

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**FILED**

Apr 6, 2026

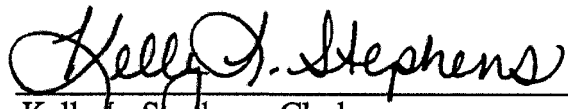
KELLY L. STEPHENS, Clerk

JARAME NELSON, aka Tarence Nelson,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	<u>ORDER</u>
	)	
JOHNNY FITZ, Warden,	)	
	)	
Respondent-Appellee.	)	

Before: SUTTON, Chief Judge; McKEAGUE and GRIFFIN, Circuit Judges.

Jarame (a.k.a. Tarence) Nelson petitions for rehearing en banc of this court's order entered on January 14, 2026, denying him a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court,* none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT


 Kelly L. Stephens, Clerk

*Judge Hermandorfer is recused in this case.

APPENDIX B

No. 25-5349

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Jan 14, 2026

KELLY L. STEPHENS, Clerk

JARAME NELSON, a.k.a. Tarence Nelson,

Petitioner-Appellant,

v.

JOHNNY FITZ, Warden,

Respondent-Appellee.

ORDER

Before: NORRIS, Circuit Judge.

Jarame (a.k.a. Tarence) Nelson, a pro se Tennessee prisoner, appeals a district-court judgment denying his petition for a writ of habeas corpus. *See* 28 U.S.C. § 2254. He applies for a certificate of appealability (COA) on six issues, *see* 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22(b)(1)-(2), and moves for in forma pauperis (IFP) status. He has also filed a motion for return of property. Specifically, he seeks an order compelling his trial counsel to (a) return to Nelson all the firearms that counsel retrieved for this case or (b) turn them over to this court or the district court for examination. Nelson's requests are denied.

Tonya Johnson was eight months pregnant with Nelson's child on Friday evening, September 25, 2009, when he fired two bullets into her. According to the medical examiner who performed the autopsy, the bullet to Johnson's head "really didn't hit anything that would be immediately lethal." The bullet to the abdomen caused the "rapidly fatal injury." Even so, the examiner ascribed Johnson's death to multiple gunshot wounds. The mother's death, in turn, caused the death of the fetus by cutting off the flow of oxygen. But, the trial court later found, this was not mere byproduct. The trial judge wrote that he thought this "a case where [Nelson] killed that baby."

Convicted by jury of two counts of premeditated first-degree murder—one for the mother’s killing, one for the child’s—Nelson was sentenced to two consecutive life sentences. The trial court’s judgments were affirmed on direct appeal. *State v. Nelson*, No. W2011-02222-CCA-R3-CD, 2013 WL 12185279 (Tenn. Crim. App. May 24, 2013). He did not seek discretionary review by the Tennessee Supreme Court.

Nelson did bring several state-court postconviction actions. The one relevant now is his petition for post-conviction relief. The trial court denied it, and the court of criminal appeals affirmed. *Nelson v. State*, No. W2017-02063-CCA-R3-PC, 2019 WL 3777030 (Tenn. Crim. App. Aug. 12, 2019), *perm. app. denied* (Tenn. Jan. 15, 2020).

In 2020, Nelson timely filed his § 2254 petition. It raised 17 claims, which the district court reordered to streamline analysis. The relevant claims (as renumbered by the district court) are these:

(4) Committing ethical and potentially criminal violations, trial counsel rendered Nelson ineffective assistance by retrieving the weapons involved in the killing yet not turning them over to the State for review.

(5) Trial counsel ruined the chain of custody, and was thereby ineffective, when he retrieved the weapons himself but did not turn them over to the proper authorities.

(6) Trial counsel was ineffective for failing to investigate and present as evidence (a) the two handguns used in the shooting and (b) any helpful information that could have been ascertained from them.

(7) The State presented insufficient evidence that Nelson did not act in self-defense.

(9) Trial counsel was ineffective in not getting a ballistics expert to test the weapons even though counsel had retrieved them.

The petition also asked for an evidentiary hearing. On September 20, 2024—slightly more than four years after filing the petition—Nelson moved to amend it by adding a claim. The district court denied amendment, evidentiary hearing, petition, and COA, then dismissed the matter with prejudice.

Nelson timely appealed. He seeks a COA on six issues: four claims (4, 5, 6, and 9), the denial of amendment, and the denial of an evidentiary hearing. Nelson has forfeited review of his remaining claims by failing to argue them in his COA application. *See Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000); *see also Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002) (per curiam).

A COA shall issue "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). If the district court denied the habeas petition on the merits, the applicant must show that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). If the district court denied the petition on procedural grounds without reaching the petitioner's underlying constitutional claim, a COA should issue when the applicant shows that jurists of reason would find debatable (a) whether the petition states a valid claim of the denial of a constitutional right and (b) whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). A COA is improper "if *any* outcome determinative issue is not reasonably debatable." *Moody v. United States*, 958 F.3d 485, 488 (6th Cir. 2020). Nelson fails to meet this standard.

Ineffectiveness Claims

Claims 4, 5, 6, and 9 present variations on the argument that trial counsel was ineffective for not having the weapons involved in the killings tested for evidence favorable to the defense.

In state post-conviction proceedings, the court of criminal appeals held that Nelson forfeited Claims 4 and 5 by raising them for the first time on appeal. *Nelson*, 2019 WL 3777030, at *9. In the § 2254 petition, Nelson admitted that Claim 6 "was not specifically raised to the state courts and is therefore procedurally defaulted." The district court agreed all three claims were defaulted. By contrast, the state court of criminal appeals in post-conviction proceedings denied Claim 9 on the merits. *Id.* at *9-10. The district court held that the merits decision was not contrary to, or an unreasonable application of, *Strickland* and was based on a reasonable determination of the facts in light of the evidence presented in state court. *See* 28 U.S.C. § 2254(d).

Those four claims would fail even if reviewed de novo.

A requirement of an ineffectiveness claim is that Nelson show prejudice, *Strickland v. Washington*, 466 U.S. 668, 687 (1984): “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. That gets at each claim’s weakness. Nelson never shows a reasonable probability there *was* any favorable evidence to be found. Jurists of reason would not disagree.

At trial, Nelson argued self-defense. *Nelson*, 2019 WL 3777030, at *6. Or as he put it when testifying, he shot Johnson “[b]ecause she was trying to shoot me.” He presented evidence of their past relationship: her jealousy, her volatility, and her violence toward him when he was with other women. *Nelson*, 2013 WL 12185279, at *3-5. And he testified to his version of events that Friday, September 25th. He went to her house at her invitation, according to Nelson. *Id.* at *4; *see also id.* at *3 (the State presenting evidence that she had indeed been expecting to meet him for dinner but had “seemed rather distressed,” “like she was not looking forward to it”). Johnson let him in, *id.* at *4, but when he told her that he “wasn’t going to spend the night with her,” she “just verbally lashe[d] out” at him. They began arguing. Matters did not improve when another woman—this time, Amanda Hill—called him on his cell phone. Nelson testified that Johnson “told me from her mouth that she was going to kill me and Amanda Hill.” Johnson “left the room, and [he] heard cabinet doors slamming and [Johnson] yelling. [She] came back into the living room and threw condoms at [him]. She sat down again and threw her cell phone at [him].” *Id.* When he reached down to pick it up, she yelled, “[L]ook at me[, bitch].” *Id.* That is when (per Nelson’s version of events) he saw the gun in her hand.

When Defendant looked up at the victim, she was pointing a gun at his head. Defendant “froze.” Defendant heard the victim pull the trigger, but the weapon did not fire. He heard her pull the trigger twice more, but it did not fire. After Defendant saw the victim remove the clip, put it back in the gun and manually cock the gun and point it at Defendant again, Defendant pulled out his 9 millimeter pistol that he was carrying in a concealed holster and fired it at her. Defendant grabbed the items around him, *including both firearms*, and ran out of the house. Defendant testified that he did not check to see if the victim was injured. He circled the neighborhood three or four times and contemplated going back to the house, but he decided not to and “left the scene completely.” Defendant drove to Amanda Hill’s house and stayed the night.

Id. (emphasis added). Nelson described the guns as follows: The one Johnson had threatened him with was a Sig Sauer. *Id.* The one he killed her with was (as noted) that 9-millimeter pistol, *id.*—specifically, an HK USP 9 millimeter. *Nelson*, 2019 WL 3777030, at *6, *10. He testified that he hid both “‘under a barn in Murfreesboro’ because he had heard that the police wanted to talk to him.” *Nelson*, 2013 WL 12185279, at *4.

In state post-conviction proceedings, Nelson testified as follows: He told trial counsel before trial that the two guns, “along with a shotgun,” were hidden “under a shed in Murfreesboro. Upon receiving this information, trial counsel went to the shed and retrieved two firearms,” *Nelson*, 2019 WL 3777030, at *6—two, not three. Nelson “insisted one of the firearms was the 9 millimeter he used to shoot the victim and alleged trial counsel should have had the gun tested for a hair trigger and presented it as evidence at trial.” *Id.* Nelson also “believed a ballistics expert could have shown the victim shot at the petitioner, necessitating self-defense,” *id.*—although this was not quite the version of events Nelson testified to at trial, when he went only so far as to say that she *tried* to shoot him.

In those state post-conviction proceedings, the trial court held two evidentiary hearings, one in 2015, the other in 2017. Trial counsel testified at both.

At the first, trial counsel confirmed that he had retrieved the “weapons that were used.” He testified that he himself had tested for the hair trigger Nelson had told him about, but “I didn’t find anything improper with the trigger.” Counsel had no other testing done.

At the second hearing, two years later, trial counsel testified that he “*believe[d]*” the weapons found were “a 44 millimeter [sic] handgun” and “a pistol grip shotgun 12 gauge”: “[A]nd I brought those back to my office and that’s where I kept them from that point forward.” (Emphasis added.) But, he testified, they were then (in 2017) “at my house.” Trial counsel reiterated that Nelson “had told me that the gun that he fired in the course of the incident giving rise to this had a hair trigger on it, meaning that it didn’t take very much pressure on the trigger,” but “when I fired it, I didn’t find that to be the case.” And counsel again testified that he had had no independent testing done.

Nelson presented no evidence at the hearings of what testing would have revealed. *Id.* at *6, *10.

The post-conviction trial court held that Nelson had failed to prove counsel's ineffectiveness because he failed to show that testing would have revealed anything favorable.

The gun used to kill the victim was still in the possession of the attorney at the time of the hearing . . . and could have been presented by the petitioner at the hearing as an exhibit and subjected to all manner of tests, but the petitioner chose not to elicit any of this proof at the hearing. This allegation fails for a lack of proof of any deficient performance or prejudice to the petitioner.

Note that opening phrase: "[t]he gun used to kill the victim." The trial court was not merely holding that trial counsel was not ineffective. The court was also finding that the handgun in counsel's possession was the handgun used to kill.

The court of criminal appeals (reviewing Claim 9 on the merits) agreed that Nelson failed to prove prejudice but held that "the record does not support the trial court's factual determination concerning whether trial counsel possessed the murder weapon." *Id.* at *10. Trial counsel had found two weapons. The shotgun, of course, was irrelevant, since no one alleged it had been used in the incident. The problem was the handgun. The appellate court was troubled by the conflicting testimony about it (9 millimeter versus "44 millimeter," hair trigger versus normal trigger) "and the fact the firearm at issue was not introduced." *Id.* From this, the appellate court concluded that "the petitioner failed to prove his factual allegation, that trial counsel possessed the murder weapon, by clear and convincing evidence. Thus, the evidence preponderates against the post-conviction court's finding of fact." *Id.*

Nelson argues that the handgun found *was* the handgun that killed Johnson, that a contrary holding is legally precluded, and that dispute over which handgun was found creates a genuine issue of material fact. This gets him nowhere. Even assuming him right about the identity of the handgun found, he still fails to show it reasonably probable that testing would have revealed favorable evidence.

In the COA application, Nelson points to another argument falling under Claim 6, this one dealing with the Sig Sauer, the handgun Johnson allegedly tried to use on him. He contends that

the district court failed to acknowledge that he was prejudiced by trial counsel's failure to find and present that gun at trial. Nelson further writes that "[t]he Sig Sauer was recovered after the post-conviction hearings," but he provides no citation to back up that statement. In his § 2254 petition, he gave more details: he testified at the post-conviction hearing that the Sig Sauer "was hidden inside of an IBM computer server," which—he alleges in the § 2254 petition—"was seized from Nelson's residence and is currently in possession of the [S]tate" in "the Memphis Property and Evidence room." But again, he gives no backup citation. In neither spot does he allege that any testing has been performed on the gun.

This argument, too, would fail even reviewed de novo.

Put aside, for now, the question whether this court may even consider evidence presented neither at trial nor at those post-conviction hearings. Focus on the problems left. The first is that it was Nelson who hid the Sig Sauer. If trial counsel could not find it, that was not trial counsel's fault. But put that aside too and focus on the failure of Nelson to give backup citations. The result of that is that he fails to show the gun actually was found. He certainly fails to show it could have been found in time for trial. And even putting those failures aside, another remains. He fails to show it reasonably probable that testing would have put the gun where he needs it—in *Johnson's* hand. Jurists of reason would not debate this.

Motion to Amend

Nelson argues that the district court erred in denying his motion to amend his § 2254 petition. He wanted to add a jury-instruction claim, raising two arguments: (1) Trial counsel was ineffective in failing to either object to the self-defense instruction or request a special jury instruction. And (2) the trial court gave the jurors an erroneous instruction on self-defense.

The district court credited Nelson with filing his federal petition on July 24, 2020, and with filing the motion to amend on September 20, 2024. Calculating his federal habeas corpus deadline as having been August 5, 2020, *see* 28 U.S.C. § 2244(d), the district court held that the petition had been timely filed, but the proposed new claim was being raised well beyond the limitations period—more than four years beyond. The district court then denied amendment because the proposed claim (a) was untimely, (b) did not relate back to the original § 2254 petition, and (c) was

not rescued by equitable tolling. Nelson contends that his proposed claim does relate back to the original petition—specifically, to the insufficiency claim (Claim 7).

But even assuming the district court's procedural ruling incorrect, a COA is unwarranted. For his proposed claim with its two arguments fails to meet the other COA element required to reach at least the reasonable-debatability level: stating a valid claim of the denial of a constitutional right. To meet that standard, "it is not enough for a petitioner to allege claims that are arguably *constitutional*; those claims must also be arguably *valid* or *meritorious*." *Dufresne v. Palmer*, 876 F.3d 248, 254 (6th Cir. 2017).

