel performed ineffectively by failing to ask for a curative instruction when the victim's family wore t-shirts promoting domestic-violence awareness at trial. The Tennessee Court of Criminal Appeals rejected this claim as well, noting that counsel had objected to the shirts and that the trial court had ordered the shirts be turned inside out so that they could not be read. *See id.* It further concluded that the shirts were not so prejudicial as to deny a fair trial. *Id.* This conclusion was reasonable because the trial court and counsel had thoroughly examined the jury pool for potential bias. And Stitts presented no evidence that any of the jurors were influenced by the shirts, which did not explicitly advocate for Stitts's guilt. Reasonable jurists thus could not debate the district court's conclusion that the state court's decision was reasonable.

The district court denied Stitts's remaining claims based on procedural default, including additional ineffectiveness claims concerning a bill of particulars and involuntary intoxication and claims concerning double jeopardy, prosecutorial misconduct, fabricated evidence, sequestration, his desire for different counsel, and juror bias. When a petitioner has failed to fairly present his claims to the state courts and no remedy remains, his claims are considered procedurally defaulted. *See Gray v. Netherland*, 518 U.S. 152, 161–62 (1996). Although Stitts raised most of these claims in his postconviction petition, he did not raise them in his appeal to the Tennessee Court of Criminal Appeals. Reasonable jurists could not debate that they are thus procedurally defaulted

because he no longer has an available avenue to fully exhaust them. Stitts argues that this default should be excused because postconviction appellate counsel was ineffective for failing to raise them. Although the failure of postconviction counsel to raise an issue can in some instances excuse a default, *see Martinez v. Ryan*, 566 U.S. 1, 14 (2012), that principle does not extend beyond the trial court's initial postconviction review. Thus, alleged ineffective assistance on appeal from the denial of the postconviction petition cannot serve as cause for a procedural default. *See Middlebrooks v. Carpenter*, 843 F.3d 1127, 1139 (6th Cir. 2016); *West v. Carpenter*, 790 F.3d 693, 698 (6th Cir. 2015). And Stitts's reference to *Chase v. MaCauley*, 971 F.3d 582, 592 (6th Cir. 2020), does not help him because that case involved a failure to raise a claim on direct appeal, not a failure to raise a claim on the appeal from the denial of postconviction relief. Neither does he show that failing to address the claim would result in a fundamental miscarriage of justice, which requires a showing of actual innocence. *See Coleman v. Thompson*, 501 U.S. 722, 748, 750 (1991). Reasonable jurists could not debate the denial of these claims.

For these reasons, the application for a COA is **DENIED**. Stitts's motion to proceed in forma pauperis on appeal is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

United States Court of Appeals for the Sixth Circuit

U.S. Mail Notice of Docket Activity

The following transaction was filed on 09/17/2024.

Case Name: Michael Stitts v. Brian Eller
Case Number: 24-5318

Docket Text:
ORDER filed: For these reasons, the application for a COA [7152435-2] is DENIED. Stitts's motion to proceed in forma pauperis on appeal [7152422-2] [7159112-2] is DENIED as moot. Joan L. Larsen, Circuit Judge.

The following documents(s) are associated with this transaction:
Document Description: Order

Notice will be sent to:

Mr. Michael John Stitts
Northeast Correctional Complex
P.O. Box 5000
Mountain City, TN 37683

A copy of this notice will be issued to:

Mr. John H. Bledsoe
Ms. Wendy R. Oliver

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION**

MICHAEL JOHN STITTS,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 1:20-cv-01281-STA-jay**
	)	
BRIAN ELLER	)	
	)	
Respondent.	)	
	)	

ORDER DIRECTING CLERK TO MODIFY DOCKET, DENYING AND DISMISSING § 2254 PETITION, DENYING CERTIFICATE OF APPEALABILITY, CERTIFYING APPEAL IS NOT TAKEN IN GOOD FAITH, AND DENYING LEAVE TO PROCEED IN FORMA PAUPERIS ON APPEAL

Before the Court is the *pro se* petition under 28 U.S.C. § 2254 of Petitioner Michael John Stitts, Tennessee Department of Correction prisoner number 213173, an inmate incarcerated at the Northeast Correctional Complex in Mountain City, Tennessee.[1] (ECF No. 1.) For the reasons set forth below, the Court **DENIES** and **DISMISSES** Petitioner's claims because they are without merit or procedurally defaulted.

[1] The Clerk is **DIRECTED** to modify the docket to record Respondent Warden as Brian Eller and to terminate Bert Boyd as a party to this action. *See* Fed. R. Civ. P. 25(d); *see also Rumsfeld v. Padilla*, 542 U.S. 426, 435 (2004) (explaining that "in habeas challenges to present physical confinement . . . the default rule is that the proper respondent is the warden of the facility where the prisoner is being held").

A. Procedural History

On September 20, 2016, a jury in Madison County, Tennessee, convicted Petitioner of attempted first degree murder, aggravated assault, aggravated burglary, and employing a firearm during the commission of a dangerous felony. (ECF No. 11-1 at PageID 217-24.) The trial court sentenced Petitioner to an effective sentence of 61 years. (*See* ECF No. 11-2 at PageID 263-66.) Petitioner appealed his conviction and sentence to the Tennessee Court of Criminal Appeals ("TCCA"). *State v. Stitts*, No. W2017-00209-CCA-R3-CD, 2018 WL 2065043 (Tenn. Crim. App. Apr. 27, 2018). The TCCA affirmed the judgments of the trial court. *Id.* at *15. The Tennessee Supreme Court denied Petitioner's application for discretionary review. (ECF No. 11-21.)

Petitioner filed a *pro se* petition for state post-conviction relief on November 27, 2018. (ECF No. 11-22 at PageID 1335-51.) Post-conviction counsel was appointed, and Petitioner filed an amended petition, raising claims of ineffective assistance of counsel. (ECF No. 11-22 at PageID 1401-02, 1408-09.) The post-conviction trial court held an evidentiary hearing on the petition, as amended, and denied relief. (ECF No. 11-22 at PageID 1429-31.) The TCCA affirmed the denial of habeas relief. *Stitts v. State*, No. W2019-00867-CCA-R3-PC, 2020 WL 2563470, at *8 (Tenn. Crim. App. May 20, 2020). The Tennessee Supreme Court denied Petitioner's application for discretionary review on September 21, 2020. (ECF No. 11-32.)

On December 21, 2020, Petitioner filed his § 2254 petition. (ECF No. 1.) He later filed a memorandum of law in support. (ECF No. 6.) After the Court issued an order directing Respondent to file the state court record and a response to the § 2254 petition (ECF No. 7),

Respondent filed the state court record (ECF No. 11) and an answer (ECF No. 17). Petitioner filed a reply. (ECF No. 18.)

B. Trial Proceedings

Mary Ann Greer testified that she had been in a romantic relationship with Petitioner for approximately five years. *Stitts*, 2018 WL 2065043, at *1. Greer recalled that on April 6, 2015, she was at the home of her current boyfriend, John Forrest. *Id.* After Forrest had left for work, Greer heard someone knocking on the door. *Id.* Realizing that it was Petitioner, Greer called 911 and reported that her ex-boyfriend was attempting to enter the home. *Id.*

While Petitioner was on the phone with the 911 operator, Petitioner broke in. *Id.* Greer tried to hide in the bathroom, but the bathroom door did not have a lock. *Id.* Greer stopped responding to the 911 operator, but her screams could be heard on the recording of the 911 call, which was entered into evidence. *Id.*

Greer testified that Petitioner shot her in the chest and arm. *Id.* Petitioner told her during the attack that "[i]f he can't have [her], ain't nobody else going to have [her]." *Id.* Greer's injuries required 15 surgeries and resulted in the amputation of her arm. *Id.* She also suffered a stroke after the attack, and she testified that as a result of her stroke, she "had difficulty remembering the details of the attack." *Id.* Her vision had also worsened since the incident. *Id.* Greer's medical records were entered into evidence. *Id.*

Officer Jonathan McCrury of the Jackson Police Department ("JPD") was the first officer on the scene. *Id.* He testified that he heard a "crash" or a "loud noise" and went to the area to investigate. *Id.* He found Petitioner lying in the grass behind Forrest's house. *Id.* When Petitioner saw Officer McCrury, he ran. *Id.* Officer McCrury went after Petitioner and

apprehended him. *Id.* As other officers were leading Petitioner to the patrol car, they noticed a shotgun lying on the ground on top of a gun bag. *Id.* at *2. The gun was located near where Petitioner had been lying on the ground when Officer McCrury first spotted him. *Id.* The officers searched Petitioner and found 21 shotgun shells in his front pants pocket. *Id.* There was one spent shell casing inside the gun. *Id.*

When officers went to Forrest's house, they saw a shell casing on the porch and a bullet hole in the front door. *Id.* Petitioner, who was still in custody with Officer McCrury, "spontaneously" shouted for the officers to kick in the front door. *Id.* They eventually kicked in the door and found Greer inside with a "softball sized hole" in her chest and a gunshot wound to her right arm. *Id.* The responding officers testified about other evidence found at the residence:

> An air conditioning window unit was lying in the backyard against the house. There was a shell casing on the front porch and another in the kitchen. There were bullet holes in the front door, in the bathroom door, in another interior door frame, and in the bathroom sink. Blood was splattered and smeared in various rooms of the house, and vomit was splattered in the bathroom.