Nelson argued in his motion to amend as follows: Even before September 25, 2009, he was a convicted felon, who therefore was not allowed to possess a firearm. But he did have one when he went to Johnson's house—in that concealed holster, as he testified at trial. At the time of the incident, then, he was engaged in "unlawful activity." Yet the jury instructions stated that self-defense applied "[i]f a defendant was *not* engaged in unlawful activity." (Emphasis added.) Nelson is concerned that this left the jurors thinking that, by definition, he was disqualified from claiming self-defense. Citing Tennessee caselaw, he argues that the correct statement of Tennessee law is that a defendant engaged in unlawful activity has a right to self-defense but must first retreat before using force, whereas a defendant not engaged in unlawful activity may stand his ground. Nelson contends that the court should have so instructed the jurors. He therefore wished to add a claim contending that the trial court gave an erroneous self-defense instruction and that trial counsel was ineffective for neither objecting nor requesting a special jury instruction.

But even had the trial court so instructed the jurors, it is not reasonably probable they would have found self-defense. Consider what Nelson did after firing those two shots into Johnson. The jurors surely would have considered it: to see what light it threw on his motivation when shooting and what credibility to assign his description of the shooting.

One point before proceeding. If Nelson's testimony is credited, he did not know Johnson was pregnant. *See Nelson*, 2013 WL 12185279, at *4 (Nelson testifying that, in February or March of 2009, she told him she was pregnant but afterwards texted him she was not). Hence, in the

analysis that follows, his failure to seek medical assistance for the child will not be taken into account.

Now consider the events of that September evening. Johnson fell across the ottoman when shot. *See id.* at *1 (witnesses describing finding her body "slumped over her ottoman" in her living room). Nor did she live long thereafter. Unlike the shot to the head, the one to the abdomen was rapidly fatal, causing death (according to the medical examiner) in "maybe 30 seconds to a minute." What did Nelson do? According to his testimony, he grabbed the items around him and ran out of the house. *Id.* at *4. But consider the items grabbed. Two of them were the guns—the one he had used on her and (if his story is believed) the one she had used on him. *Id.* That is significant. *He had the guns.* Whether he knew she was dead or not, he now knew she was not a threat. She was not moving, and she had no weapon. He could have called for medical assistance. But he did not.

Consider also the other items grabbed, items Nelson *admitted* grabbing: the cell phone she had thrown at him and her laptop computer. *Id.* at *2, *4, *6, *10. One can understand his unthinkingly, in the heat of the moment, grabbing the cell phone. After all, he had already been reaching for it when (according to his story) he saw the gun in her hand. But why the laptop? If he only shot in self-defense, it is difficult to see how afterwards grabbing her laptop increased his safety in the slightest. If anything, that would seem to have only slowed down his exit. That she was no longer a danger, therefore, was not just obvious from the cool, calm vantagepoint of hindsight. He knew *then* he was not in danger.

Nelson testified that he did not check to see if Johnson was injured, *id.* at *4, but it is completely implausible that he did not know this was an occasion for expert medical examination. He had just fired two bullets into her. And certainly, she was not getting up to interfere as he grabbed guns, cell phone, and laptop. She stayed slumped over that ottoman. Yet he "left her to die without calling for help." *Id.* at *10.

What did Nelson do instead? He drove to Amanda Hill's house, where (his appetite apparently unimpaired) the two ate, watched a movie, went to bed, and in the morning breakfasted together. *Id.* at *2, *4, *6, *10. No matter the jury instruction, it is not reasonably probable the

jurors would have thought that the behavior of someone who had just been forced to shoot in self-defense.

And all of that is even before taking into account his subsequent behavior: hiding guns, cell phone, and laptop from the police. *Id.* at *4, *6.

Last, consider something existing independent of Nelson's post-event behavior: Johnson's body slumped over that ottoman. According to his story, the two had been facing each other. Yet the bullet to her head entered in the *back* of her head, behind her ear. *Id.* at *1-3. According to the medical examiner, "[t]he bullet went through the soft tissue and muscles, down along the scalp and exited through the right side of the victim's neck. The bullet reentered the victim's chest and through soft tissue and muscle and then fragmented and made two exit wounds." *Id.* at *3. If that was the *second* shot—if Johnson was *already* slumped over the ottoman—that would explain why the bullet entered from behind and why it then proceeded *downward*. That trajectory does not increase the plausibility of the self-defense theory.

The jurors did not think Nelson acted in self-defense. It is not reasonably probable that his suggested instruction would have changed that. Jurists of reason would not debate that the claim is not "arguably *valid* or *meritorious*." *Dufresne*, 876 F.3d at 254.

Evidentiary Hearing

Nelson argues that the district court erred in denying him an evidentiary hearing. He requested one to develop evidence relating to "the missing weapons involved in the shooting and any facts ascertainable from such weapons." The district court denied a hearing because (1) a federal habeas court is limited to the state-court record and (2) the factual predicate on which he relies could have been discovered previously through due diligence.

The district court is undebatably correct.

Absent a showing of actual innocence, the district court is not allowed to hold an evidentiary hearing "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings." 28 U.S.C. § 2254(e)(2). Nelson did not present in state court the evidence he now seeks to develop. Hence he "failed" to present it. *See Shinn v. Ramirez*, 596 U.S. 366, 380, 382 (2022). He blames trial-level post-conviction counsel for this failure. But Nelson may not

present new evidence to prove this. “[U]nder § 2254(e)(2), a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record based on ineffective assistance of state postconviction counsel.” *Id.* at 382.

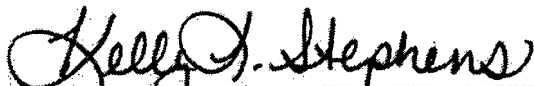
That leaves an evidentiary hearing in federal court forbidden unless Nelson shows actual innocence. But to show that, he must show, among other matters, that his claim relies on (a) a new rule of constitutional law or (b) “a factual predicate that could not have been previously discovered through the exercise of due diligence.” § 2254(e)(2).

He can make neither showing. He does not rely on a new rule of constitutional law. And “the missing weapons involved in the shooting and any facts ascertainable from such weapons” could have been previously discovered if he had not hidden them in the first place. Jurists of reason would not debate this.

Conclusion

Upon consideration, Nelson’s application for a certificate of appealability is **DENIED**, and his other motions are **DENIED** as moot.

ENTERED BY ORDER OF THE COURT


Kelly L. Stephens, Clerk

APPENDIX C

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

JARAME NELSON
a/k/a TARENCE NELSON,

Petitioner,

v.

Case No. 2:20-cv-02557-MSN-tmp

JOHNNY FITZ,

Respondent.

**ORDER DENYING MOTION TO AMEND HABEAS PETITION; DENYING PETITION
PURSUANT TO 28 U.S.C. § 2254; DENYING A CERTIFICATE OF APPEALABILITY;
CERTIFYING THAT AN APPEAL WOULD NOT BE TAKEN IN GOOD FAITH; AND
DENYING LEAVE TO PROCEED IN FORMA PAUPERIS ON APPEAL**

Before the Court are: (1) the Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (ECF No. 1, “§ 2254 Petition”) filed by Petitioner Jarame Nelson, also known as Tarence Nelson¹; (2) Respondent’s Response to the Petition For A Writ of Habeas Corpus (ECF No. 21, “Response”); (3) Petitioner’s Reply (ECF No. 25, “Reply”); and (4) Petitioner’s September 24, 2024 Motion To Amend 2254 Petition (ECF No. 57, “MTA”).

For the reasons stated below, the Court: (1) **DENIES** the MTA because it would be futile to amend the § 2254 Petition to raise time-barred claims that do not relate back to the § 2254 Petition; and (2) **DENIES** the § 2254 Petition in its entirety because its claims are either (a)

¹ Nelson’s Tennessee Department of Correction (“TDOC”) prisoner number is 00352541. He is confined at the West Tennessee State Penitentiary (“WTSP”), in Henning, Tennessee. (ECF No. 59-2 at PageID 2280.) (See also <https://foil.app.tn.gov/foil/details.jsp> (TDOC Felony Offender Information website) (last accessed Dec. 29, 2024).)

non-cognizable in federal habeas, (b) procedurally defaulted for failure to comply with a state court procedural rule, (c) procedurally defaulted for failure to exhaust, (d) without merit, or (e) improperly pled.

I. BACKGROUND

A. FACTUAL BACKGROUND & TRIAL

On April 14, 2010, a grand jury in Shelby County, Tennessee returned an indictment charging Petitioner with two counts of premeditated first degree murder ("Charges") in violation of Tenn. Code Ann. § 39-13-202. (ECF No. 20-1 at PageID 150-52.) The Charges arose from the September 2009 shooting death ("Incident") of Tonya Johnson ("Victim"), who was eight months pregnant with Petitioner's child when the Incident occurred. *See State v. Nelson*, No. W2011-02222-CCA-R3-CD, 2013 WL 12185279, at *1 (Tenn. Crim. App. May 24, 2013) ("*Nelson I*").

Attorney Stephen Leffler represented Petitioner during his June 2011 trial. (ECF No. 20-2; ECF No 20-3.) The Tennessee Court of Criminal Appeals ("TCCA") summarized the evidence about Petitioner and the Victim that was presented at trial:

The victim [...] was 36 years old at the time of her death. She was eight months pregnant with [the Petitioner]'s child. Kaye Ingram lived across the street from the victim [...]. On September 25, 2009, Ms. Ingram observed Ms. Johnson arrive home at approximately 5:00 or 5:30 p.m. Ms. Ingram testified that Ms. Johnson left her garage door open, which was unusual because "she never ever leaves her garage door up so [she] assumed that she probably had company coming." At approximately 6:00 p.m., Ms. Ingram went outside to watch her grandchildren ride their bikes on the sidewalk. She saw a black car pull into Ms. Johnson's driveway. She described the driver of the vehicle as a black male, between 5 feet 7 inches and 6 feet in height. He was wearing blue jeans and a white shirt. He entered the house through the garage. Ms. Ingram saw him leave Ms. Johnson's house at approximately 9:30 p.m.

Ms. Ingram and her husband decided to go to Ms. Johnson's house to tell her that her garage door was open. They knocked on her front door, and she did not answer. Ms. Ingram looked through the window beside the front door and saw Ms. Johnson

"slumped over her ottoman." She yelled to another neighbor, Dixie Harber, to call 911.

[****]

Amanda Hill testified that she and [Petitioner] began dating each other in 2005, and they dated until February, 2007. They remained friends after their romantic relationship ended. On September 25, 2009, [Petitioner] drove from his home in Murfreesboro to Memphis to visit Ms. Hill. [Petitioner] told Ms. Hill that he would leave work at 5:00 p.m., and she expected him to arrive at her house at approximately 9:00 p.m. [Petitioner] arrived at her house at 10:00 p.m. She testified that [Petitioner] was carrying a laptop and a cell phone, and he had an empty gun holster in the back of his waistband. They ate, watched a movie and then went to bed.

[Petitioner] was arrested on September 26, 2009, and transported to the Rutherford County Adult Detention Center. Lieutenant Todd Sparks, of the Rutherford County Sheriff's Office, assisted in obtaining and executing a search warrant for [Petitioner]'s residence in Murfreesboro on September 27, 2009. Lieutenant Sparks found two firearms in [Petitioner]'s kitchen in the "open space on top of the cabinets." One was a Bushmaster AR-15 .223 caliber rifle [the "Rifle"], and the other was a Taurus .44 Magnum revolver [the "Revolver"].²

[****]

Assistant Medical Examiner Lisa Funte performed an autopsy of the victim. Dr. Funte testified that the victim suffered two gunshot wounds, one to the head and another to the abdomen. Dr. Funte determined that the victim was between 35 and 37 weeks pregnant and that the fetus was viable at the time of the victim's death. Dr. Funte described the gunshot wound to the victim's head [...] She determined that the bullet was fired from greater than four feet away.

[****]

[Petitioner] testified and admitted that he shot the victim. However, he stated that she "was trying to shoot [him]." [Petitioner] testified that he met the victim online approximately four years prior to trial. He lived in Memphis at that time. [Petitioner] testified that when the victim learned that he was dating another woman, "it really wasn't a big deal." The victim contacted the other woman, and [Petitioner] and the other woman did not talk again. [Petitioner] and the victim continued their relationship. On another occasion, [Petitioner] was having drinks with another woman at his house when the victim came in. The victim told the other woman to leave. [Petitioner] testified that "[i]t wasn't a big commotion or pow wow[.]" and the other woman "politely left." The victim and [Petitioner]

² The Revolver was not the murder weapon. Petitioner's 9mm was the murder weapon.

continued their relationship. [Petitioner] testified there were "several [more] incidents." On one occasion, a woman named Shayla was at [Petitioner]'s house at "3:00 or 4:00 in the morning." [Petitioner] heard the victim "kicking and beating and screaming" at the front door for "probably an hour, two hours nonstop." The same woman stayed at [Petitioner]'s house again, and the victim "had her car boxed in, ... and wouldn't let her leave." [Petitioner] testified that there were "so many incidents" in which the victim "would ... come over and harass [him] or the person [he] was with[.]" that he moved to another residence. On one occasion when Trella King was at [the petitioner]'s house, [Petitioner] heard what he thought was a gunshot and saw the victim standing outside of his house. On another occasion, Amanda Hill was at [Petitioner]'s house. They were sitting at the kitchen table having breakfast. [Petitioner] saw the victim drive by his house and he closed the window blinds. [Petitioner] had an "uneasy feeling." He opened the front door, and the victim "c[ame] bashing through the front door." The victim was "picking up stuff and throwing it at [Petitioner]." [Petitioner] tried to restrain her, and he called the police. He testified that he was injured during that incident. On another occasion, a woman named Pamela Young was at his house when the victim arrived there. [Petitioner] answered the door, and the victim "didn't say anything ... She just came in punching [him], kicking [him], and she was just rapidly, consecutively punching [him]." [Petitioner] did not hit the victim but tried to restrain her.

[Petitioner] testified that he maintained a relationship with the victim because he "knew why she was upset." He testified, "I couldn't get mad at her for what was going on so I just kind of accepted that, you know, if you're going to deal with this woman and you're going to continue to see other women, this type of action is going to be a side effect. And I guess because we had known each other so long, I was just willing to deal with it."

[Petitioner] worked providing technical support as a consultant for several companies in Memphis. He later accepted a job with Tractor Supply Company in Brentwood. He moved to Murfreesboro in December, 2007. [Petitioner] testified that he only saw the victim on two occasions in 2009. In February or March, 2009, while the victim was visiting [Petitioner], she told him that she was pregnant. [Petitioner] testified that his reaction was "neutral." [Petitioner] testified that after the victim returned to Memphis, she sent a text message to him that she was not pregnant. [Petitioner] had no other discussions with the victim about the pregnancy.

On September 25, 2009, [Petitioner] left work early to drive to Memphis to visit the victim and others. He rented a vehicle because his vehicles were not reliable enough for the trip. [Petitioner] testified that he was "going to see whoever [he] could see ... going to do whatever [he] could do while [he was] in Memphis type of deal." He sent a text message to the victim while he was shopping in some of his favorite stores in Memphis. The victim responded and invited him to her house. She told [Petitioner] that she would leave the garage door open. [Petitioner] got stuck in traffic and became lost on his way to the victim's house, and he arrived at

6:45 p.m. He entered the house through the garage. He testified that the victim opened the door and walked back into the house without speaking to him. He sat beside her on the couch and spoke to her, but she did not respond.

When [Petitioner] told the victim that he was not going to stay the night at her house, the victim "verbally lashe[d] out" at [the petitioner]. [Petitioner] and the victim were arguing when Amanda Hill called [Petitioner] on his cell phone. The victim told [the petitioner] that she was going to kill [Petitioner] and Amanda Hill. The victim left the room, and [Petitioner] heard cabinet doors slamming and the victim yelling. The victim came back into the living room and threw condoms at [Petitioner]. She sat down again and threw her cell phone at [Petitioner]. [Petitioner] reached down to pick up the phone, and the victim yelled, "look at me [bitch]." When [Petitioner] looked up at the victim, she was pointing a gun at his head. [Petitioner] "froze." [Petitioner] heard the victim pull the trigger, but the weapon did not fire. He heard her pull the trigger twice more, but it did not fire. After [Petitioner] saw the victim remove the clip, put it back in the gun and manually cock the gun and point it at [Petitioner] again, [Petitioner] pulled out his 9 millimeter pistol that he was carrying in a concealed holster and fired it at her. [Petitioner] grabbed the items around him, including both firearms, and ran out of the house. [Petitioner] testified that he did not check to see if the victim was injured. He circled the neighborhood three or four times and contemplated going back to the house, but he decided not to and "left the scene completely." [Petitioner] drove to Amanda Hill's house and stayed the night.

[Petitioner] testified that after the incident, while he was driving to Amanda Hill's house, he noticed the gun that the victim had pointed at him lying in the seat of his car, and he realized that it was his Sig Sauer that had been in the glove compartment of the rental car [the "Sig Sauer"]. [Petitioner] apparently did not recognize the gun as belonging to him during the incident inside the victim's home. The following morning, after [Petitioner] and Amanda Hill had breakfast together, [Petitioner] returned to the victim's house to return the victim's laptop and cell phone. He saw a pickup truck parked outside and he left. [Petitioner] testified that he later hid the victim's laptop, phone, the Sig Sauer and the 9 millimeter handgun "under a barn in Murfreesboro" because he had heard that the police wanted to talk to him. [Petitioner] acknowledged that he had prior convictions for theft of property.

Amanda Hill, Pamela Young, Trella King, and Shayla Grant also testified on behalf of [Petitioner] about the incidents in which the victim was involved. Ms. Hill testified about the incident in which the victim went to [Petitioner]'s house while Ms. Hill was present, and Ms. Hill heard "all this scuffling, screaming, [and] glass breaking," and the police responded. Ms. Young testified about an incident in which the victim went to [Petitioner]'s house while Ms. Young was present. Ms. Young testified that the victim "was either bamming on the door or ringing the door bell[.]" and [Petitioner] stepped outside to talk to the victim. Ms. Young testified, "in the blink of an eye [the Victim] had broke through the door and was in the

bedroom and they were arguing and [the Victim] struck [Petitioner] with her fist.” She saw the victim strike [Petitioner] “a couple of more times.” She testified that she did not see [Petitioner] strike the victim, but she testified, “after that last strike [Petitioner] picked her up and body slammed her on the kitchen floor.” Ms. Young then left [Petitioner]’s house. Ms. Young testified that “three or four weeks” after that incident, the victim came to her house around 5:00 or 6:00 a.m. and rang the doorbell. Ms. Young went outside with a baseball bat, and the victim began “backing away and [saying] that she [wa]s not trying to start anything. She just wanted [Ms. Young] to know that [Petitioner] was with her the day before.” Ms. King testified about an incident when she was at [Petitioner]’s house, and the victim “would not let [her] leave.” She testified the victim blocked her car in the garage until the police were called. Ms. Grant testified that she was spending a weekend with [Petitioner] when the victim arrived at 3:00 or 4:00 a.m. and was knocking on the doors and windows. She heard [Petitioner] and the victim arguing outside. Ms. Grant testified that the victim went to [Petitioner]’s residence on two other occasions while Ms. Grant was visiting, and the victim and [Petitioner] argued.

Nelson v. State, No. W2017-02063-CCA-R3-PC, 2019 WL 3777030, at *1–5 (Tenn. Crim. App. Aug. 12, 2019) (“*Nelson I*”), *perm. app. denied* (Tenn. Jan. 15, 2020) (citing *Nelson I*, 2013 WL 12185279, at *1–5).

On June 25, 2011, the jury returned a guilty verdict on the Charges. (ECF No. 20-1 at PageID 196; ECF No. 20-3 at PageID 821–22.) *See also Nelson II*, 2019 WL 3777030, at *1. On July 22, 2011, the trial court sentenced Petitioner to two consecutive life sentences. (ECF No. 20-5 at PageID 865–66.) (*See also Nelson II*, 2019 WL 3777030, at *1; ECF No. 20-1 at PageID 197.)

B. DIRECT APPEAL

Petitioner filed a direct appeal, raising four issues: (1) the State did not disprove beyond a reasonable doubt that he acted in self-defense; (2) the trial court erred by allowing into evidence the Revolver, which the court at sentencing referred to “the largest handgun [the court] had ever seen”, thus making the court’s comment a “tacit admission” that the Revolver was unfairly prejudicial enough to have warranted its exclusion from evidence; (3) the prosecutor committed misconduct during closing argument when he misquoted Petitioner; and (4) the trial court erred by

imposing consecutive sentences based on its finding that Petitioner was a dangerous offender. *Nelson I*, 2013 WL 12185279, at *5–9. (See also ECF No. 20-7 at PageID 903.)

The TCCA affirmed Petitioner's convictions and sentences, concluding: (1) the jury was properly instructed on self-defense, the evidence was sufficient to sustain Petitioner's convictions, and the jury was free to reject Petitioner's claim of self-defense, *see Nelson I*, 2013 WL 12185279, at *6; (2) the trial court did not abuse its discretion in admitting the Revolver into evidence, *see id.* at *8; (3) the prosecutor's remarks did not affect the trial's outcome to the prejudice of Petitioner, *see id.* at *9; and (4) the trial court properly considered and applied the sentencing factors set forth in *State v. Wilkerson*, 905 S.W.2d 933, 939 (Tenn. 1995). *See id.* at *9–10. Petitioner did not file an application for discretionary review with the Tennessee Supreme Court ("TSC").

C. POST-CONVICTION PROCEEDINGS

On January 3, 2014, Petitioner filed a timely *pro se* petition for state post-conviction relief (ECF No. 20-12 at PageID 993–1029), raising eleven claims: (1) denial of effective assistance of counsel; (2) newly discovered evidence; (3) his conviction was based on the unconstitutional failure of the prosecution to disclose evidence favorable to the defense; (4) his conviction was based on the action of a grand jury that was unconstitutionally selected and impaneled; (5) prosecutorial misconduct; (6) the trial judge should have recused himself; (7) the trial court placed the burden on Petitioner to prove self-defense; (8) the trial court never provided Petitioner with a copy of the pre-sentence report; (9) "unconstitutional presumption violated Due process clause [sic]"; (10) "due process of Fifth Amendment"; and (11) the "State rushing the defendant off the stand deprived defendant a right to a fair trial" (*id.* at PageID 1002).

Attorney Paul Guibao was appointed to represent Petitioner. (ECF No. 20-12 at PageID 1030.) Guibao filed an amended post-conviction petition, raising the following claims: (1) the

State failed to disclose evidence favorable to the defense; (2) the prosecution made improper statements during closing argument; and (3) twenty-two claims of ineffective assistance of counsel (“IAC”), most of which had multiple sub-claims.³ (*Id.* at PageID 1030–40.)

The post-conviction trial court held two evidentiary hearings. (ECF No. 20-13 at PageID 1073–1200 (February 6, 2015); ECF No. 20-14 at PageID 1202–31 (March 24, 2017).) The court denied post-conviction relief on September 18, 2017. (ECF No. 20-12 at PageID 1045–68.) Petitioner appealed, contending: (1) “[trial] counsel erred when he retrieved the weapons used in the [I]ncident and did not disclose this information to authorities”; (2) “[trial] counsel erred when he did not request funding for a ballistics expert”; (3) “[trial] counsel erred when he did not request oral argument for the direct appeal”; and (4) the “cumulative errors by counsel caused him to be ineffective[,] which prejudiced Nelson.” (ECF No. 20-16 at PageID 1275.) *See also Nelson II*, 2019 WL 3777030, at *1, *8. The TCCA affirmed. *Nelson II*, 2019 WL 3777030, at *11. The TSC denied Petitioner’s application for discretionary review. (ECF No. 20-23.)

After the state post-conviction trial court denied relief, Petitioner filed his first petition for writ of error coram nobis in October 2017. (ECF No. 21-1 at PageID 1444.) Petitioner filed a motion to reopen the state post-conviction proceedings on December 4, 2017. (*Id.*) These matters were stayed pending Petitioner’s appeal of the denial of post-conviction relief. (ECF No. 42-1 at PageID 1969–70.) On May 13, 2020, the post-conviction trial court denied the petition for writ of error coram nobis and the motion to reopen post-conviction proceedings. (ECF No. 21-1 at PageID 1445.) Petitioner did not appeal. (*Id.*)

³ *See, e.g., Nelson II*, 2019 WL 3777030, at *5 (“After the appointment of counsel, the petitioner filed an amended petition, arguing, in part: trial counsel failed to provide pre-trial discovery to the petitioner; trial counsel failed to comprehensively review the petitioner’s testimony with him; trial counsel failed to present characteristics of the HK USP 9 millimeter firearm used in the shooting; and trial counsel failed to request oral argument on direct appeal.”).

D. THE SECOND CORAM NOBIS PETITION

After filing the § 2254 Petition, Petitioner filed a second petition for writ of error coram nobis in state court. (ECF 42-1 at PageID 1913–49.) On July 20, 2021, the state trial court dismissed the second petition for writ of error coram nobis because it was untimely. (ECF No. 42-1 at PageID 1969–77.) The TCCA affirmed on April 18, 2022. (ECF No. 42-4 at PageID 2018.)

E. FINGERPRINT PETITION

While the § 2254 Petition and the second coram nobis petition were pending, Petitioner filed a petition for fingerprint analysis under Tenn. Code Ann. § 40-30-401. (ECF No. 56-1 at PageID 2181–93.) Petitioner sought to have the Sig Sauer and three magazines tested for the Victim’s fingerprints, to support his claim that he had acted in self-defense during the Incident. (*Id.* at PageID 2189–93.) On April 15, 2024, the State filed a motion to dismiss the petition for fingerprint analysis. (ECF No. 56-2.) The State attached a report from the Tennessee Bureau of Investigation (“TBI”) showing that an examination of the Sig Sauer and the three magazines “failed to reveal the presence of identifiable latent prints.” (*Id.* at PageID 2204.) Because the results of the fingerprint analysis were not favorable to Petitioner, the State moved to dismiss the fingerprint petition. (*Id.* at PageID 2203.) The state court record suggests that the State’s motion and the fingerprint petition remain pending. (See <https://cjs.shelbycountyttn.gov/CJS/Home/WorkspaceMode?p=0> (Shelby County Criminal Justice Portal, *State v. Tarence Nelson*, Case No. 10 02396-09137467) (last accessed Dec. 29, 2024).)

F. THE THIRD CORAM NOBIS PETITION

Petitioner filed a third petition for writ of error coram nobis on August 28, 2023. (ECF 49-1 at PageID 2105–30.) The State filed a motion to dismiss, arguing that the petition was

untimely and that Petitioner had failed to show that he was entitled to equitable tolling of the limitations period. (ECF No. 56-3 at PageID 2209.) On September 17, 2024, the post-conviction trial court denied Petitioner's third petition for writ of error coram nobis ("Third Coram Nobis Denial"). (See <https://cjs.shelbycountyttn.gov/CJS/Home/WorkspaceMode?p=0> (Shelby County Criminal Justice Portal, *State v. Tarence Nelson*, Case No. 10 02396-09137467) (last accessed Dec. 29, 2024).) On October 22, 2024, Petitioner appealed the Third Coram Nobis Denial. (ECF No. 59.)

II. THE § 2254 PETITION

Petitioner's § 2254 Petition presents the following claims⁴:

1. The trial court erred by admitting the Revolver into evidence, which violated Petitioner's due process rights. (ECF No. 1 at PageID 4-5; ECF No. 1-1 at PageID 41-43) ("Claim 1");
2. The trial court erred when it imposed consecutive life sentences. (ECF No. 1 at PageID 6) ("Claim 2");
3. Trial counsel failed to prepare Petitioner for sentencing. (ECF No. 1 at PageID 11-12; ECF No. 1-1 at PageID 49-50) ("Claim 3").
4. Trial counsel was ineffective by retrieving the weapons involved in the murder and not turning them over to the State. (ECF No. 1 at PageID 6-7; ECF No. 1-1 at PageID 30-40) ("Claim 4");
5. Trial counsel ruined the chain of custody when he opted to retrieve the weapons himself and not to turn them over to the proper authorities. (ECF No. 1 at PageID 7-8; ECF No. 1-1 at PageID 30-40) ("Claim 5");
6. Trial counsel failed to fully investigate and present as evidence the two handguns used in the Incident or any ascertainable facts from or related to them — including the possibility that the Victim actually shot at Petitioner. (ECF No. 1 at PageID 12; ECF No. 1-1 at PageID 50-68) ("Claim 6");
7. The State failed to prove that Petitioner did not act in self-defense. (ECF No. 1 at Page ID 4) ("Claim 7");

⁴ The Court sequences the § 2254 Petition's claims below according to topic, rather than their numerical assignment in the Petition, to streamline their analysis in the instant Order.