Id.

Petitioner was questioned by the police on three occasions, and he gave two written statements. *Id.* at *3. The TCCA summarized Petitioner's statements as follows:

> Investigator Isaiah Thompson testified that the Defendant was "nonchalant" and "playing possum" during his first interview. He explained that the Defendant would appear alert when not being asked questions but would pretend to be sleepy or under the influence as soon as he was asked a question. He stated that the Defendant did not appear to be under the influence and was "absolutely acting" as though he were. He acknowledged on cross examination that the Defendant was not tested for drugs and was not seen by a medical professional. He stated that the Defendant did not appear to require any medical attention or drug testing. During the interview, the Defendant was left alone for a few minutes to rest, and then Investigator Thompson returned with JPD Investigator John Chew. Investigator Chew described the Defendant's behavior as "very odd," noting that the Defendant put his head on the desk and would not talk to them. He also believed the

Defendant's behavior was an "act" and that the Defendant was not actually sick or intoxicated.

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Later that afternoon, the Defendant requested to speak with investigators, so he was transported back to the police station. The Defendant gave a verbal statement, which was reduced to writing by Investigator Chew. The Defendant reviewed the statement before signing it. The typed-written statement was dated April 6th at 1:35 p.m. and said:

> Last night I was up all night. I have not been able to sleep since I got out of jail. I was in a relationship with [the victim] for 5 years before I was locked up. She stayed in contact with me the first year and a half but then she stopped talking to me. I wanted to have my family back[,] and I paid her phone bill when I first got out of jail so we could talk. I wanted to check on her and the grandkids. I did everything I could to take care of her. This morning I went over to her friend's house and knocked on the door. Nobody would answer the door[,] so I shot it. After I shot it[,] I walked around the side of the house to see if I could hear anyone inside. I heard someone moving inside so I went around back and pulled the air conditioner out of the window. I crawled through the window and went inside the house. Someone was in the bathroom and had the door closed. They would not open the bathroom door[,] so I shot through it. I heard [the victim] sa[y] that she had been hit. I tried to open the door[,] but she was up against it. I finally opened the door and we started to fight over the gun. She had the barrel[,] and I had the bottom part. The gun went off when we were fighting over it. I did not know if she was hit[,] but I saw blood. We w[ere] still fighting for the gun[,] and I was able to get it away from her. I hit her with the barrel in her head or top half of her body. I left the bathroom and went through the window I came in. I did not intend to hurt [the victim]. I went over [to] the house to deal with the guy friend that she was dating. We had a car accident and my truck hit his in the rear. The brakes on my truck went out[,] but he lied to the police and told them that I tried to run them off the road. I love [the victim] more than I love myself and wish that I could take what happened back. I feel like I was not myself, like the devil had me and was telling me what to do. [The victim] was at the wrong place at the wrong time. I took the gun from the house that I live in. They were sleeping and did not know about it. I got the shells from . . . [Mr. Forrest's] truck. It was locked[,] so I got the keys off the wall and opened the truck up.

Investigator Chew testified that the Defendant appeared of clear mind and had normal behavior when giving his type-written statement. Officer Thompson agreed that the Defendant was "very alert" and "normal" during this interview.

After giving his type-written statement, the Defendant was transported back to the jail, and he requested to speak to investigators again on the following day. He was taken to the police station, where he read a handwritten statement that he had written prior to that interview. It was dated April 7th, sometime between 5:00 and 6:00 p.m., and said:

> On April 6, 2015[,] I . . . was arrested . . . in a backyard next door to where [the victim] was shot[.] I'm not the shooter[,] and I was in the backyard next door to pick up the shotgun and shells that John Forrest purchase[d] from me. Well he . . . paid me $150.00 to bring him a shotgun around 12:30 a.m. on April 6, 2015. I was told by him to be back over there later to pick up the gun from the backyard by the air conditioner in [the] back of the house. I didn't go in the house[.] John Forrest knock[ed] the air conditioner out and the window out to make it seem[ ] like someone else done it. At 12:00 or 11:55 p.m. I spent my last $5.00 getting gas at Citgo gas station. I love [the victim] and her family[,] but I wouldn't hurt her or her family. I will hurt myself before [I would] hurt her or her family. Well y[']all can ask anybody about me[,] and they will tell you [I]'m not that type of person to shoot and harm [the victim]. John Forrest left home[,] went to sign in at work but came back home[,] and he left before the police came. He was wearing beige pants and a blue shirt like some work clothes. He probably did this because I said at the accident that [the victim] had [AIDS] and he need[ed] to get check[ed] out. I have [a] back problem and can't do any heavy lifting or climbing due to a bullet in my back close to my spine in my lower back. Well [I] didn't commit these charges [I']m accused of but will do all [I] can to help officers to arrest and convict this John Forrest the suspect who done this to [the victim]. He . . . was driving a Chevy Blazer[,] maroon in color . . . when he left [and] went back to work.

The Defendant signed the end of the statement and wrote under his signature, "Please help [the victim] to convict her suspect." Both the typed-written and the subsequent handwritten statements were entered into evidence.

Id. at *4.

Petitioner testified that on the morning of the shooting, he was sitting outside the home of Phillip Taylor in Taylor's van. *Id* at *5. According to Petitioner, Taylor was smoking marijuana, which Petitioner believed was "laced" with "something." *Id.* Petitioner testified that he was in the van with Taylor for between 20 to 25 minutes with the windows rolled up. *Id.* He testified that after leaving Taylor, he felt "real bad, real sick" and that he eventually "just blanked out." *Id.* Petitioner claimed that he had no recollection of going to Forrest's residence or seeing Greer. *Id.*

Petitioner further testified that he was "involuntarily intoxicated" when investigators attempted to question him at the police station. *Id.* He claimed that he "wasn't aware of . . . who [he] was or what was going on." *Id.* Petitioner testified that he could not recall who had initially interviewed him, but he remembered Investigators Thompson and Chew interviewing him the second time. *Id.* He testified that he did not request the third interview with the investigators. *Id.* He also claimed that he still "[w]asn't feeling too well" during the third interview but that he could "focus a little better." *Id.* Petitioner refuted his type-written statement. *Id.*

C. State Post-Conviction Proceedings

At the evidentiary hearing on his state-post conviction petition, Petitioner testified at length regarding his claims of ineffective assistance of counsel. The testimony relevant to the instant § 2254 petition is as follows:

> The Petitioner was further aggrieved because trial counsel failed to object to the testimony by . . . Agent [Christie] Smith, [with the Tennessee Bureau of Investigation ("TBI")], which he believed was perjured. Agent Smith testified at trial that she was unable to perform both a fingerprint analysis and a DNA analysis of the gun due to technical limitations. However, the Petitioner claimed that [the] TBI had conducted both fingerprint and DNA analysis on the same piece of evidence in other cases, and that Agent Smith's testimony must therefore be perjured.
>
> ***

The Petitioner testified that he requested trial counsel pursue a defense strategy of involuntary intoxication. According to the Petitioner, he and Mr. Taylor were talking in Taylor's van when Taylor started to smoke marijuana. The Petitioner refused to smoke as well, but the van was closed off and the smoke affected him regardless. He reported to trial counsel that he "wasn't feeling [himself]" as a result of the smoke and believed the marijuana must have been laced with some other substance such as angel dust—a common name for Phencyclidine or PCP. Although trial counsel argued involuntary intoxication during trial, and the trial court instructed the jury on involuntary intoxication, the Petitioner believed that it was error for trial counsel not to question Mr. Taylor.