8. The prosecutor committed prosecutorial misconduct during closing argument when he misquoted Petitioner. (*Id.* at PageID 5–6) (“Claim 8”);
9. Trial counsel was ineffective by retrieving the weapons and not hiring a ballistics expert to test the weapons. (ECF No. 1 at PageID 7; ECF No. 1-1 at PageID 40) (“Claim 9”);
10. Trial counsel failed to provide Petitioner access to discovery. (ECF No. 1 at PageID 8; ECF No. 1-1 at PageID 44) (“Claim 10”);
11. Trial counsel failed to file any pretrial motions. (ECF No. 1 at PageID 8–9; ECF No. 1-1 at PageID 45) (“Claim 11”);
12. Trial counsel failed to submit the repair estimates on Petitioner’s vehicle and specific receipts regarding the rental car he drove in Memphis. (ECF No. 1 at PageID 9; ECF No. 1-1 at PageID 45) (“Claim 12”);
13. Trial counsel failed to put forth evidence of the Victim’s violence toward Petitioner to show the necessity of self-defense. (ECF No. 1 at PageID 10; ECF No. 1-1 at PageID 45–47) (“Claim 13”);
14. Trial counsel failed to investigate Petitioner’s cell phone records. (ECF No. 1 at PageID 10–11; ECF No. 1-1 at PageID 47–48) (“Claim 14”);
15. Trial counsel failed to prepare Petitioner to testify in his own defense. (ECF No. 1 at PageID 11; ECF No. 1-1 at PageID 48) (“Claim 15”);
16. Trial counsel failed to move for a mistrial when the State made unfairly prejudicial and inflammatory comments in closing argument. (ECF No. 1-1 at PageID 48–49) (“Claim 16”); and
17. The cumulative errors of trial counsel rendered him ineffective (ECF No. 1-1 at PageID 44–50) (“Claim 17”).

Petitioner asks the Court to “reverse[] back to the State courts for a new trial” (ECF No. 1 at PageID 13) and to hold an evidentiary hearing regarding “the missing weapons involved in the shooting and any facts ascertainable from such weapons.” (ECF No. 1-1 at PageID 70–71.)

The Court directed Respondent to file the state-court record and answer the § 2254 Petition (ECF No. 7), which he did. (ECF No. 20; ECF No. 21 (“Answer”).)⁵ Respondent argues that: (1) Claims 1, 2, and 17 are not cognizable in federal habeas; (2) Claims 1, 4, 5, and 6 are procedurally defaulted; and (3) Claims 3 and 7 – 16 are without merit. (ECF No. 21 at PageID 1405–41.)

Petitioner filed a reply to the Answer, in which he contends vaguely that: (1) “the state-court decision”—which he does not specifically identify—was “contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States” and was “based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding” (ECF No. 25 at PageID 1679, 1683–84); (2) despite the state court’s ruling to the contrary, Petitioner did not waive claims of IAC regarding (a) retrieval of the firearms used during the Incident, (b) failure to disclose the firearms to authorities, and (c) failure to retrieve the Victim’s gun from the police evidence room (*id.* at PageID 1685–1704); and (3) trial counsel was ineffective as to the conduct alleged in Claims 6, 11, 12, 13, and 14. (*Id.* at PageID 1679, 1706–30.)

III. THE MTA

In the MTA, Petitioner seeks to amend the § 2254 Petition with a “two part claim” that: (1) “Counsel prov[.]ed [sic] to be ineffective by failing to object to self-defense jury instruction or file a motion requesting special jury instruction” (“MTA-IAC Claim”); and (2) “Trial Court gave an erroneous jury instruction” about an unspecified issue (“MTA-Instruction Claim”). (ECF No. 57 at PageID 2210 (collectively, “Proposed Amended Habeas Claims”).)

⁵ Respondent later supplemented the state court record over the course of the habeas proceedings. (ECF No. 22; ECF No. 31.)

Respondent did not file a response to the MTA, and the deadline for doing so has expired. (See ECF No. 7 at PageID 107.⁶)

A. THE PROPOSED AMENDED HABEAS CLAIMS ARE UNTIMELY

Petitioner filed the § 2254 Petition on July 24, 2020. (ECF No. 1-1 at PageID 86–87.)⁷ He filed the MTA on December 3, 2023. (ECF No. 20 at PageID 1869.)

There is a one-year statute of limitations for the filing of a petition for a writ of habeas corpus “by a person in custody pursuant to the judgment of a State court.” 28 U.S.C. § 2244(d)(1). The AEDPA establishes “a tight time line, a one-year limitation period ordinarily running from ‘the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.’” *Mayle v. Felix*, 545 U.S. 662 (2005). “Any attempt to raise a new claim for relief in a Rule 15 motion to amend pleadings is subject to AEDPA’s one-year statute of limitations.” *Howard v. United States*, 533 F.3d 472, 475 (6th Cir. 2008).

Under § 2244(d)(1)(A), the running of the limitations period commences on “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” State convictions ordinarily become final when the time expires for filing a petition for a writ of certiorari from a decision of the highest state court on direct appeal. *Pinchon v. Myers*, 615 F.3d 631, 640 (6th Cir. 2010); *Sherwood v. Prelesnik*, 579 F.3d 581, 585 (6th Cir. 2009).

⁶ “The response to the motion and its supporting memorandum, unless the motion is pursuant to Fed. R. Civ. P. 12(b) and (c) or 56 (*see* LR 12.1(b)) shall be filed within 14 days after service of the motion [...]” Local Rule 7.2(a)(2).

⁷ Petitioner had the § 2254 Petition notarized on July 24, 2020. (ECF No. 1-1 at PageID 86.) He alleges that he placed the § 2254 Petition into “the United States mail” that same day. (*Id.* at PageID 87.) Liberally construing the record in Petitioner’s favor, the Court treats July 24, 2020 as the date Petitioner placed the § 2254 Petition into the WTSP mail system to send to the Court.

Here, the TCCA affirmed Petitioner's convictions and sentences on May 24, 2013. *See Nelson I*, 2013 WL 12185279, at *1, *10. Petitioner did not seek permission from the TSC to appeal, so his judgment of conviction became final sixty (60) days later, on Tuesday, July 23, 2013—*i.e.*, the last day on which he could have filed an application for permission to appeal to the TSC. *See* Tenn. R. App. P. 11(b) (establishing that an application for permission to appeal to the TSC must be filed “within 60 days after the entry of the judgment of the ... Court of Criminal Appeals”); *see also Gonzalez v. Thaler*, 565 U.S. 134, 149–50 (2012) (confirming that a judgment becomes final when the time for seeking direct review expires). The one-year statute of limitations for filing a federal habeas petition under 28 U.S.C. § 2254 began running the next day, on July 24, 2013. *See* 28 U.S.C. § 2244(d)(1). The limitations period ran for one hundred and sixty-three (163) days until it was tolled beginning on January 3, 2014—*i.e.*, the day Petitioner filed his *pro se* state court petition for post-conviction relief.⁸ (*See* ECF No. 20-12 at PageID 993.)

Post-conviction relief was denied on September 18, 2017 (ECF No. 20-12 at PageID 1045); the denial was affirmed by the TCCA on August 12, 2019 (*Nelson II*, 2019 WL 3777030, at *1, *11; and the TSC denied discretionary review on January 15, 2020 (ECF No. 20-23 at PageID 1391). At that point, two hundred and two (202) days remained of the habeas limitations period.⁹

⁸ The AEDPA statute provides that “[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.” 28 U.S.C. § 2244(d)(2).

⁹ The one-year habeas statute of limitations is not tolled during the ninety (90) days a petitioner could file a writ of certiorari in the United States Supreme Court following the conclusion of state collateral review. *See Lawrence v. Florida*, 549 U.S. 327, 329, 332 (2007) (a state application for post-conviction or other collateral review is not “pending” for the purpose of § 2244(d)(2) when the state courts have entered a final judgment on the matter but a petition for certiorari has been filed with the Supreme Court).

The limitations period began running again on January 16, 2020, meaning that Petitioner had until Wednesday, August 5, 2020, to file a timely habeas petition and any amendments. *See* 28 U.S.C. § 2244(d)(1).

The § 2254 Petition—filed on July 24, 2020 (ECF No. 1-1 at PageID 86–87)—is timely

However, Petitioner did not file the MTA until September 20, 2024¹⁰—more than four (4) years after the statute of limitations expired. Since the MTA is untimely pursuant to § 2244(d)(1), the Proposed Amended Habeas Claims are time-barred unless they relate back to the § 2254 Petition's claims. As explained below, they do not.

B. THE PROPOSED AMENDED HABEAS CLAIMS DO NOT SHARE A COMMON CORE OF OPERATIVE FACTS WITH THE § 2254 PETITION

Pursuant to 28 U.S.C. § 2242, a federal habeas petition may be amended according to the requirements set forth in Federal Rule of Civil Procedure 15, which governs amendment of claims. *See, e.g., Oleson v. United States*, 27 F. App'x 566, 568–570 (6th Cir. 2001). Under certain circumstances, Rule 15 allows amendments to “relate back” to the date of the original pleading when the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out in the original pleading. Fed. R. Civ. P. 15(c)(1)(B). However, “[a]n amended habeas petition [...] does not relate back (and thereby escape AEDPA’s one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth.” *Mayle*, 545 U.S. at 664; *see also United States v. Clark*, 637 F. App'x 206, 209 (6th Cir.), *cert. denied*, 136 S. Ct. 2032 (2016.) In other words, “Rule 15(c)(2) relaxes, but does not obliterate, the statute of limitations; hence relation back depends on

¹⁰ Petitioner does not indicate the date he gave the MTA to prison officials for mailing to the Clerk of this Court. (ECF No. 57 at PageID 2216.) The Court liberally construes the MTA’s post-mark date of September 20, 2024 as the date Petitioner filed the MTA. (ECF No. 57-2 at PageID 2232.) *See also Houston*, 487 U.S. at 270; *Richard*, 290 F.3d at 812.

the existence of a common ‘core of operative facts’ uniting the original and newly asserted claims.”
Mayle, 545 U.S. at 659.

“[A] petitioner does not satisfy the Rule 15 ‘relation back’ standard merely by raising some type of ineffective assistance in the original petition, and then amending the petition to assert another ineffective assistance claim based upon an entirely distinct type of attorney misfeasance.”
See Watkins v. Deangelo-Kipp, 854 F.3d 846, 850 (6th Cir. 2017) (quotation omitted). The Supreme Court expressly rejected an interpretation of the same “conduct, transaction, or occurrence” to mean the same “trial, conviction, or sentence.” *See Mayle*, 545 U.S. at 664. In short, the untimely claims in the MTA relate back to the claims in the § 2254 Petition only if both sets of claims share a common core of operative facts. That is not the case here. The Proposed Amended Habeas Claims are factually and temporally distinct from those in the § 2254 Petition.

1. The MTA-IAC Claim Does Not Relate Back

The § 2254 Petition raises twelve IAC claims against trial counsel based *only* on counsel’s performance relative to: (1) retrieval of the weapons used during the Incident; (2) destruction of the weapons’ chain of custody; (3) investigation of the weapons; (4) failure to retain a ballistics expert; (5) failure to provide Petitioner with discovery access; (6) failure to file pre-trial motions; (7) failure to submit repair estimates on Petitioner’s vehicle; (8) failure to offer evidence of the Victim’s violence towards Petitioner; (9) failure to investigate Petitioner’s cell phone records; (10) failure to prepare Petitioner to testify; (11) failure to move for a mistrial; and (12) failure to prepare Petitioner for sentencing. (ECF No. 1 at PageID 4–9, 12; ECF No. 1-1 at PageID 30–68.)

The MTA’s IAC-based claim, however, is based on entirely different conduct by counsel: *i.e.*, counsel’s failure to (1) object to the self-defense jury instruction or (2) file a motion requesting a special jury instruction. (ECF No. 57 at PageID 2210.) The MTA-IAC Claim involves different

legal errors committed at different stages of the state proceedings than those alleged in the § 2254 Petition. Accordingly, the relation-back doctrine does not apply to the MTA-IAC Claim.

2. The MTA-Instruction Claim Does Not Relate Back

The MTA contends that the trial court erred by giving “an erroneous jury instruction.” (ECF No. 57 at PageID 2210; *see also id.* at PageID 2215 (alleging “[t]he trial court provided an incomplete and misleading jury instruction on self-defense”).) In the MTA, Petitioner raises claims about the jury instructions for the first time in the habeas proceedings. The § 2254 Petition does not raise any claim about jury instructions. (ECF No. 1 at PageID 4–6; ECF No. 1-1 at PageID 41–43.) The MTA, therefore, seeks to add a new ground for relief based on trial court rulings different in time and type than those challenged in the § 2254 Petition. The MTA-Instruction Claim shares no common core of operative facts with the § 2254 Petition’s claims of trial court error. Accordingly, the relation-back doctrine does not apply to the MTA-Instruction Claim.

3. Equitable Tolling Does Not Apply To The Proposed Amended Habeas Claims

Section 2244(d)(1)’s one-year statute of limitations is not jurisdictional and is subject to equitable tolling in extraordinary circumstances. *Johnson v. Settles*, No. 1:17-cv-1195, 2018 WL 1788064, at *1 (W.D. Tenn. Apr. 13, 2018) (citing *McClenson v. Sherman*, 329 F.3d490, 492 (6th Cir. 2003)). Traditional equitable tolling requires a petitioner to show that (1) “he has been pursuing his rights diligently;” and (2) “some extraordinary circumstance stood in his way and prevented timely filing.” *Holland v. Florida*, 560 U.S. 631, 649 (2010) (internal quotation marks omitted). Here, Petitioner does not make an argument for equitable tolling of § 2244(d)(1)’s limitation statute. Equitable tolling is inappropriate to rescue the untimely Proposed Amended Habeas Claims (*see* ECF No. 57).

Because it would be futile to amend a § 2254 habeas petition to include time-barred claims that do not relate back, the Court **DENIES** the MTA (ECF No. 57) in its entirety. *See Wren v. United States*, No. 17-2054, 2018 WL 4278569, at *3 (6th Cir. Sept. 6, 2018) (observing that futility of amendment is one factor to consider in determining whether amendment should be allowed and finding that untimely amendments would be futile).

IV. STANDARDS OF REVIEW FOR THE § 2254 PETITION

A. EXHAUSTION

A federal court may not grant a writ of habeas corpus on behalf of a state prisoner unless, with certain exceptions, the prisoner has exhausted available state remedies by presenting the same claim sought to be redressed in a federal habeas petition to the state courts pursuant to and (c). *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). The petitioner must “fairly present” each claim to each appropriate state court, *Baldwin v. Reese*, 541 U.S. 27, 29 (2004), except where the state has explicitly disavowed state supreme court review as an available state remedy, *O’Sullivan v. Boerckel*, 526 U.S. 838, 847–48 (1999). TSC Rule 39, effective June 28, 2001, eliminated the need to seek review in the TSC to “be deemed to have exhausted all available state remedies.” *Adams v. Holland*, 330 F.3d 398, 402 (6th Cir. 2003); *see also Smith v. Morgan*, 371 F. App’x 575, 579 (6th Cir. 2010).

To fairly present a federal claim, a prisoner must present the same facts and legal theory to the state courts as is raised in his federal habeas petition. *See Anderson v. Harless*, 459 U.S. 4, 6–7 (1982); *Picard v. Connor*, 404 U.S. 270, 276–77 (1971); *Hodges v. Colson*, 727 F.3d 517, 529 (6th Cir. 2013) (“The exhaustion doctrine requires the petitioner to present the same claim under the same theory to the state courts before raising it on federal habeas review”) (cleaned up). In evaluating whether a prisoner has “fairly presented” a claim to a state appellate court, the

controlling document is the inmate's brief. *See Baldwin*, 541 U.S. at 32 (“[O]rdinarily 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”).

B. PROCEDURAL DEFAULT

The procedural default doctrine is ancillary to the exhaustion requirement. *See Edwards v. Carpenter*, 529 U.S. 446, 452–53 (2000) (noting the interplay between the exhaustion rule and the procedural default doctrine). If a claim has never been presented to the state courts but a state court remedy is no longer available (such as when an applicable statute of limitations bars a claim), the claim is technically exhausted due to the expiration of potential remedies, but still barred by procedural default. *Coleman v. Thompson*, 501 U.S. 722, 731–32 (1991). 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*, 727 F.3d at 530 (noting that a Tennessee petitioner “no longer has any state court remedies to exhaust” when he failed to present claim in initial post-conviction petition). To avoid procedural default, a habeas petitioner in Tennessee must present his federal claims to the trial court and, on appeal, to the TCCA. *Covington v. Mills*, 110 F. App’x 663, 665 (6th Cir. 2004) (to avoid procedural default, federal law requires a federal habeas petitioner in Tennessee to present his federal claims to the TCCA). Accordingly, where a Tennessee habeas petitioner fails to fairly present his federal claim to the State courts prior to filing her federal habeas petition, there is generally no longer a State remedy to exhaust. In such cases, the claim is technically exhausted but procedurally defaulted. *See Jones v. Bagley*, 696 F.3d 475, 483 (6th Cir. 2012) (“When a petitioner has failed to present a

legal issue to the state courts and no state remedy remains available, the issue is procedurally defaulted"). Due to Tennessee's "one-petition" rule for post-conviction proceedings, the Petitioner cannot now bring a claim in state court. *See* Tenn. Code Ann. § 40-30-102(c).

Under either scenario, a petitioner must show (1) cause to excuse his failure to present the claim and (2) actual prejudice stemming from the constitutional violation or, alternatively, that a failure to review the claim will result in a fundamental miscarriage of justice. *Schlup v. Delo*, 513 U.S. 298, 320–21 (1995); *Coleman*, 501 U.S. at 750; *see also House v. Bell*, 547 U.S. 518, 536–39 (2006) (to excuse a procedural default and permit consideration of the merits of a procedurally defaulted claim, a petitioner must show "cause for the default and prejudice from the asserted error"); *Atkins v. Holloway*, 792 F.3d 654, 657 (6th Cir. 2015). A petitioner may establish 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, 137 S. Ct. 2058, 2065 (2017) (citations omitted). To establish 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 omitted). The burden of showing cause and prejudice is on the habeas petitioner. *Lucas v. O'Dea*, 179 F.3d 412, 418 (6th Cir. 1999). To demonstrate a fundamental miscarriage of justice, a petitioner must establish that a constitutional error has probably resulted in the conviction of a person who is actually innocent of the crime. *Schlup*, 513 U.S. at 321.

The ineffectiveness of post-conviction trial counsel may be cause to excuse the default of a substantial ineffective-assistance-of-trial-counsel claim. *Trevino v. Thaler*, 569 U.S. 413, 423

(2013) (citing *Martinez v. Ryan*, 566 U.S. 1, 16–17 (2012)). For a procedural default to be excused under *Martinez* or *Trevino*, a petitioner must demonstrate:

- (1) the claim of “ineffective assistance of trial counsel” was a “substantial” claim;
- (2) the “cause” consisted of there being “no counsel” or “ineffective” counsel during the state collateral review proceeding;
- (3) the state collateral review proceeding was the “initial” review proceeding in respect to the “ineffective-assistance-of-trial-counsel claim”; and
- (4) state law requires that an “ineffective assistance of trial counsel [claim] . . . be raised in an initial-review collateral proceeding.”

Trevino, 529 U.S. at 423 (quoting *Martinez*, 566 U.S. at 16–17). A claim is substantial if it has “some merit” based on the controlling standard for IAC stated in *Strickland v. Washington*, 466 U.S. 668 (1984). *Martinez*, 566 U.S. at 14.

Under *Martinez*, ineffective assistance of post-conviction counsel does not create cause to excuse the procedural default of a claim of ineffective assistance of appellate counsel. *See Davila*, 582 U.S. at 528, 137 S. Ct. at 2065; *Hodges*, 727 F.3d at 531 (“Under *Martinez*’s unambiguous holding our previous understanding of *Coleman* in this regard is still the law—ineffective assistance of post-conviction counsel cannot supply cause for procedural default of a claim of ineffective assistance of appellate counsel”).

In the Supreme Court’s subsequent decision in *Trevino*, 569 U.S. at 429, the Supreme Court extended its holding in *Martinez* to states in which a “state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal . . .” Thus, the decision in *Trevino* modified the fourth requirement under *Martinez* for overcoming a procedural default. The Sixth Circuit, in *Sutton v. Carpenter*, 745 F.3d 787 (6th Cir. 2014), held that IAC of state post-conviction counsel can establish cause to excuse a Tennessee prisoner’s

procedural default of a substantial federal habeas claim that his trial counsel was constitutionally ineffective.

C. MERITS REVIEW OF THE § 2254 PETITION

Where a state prisoner's claim has been adjudicated on the merits in state court, a federal court can issue a writ only if the adjudication:

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

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

28 U.S.C. § 2254(d)(1)–(2). A petitioner carries the burden of proof for this “difficult to meet” and “highly deferential standard,” which “demands that state-court decisions be given the benefit of the doubt” (referred to as “Habeas Standard of Review”). *Cullen*, 563 U.S. at 181 (cleaned up). A state court's decision is “contrary” to federal law when it “arrives at a conclusion opposite to that reached” by the Supreme Court on a question of law or “decides a case differently than” the Supreme Court has “on a set of materially indistinguishable facts.” *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000). “[A] run-of-the-mill state-court decision applying the correct legal rule ... to the facts of a prisoner's case” does not “fit comfortably within § 2254(d)(1)'s ‘contrary to’ clause.” *Id.* at 406.

V. EVIDENTIARY HEARING

In the § 2254 Petition, Petitioner requests an evidentiary hearing regarding “the missing weapons involved in the shooting and any facts ascertainable from such weapons.” (ECF No. 1-1 at PageID 70–71.) “In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief.” *Schriro v.*

Landrigan, 550 U.S. 465, 474 (2007). A court must consider the deferential standards prescribed by 28 U.S.C. § 2254 when determining whether an evidentiary hearing is appropriate. *Id.* “[B]ald assertions and conclusory allegations do not provide sufficient ground to warrant requiring . . . an evidentiary hearing.” *Washington v. Renico*, 455 F.3d 722, 733 (6th Cir. 2006) (quotation omitted). Here, an evidentiary hearing is unwarranted for two reasons.

First, this Court’s review of the record is confined to the record that was before the state court, and an evidentiary hearing is not warranted. *See Pinholster*, 563 U.S. at 180-81.

Second, pursuant to 28 U.S.C. § 2254(e)(2)(A)(ii), “[i]f [a] [habeas] applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that the claims relies on a factual predicate that could not have been previously discovered through the exercise of due diligence.” Here, Petitioner does not meet this burden. The factual predicate of his habeas claims originates from weapons and evidence that he himself allegedly hid the day after the Victim’s murder. As Petitioner was the individual who concealed the items, the failure to further develop this claim in state court is directly attributable to him. In the § 2254 Petition, he offers no “short and plain statement”, *see* Fed. R. Civ. P. 8, showing that his habeas claims rely upon a factual predicate that could not have previously been discovered through the exercise of due diligence.

For these reasons, Petitioner’s request for an evidentiary hearing (ECF No. 1-1 at PageID 70–71) is **DENIED**.

VI. ANALYSIS OF THE § 2254 PETITION

A. CLAIM 1’S STATE EVIDENTIARY CHALLENGE AND CLAIM 2 ARE NOT COGNIZABLE IN FEDERAL HABEAS

Under 28 U.S.C. § 2254(a), a district court may entertain “an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court *only* on

the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254 (emphasis added). A state court decision that rests entirely on state law generally is not subject to federal habeas review. *See, e.g., Swarthout v. Cooke*, 562 U.S. 216, 218 (2011) (holding that claims alleging state law error or an incorrect application of state law do not present cognizable issues for federal habeas review: “We have stated many times that ‘federal habeas corpus relief does not lie for errors of state law’”) (internal citation omitted); *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) (“[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions”); *see also Wilson v. Parker*, 515 F.3d 682, 705 (6th Cir. 2008) (“[a] federal court cannot issue a writ of habeas corpus ‘on the basis of a perceived error of state law’”) (quoting *Pulley v. Harris*, 465 U.S. 37, 41 (1984)). The threshold question in a federal habeas petition, therefore, is whether it even raises claims that a petitioner is in custody in violation of federal law.

Here, (1) Claims 1’s evidentiary challenge and (2) Claim 2 do not.

1. Claim 1’s Challenge To A State Court Evidentiary Determination

In Claim 1, Petitioner argues, in part, that the trial court “erred by allowing into evidence [the] [R]evolver found during the search of [Petitioner’s] residence that was not the murder weapon.” (ECF No. 1 at PageID 4–5; ECF No. 1-1 at PageID 41–43.) Petitioner argues that the weapons he possessed (an AR-15 assault rifle and the Revolver), which were not the murder weapons, were not relevant and therefore not admissible at trial under Tenn. R. Evid. 402. (ECF No. 1-1 at PageID 41–42.) He contends that the actual handguns used in the Incident—“an HK 9-millimeter USP and a Sig Sauer P229”—were not admitted into evidence. (*Id.* at PageID 54, 56.) Petitioner alleges that he “used the HK 9-millimeter USP to shoot the [V]ictim” and that the Victim used the Sig Sauer to fire at him. (*Id.* at PageID 54, 56, and 62.) Petitioner’s counsel had

objected at trial to the admission of the AR-15 assault rifle and the Revolver into evidence. (*Id.* at PageID 42.) However, the trial court allowed it. Petitioner now argues both (1) an evidentiary question and (2) a due process violation in Claim 1. His due process contention is that the state evidentiary ruling is so egregious that he was denied a fair trial. (*Id.* at PageID 43 (*see* discussion, *infra.*)).¹¹ His evidentiary challenge contends that the TCCA's ruling on the weapons admission was based on an unreasonable determination of facts. (*Id.*) Respondent argues that Claim 1's evidentiary challenge is not cognizable in federal habeas. (ECF No. 21 at PageID 1409.)

During direct appeal, the TCCA rejected Claim 1's evidentiary question, explaining:

Initial questions of admissibility of evidence are governed by Tennessee Rules of Evidence 401 and 403. These rules require that the trial court must first determine whether the proffered evidence is relevant. Evidence is deemed relevant under Rule 401 if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." In other words, "evidence is relevant if it helps the trier of fact resolve an issue of fact."

[****]

Only after the court finds that the proffered evidence is relevant does the court then weigh the probative value of that evidence against the risk that the evidence will be unfairly prejudicial. If the court, in its discretionary authority, finds that the probative value is substantially outweighed by its prejudicial effect, the evidence may be excluded. Tenn. R. Evid. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice"). Clearly, Rule 403 is a rule of admissibility, and it places a heavy burden on the party seeking to exclude the evidence. "Thus, excluding relevant evidence under [this rule] is an extraordinary remedy that should be used sparingly, and persons seeking to exclude otherwise admissible and relevant evidence have a significant burden of persuasion."

In this case, the trial court determined that the weapons found at Defendant's house were probative of the question of whether Defendant possessed the weapon that killed the victim. The evidence was presented during the State's case-in-chief, and

¹¹ In addition to alleging improper admission of the Revolver at trial, Claim 1 contends that "[w]hen a state evidentiary ruling is so egregious that it results in a denial of fairness, it may violate due process and thus warrant habeas relief." (ECF No. 1-1 at PageID 43.) To the extent Petitioner raises a federal due process issue in Claim 1, the Court addresses that contention *infra* in this Order.

therefore, prior to Defendant's decision to testify and his testimony that he did in fact shoot the victim and that he owned the weapons involved in the shooting. Because the weapon used to kill the victim was not recovered, evidence that Defendant possessed ammunition of the same caliber that killed the victim and weapons that were not of the same caliber was relevant to a material fact. Therefore, the trial court did not abuse its discretion in admitting the handgun into evidence.

Nelson I, 2013 WL 12185279, at *8 (internal citations omitted). Petitioner argues that because the TCCA's ruling "was based upon an unreasonable determination of the facts, this Court must consider [C]laim [1] *de novo* and reverse his conviction." (ECF No. 1-1 at PageID 43.)

A federal habeas court "'must defer to a state court's interpretation of its own rules of evidence and procedure' when assessing a habeas petition." *Miskel v. Karnes*, 397 F.3d 446, 453 (6th Cir. 2005) (quotation omitted). The Sixth Circuit has explained that habeas relief is rarely appropriate in connection with a state court's rulings about evidentiary issues:

With regard to evidentiary rulings, the standard for habeas relief is not easily met. "[F]ederal habeas courts review state court evidentiary decisions only for consistency with due process." "A state court evidentiary ruling will be reviewed by a federal habeas court only if it were so fundamentally unfair as to violate the petitioner's due process rights." [S]uch rulings "are usually not to be questioned in a federal habeas corpus proceeding." Even if errors are made in the application of state law, "[such] errors ... especially with regard to the admissibility of evidence, are usually not cognizable in federal habeas corpus." If a ruling is especially egregious and "results in a denial of fundamental fairness, it may violate due process and thus warrant habeas relief." Importantly, however, as a general matter, "state-court evidentiary rulings cannot rise to the level of due process violations unless they 'offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" Ultimately, states have wide latitude with regard to evidentiary matters under the Due Process Clause.

Wilson v. Sheldon, 874 F.3d 470, 475–76 (6th Cir. 2017) (internal citations omitted). Petitioner has not satisfied this high standard in Claim 1.

He does not offer relevant facts, does not make arguments about, and does not cite federal authority supporting Claim 1. Rather, he only summarizes the trial's procedural history about evidentiary admission of the weapons, and he cites only Tennessee state court decisions and

Tennessee Rules of Evidence. (ECF No. 1-1 at PageID 41–43.) That does not raise a cognizable claim that he is in custody in violation of federal law. Indeed, the TCCA recognized the state law nature of Claim 1. Relying on state rules of evidence and state law, the TCCA held that Petitioner was not entitled to relief. *Nelson I*, 2013 WL 12185279, at *8. Claim 1’s challenge to a state evidentiary question—which presents solely a question of state law and therefore does not allege a violation of federal constitutional law—provides no cognizable basis for habeas corpus relief. For these reasons, Claim 1 is **DENIED**.