The Petitioner testified that trial counsel failed to cross-examine witnesses effectively. The victim identified the Petitioner at trial, but [she] was unable to read a written statement that she had given to police earlier in the investigation. The Petitioner believed it was ineffective for trial counsel to allow this testimony without a more exacting cross-examination. Similarly, the Petitioner was aggrieved that trial counsel did not object to the testimony of a 9-1-1 operator. Ms. [Lanonda] Jernigan, a 9-1-1 operator, testified at trial and authenticated a recording of the victim's 9-1-1 call. The Petitioner believed that trial counsel should have objected to her testimony because she was not working the night of the shooting, had no direct knowledge of the recording's content, and therefore should not have been allowed to testify.

The Petitioner then challenged trial counsel's failure to file pre-trial motions. Trial counsel did not file a bill of particulars, and he did not provide certain electronic records to the Petitioner during discovery. Trial counsel also did not move for a change of venue. According to the Petitioner, his picture and story were featured in a mayoral campaign advertisement. The advertisement claimed that the opposing candidate, as a criminal defense attorney, worked to get criminals like the Petitioner out of jail and on the streets. The Petitioner was aggrieved because trial counsel never asked members of the jury if they had seen this commercial, and he did not move for a change of venue. Similarly, the Petitioner believed that trial counsel was deficient because he did not question the jury if their impartiality had been affected after members of the gallery came to court wearing matching shirts in solidarity with victims of domestic violence.

The Petitioner also testified that trial counsel failed to request a psychiatric examination to support his claim of involuntary intoxication. He acknowledged that his prior counsel had an examination performed, but he complained that the examination did not investigate the possibility of involuntary intoxication.

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Trial counsel testified that he was a current employee of the Memphis Federal Defender's Office and was in private practice at the time of the Petitioner's trial.

> He testified that he had nine years of criminal law experience at the time of the Petitioner's trial. Trial counsel was appointed to represent the Petitioner after the public defender withdrew from representation. Trial counsel testified that he did not file for a bill of particulars because the prosecutor's office had an open file discovery process that made a bill of particulars redundant.
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> ***
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> Trial counsel testified that he did not request a mental evaluation of the Petitioner because the public defender had already had one conducted, and he did not see a reason that would justify a second evaluation.
>
> ***
>
> Trial counsel recalled the Petitioner telling him about a political advertisement that may have biased the jury against him, but he was unable to locate evidence of the ad. Trial counsel testified that did not interview Mr. Taylor about involuntary intoxication because the public defender's office had previously spoken with Taylor, who denied that he drugged the Petitioner and claimed that the Petitioner had been violent towards previous girlfriends. Trial counsel expected that this testimony would be more damaging than helpful to the defense.

Stitts, 2020 WL 2563470, at *3-5.

LEGAL STANDARDS

The statutory authority for federal courts to issue habeas corpus relief for persons in state custody is provided by § 2254, as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *See* 28 U.S.C. § 2254. Under § 2254, habeas relief is available only if the prisoner is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

The availability of federal habeas relief is further restricted where the prisoner's claim was "adjudicated on the merits" in state court. 28 U.S.C. § 2254(d). Habeas corpus relief shall not be granted on any claim that was adjudicated on the merits in state court unless the decision was "contrary to, or involved an unreasonable application of, clearly established federal law, as

determined by the Supreme Court" or "resulted in a decision that was based on an unreasonable determination of the facts" based on evidence presented in state court. § 2254(d)(1)-(2).

A state court's decision is contrary to federal law when it reaches an opposite conclusion on a question of law that the Supreme Court previously decided or if the state court confronts materially indistinguishable facts from a relevant Supreme Court precedent and reaches an opposite result. *Williams v. Taylor*, 529 U.S. 362, 405 (2000). The adjudication must be "diametrically different" or "mutually opposed" to the relevant Supreme Court precedent. *Id.* Conversely, "a run-of-the-mill state-court decision applying the correct legal rule . . . to the facts of a prisoner's case would not fit comfortably within § 2254(d)(1)'s 'contrary to' clause." *Id.* at 406.

An unreasonable application of federal law occurs when the state court, having invoked the correct governing legal principle, "unreasonably applies that principle to the facts of a prisoner's case." *Id.* at 413. "[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." *Id.* at 411. The state court's application must also be unreasonable. *Id.* An "unreasonable application" of federal law is one "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility of fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

To show that a state court's factual determination was unreasonable for purposes of § 2254(d)(2), it is not enough that "the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010). The Sixth Circuit

construes § 2254(d)(2) in tandem with § 2254(e)(1) to require a presumption that the state court's factual determination is correct in the absence of clear and convincing evidence to the contrary. *Ayers v. Hudson*, 623 F.3d 301, 308 (6th Cir. 2010). A state court's factual findings are only unreasonable where they are "rebutted by clear and convincing evidence and do not have support in the record." *Pouncy v. Palmer*, 846 F.3d 144, 158 (6th Cir. 2017) (internal quotation marks and citation omitted).

Exhaustion

"A federal court may not grant a writ of habeas corpus unless the applicant has exhausted all available remedies in state court." *Wagner v. Smith*, 581 F.3d 410, 414 (6th Cir. 2009) (citing 28 U.S.C. § 2254(b)(1)(A)). In Tennessee, a petitioner exhausts state remedies on a claim when the claim is presented to at least the TCCA. *Adams v. Holland*, 330 F.3d 398, 402 (6th Cir. 2003) (citing Tenn. Sup. Ct. R. 39). "To be properly exhausted, each claim must have been fairly presented to the state courts." *Wagner v. Smith*, 581 F.3d 410, 414 (6th Cir. 2009) (citation omitted). "Fair presentation" requires the petitioner to provide the state courts with the "opportunity to see both the factual and legal basis for each claim." *Id.* at 414-15. While a petitioner need not cite "chapter and verse" of federal constitutional law to fairly raise a claim, the petitioner must "make a specific showing of the alleged claim." *Id.* at 415 (quoting *Slaughter v. Parker*, 450 F.3d 224, 236 (6th Cir. 2006)). In evaluating whether a petitioner has "fairly presented" a claim to a state appellate court, the controlling document is the inmate's brief. *See Baldwin v. Reese*, 541 U.S. 27, 39 (2004) (holding that "ordinarily a state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or a brief (or a

similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does so").

Procedural Default

The procedural default doctrine is ancillary to the exhaustion requirement. *See Edwards v. Carpenter*, 529 U.S. 446, 452 (2000) (noting interplay between exhaustion rule and procedural default doctrine). If a petitioner fails to properly exhaust a claim in state court and state law bars proper exhaustion, the petitioner has technically exhausted the claim through procedural default because "there are no state remedies any longer 'available' to him." *Coleman v. Thompson*, 501 U.S. 722, 732 (1991) (quoting 28 U.S.C. § 2254(b)(1)(A)). Tennessee's one-year statute of limitations and "one-petition" rule on post-conviction petitions generally prevent a return to state court to litigate any additional constitutional claims. *See* Tenn. Code Ann. § 40-30-102(a) (one-year limitation period), § 40-30-102(c) ("one-petition" rule); *Hodges v. Colson*, 727 F.3d 517, 530 (6th Cir. 2013) (stating that a Tennessee prisoner "no longer ha[d] any state court remedies to exhaust" when he failed to present claim in initial post-conviction petition).

"As a general rule, claims forfeited under state law may support federal habeas relief only if the prisoner demonstrates cause for the default and prejudice from the asserted error." *House v. Bell*, 547 U.S. 518, 536 (2006). A petitioner establishes cause by "show[ing] that some objective factor external to the defense"—a factor that "cannot be fairly attributed to" the petitioner—"impeded counsel's efforts to comply with the State's procedural rule." *Davila v. Davis*, 582 U.S. 521, 528 (2017) (internal quotations marks and citation omitted). "To establish actual prejudice, a petitioner must show not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to *his actual* and substantial disadvantage, infecting his entire

trial with error of constitutional dimensions." *Garcia-Dorantes v. Warren*, 801 F.3d 584, 598 (6th Cir. 2015) (internal quotation marks and citation omitted). The burden of showing cause and prejudice is on the petitioner. *Lucas v. O'Dea*, 179 F.3d 412, 418 (6th Cir. 1999).