2. Claim 2 Challenges The State Court’s Sentencing Determination

In Claim 2, Petitioner contends that the trial court erred “by imposing consecutive life sentences based on [its] finding that Defendant was a dangerous offender.” (ECF No. 1 at PageID 6.) Petitioner offers no facts and makes no legal arguments in support of Claim 2. (*See id.*) Petitioner does not allege a federal constitutional violation. Respondent argues that Claim 2 is not cognizable in federal habeas. (ECF No. 21 at PageID 1416.)

During direct appeal, the TCCA rejected Claim 2, explaining:

A trial court may order consecutive sentences on any one or more of several statutory bases. *See* Tenn. Code Ann. § 40–35–115(b) (2006). One of those bases is that a preponderance of the evidence establishes that “[t]he defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high.” *Id.* § 40–35–115(b)(4). When imposing consecutive sentences on this basis, the trial court also must find that consecutive sentencing is “reasonably related to the severity of the offenses” and is necessary to protect society from further aggravated criminal conduct by the defendant. *State v. Lane*, 3 S.W.3d 456, 461 (Tenn. 1999) (citing *State v. Wilkerson*, 905 S.W.2d 933, 939 (Tenn. 1995)).

[****]

[U]ntil otherwise directed by the supreme court, we will review a trial court’s order of consecutive sentencing on the basis that a defendant is a dangerous offender under the standards established in *Wilkerson*. In this case, at the conclusion of the sentencing hearing, the trial court found that Defendant had an extensive criminal history. The court stated, however, “under the circumstances and looking at the

thefts, I really cannot find that his sentences on that factor alone should run consecutively.” The court then considered the evidence presented at trial and concluded that Defendant was a dangerous offender whose behavior indicates no regard for human life and no hesitation about committing a crime in which the risk to human life is high. Specifically, the trial court noted that Defendant showed no remorse and no concern for the victim or her unborn child. The trial court also found that confinement for an extended period of time was necessary to protect society from Defendant’s criminal conduct and that “the aggregate length of the sentence as it reasonably relates to the offense of which the defendant stands convicted, which is basically he’s not only robbed this family of their daughter but also their grandchild.” The court noted, “I don’t find this is a case where [Defendant] killed the mom and the baby died as a result. It think this is a case where he killed that baby.” The trial court ordered that Defendant’s life sentences should be run consecutively.

The Defendant contends that the trial court erred by ordering consecutive sentencing because there were insufficient reasons for finding that Defendant was a dangerous offender whose behavior indicates little or no regard for human life and no hesitation about committing a crime in which the risk to human life is high. We disagree. As the trial court explained at the sentencing hearing, the evidence at trial showed that Defendant shot his pregnant girlfriend in the head and the stomach, claimed self-defense, and left her to die without calling for help. Defendant drove from Murfreesboro to Memphis in a rented car. He took two handguns with him. After he shot the victim, he left her house with both handguns as well as the victim’s laptop and cell phone. He later disposed of the handguns and the victim’s property. Defendant exhibited calmness after the shooting and showed no remorse for his actions. After he left the victim’s home, he drove to the home of Amanda Hill and did not speak about the shooting. Defendant’s actions were cold and calculated.

The trial court properly considered the [*State v. Wilkerson*], [905 S.W.2d 933, 939 (Tenn. 1995)] factors, and we conclude that the trial court did not abuse its discretion in ordering Defendant’s sentences be served consecutively. Defendant is not entitled to relief on this issue.

Nelson I, 2013 WL 12185279, at *9–10.

An allegation that a sentence has been imposed in violation of state sentencing law does not present a federal constitutional issue. See e.g., *Howard v. White*, 76 Fed. App’x. 52, 53 (6th Cir. 2003) (“A state court’s alleged misinterpretation of state sentencing guidelines and crediting statutes is a matter of state concern only”); see also *Sneed v. Donahue*, 993 F.2d 1239, 1244 (6th

Cir. 1993). Because Claim 2 raises solely an issue about Tennessee state sentencing law, it is not cognizable in federal habeas and is **DENIED**.

B. CLAIMS 1'S DUE PROCESS CHALLENGE AND CLAIM 6 WERE NOT FAIRLY PRESENTED TO THE TCCA

1. Claim 1's Due Process Challenge

In Claim 1, Petitioner argues, in part, that admission of the Revolver at trial violated due process. (ECF No. 1-1 at PageID 43.) Respondent contends that Claim 1's due process challenge is procedurally defaulted for failure to exhaust in state court. (ECF No. 21 at PageID 1409-11.)

Petitioner presents Claim 1's federal due process issue for the first time in this habeas proceeding. He did not raise Claim 1's due process challenge at any phase of direct appeal or post-conviction proceedings. *See Nelson I*, 2013 WL 12185279, at *1, *6; *Nelson II*, 3777030, at *1. (*See also* ECF No. 20-7 at PageID 903 (Petitioner's brief on direct appeal); ECF No. 20-12 at PageID 993-1029 (*pro se* post-conviction petition); *id.* at PageID 1030-40 (amended post-conviction petition).) Specifically, his brief on direct appeal cited solely to Tennessee caselaw and evidentiary rules, and the cases he cited did not employ any federal constitutional analysis. (*See* ECF No. 20-7 at PageID 919-20.) In state court, he presented Claim 1's due process challenge exclusively in terms of a violation of Tennessee's evidentiary rules. (*Id.*) The TCCA relied on Tennessee caselaw and evidentiary rules in rejecting Petitioner's argument solely as an evidentiary issue. *Nelson I*, 2013 WL 12185279, at *7-8. Thus, Petitioner did not exhaust Claim 1's federal due process allegation because he did not present it to the TCCA for review. *See Cullen*, 563 U.S. at 181; *Baldwin*, 541 U.S. at 29; *Anderson*, 459 U.S. at *6-7; *Hodges*, 727 F.3d at 529.

State-court remedies for Claim 1's federal due process allegation are no longer available to Petitioner due to the statute of limitations and Tennessee's one-petition rule. *See Jones*, 696

F.3d at 483; Tenn. Code Ann. § 40-30-102. Because there is no avenue by which Petitioner may now obtain state-court review of Claim 1's federal due process allegation, that contention is technically exhausted but procedurally defaulted by Tennessee's one-year limitation period and its one-petition rule. *See Jones*, 696 F.3d at 483; *see also* Tenn. Code Ann. § 40-30-102(a), 102(c).

He makes no effort to overcome the procedural default of Claim 1's due process issue. He does not allege cause and prejudice for his procedural default. (ECF No. 1; ECF No. 1-1; ECF No. 25.) *See Lucas*, 179 F.3d at 418; *Schlup*, 513 U.S. at 320–21. Additionally, he makes no argument that failure to review Claim 1's due process issue would result in a fundamental miscarriage of justice. (ECF No. 1; ECF No. 1-1; ECF No. 25.) *See Schlup*, 513 U.S. at 321. Accordingly, he has not met his burden to vitiate the procedural default of Claim 1's due process challenge, which is **DENIED**.

2. Claim 6

In Claim 6, Petitioner contends that trial counsel failed to “fully investigate and present as evidence the two handguns used in the shooting or any ascertainable facts from or related to these two handguns -- including the possibility that the [V]ictim actually shot at [P]etitioner.” (ECF No. 1 at PageID 12; ECF No. 1-1 at PageID 53-54, 64–68.) Respondent argues that Claim 6 is procedurally defaulted for failure to exhaust. (ECF No. 21 at PageID 1436.)

Petitioner raised Claim 6 in his amended petition for post-conviction relief. (ECF No. 20-12 at PageID 1036.) The post-conviction trial court rejected Claim 6 due to “lack of proof of any deficient performance or prejudice to [P]etitioner.” (ECF No. 20-12 at PageID 1059.) Petitioner procedurally defaulted Claim 6 by not raising it during post-conviction appeal. *See Nelson II*, 2019 WL 3777030, at *1, *8, *10–11. (*See also* ECF No. 20-16 at PageID 1275.)

Conceding that Claim 6 was procedurally defaulted during state court proceedings, Petitioner blames the “error of [post-conviction] counsel” who did “not explore the issue of the ethical violations of [trial counsel] obtaining and keeping [...] the weapons.” (ECF No. 1-1 at PageID 50–51.) Petitioner argues that Claim 6’s procedural default can be excused under *Martinez*. (*Id.* at PageID 50–54 (“*Martinez* excuses a procedurally defaulted claim due to post-conviction counsel’s ineffectiveness”).) However, *Martinez* does not apply to claims that are procedurally defaulted on post-conviction appeal. See *Middlebrooks v. Carpenter*, 843 F.3d 1127, 1136 (6th Cir. 2016) (“the *Martinez-Trevino* exception does not apply to save procedural defaults that occur in ‘appeals from initial-review collateral proceedings’”) (citing *Martinez*, 132 S. Ct. at 1320); *West v. Carpenter*, 790 F.3d 693, 698 (6th Cir. 2015) (“Although the *Martinez-Trevino* exception applies in Tennessee cases, it does not apply to West’s [...] claim because he raised [it] at the post-conviction initial-review proceeding and failed to preserve it on appeal”); *Wallace v. Sexton*, 570 F. App’x 443, 453 (6th Cir. 2014). Therefore, habeas relief on the procedurally defaulted Claim 6 is unavailable because the *Martinez-Trevino* exception does not apply to overcome the default.

For these reasons, Claim 6 is **DENIED**.

C. CLAIMS 4 AND 5 WERE PROCEDURALLY BARRED IN STATE COURT

In Claim 4, Petitioner argues that trial counsel prejudiced the trial’s outcome by committing ethical violations by retrieving the weapons involved in the Incident and not providing them to the State. (ECF No. 1 at PageID 6–7; ECF No. 1-1 at PageID 30–40.) In Claim 5, Petitioner contends that trial counsel “ruin[ed] the chain of custody when he opted to retrieve the weapons himself and not to turn them over to the proper authorities[,] potentially making himself a witness by inserting

himself into the chain of custody.” (ECF No. 1 at PageID 7; ECF No. 1-1 at PageID 30, 33.) Respondent argues that Claims 4 and 5 are procedurally defaulted. (ECF No. 21 at PageID 1419.)

Since Claims 4 and 5 substantively overlap, the Court considers them jointly.

On post-conviction appeal, Petitioner argued that trial counsel was ineffective by retrieving the firearms used in the Incident but not disclosing them to authorities or submitting them for testing, in violation of Tenn. Code Ann. § 39-16-503 and Tenn. Sup. Ct. R. 8, RPC 3.4. (ECF No. 20-16 at PageID 20–22.) However, the TCCA observed that “[t]he only argument raised at the post-conviction hearing regarding trial counsel’s possession of the firearm was that trial counsel was ineffective for failing to present characteristics of the firearm to the jury. The petitioner cannot raise a new argument for the first time on appeal.” *Nelson II*, 2019 WL 3777030, at *9.

The TCCA concluded that Petitioner had waived his IAC claim about counsel’s weapons retrieval because that claim was raised for the first time on post-conviction appeal. Thus, the TCCA declined to reach the claim’s merits. *Id.* at *9 (“[P]etitioner cannot raise a new argument for the first time on appeal”); *see also* Tenn. Code Ann. § 40-30-106(g) (West) (“A ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented [...]”) and Tenn. R. App. P. 3(e) (“In all cases tried by a jury, no issue presented for review shall be predicated upon error in ... [any] ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise, such issues will be treated as waived”) (referred to as the “Preservation of Error Rule”).

When a state court decides a claim on an independent and adequate state ground, such as a procedural rule prohibiting the state court from reaching the merits of the constitutional claim, a petitioner ordinarily is barred from seeking federal habeas review. *Wainwright v. Sykes*, 433 U.S.

72, 87–88 (1977); *see also Walker v. Martin*, 562 U.S. 307, 315 (2011). When a state procedural rule prevented the state courts from reaching the merits of a petitioner’s claim, “that claim is procedurally defaulted and may not be considered by the federal court on habeas review.” *Seymour v. Walker*, 24 F.3d 542, 550 (6th Cir. 2000) (citing *Wainwright*, 433 U.S. at 80, 84–87). In this regard, the Sixth Circuit applies a four-part test to determine whether a habeas claim has been procedurally defaulted due to a petitioner’s failure to comply with a state procedural rule:

First, the court must determine that there is a state procedural rule that is applicable to the petitioner’s claim and that the petitioner failed to comply with the rule ...

Second, the court must decide whether the state courts actually enforced the state procedural sanction ...

Third, the court must decide whether the state procedural forfeiture is an “adequate and independent” state ground on which the state can rely to foreclose review of a federal constitutional claim ...

Once the court determines that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner must demonstrate under [*Wainwright v. Sykes*], [433 U.S. 72][,] that there was “cause” for him to not follow the procedural rule and that he was actually prejudiced by the alleged constitutional error.

Davis v. Parris, No. 2:17-cv-02846-MSN-tmp, 2021 WL 9638643, at *1 (W.D. Tenn. Aug. 6, 2021) (citing *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1985) (citations and footnote omitted). *See also Guilmette v. Howes*, 624 F.3d 286, 290 (6th Cir. 2010) (quotation omitted). “To determine whether a state procedural rule was applied to bar a habeas claim, we look ‘to the last reasoned state court decision disposing of the claim.’” *Henderson v. Palmer*, 730 F.3d 554, 560 (6th Cir. 2013) (quoting *Guilmette*, 624 F.3d at 291). There must have been “unambiguous state-court reliance on a procedural default” in order to limit federal court review of the claim. *Id.* at 561.

Here, the first *Maupin* factor has been satisfied. The Preservation of Error Rule is a state procedural rule applicable to Claims 4 and 5, and Petitioner failed to comply with it. *See* Tenn. Code Ann. § 40-30-106(g) and Tenn. R. App. P. 3(e).

The second *Maupin* factor is also satisfied—*i.e.*, the TCCA enforced the principle of the Preservation of Error Rule. *Nelson II*, 2013 WL 3777030, at *9. (*See also* ECF No. 20-19 at PageID 1352 (“The petitioner cannot raise a new argument for the first time on appeal”).)