The Supreme Court has also recognized a "miscarriage of justice" exception to the procedural default rule. *Schlup v. Delo*, 513 U.S. 298, 315 (1995). This exception only applies in the "extraordinary case" and requires a petitioner to establish that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Id.* at 321 (internal quotation marks and citation omitted). A credible claim of actual innocence "requires [a] petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Id.* at 324. Actual innocence in this context "means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998).

ANALYSIS

Claim #1: Trial Court Erred in Denying Motion to Suppress

Petitioner contends that the trial court erred in denying his motion to suppress his police statement where he confessed to the shooting because "at [the] time of arrest," he was "suffer[ing] from [the] effects of involuntary intoxication." (ECF No. 1 at PageID 5.) Petitioner claims that on the morning of his arrest, he "was drugged against his knowledge and will, and was impaired, rather severely." (*Id.*) He further claims that the "[p]olice noted his strange and confused behavior" but continued with the interrogation. (*Id.*)

Petitioner's first attorney filed a motion to suppress Petitioner's confession on the ground that Petitioner was "suffering from sleep deprivation" when he was subjected to "numerous

interrogations over a period of several hours." (ECF No. 11-1 at PageID 98.) The state trial court held an evidentiary hearing. (ECF No. 11-4.) Investigator Thompson, who questioned Petitioner the morning of the shooting, testified. (ECF No. 11-4 at PageID 307.) Investigator Thompson described Petitioner's behavior as follows:

> I saw him kind of acting like he was sleepy. When . . . Stitts walked in, he was wide awake. His eyes [were] open, he was very alert, and then all of a sudden when the interview came, he tried to act like he didn't know where he was at[,] and he became sleepy all of a sudden.

(*Id.* at PageID 311.) Investigator Thompson explained that he made two attempts to question Petitioner, with each attempt lasting "five or ten minutes," but that Petitioner was uncooperative. (*Id.* at PageID 312.) On redirect, Investigator Thompson confirmed that Petitioner, though acting sleepy, "didn't look like he was on any drugs or narcotics." (*Id.* at PageID 323.)

After the initial interview, Petitioner was sent back to jail, but that afternoon, he asked to speak to the police. (*Id.* at PageID 312-13.) He was brought to the interview room, and he was "read . . . his [*Miranda*] rights again." (*Id.* at PageID 313.) Petitioner then gave an account of "what he had done that morning." (*Id.*) Investigator Thompson testified that the interview lasted less than an hour. (*Id.* at PageID 316.) Investigator Thompson recalled that Petitioner requested another meeting the following day. (*Id.*) During that interview, Petitioner "retracted his statement and said he was not the shooter." (*Id.*)

The trial court denied Petitioner's motion to suppress, finding that Petitioner's statement was "freely, voluntarily, knowingly and intelligently made." (*Id.* at PageID 331.) The court found Investigator Thompson to be a "credible witness." (*Id.* at PageID 326.) Additionally, the court noted there was no lengthy interrogation of Petitioner, nor was there any evidence that Petitioner had been threatened during the interviews. (*Id.* at PageID 326-27.) The court further

noted that both times Petitioner was interviewed were at his request, and he was advised of his *Miranda* rights prior to each interview. (*Id.* at PageID 327-28.) Finally, the court found "no evidence of any alcohol or drug or sleep deprivation in this case." (*Id.* at PageID 330.)

After Petitioner was convicted, his attorney filed a motion for a new trial, arguing that the trial court had erred in denying his motion to suppress because the evidence at trial suggested that Petitioner was "involuntarily under the influence of an intoxicant(s)" at the time of his confession, and therefore, his statement was not knowing and voluntary. (ECF No. 11-2 at PageID 275.) According to Petitioner, the trial evidence showed that "the investigators were aware that something was wrong with [Petitioner], but [they] ignored these warnings because they thought that [Petitioner] was faking or acting." (*Id.*) The state trial court denied the motion, affirming its ruling on the motion to suppress. (*Id.* at PageID 280.)

Before the TCCA on direct appeal, Petitioner again urged that the was "involuntarily intoxicated" at the time of his confession, and therefore the trial court had erred in denying his motion to suppress. (ECF No. 11-16 at PageID 1230-31.) The TCCA addressed Petitioner's argument as follows:

> "On appeal from the denial of a motion to suppress, we review the trial court's legal conclusions de novo with no presumption of correctness." *State v. Dailey*, 273 S.W.3d 94, 100 (Tenn. 2009) (citing *State v. Walton*, 41 S.W.3d 75, 81 (Tenn. 2001); *State v. Yeargan*, 958 S.W.2d 626, 629 (Tenn. 1997)). This court defers to the trial court's findings of fact unless the evidence preponderates against such findings. *State v. Northern*, 262 S.W.3d 741, 747 (Tenn. 2008). "Questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996). The prevailing party is entitled to the strongest legitimate view of the evidence from the suppression hearing, as well as "all reasonable and legitimate inferences that may be drawn from that evidence." *Id.* In evaluating the correctness of a trial court's ruling on a pretrial motion to suppress, this court may consider proof adduced both at the suppression hearing and at trial. *State v. Henning*, 975 S.W.2d 290, 299 (Tenn. 1998).

The Fifth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution provide the accused with a right against self-incrimination. *See Walton*, 41 S.W.3d at 81. Whether a confession is voluntary is a question of fact, and the State has the burden of proving voluntariness by a preponderance of the evidence. *State v. Sanders*, 452 S.W.3d 300, 306 (Tenn. 2014). "[T]he essential inquiry under the voluntariness test is whether a suspect's will was overborne so as to render the confession a product of coercion." *State v. Climer*, 400 S.W.3d 537, 568 (Tenn. 2013) (citing *Dickerson v. United States*, 530 U.S. 428, 433-35 (2000)). The trial court must examine the totality of the circumstances surrounding the confession. *Id.* Circumstances relevant to this inquiry include:

> [T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured[,] intoxicated[,] or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep[,] or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.

Id. (quoting *State v. Huddleston*, 924 S.W.2d 666, 671 (Tenn. 1996)).

Here, Investigator Thompson testified that the Defendant did not appear to be intoxicated or require medical attention. Instead, he believed based on his experience as an investigator that the Defendant was "playing possum" and intentionally acting as though he were sick or intoxicated in an effort to avoid talking to law enforcement. The audio recordings were consistent with Investigator Thompson's description of the interviews. They also demonstrated that when the Defendant asked for the interview to end, the investigators ceased questioning him. At trial, Investigator Chew testified that he did not believe the Defendant was under the influence or sick and that the Defendant's behavior was an "act." The Defendant testified at trial that he believed he was involuntarily intoxicated by being in a vehicle with Mr. Taylor as Mr. Taylor smoked marijuana the Defendant believed had been "laced" with "something."

We note that the Defendant's motion to suppress did not include an allegation that he was intoxicated when giving his statements, and the Defendant did not present any evidence or testimony at the hearing to support this contention. The allegation that the Defendant was intoxicated by being in close proximity of Mr. Taylor was

> first raised at trial. Nevertheless, the trial court made specific findings regarding the circumstances to be considered in determining the voluntariness of a statement. The court credited the testimony of Investigator Thompson at the motion hearing that the Defendant was "playing possum" and did not appear intoxicated. We conclude that the evidence does not preponderate against the court's findings. Accordingly, the Defendant is not entitled to relief.

Stitts, 2018 WL 2065043, at *10-11.

The TCCA's decision is not "contrary to" clearly established federal law. § 2254(d)(1). The TCCA correctly cited *Dickerson*, as the governing and clearly established law for evaluating the voluntariness of a confession. *Stitts*, 2018 WL 2065043, at *11. As such, the decision is "run-of-the-mill" and does not "fit comfortably" within § 2254(d)(1)'s "contrary to" clause. *Williams*, 529 U.S. at 406.

The unreasonable application clause in § 2254(d)(1) likewise provides Petitioner no relief. The TCCA reasonably applied *Dickerson* in considering the totality of the circumstances surrounding Petitioner's confession. *See Stitts*, 2018 WL 2065043, at *10-11. As the TCCA noted, the proof presented at trial did not support Petitioner's allegation of involuntary intoxication. *Id.* at *11. Investigator Thompson testified that Petitioner did not appear intoxicated; instead, he appeared to be "playing possum" or acting as though he was intoxicated to avoid questioning. *Id.* The TCCA noted that Investigator Thompson's description of Petitioner's conduct was also consistent with the audio recordings introduced at trial. *Id.* The TCCA's consideration of the totality of the circumstances in affirming the trial court's denial of Petitioner's motion to suppress is "not so lacking in justification" to warrant relief under § 2254(d)(1). *See Richter*, 562 U.S. at 103.

Finally, the TCCA's decision was not based on an unreasonable determination of the established facts. *See* § 2254(d)(2). Petitioner does not raise any particularized argument under

§ 2254(d)(2). Nevertheless, the facts upon which the TCCA based its holding find support in the record. *Pouncy*, 846 F.3d at 158. As such, Petitioner is not entitled to relief under § 2254(d)(2).

Claim #2: Unlawful Amendment of Indictment

Petitioner next argues that the trial court erred in allowing the State to amend the offense date in one count of the indictment the week prior to the start of his trial. (ECF No. 1 at PageID 7.) Petitioner argues that by allowing the State to change the date of the offense in Count 4 of the indictment from April 12, 2015, to April 6, 2015, the trial court prejudiced his defense because "counsel had prepared a defense showing [his whereabouts] on April 12" and had to alter his trial strategy. (*Id.*)

As Respondent points out, this claim is not cognizable because the claim is based on the trial court's alleged misapplication of Rule 7 of the Tennessee Rules of Criminal Procedure.[2] (ECF No. 17 at PageID 1953.) Generally, claims that a state trial court violated a state law are not cognizable in habeas corpus proceedings. *Stuart v. Wilson*, 442 F.3d 506, 513 n.3 (6th Cir. 2006); *Estelle v. McGuire*, 502 U.S. 62, 67 (1991). "Only errors of state law that result in a denial of fundamental fairness in violation of due process are cognizable in federal habeas corpus proceedings." *Stuart*, 442 F.3d at 513 n.3.

Petitioner has failed to show that allowing an amendment to the indictment violated his right to due process. *See id.* As the TCCA explained when it considered this claim on direct appeal, "[t]he amendment changed the date April 12, 2015, in Count 4 to reflect the correct offense date of April 6, 2015. The remaining counts in the indictment had the correct offense date and all

[2] Rule 7 authorizes a court to permit amendment of the indictment without the defendant's consent "if no additional or different offense is charged and no substantial right of the defendant is prejudiced." Tenn. R. Crim. P. 7(b)(2).

of the counts arose from the same incident." *Stitts*, 2018 WL 2065043, at *11. Petitioner does not explain how the correction of a clerical error in one count of the indictment violated his federal constitutional rights, especially where all of the remaining counts all had the correct offense date. (*See* ECF No. 1 at PageID 7.) Accordingly, Petitioner has failed to allege a cognizable habeas claim based on the trial court's application of state law. *See Stuart*, 442 F.3d at 513 n.3.

Claim #3: Ineffective Assistance of Counsel

Petitioner raises various claims of ineffective assistance of trial counsel in his § 2254 petition. (*See generally* ECF No. 1 at PageID 8.) In particular, he alleges that counsel was ineffective for failing to: (1) adequately investigate his case; (2) object to improper witness testimony; (3) thoroughly cross-examine the victim; (4) file pretrial motions; and (5) ensure that the jury pool was impartial. (ECF No. 6 at PageID 30-42.)

The framework for assessing Petitioner's claims of ineffective assistance of counsel is set out in *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* requires that Petitioner show two elements: (1) "that counsel's performance was deficient" and (2) "that the deficient performance prejudiced the defense." *Id.* at 687. If Petitioner fails make either showing, his claim fails, and the Court's analysis ends. *See id.*

To establish deficient performance, a petitioner "must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. When reviewing counsel's performance, a court must make "every effort" to eliminate "the distorting effects of hindsight" and "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 689-90. An attorney's "strategic choices" are "virtually unchallengeable" if based on a "thorough investigation of law and facts relevant to plausible options." *Id.* at 690.

The test for prejudice requires Petitioner to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding [because] [v]irtually every act or omission of counsel would meet that test." *Id.* at 693. Rather, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

While a court's consideration of counsel's assistance is "highly deferential" under the *Strickland* standard, *id.* at 689, on habeas review, the petitioner must overcome a "doubly" deferential standard in favor of the state court judgment, *Richter*, 562 U.S. at 101. "When 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.* at 105. Thus, when a *Strickland* claim is rejected on the merits by the state court, a petitioner "must demonstrate that it was necessarily unreasonable" for the state court to rule as it did in order to obtain habeas relief. *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011).

Failure to Investigate

Petitioner claims that his attorney "failed to conduct any meaningful pre-trial investigation into the facts of the case." (ECF No. 6 at PageID 32.) Before the TCCA, Petitioner alleged that his attorney's investigation into the following matters was deficient:

> The Petitioner claims that trial counsel was deficient for failing to notice a discrepancy in the number of shotgun shells recovered from the crime scene and the number of shells that the owner of the gun testified that he owned. He also claims that trial counsel failed to investigate the fact that mud was found in the barrel of the shotgun, even though it did not rain until after he had been arrested. He noted that trial counsel made no effort to test the gun for fingerprints, and trial counsel did not have the blood evidence tested to ensure that it was human blood. He claims that trial counsel did not hire experts in blood-spatter analysis or forensic

> toxicology. Finally, the Petitioner claims trial counsel was deficient for failing to investigate the crime scene or to interview Mr. Taylor about the drugs he had used in the time leading up to the shooting.

Stitts, 2020 WL 2563470, at *6.

The TCCA addressed Petitioner's claim that counsel failed to conduct an adequate investigation as follows:

> The Petitioner has failed to demonstrate how these alleged failures fell "below an objective standard of reasonableness under prevailing professional norms." *Goad*, 938 S.W.2d at 369. Trial counsel's testimony at the post-conviction hearing, which was accredited by the post-conviction court, showed that he had conducted a thorough investigation of the facts and prepared a defense to the best of his ability. Additionally, the Petitioner has not shown what testimony additional witnesses would have been able to provide, *see Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990), and he has failed to show how trial counsel's alleged errors impacted the results of trial. Accordingly, the Petitioner is not entitled to relief.

Id.

The TCCA's decision did not contradict *Strickland*'s performance and prejudice prongs. *See* § 2254(d)(1). The TCCA correctly cited and applied both prongs to the facts of the case, *Stitts*, 2020 WL 2563470, at *5-6, resulting in a "run-of-the-mill" state court decision, *Williams*, 529 U.S. at 406. Petitioner provides no argument that the decision was not run-of-the-mill, and thus, he is entitled to no relief under the contrary-to clause. (*See* ECF No. 6 at PageID 32-35.)

The decision likewise did not involve an unreasonable application of *Strickland*'s two prongs. *See* § 2254(d)(1). The TCCA based its performance decision on *Strickland*'s rule that trial counsel must perform in an objectively reasonable manner when representing a defendant. *See Strickland*, 466 U.S. at 688; *see also Stitts*, 2020 WL 2563470, at *6. The TCCA relied on counsel's accredited testimony from the post-conviction hearing, which "showed that he had conducted a thorough investigation of the facts and prepared a defense to the best of his ability."

Stitts, 2020 WL 2563470, at *6. The transcript from the evidentiary hearing supports the TCCA's conclusion that counsel adequately investigated the case.[3] (*See* ECF No. 11-23 at PageID 1586-1614.) Thus, the TCCA's application of the performance prong is "not so lacking in justification" to warrant relief under the unreasonable-application clause. *Richter*, 562 U.S. at 103.

The same is true of the TCCA's application of *Strickland*'s prejudice prong. Petitioner did not present any evidence showing that, but for trial counsel's performance, there was a "reasonable probability" of a different outcome. *Strickland*, 466 U.S. at 694. Without any evidence of prejudice, the TCCA could not grant relief, which justifies its application of the prejudice prong. *See Stitts*, 2020 WL 2563470, at *6.