The third requirement—that the state procedural rule be an “adequate and independent” state ground— focuses on “the legitimate state interests behind the procedural rule in light of the federal interest in considering federal claims.” *Maupin*, 785 F.2d at 138; *see also Henry v. Mississippi*, 379 U.S. 443, 447–48 (1965) (“[A] litigant’s procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State’s insistence on compliance with its procedural rule serves a legitimate state interest”). A state procedural rule’s adequacy “is itself a federal question.” *Lee v. Kemna*, 534 U.S. 362, 375 (2002) (quoting *Douglas v. Alabama*, 380 U.S. 415, 422 (1965)). “Ordinarily, violation of ‘firmly established and regularly followed’ state rules ... will be adequate to foreclose review of a federal claim.” *Kemna*, 534 U.S. at 376 (quotation omitted). The Supreme Court has held a procedural ground to be inadequate in “exceptional cases,” such as where the application of a “generally sound rule” has been deemed “exorbitant.” *Id.* at 376; *see also Walker*, 562 U.S. at 320 (a state procedural rule may be inadequate when a state court “exercised its discretion in a surprising or unfair manner”).

The Sixth Circuit has held the requirement that appellants preserve errors for appeal is an independent and adequate state ground. *See, e.g., Keller v. Genovese*, 65 F.4th 785, 789 (6th Cir. 2023) (“As the TSC has explained, ‘[i]t has long been the rule ... that in order to preserve errors for appeal, the appellant must first bring the alleged errors to the attention of the trial court in a

motion for new trial.’ Rule 3(e) codifies this longstanding practice. The purpose of Rule 3(e) is to define potential issues for appeal and require appellants to raise each issue before the trial court so the trial court has the opportunity to review and remedy errors prior to appeal”) (internal citations omitted); *accord Polochak v. Dickerson*, No. 23-5863, 2024 WL 4472057, at *2 (6th Cir. Apr. 3, 2024) (citing Tenn. Code Ann. § 40-30-106(g) (West) and *Hutchison v. Bell*, 303 F.3d 720, 738 (6th Cir. 2002)).

The Preservation of Error Rule is firmly established. *See State v. Reynolds*, 635 S.W.3d 893, 926 (Tenn. 2021); *Mejia v. Wazir*, No. M2024-00365-COA-R3-CV, 2024 WL 4603437, at *1–2 (Tenn. Ct. App. Oct. 29, 2024); *State v. Hester*, No. M2023-013120CCA-CD, 2024 WL 4564371, at *1, *8 (Tenn. Crim. App. Oct. 24, 2024); *State v. Shaw*, No. W2024-00138-CCA-R3-CD, 2024 WL 4481615, at *1 (Tenn. Crim. App. Oct. 14, 2024). The third *Maupin* factor is met.

The fourth *Maupin* factor—cause and prejudice—works against habeas review of Claims 4 and 5. In support of his argument that his procedural default of Claims 4 and 5 should be excused, Petitioner contends that trial counsel’s testimony at the post-conviction evidentiary hearings was “contradictory.” (ECF No. 25 at PageID 1702–03.) Petitioner alleges that trial counsel equivocated at the March 24, 2017 hearing about whether or not “one of the guns he found under the shed was the murder weapon[,] [w]hereas [at the] February 6, 2015 [hearing] he expressed no such uncertainty.” (*Id.*)

For the purpose of determining whether Petitioner was prejudiced within the meaning of *Maupin*’s fourth factor, Petitioner’s argument is unpersuasive. Petitioner’s grievance in Claims 4 and 5 is that counsel improperly injected himself into the evidence retrieval process. Counsel’s subjective opinion at the March 24, 2017 hearing about whether or not one of the retrieved

weapons was, in fact, the murder weapon is immaterial to Petitioner's complaint in Claims 4 and 5. Counsel's uncertainty about whether he had retrieved "the murder weapon" (*id.* at PageID 1702) does not demonstrate cause for Petitioner to postpone his challenge of counsel's evidence-retrieval conduct until post-conviction appellate proceedings. Petitioner was aware before and during trial that counsel retrieved the weapons. (See ECF No. 20-14 at PageID 1207-08.)

Based on the *Maupin* factors, Claim 4 and Claim 5 are barred by procedural default due to Petitioner's failure to follow the Preservation of Error Rule. He does not demonstrate cause and prejudice to overcome his procedural default. See *Lucas*, 179 F.3d at 418; *Schlup*, 513 U.S. at 320-21. Because trial counsel did not have the murder weapon in the first place, Petitioner cannot show that counsel's actions regarding the weapons in his possession—which were unrelated to the shooting—constituted deficient performance or caused Petitioner prejudice. For that same reason, Petitioner does not demonstrate that failure to review Claims 4 and 5 would result in a fundamental miscarriage of justice. See *Schlup*, 513 U.S. at 321.

On the basis explained above, Claim 4 and Claim 5 are **DENIED**.

D. PETITIONER'S EXHAUSTED CLAIMS LACK MERIT

Claims 3 and 7-16 were rejected by the TCCA during post-conviction appellate proceedings. Those exhausted claims that are properly before this habeas Court are considered below.

1. CLAIM 3: IAC BY FAILING TO PREPARE PETITIONER FOR SENTENCING

Petitioner contends that trial counsel rendered IAC when he failed to prepare Petitioner for sentencing. (ECF No. 1 at PageID 11-12; ECF No. 1-1 at PageID 49-50.) Petitioner argues that he "was facing consecutive life sentences, and despite that[,] [trial counsel] did not prepare him for sentencing or allow him to make his desired allocution expressing his remorse at that time."

(ECF No. 1-1 at PageID 49.) Respondent argues that the TCCA's rejection of Claim 3 was not unreasonable. (ECF No. 21 at PageID 1434.)

Petitioner raised this issue during post-conviction appellate proceedings. *Nelson II*, 2019 WL 3777030, at *10–11. (See also ECF No. 20-16 at PageID 1301.) The TCCA rejected the claim, explaining solely that Petitioner had adduced no proof of counsel's deficient performance:

[T]he petitioner argues trial counsel failed to [...] prepare the petitioner for the sentencing hearing. The petitioner, however, provided no proof to support [...] th[i]s claim[.]

Nelson II, 2019 WL 3777030, at *11. (See also ECF No. 20-13 at PageID 1078–1145; ECF No. 20-14 at PageID 1213–1230 (Petitioner did not offer proof at the post-conviction evidentiary hearing about what he would have said in allocution).)

Claim 3 lacks merit. A criminal defendant alleging prejudice from trial counsel's failure to properly prepare and present mitigating evidence at sentencing must show that there is a "reasonable probability," *Strickland*, 466 U.S. at 694, that the mitigating evidence not presented would have changed the outcome. See *Cullen*, 563 U.S. at 200 (denying habeas relief where "[t]here was no reasonable probability that [petitioner's] additional evidence" in mitigation would have changed the sentence); see also *Morris v. Carpenter*, 802 F.3d 825, 843 (6th Cir. 2015) (habeas petitioner claiming that trial counsel was ineffective in presenting mitigating evidence at sentencing "must present new evidence that differs both in strength and subject matter from the evidence actually presented at sentencing").

Because Petitioner did not present during post-conviction proceedings any proof about counsel's preparation for sentencing, see *Nelson*, 2019 WL 3777030, at *11, the TCCA reasonably concluded that he did not establish counsel's deficient performance during the sentencing hearing. What is more, the state court record contradicts Petitioner's unsupported opinion that counsel "did

not prepare [Petitioner] for sentencing” (ECF No. 1-1 at PageID 49). Trial counsel testified that he would “normally tell somebody they have an opportunity to tell the judge anything they want” during sentencing. (ECF No. 20-13 at PageID 1181.) Further, Petitioner has not described in the § 2254 Petition the testimony he would have provided that would have likely changed the outcome at trial.

Accordingly, the Court finds that Petitioner has failed to satisfy his burden of demonstrating that the TCCA’s decision was contrary to or an unreasonable application of *Strickland* or was based on an unreasonable determination of facts in light of the evidence presented in the state courts. Therefore, Claim 3 lacks merit. What is more, Claim 3 is also not properly pled under Rule 2(c) of the Rules Governing Section 2254 Cases in the United States District Courts (“Habeas Rules”), which requires a petition to “state the facts supporting each ground” for relief. “A petitioner’s failure to fulfill the pleading requirements of Habeas Rule 2(c) provides an appropriate basis for dismissal.” *Grimes v. Mays*, No. 3:19-cv-0585, 2022 WL 3582487, at *9 (M.D. Tenn. Aug. 19, 2022) (citing *Guerrero v. Ford*, No. 1:17-cv-00103, 2019 WL 330878, at *12 (M.D. Tenn. Jan. 25, 2019) (dismissing claim under Habeas Rule 2(c) where petitioner “d[id] not set forth any facts to support his allegation ...”). Petitioner does not identify what he would have said in allocution but was unable to provide, allegedly due to counsel’s actions. (ECF No. 1 at PageID 11–12; ECF No. 1-1 at PageID 49–50.) For these reasons, Claim 3 is **DENIED**.

2. CLAIM 7: INSUFFICIENCY OF THE EVIDENCE

In Claim 7, Petitioner contends that the State failed to prove that he did not act in self-defense. (ECF No. 1 at Page ID 4.) He argues that the State’s proof that he did not act in self-defense was circumstantial. (*Id.*) Claim 7 is construed as a contention that the evidence was

did not instruct the jury appropriately

insufficient to support Petitioner's conviction for the intentional and premeditated killing of the Victim. Respondent argues that (1) the trial court instructed the jury appropriately regarding self-defense and (2) the TCCA during direct appeal properly found the evidence was sufficient to sustain Petitioner's convictions. (ECF No. 21 at PageID 1405-1407.) Claim 7 was exhausted before the TCCA and was adjudicated on the merits. *See Nelson I*, 2013 WL 12185279, at *5-6.

A challenge to the sufficiency of evidence addresses whether "the government's case was so lacking that it should not have even been submitted to the jury." *Musacchio v. United States*, 577 U.S. 237, 243 (2016) (internal quotation marks omitted). In *Jackson v. Virginia*, the Supreme Court held that, "in a challenge to a state criminal conviction brought under 28 U.S.C. § 2254 -- if the settled procedural prerequisites for such a claim have otherwise been satisfied -- the applicant is entitled to habeas corpus relief" if the Court finds, that "upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." 443 U.S. 307, 324 (1979). A reviewing court makes a limited inquiry tailored to ensure that a defendant receives the minimum that due process requires: a meaningful opportunity to defend against the charge against her and a jury finding of guilt beyond a reasonable doubt." *Musacchio*, 577 U.S. at 243 (quoting *Jackson*, 443 U.S. at 314-15) (cleaned up).

A habeas court asks only "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319 (emphasis in original).

Sufficiency of evidence claims "face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference." *Coleman v. Johnson*, 566 U.S. 650, 651 (2012). First, on direct appeal, the reviewing court defers to the trier of fact. Second, on habeas review, "a federal court may not overturn a state court decision rejecting a sufficiency of the evidence

challenge simply because the federal court disagrees with the state court.” *Id.* (internal quotation marks omitted). The federal habeas court may overturn the state court’s rejection of such a claim only if the state court’s decision was “objectively unreasonable.” *Id.* (citation omitted). *See also Brown v. Konteh*, 567 F.3d 191, 205 (6th Cir. 2009) (“we are thus bound by two layers of deference to groups who might view facts differently than we would”).

Here, the TCCA on direct appeal found the evidence sufficient to support Petitioner’s conviction, explaining:

Defendant contends that the State did not disprove beyond a reasonable doubt that he acted in self-defense. The State responds that the only proof supporting Defendant’s claim of self-defense was Defendant’s own testimony, and the jury discredited it.

In determining sufficiency of the proof, the appellate court does not reweigh the evidence. Witness credibility, the weight and value of the evidence, and factual disputes are entrusted to the finder of fact. Simply stated, the court will not substitute its judgment for that of the trier of fact. Instead, the court extends to the State the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences that may be drawn from the evidence. A criminal offense may be proven exclusively by the use of circumstantial evidence because the jury ultimately decides the appropriate weight to be given to the evidence and the inferences to be drawn therefrom.

First degree murder is defined as the “premeditated and intentional killing of another.” Tenn. Code Ann. § 39-13-202(a)(1). Premeditation “is an act done after the exercise of reflection and judgment. ‘Premeditation’ means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time.” *Id.* § 39-13-202(d). Intentional “refers to a person who acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person’s conscious objective or desire to engage in the conduct or cause the result.” *Id.* § 39-11-302(a). The existence of premeditation is a question for the jury and may be inferred from the circumstances surrounding the killing.

In order for a defendant to prevail on a claim of self-defense, there must be a showing that he acted upon a well-founded apprehension of great bodily injury and that the actions he took were necessary. The State bears the burden of proving that the defendant did not act in self-defense. It is well-settled that whether an individual acted in self-defense is a factual determination to be made by the jury as the sole trier of fact. It is within a jury’s prerogative to reject a claim of self-

defense. The jury is not obligated to accept the defendant's testimony as to self-defense.

The Defendant argues that the proof relied upon by the State to show that Defendant did not act in self-defense was circumstantial, and Defendant points to evidence in the record that, he asserts, corroborates his account of the events surrounding the shooting. Specifically, Defendant asserts that testimony that the victim appeared distraught and upset at her doctor's appointment on the afternoon of the incident, witnesses' descriptions of the crime scene, and medical testimony about the trajectory of the victim's gunshot wounds all fit with Defendant's explanation of what happened. Defendant asserts that the State offered no evidence that the victim was not the aggressor and that the testimony of Defendant and several others supported the theory that the victim had a history of irrational behavior and propensity for violence.

The jury rejected Defendant's theory of self-defense, as was its prerogative. Upon review, we find that the evidence sufficiently supports Defendant's convictions for premeditated murder. The evidence established that Defendant rented a car and traveled from Murfreesboro to Memphis with a Sig Sauer in the glove compartment and a concealed 9 millimeter handgun on his waist. After Defendant left the victim's house, the victim was found shot twice in her living room. The victim and her unborn child died as a result of gunshots to the victim's head and abdomen. After he shot the victim, Defendant took the victim's laptop, phone and both weapons without checking to see if the victim was injured or calling for help. After he left the victim's house, Defendant went to another girlfriend's house where he ate dinner and spent the night. Defendant later concealed the victim's property and the weapons because he knew that police wanted to talk to him.

The record shows that the jury was properly instructed on self-defense. The evidence is sufficient to sustain Defendant's convictions for premeditated murder, and the jury was free to reject Defendant's claim of self-defense. Defendant is not entitled to relief on this issue.

Nelson I, 2013 WL 12185279, at *5-6 (other internal citations omitted).

In the § 2254 Petition, Petitioner contends that "the State offered no evidence that the victim was not the aggressor and that the testimony of Defendant and several others supported the theory that the [V]ictim had a history of irrational behavior and propensity for violence." (ECF No. 1 at PageID 4.) Respondent replies that the TCCA correctly identified and applied the standard in *Jackson v. Virginia* to analyze Petitioner's sufficiency of the evidence claim and did not base its decision on an unreasonable determination of the facts given the evidence presented at trial.