Finally, Petitioner neither provides clear and convincing evidence that rebuts the TCCA's factual determinations nor shows how the TCCA's decision was based on an unreasonable determination of these facts. (*See generally* ECF No. 6 at PageID 32-35.) As such, he is not entitled to relief under § 2254(d)(2).

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[3] For example, trial counsel testified that he did not interview Taylor about Petitioner's claim of involuntary intoxication because the public defender's office had already spoken to him, and he denied drugging Petitioner; he also stated that Petitioner had been violent towards other girlfriends, which counsel understood would have been damaging to the defense. (ECF No. 11-23 at PageID 1602.) This testimony was noted by the TCCA in its decision. *Stitts*, 2020 WL 2563470, at *5.

Petitioner makes much of counsel's alleged failure to investigate Petitioner's claim that Taylor allegedly stole his car sometime after the shooting. (*See* ECF No. 6 at PageID 33; ECF No. 18 at PageID 1971-74.) According to Petitioner, because Taylor allegedly stole his car, "one may infer that Taylor had given [him] a mind-altering drug." (ECF No. 6 at PageID 33.) Petitioner's claim is speculative at best, and it does not support a claim of ineffective assistance of counsel. *See Bowen v. Foltz*, 763 F.2d 191, 194 (6th Cir. 1985) (explaining that mere "speculative assertions" will not support an ineffective assistance claim).

Failure to Object to Witness Testimony

Petitioner alleges in his next claim that trial counsel was ineffective for failing to object to the testimony of Agent Christie Smith, a forensic scientist with the Tennessee Bureau of Investigation ("TBI"). (*See* ECF No. 6 at PageID 35, 42.) According to Petitioner, the TBI "routinely" tests evidence for fingerprints and DNA, and counsel should have objected to Agent Smith's testimony that it was impossible to collect fingerprints and DNA from the shotgun found at the scene. (*Id.* at PageID 35.) The TCCA denied relief on this claim as follows:

> As to this issue, the Petitioner has failed to establish deficient performance or prejudice to his case. Agent Smith, an expert in DNA analysis, testified that she was unable to perform both tests on the shotgun. The cases that the Petitioner introduced showing both DNA analysis and fingerprinting overlooked the fact that the testing at issue was performed on different pieces of evidence. Nothing in the record intimates that Agent Smith had perjured herself, and the Petitioner failed to provide testimony at the post-conviction hearing that would have substantiated the claim.

Stitts, 2020 WL 2563470, at *7.

Petitioner also argues that counsel should have objected to the testimony of Lanonda Jernigan. (ECF No. 6 at PageID 38.) Jernigan, a 911 operator, was called to authenticate the recording of the victim's 911 call. *Stitts*, 2020 WL 2563470, at *3. Petitioner maintains that counsel should have objected to Jernigan's testimony because she was not working at the time of the call and had no direct knowledge of the events that led to the call.[4] (ECF No. 6 at PageID 39.)

[4] Jernigan also authenticated the police dispatch calls and the audio recordings from the officers' microphones. (ECF No. 11-8 at PageID 398-402.) Petitioner claims that Jernigan was "unable to state whether certain data feeds were . . . missing." (ECF No. 6 at PageID 39.) He then suggests that Officer McCrury planted the shotgun shells in his pockets because "there is no footage of anyone finding shells in [his] pockets. (*Id.*)

The transcript of Jernigan's testimony reveals no questioning regarding missing data feeds. (*See* ECF No. 11-8 at PageID 391-406.) She also only authenticated audio recordings, not dash cam footage. (*See id.* at PageID 392-402.) Petitioner's allegation regarding Jernigan's

The TCCA rejected Petitioner's claim, explaining that Jernigan testified "as the keeper of the records," and her testimony was properly admitted "to authenticate the veracity of the recording" under Tennessee Rule of Evidence 803. *Stitts*, 2020 WL 2563470, at *7.

The TCCA's decision did not contradict *Strickland*'s performance and prejudice prongs. *See* § 2254(d)(1). The TCCA again correctly cited and applied both prongs to the facts, resulting in a "run-of-the mill" state-court decision that does not run afoul of the contrary-to clause. *Williams*, 529 U.S. at 406.

The unreasonable application clause also provides no relief. *See* § 2254(d)(1). The TCCA concluded that Petitioner had failed to show deficient performance or prejudice with respect to his complaint about counsel's failure to object. *Stitts*, 2020 WL 2563470, at *7. The TCCA found no evidence in the record that Agent Smith had perjured herself, and "Petitioner failed to provide testimony at the post-conviction hearing that would have substantiated the claim." *Id.* With respect to Jernigan, the TCCA held that that her authentication testimony was properly admitted under Rule 803. *Id.* Thus, there was no basis for trial counsel to object.[5] "[C]ounsel cannot be said to be deficient for failing to take frivolous action." *United States v. Carter*, 355 F.3d 920, 924 (6th Cir. 2004). Based on the record, the TCCA reasonably applied *Strickland.*

Finally, Petitioner provides nothing beyond a conclusory allegation that the TCCA's decision was based on an unreasonable determination of the facts. *See* § 2254(d)(2). Thus,

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testimony is simply not supported by the record, nor is there any evidence to support his claim regarding Officer McCrury. "Conclusory allegations, without evidentiary support, do not provide a basis for habeas relief." *Prince v. Straub*, 78 F. App'x 440, 442 (6th Cir. 2003).

[5] Before the TCCA, Petitioner also argued that counsel should have objected to statements made by the prosecutor during closing arguments. *Stitts*, 2020 WL 2563470, at *7. He does not raise this issue in his § 2254 petition. (*See generally* ECF No. 6 at PageID 30-39.)

Petitioner fails to rebut the state court's factual determinations and their application in the decision by clear and convincing evidence. *See* § 2254(e)(1).

Failure to Adequately Cross-Examine the Victim

Petitioner also argues that trial counsel was ineffective for failing to conduct a more thorough cross-examination of the victim. (ECF No. 6 at PageID 33-34.) According to Petitioner, counsel should have inquired further about Greer's "bad eyesight and faulty memory." (*Id.* at PageID 33.) The TCCA considered this claim as follows:

> The Petitioner alleges that trial counsel was ineffective for failing to thoroughly cross-examine the victim. At trial, the victim was able to positively identify the Petitioner from across the room, but [she] was unable to read a document that was given to her by trial counsel.
>
> ***
>
> The Petitioner argues that the victim's inability to read her prior statement implies that she should not be able to recognize the Petitioner. As to this issue, the record shows that the victim and the Petitioner had been in a long-term relationship, and identity was not at issue. Moreover, the severity and direction that a trial attorney cross-examines a witness is a matter of strategy, and as such, this Court must be highly deferential to trial attorneys' decisions. *Goad*, 938 S.W.2d at 369; *Hellard v. State*, 629 S.W.2d 4, 11 (Tenn. 1982). Trial counsel's decision not to aggressively cross-examine a sympathetic victim about the disability she suffered as a result of a shooting was reasonable.

Stitts, 2020 WL 2563470, at *7.

The decision does not contradict or involve an unreasonable application of *Strickland*. *See* § 2254(d)(1). The TCCA relied on *Strickland*'s performance prong, recognizing that "the severity and direction" of trial counsel's cross-examination of a witness is "a matter of strategy" entitled to deference.[6] *Stitts*, 2020 WL 2563470, at *7; *accord Strickland*, 466 U.S. at 690 (stating

[6] Petitioner's additional argument that counsel should have more vigorously cross-examined Greer regarding her alleged memory loss was not raised before the TCCA in Petitioner's post-conviction appeal. (*See* ECF No. 11-27 at PageID 1829-30.) As such, it is procedurally defaulted because it was not properly exhausted before the TCCA on post-conviction appeal.

that well-informed strategic decisions receive deference and are "virtually unchallengeable"). The TCCA then concluded that Petitioner had failed to show deficient performance because his attorney's "decision not to aggressively cross-examine a sympathetic victim about the disability she suffered as a result of a shooting was reasonable." *Stitts*, 2020 WL 2563470, at *7. The TCCA's application of the performance prong is "not so lacking in justification" to warrant relief under § 2254(d)(1). *Richter*, 562 U.S. at 103.

Petitioner also fails to satisfy his burden under § 2254(d)(2). Petitioner neither provides clear and convincing evidence that rebuts the TCCA's factual determinations nor shows how the TCCA's decision was based on an unreasonable determination of these facts. (*See* ECF No. 6 at PageID 33-34.) As such, he is not entitled to habeas relief under § 2254(d)(2).

Failure to File Pretrial Motions

In his next claim, Petitioner faults his trial counsel for failing to file a motion for a change in venue, a bill of particulars, and a motion to suppress that raised involuntary intoxication. (ECF No. 6 at PageID 30.) Petitioner raised these claims in his state post-conviction petition, and they were rejected on the merits. (ECF No. 11-22 at PageID 1341, 1429-31.) He did not, however, raise the claims related to the bill of particulars and the motion to suppress before the TCCA in his post-conviction appeal.[7] (*See* ECF No. 11-27 at PageID 1826-31.)

Petitioner no longer has an available state court remedy to properly exhaust these two claims, thus, they are procedurally defaulted. *See Coleman*, 501 U.S. at 731-32. To the extent

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See Coleman, 501 U.S. at 750. Petitioner's claim is also refuted by the record. During counsel's cross-examination of Greer, her difficulty remembering various details surrounding the shooting was explored. (*See* ECF No. 11-8 at PageID 414-28.)

[7] Before the TCCA, Petitioner only argued that counsel was ineffective for failing to move for a change in venue. *See Stitts*, 2020 WL 2563470, at *5.

that Petitioner relies on *Martinez v. Ryan*, 566 U.S. 1 (2012), to excuse his procedural default, he cannot. (*See* ECF No. 6 at PageID 25.) As the Sixth Circuit has recognized, *Martinez* does not apply "to cure any procedural default that may have occurred at the state appellate court." *Middlebrooks v. Carpenter*, 843 F.3d 1127, 1139 (6th Cir. 2016). Thus, Petitioner's claims related to counsel's alleged ineffectiveness in failing to file an additional motion to suppress and a bill of particulars are **DISMISSED** as procedurally defaulted.

With respect to his exhausted claim, Petitioner argues that counsel should have sought a change in venue because prior to trial, his picture and the details of the offense were featured in a campaign advertisement in a mayoral race, which allegedly "taint[ed] the jury pool." (ECF No. 6 at PageID 32.) The TCCA addressed Petitioner's claim that counsel was ineffective for failing to seek a change in venue as follows:

> According to the Petitioner, his photograph and prior conviction were used in a television ad in a mayoral election. In the ad, one of the candidates referred to the Petitioner as a hardened criminal. The Petitioner's sister testified at the post-conviction trial that she had seen the ad multiple times. According to the Petitioner, trial counsel was deficient for failing to move for a change of venue since the ad prejudiced the jury pool against him. Trial counsel testified at the post-conviction hearing that he had looked for the ad in question, but [he] was unable to find it. The Petitioner did not introduce the ad at the post-conviction hearing, and he failed to present any evidence that a member of the jury had seen the ad. *Black v. State*, 794 S.W.2d at 757. Accordingly, the Petitioner is not entitled to relief.

Stitts, 2020 WL 2563470, at *8.

Petitioner fails to show how the TCCA contradicted *Strickland* on this issue. (*See* ECF No. 6 at PageID 32.) Thus, Petitioner is entitled to no relief under § 2254(d)(1)'s contrary-to clause.

The TCCA's decision also did not involve an unreasonable application of *Strickland*. *See* § 2254(d)(1). The TCCA relied on *Strickland*'s prejudice prong, noting that Petitioner had failed to "introduce the ad at the post-conviction hearing" and had "failed to present any evidence that a member of the jury had seen the ad." *Stitts*, 2020 WL 2563470, at *8. Petitioner therefore failed to prove a "reasonable probability" of a different outcome, and the TCCA did not apply the prejudice prong unreasonably based on this lack of evidence. *See Strickland*, 466 U.S. at 694. Petitioner is entitled to no relief under the unreasonable-application clause.

Petitioner also fails to satisfy his burden under § 2254(d)(2). He neither provides clear and convincing evidence that rebuts the TCCA's factual determinations nor shows how the TCCA's decision was based on an unreasonable determination of the facts. (*See* ECF No. 6 at Page ID 32.) Regardless, the facts upon which the TCCA based its holding are supported by the record. *See Pouncy*, 846 F.3d at 158; (*see also* ECF No. 11-23 at PageID 1486-88, 1573-75.) As such, Petitioner is entitled to no relief under § 2254(d)(2).

Failure to Ensure Juror Impartiality

Petitioner argues that trial counsel was ineffective for failing to request a "curative instruction or a mistrial" because the victim's family wore t-shirts promoting domestic violence awareness at trial. (ECF No. 6 at PageID 41.) Petitioner suggests that the t-shirts were prejudicial given that he "was on trial for shooting an ex-girlfriend." (*Id.*) The TCCA considered this claim as follows:

> As to this issue, the Petitioner claims that the victim's family came to trial wearing matching purple domestic abuse t-shirts. The record on appeal includes sections of the voir dire proceedings, but it does not include a transcript of what objections trial counsel made, or what the trial court ruled regarding the shirts. According to the Petitioner's testimony at the post-conviction hearing, trial counsel objected to the shirts, and the trial court ordered the victim's family to turn them inside out so

> that the words could not be read. We note that the Petitioner bears the burden of providing a complete record on appeal. *See State v. Roberts*, 755 S.W.2d 833, 836 (Tenn. Crim. App. 1998) (citing *State v. Groseclose*, 615 S.W.2d 142, 147 (Tenn. 1981); *State v. Jones*, 623 S.W.2d 129, 131 (Tenn. Crim. App. 1981)). Regardless, the Petitioner's allegations do not entitle him to relief.
>
> The Tennessee Supreme Court has held that trial courts should determine on a case-by-case basis whether gallery members' attire is so prejudicial that it denies a defendant a fair trial. *State v. Davidson*, 509 S.W.3d 156, 196 (Tenn. 2016). Buttons and t-shirts with victim's faces or names are not inherently prejudicial so long as they do not suggest or advocate the defendants' guilt or innocence. *Id.* According to the Petitioner's allegations, trial counsel objected to the t-shirts, and the trial court instructed the victim's family to turn them inside out. The trial court engaged in a case-by-case determination of the likely effect of the shirts and determined that its instructions were sufficient to guarantee impartiality. The record shows that trial counsel, in coordination with the trial court, thoroughly examined the jury pool for any potential bias. Trial counsel questioned the jury venire on whether they could apply the presumption of innocence and reasonable doubt standard; whether they knew the Petitioner, the victim, or other jurors; whether they had an inherent bias about domestic abuse; and whether they had a bias toward the police and their testimony. Trial counsel excused one juror for cause after he admitted to knowing the Petitioner's family and stating that the family had been in "a lot of trouble" before. On this record, the Petitioner has failed to demonstrate deficient performance or prejudice to his case. He is not entitled to relief.

Stitts, 2020 WL 2563470, at *8.

The above decision does not contradict *Strickland*. *See* § 2254(d)(1). The TCCA again correctly cited and applied *Strickland*'s prongs to the facts of this case. *See Stitts*, 2020 WL 2563470, at *8. Thus, the decision is "run-of-the-mill" and does not fall within § 2254(d)(1)'s contrary-to clause, and Petitioner does not argue otherwise. *See Williams*, 529 U.S. at 406.

Petitioner also fails to show that the TCCA unreasonably applied *Strickland*. *See* § 2254(d)(1). The TCCA noted that according to Petitioner's testimony at the post-conviction evidentiary hearing, trial counsel had objected to the t-shirts, and in response, the trial court had instructed the victim's family members to turn the shirts inside out. *Stitts*, 2020 WL

2563470, at *8; (*see* ECF No. 11-23 at PageID 1489-90). According to the TCCA, the trial court engaged in the required "case-by-case" consideration of the impact of the t-shirts and determined that its instructions were sufficient to prevent any prejudice to Petitioner. *Stitts*, 2020 WL 2563470, at *8. Further, as the TCCA noted, "trial counsel, in coordination with the trial court, thoroughly examined the jury pool for any potential bias." *Id.* The TCCA's application of the performance and prejudice prongs was not "so lacking in justification" to warrant relief under the unreasonable-application clause. *Richter*, 562 U.S. at 103.

As for § 2254(d)(2), the record supports the TCCA's determination of the facts on this claim as noted above. *See Pouncy*, 846 F.3d at 158. Moreover, Petitioner advances no argument that he is entitled to relief under § 2254(d)(2). (ECF No. 6 at PageID 41.) Thus, Petitioner fails to rebut the state court's factual determinations by clear and convincing evidence, § 2254(e)(1), and is entitled to no relief under § 2254(d)(2).

Claim #4: Double Jeopardy

Petitioner claims that his convictions violate the Double Jeopardy Clause. In particular, he alleges that:

> Both the Attempted Murder and Agg[ravated] Assault charges are based on a single shooting. Further, the element of "Aggravated" in "Agg[ravated] Assault" is based on the use of a weapon. Since [P]etitioner is . . . already charged with use of a weapon, and since that offense's sentence is substantially enhanced from simple assault (assault without a weapon), the offense of "Employment of a Firearm" is redundant and Double Jeopardy.

(ECF No. 1 at PageID 10.) Petitioner raised this issue in his state post-conviction petition. (ECF No. 11-22 at PageID 1339-40.) He did not, however, raise it before the TCCA in his post-conviction appeal. (*See generally* ECF No. 11-27.) Before the TCCA, Petitioner only argued his claims of ineffective assistance of counsel. *See Stitts*, 2020 WL 2563470, at *5. Because

Petitioner no longer has an available state court remedy to properly exhaust his claim, it is procedurally defaulted. *See Coleman*, 501 U.S. at 731-32.

Petitioner acknowledges that the claim was not raised before the TCCA is his post-conviction appeal. (ECF No. 1 at PageID 10.) He claims, however, that post-conviction appellate counsel "jettisoned [the issue] for no explicable reason, without consulting [him]." (*Id.*) Petitioner states that he is "not arguing per se right to appellate counsel." (*Id.*) Instead, he seeks to excuse his procedural default by showing "cause and prejudice." (*Id.*) With the benefit of liberal construction, Petitioner appears to be seeking relief under *Martinez*.

Martinez, however, is of no benefit to Petitioner. Under *Martinez*, the ineffective assistance of post-conviction counsel may be cause for a procedural default of a claim of ineffective assistance of trial counsel. 566 U.S. at 9. The Supreme Court has declined, however, to extend *Martinez*'s "highly circumscribed, equitable exception" to other types of procedurally defaulted claims. *Davila v. Davis*, 582 U.S. 521, 530 (2017).

Consistent with *Martinez* and *Davila*, the Sixth Circuit has excused procedural default under *Martinez* only when the underlying claim was ineffective assistance of trial counsel. *See Abdur-Rahman v. Carpenter*, 805 F.3d 710, 714, 716 (6th Cir. 2015) (declining to apply *Martinez* to claims of *Brady* violations, prosecutorial misconduct, trial errors, ineffective assistance of appellate counsel, and cumulative error). The Sixth Circuit has also concluded that *Martinez* does not apply when the federal claim was defaulted in state collateral appellate proceedings. *Middlebrooks*, 843 F.3d at 1139.

Petitioner's underlying defaulted claim is that his convictions violate the Double Jeopardy Clause—not that his trial counsel was ineffective. (*See* ECF No. 1 at PageID 10.) As such,

Martinez does not apply. *See Davila*, 582 U.S. at 530. *Martinez* also does not apply where, as Petitioner claims, the procedural default occurred in his post-conviction appeal due to the alleged ineffective assistance of post-conviction appellate counsel. *See Middlebrooks*, 843 F.3d at 1139. Petitioner's claim is therefore **DISMISSED** as procedurally defaulted.

New Claims: Prosecutorial Misconduct, Official Misconduct, & Juror Bias

Petitioner raises several new allegations in his memorandum in support of his § 2254 petition. (*See* ECF No. 6 at PageID 40-46.) He alleges that Investigator Chew took his clothes to the crime scene and planted the victim's blood on his clothes. (*Id.* at PageID 42-43). Petitioner also complains about Investigator Chew's presence in the courtroom during the trial, arguing that he should have been sequestered to prevent him from "colluding" with other witnesses. (*Id.* at PageID 40-41.) Additionally, Petitioner alleges that the prosecution failed to preserve exculpatory evidence by failing to perform fingerprint analysis and gun powder tests. (*Id.* at PageID 44.) Finally, he alleges that the trial court ignored his request for new trial counsel. (*Id.* at Page 45-46.)

These claims are procedurally defaulted because they were not properly exhausted before the TCCA on post-conviction appeal. (*See* ECF No. 11-27 at PageID 17-23.) Petitioner makes no attempt to argue cause and actual prejudice to excuse his procedural default, nor does he argue that these claims should be exempted from the procedural bar based on his innocence. *See House*, 547 U.S. at 536; *see also Schlup*, 513 U.S. at 315. As such, these claims are **DISMISSED** as procedurally defaulted.

Finally, Petitioner claims without any evidence that one of the jurors was Forrest's cousin. (ECF No. 6 at PageID 47.) Petitioner admits that the issue "is not fully exhausted," and he states

that his post-conviction counsel "ignored the issue." (*Id.* at PageID 46.) Under Tennessee Code Annotated § 40-30-106(g), the issue is "waived" in state court, leading to its default because Petitioner has no remaining path to proper exhaustion of the claim, *see Hodges*, 727 F.3d at 530.

Petitioner cannot rely on *Martinez* to excuse his procedural default because the exception announced in *Martinez* applies only to claims of ineffective assistance of trial counsel. *See Martinez*, 566 U.S. at 9; *see also Davila*, 582 U.S. at 529-30. As such, the claim is **DISMISSED** as procedurally defaulted and Petitioner's related requests for an evidentiary hearing to "present evidence to support this issue" and for the appointment of counsel are **DENIED**. (ECF No. 6 at PageID 47.)

The claim also lacks merit regardless of procedural default. *See Lambrix v. Singletary*, 520 U.S. 518, 525 (1997) (recognizing that 28 U.S.C. § 2254(b)(2) permits a federal court to "deny a habeas petition on the merits notwithstanding the applicant's failure to exhaust state remedies"). Here, Petitioner offers only conclusory allegations in support of his claim of a biased juror without any evidence in support. (*See* ECF No. 6 at PageID 46.) "Conclusory allegations, without evidentiary support, do not provide a basis for habeas relief." *Prince*, 78 F. App'x at 442.

APPELLATE ISSUES

There is no absolute entitlement to appeal a district court's denial of a § 2254 petition. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). The Court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to a § 2254 petitioner. Rule 11, Rules Governing Section 2254 Cases in the United States District Courts. A petitioner may not take an appeal unless a circuit or district judge issues a COA. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22(b)(1).

A COA may issue only if the petitioner has made a substantial showing of the denial of a constitutional right, and the COA must indicate the specific issue or issues that satisfy the required showing. 28 U.S.C. § 2253(c)(2)-(3). A "substantial showing" is made when the petitioner demonstrates that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 336 (internal quotation marks and citation omitted). A COA does not require a showing that the appeal will succeed. *Id.* at 337. Courts should not issue a COA as a matter of course. *Bradley v. Birkett*, 156 F. App'x 771, 773 (6th Cir. 2005). Because Petitioner's claims are either without merit or procedurally defaulted, the Court **DENIES** a certificate of appealability.

Additionally, Federal Rule of Appellate Procedure 24(a)(1) provides that a party seeking pauper status on appeal must first file a motion in the district court, along with a supporting affidavit. However, if the district court certifies that an appeal would not be taken in good faith, or otherwise denies leave to appeal in forma pauperis, the prisoner must file his motion to proceed in forma pauperis in the appellate court. *See* Fed. R. App. P. 24(a)(4)-(5). In this case, for the same reasons the Court denies a COA, the Court determines that any appeal would not be taken in good faith. It is therefore **CERTIFIED**, pursuant to Rule 24(a) that any appeal in this matter would not be taken in good faith and leave to appeal in forma pauperis is **DENIED**.[8]

[8] If Petitioner files a notice of appeal, he must pay the full $605 appellate filing fee or file a motion to proceed in forma pauperis and supporting affidavit in the Sixth Circuit Court of Appeals within 30 days of the date of entry of this Order. *See* Fed. R. App. P. 24(a)(5).

IT IS SO ORDERED.

s/ S. Thomas Anderson
S. THOMAS ANDERSON
UNITED STATES DISTRICT JUDGE

Date: March 4, 2024.

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