(ECF No. 21 at PageID 1405–09 (“the state court reasonably deferred to the jury’s rejection of Petitioner’s self-defense claim”).)

Petitioner’s arguments about Claim 7 turn on weighing of the evidence, which is the province of the jury rather than a federal habeas court. Respondent emphasizes the fact that the jury was the fact-finder and that it was reasonable for them to conclude that Petitioner was the perpetrator, given that: (1) Petitioner admitted that he shot the Victim; (2) after he left the Victim’s home, neighbors found her slumped over her ottoman with two gunshot wounds; (3) after he shot the Victim, he did not call for help; (4) Petitioner spent the rest of that evening at the home of another girlfriend, Amanda Hill; and (5) he later hid the Victim’s property and the weapons under a barn because he knew police wanted to speak with him. (ECF No. 21 at PageID 1408.)

Based on this Court’s review of the state court record, the TCCA correctly concluded that the evidence at trial was sufficient to sustain Petitioner’s convictions for premeditated murder. The TCCA began by noting the principle of *Jackson*—i.e., whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Nelson I*, 2013 WL 12185279, at *5–6. Next, the TCCA identified the elements of first degree murder, and the court explained the meanings of “premeditation” and “intentional” as used in Tenn. Code Ann. § 39-13-202(a)(1), (d). *Id.* at *5. The TCCA then summarized the relevant evidence supporting Petitioner’s convictions. *Id.* at *6. The TCCA noted that Petitioner conceded he shot the Victim. *Id.* at *3. The TCCA explained that Petitioner’s (1) rental of a car to drive to Memphis with the Sig Sauer in the glove compartment and a concealed 9 millimeter handgun in his waist, (2) confiscation of the Victim’s property after he shot her, and (3) concealment of his weapons and the Victim’s property after the Incident supported a finding of premeditation and Petitioner’s intent to kill the Victim. *Id.* at *6.

The evidence presented at trial permits a rational trier of fact to find that Petitioner was guilty of first degree murder and did not act in self-defense. Petitioner's self-defense theory turned on a credibility determination to be made by the jury—who obviously did not believe the four character witnesses trial counsel presented in support of Petitioner's self-defense theory. *See Nelson II*, 2019 WL 3777030, at *10. Given the deference due to the jury as trier of fact and to the TCCA, this Court finds that (1) the TCCA's determination about Claim 7's sufficiency of the evidence allegation was not contrary to or an unreasonable application of *Jackson v. Virginia* and (2) the TCCA did not base its decision on an unreasonable determination of the facts in light of the evidence presented at trial. Therefore, Claim 7 is **DENIED** as without merit.

3. **CLAIM 8: PROSECUTORIAL MISCONDUCT**

Petitioner argues that the prosecutor committed misconduct when he misquoted Petitioner during closing argument by saying Petitioner called the Victim "the B word":

[T]he following remarks by the prosecutor were so inflammatory and prejudicial as to warrant a new trial:

[Defendant] wanted both of [the victims] to die that day. That was his reason. He didn't want kids in this world. He didn't want Tonya Johnson. He never respected her. For years since 2004 he lied, he cheated on her, he even admitted to calling her the B word as she was carrying his child. He called her the B word. He shot her in the head and he shot her in the abdomen and he left her for dead. That was not respect. He didn't care about the two of them.

(ECF No. 1 at PageID 5 ("Challenged Remark").) Respondent says that the state court's rejection of this claim was not unreasonable under 28 U.S.C. § 2254(d) because (1) there was evidence of several individuals—including other women in Petitioner's life—being referred to as "the B word", and therefore (2) the Challenged Remark would not have had any meaningful impact on the trial's outcome. (ECF No. 21 at PageID 1415.)

Claim 8 was exhausted before the TCCA and adjudicated on the merits. *See Nelson II*, 2019 WL 37777030, at *8–9. The TCCA on direct appeal concluded that, in light of the case’s facts, the Challenged Remark did not rise to the level of prosecutorial misconduct, explaining:

The TSC has noted that “[c]losing argument is a valuable privilege that should not be unduly restricted.” However, an attorney’s comments during closing argument “must be temperate, must be predicated on evidence introduced during the trial of the case, and must be pertinent to the issues being tried.” The trial court has substantial discretion in controlling the course of arguments and will not be reversed unless there is an abuse of that discretion. In addition, prosecutorial misconduct does not constitute reversible error absent a showing that it has affected the outcome of the trial to the prejudice of the defendant. In order to be entitled to relief on appeal, the defendant must “show that the argument of the prosecutor was so inflammatory or the conduct so improper that it affected the verdict to his detriment.” This court must consider the following factors when determining whether the argument of the prosecutor was so inflammatory or improper as to negatively affect the verdict:

1. The conduct complained of viewed in context and in light of the facts and circumstances of the case.
2. The curative measures undertaken by the court and the prosecution.
3. The intent of the prosecutor in making the improper statement.
4. The cumulative effect of the improper conduct and any other errors in the record.
5. The relative strength or weakness of the case.

Upon review, we conclude that the prosecutor’s remarks did not affect the outcome of the trial to the prejudice of Defendant. Although it appears from the record that the prosecutor’s statement that Defendant called the victim a “B word” is incorrect, in light of the facts and circumstances of the case, the remark was not so inflammatory that it affected the verdict. The State’s evidence against Defendant was strong; the trial court instructed the jury that arguments of counsel are to be discarded if not supported by the evidence; because Defendant failed to object, there was no curative instruction given by the trial court; because there are no other errors in the record, there is no cumulative effect; and the statement by the prosecutor does not appear to have been calculated. Defendant testified that while pointing a gun at him, the victim said, “look at me, b-word.” There was also testimony that the victim called another of Defendant’s girlfriends a “b-word.” Therefore, although the prosecutor misstated the evidence, we find the misstatement inconsequential to the outcome of the case. Therefore, Defendant is not entitled to relief on this issue.

Nelson I, 2013 WL 12185279, at *8–9 (internal citations omitted).

Prosecutorial misconduct claims are “reviewed deferentially on habeas review.” *Millender v. Adams*, 376 F.3d 520, 528 (6th Cir. 2004); *see also Lundgren v. Mitchell*, 440 F.3d 754, 778 (6th Cir. 2006). “[T]he relevant question is whether the prosecutor’s comments ‘so infected the trial with unfairness as to make the conviction a denial of due process.’” *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). “The touchstone of due process analysis ... is the fairness of the trial, not the culpability of the prosecutor.” *Smith v. Phillips*, 455 U.S. 209, 219 (1982); *see also Serra v. Mich. Dep’t Corr.*, 4 F.3d 1348, 1355 (6th Cir. 1993). Prosecutorial misconduct must be so egregious as to deny petitioner a fundamentally fair trial before habeas corpus relief becomes available. *Donnelly*, 416 U.S. at 643–45; *see also Bowling v. Parker*, 344 F.3d 487, 512 (6th Cir. 2003) (federal habeas corpus relief may be granted “only if the statements were so flagrant as to render the entire trial fundamentally unfair”). To obtain habeas relief in federal court, a petitioner must establish that “the prosecution’s conduct was both improper and so flagrant as to warrant reversal.” *Mason v. Mitchell*, 320 F.3d 604, 635 (6th Cir. 2003). In order to meet this high standard, a petitioner may not rely on a “reasonable possibility” that trial error contributed to the verdict. *Brecht v. Abrahamson*, 507 U.S. at 637. Rather, a petitioner must show that the prosecutor’s actions caused him “actual prejudice.” *Id.*

Considering the totality of the circumstances, the record does not reflect that the Challenged Remark was so egregious as to justify habeas relief. There was testimony at trial that several individuals with connections to the Incident routinely used the “B word”, including both Petitioner and the Victim. (ECF No. 20 at PageID 733, 738, and 743.) The plausible inference from the state court record, therefore, is that the Challenged Remark, attributing use of the “B

word” to Petitioner, would not have stood out in the jury’s mind as uniquely prejudicial to Petitioner. Further, the comment was consistent with Petitioner’s behavior toward the Victim.

On this record, the Court cannot conclude that the Challenged Remark “so infected the trial with unfairness as to make the resulting conviction a denial of due process,” *Donnelly*, 416 U.S. at 647, or that the TCCA unreasonably applied or acted contrary to federal law in so concluding. The Challenged Remark simply does not qualify as an egregious instance of prosecutorial misconduct. In addition, the State’s evidence against Petitioner was sufficiently strong to justify the jury’s verdict, notwithstanding the Challenged Remark. Petitioner admitted to shooting the Victim. *See Nelson I*, 2013 WL 12185279, at *4 (summarizing evidence supporting Petitioner’s convictions). Petitioner has not demonstrated that the Challenged Remark rendered the outcome of trial fundamentally unfair.

Accordingly, TCCA applied appropriate Supreme Court principles applicable to Claim 8. Since Petitioner is not entitled to habeas relief on the basis of his prosecutorial misconduct claim, Claim 8 is **DENIED** as without merit.

4. CLAIM 9: IAC BY FAILING TO RETAIN A BALLISTICS EXPERT

In Claim 9, Petitioner contends that trial counsel was ineffective for not hiring a ballistics expert to test retrieved weapons.¹² Petitioner argues that doing so would have helped “support the theory of self-defense.” (ECF No. 1 at PageID 7; ECF No. 1-1 at PageID 40.) He alleges that since “discovery indicate[d] the possibility of multiple shooters”, a ballistics expert “could have turned [...] the entirety of the case.” (ECF No. 1-1 at PageID 40.) Respondent argues that the TCCA’s rejection of Claim 9 was not unreasonable because Petitioner (1) failed to show by clear

¹² “Prior to trial, the petitioner told trial counsel he hid the items under a shed in Murfreesboro. Upon receiving this information, trial counsel went to the shed and retrieved two firearms.” *See Nelson II*, 2019 WL 37777030, at *6.

and convincing evidence that trial counsel retrieved the murder weapon and (2) failed to establish prejudice by not demonstrating what ballistics testing would have shown. (ECF No. 21 at PageID 1423–24.) Claim 9 was exhausted before the TCCA and is entitled to habeas review on the merits. *See Nelson II*, 2019 WL 37777030, at *1, *8.

A claim that IAC has deprived a defendant of his Sixth Amendment right to counsel is controlled by the standards stated in *Strickland*, 466 U.S. 668. To demonstrate deficient performance by counsel, a petitioner must demonstrate that “counsel’s representation fell below an objective standard of reasonableness.” *Id.* at 688.

A court considering a claim of ineffective assistance must apply a “strong presumption” that counsel’s representation was within the “wide range” of reasonable professional assistance. [*Strickland*, 466 U.S.] at 689. The challenger’s burden is to show “that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* at 687.

Harrington v. Richter, 562 U.S. 86, 104 (2011).

To demonstrate prejudice, a prisoner must establish “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694.¹³ “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

It is not enough “to show that the errors had some conceivable effect on the outcome of the proceeding.” [*Strickland*, 466 U.S.] at 693, 104 S. Ct. 2052. Counsel’s errors must be “so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* at 687, 104 S. Ct. 2052.

¹³ “[A] court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant.” *Strickland*, 466 U.S. at 697. If a reviewing court finds a lack of prejudice, it need not determine whether, in fact, counsel’s performance was deficient. *Id.*

Richter, 562 U.S. at 104; *see also id.* at 111–12 (“In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel’s performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. . . . The likelihood of a different result must be substantial, not just conceivable”) (citations omitted); *Wong v. Belmontes*, 558 U.S. 15, 27 (2009) (per curiam) (“But *Strickland* does not require the State to ‘rule out’ [a more favorable outcome] to prevail. Rather, *Strickland* places the burden on the defendant, not the State, to show a ‘reasonable probability’ that the result would have been different”) (citing *Strickland*, 466 U.S. at 694).

“Surmounting *Strickland*’s high bar is never an easy task.” *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010).

An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest “intrusive post-trial inquiry” threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S., at 689–690, 104 S. Ct. 2052. Even under *de novo* review, the standard for judging counsel’s representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is “all too tempting” to “second-guess counsel’s assistance after conviction or adverse sentence.” *Id.*, at 689, 104 S. Ct. 2052; *see also Bell v. Cone*, 535 U.S. 685, 702, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993). The question is whether an attorney’s representation amounted to incompetence under “prevailing professional norms,” not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S., at 690, 104 S. Ct. 2052.

Richter, 562 U.S. at 105.

Here, the TCCA rejected Claim 9 during post-conviction appeal, concluding that Petitioner failed to demonstrate *Strickland*’s prejudice prong:

[T]he record does not [demonstrate] [...] whether trial counsel possessed the murder weapon. At the [post-conviction] hearing, the petitioner testified that the firearm in trial counsel’s possession after searching under the shed was a ‘HK USP 9 millimeter,’ the same firearm used to shoot the victim. Contrastingly, trial

counsel testified the two firearms he found were a “44 millimeter handgun” and a “12 gauge shotgun.” Trial counsel also testified the firearm he retrieved and tested did not have a “hair trigger,” an alleged characteristic of the firearm the petitioner used to shoot the victim. Based on the conflicting testimony and the fact the firearm at issue was not introduced, the petitioner failed to prove his factual allegation, that trial counsel possessed the murder weapon, by clear and convincing evidence.

[****]

The petitioner did not present the firearm in question or the results of any such testing at the post-conviction hearing and, therefore, cannot establish prejudice. Thus, the petitioner is not entitled to relief on this issue.

Nelson II, 2019 WL 37777030, at *10 (internal citations omitted). The plausible inference from the TCCA’s determination is that the court similarly found no *Strickland* deficient performance because there was no proof that trial counsel had retrieved the murder weapon. *Id.* In other words, counsel could not be deficient for failing to hire an expert to test the murder weapon when counsel did not actually possess the murder weapon.

Emphasizing the TCCA’s conclusion that Petitioner did not show that trial counsel in fact retrieved the murder weapon, Respondent highlights a material discrepancy in testimony from the state court proceedings: (1) Petitioner testified at the post-conviction hearing that *the murder weapon was an HK 9 millimeter handgun with a hair trigger*, yet (2) trial counsel testified at the post-conviction hearing that he retrieved *a 44mm handgun*, and when test-fired, it *did not have a hair trigger*. (ECF No. 21 at PageID 1423 (emphasis added).)

Based on this Court’s review of the state court record, the TCCA cited and applied the correct standard in *Strickland*. *Nelson II*, 2019 WL 37777030, at *8, *10.

First, the state court record supports the TCCA’s determination that Petitioner had not shown *Strickland* defective performance in failing to hire a ballistics expert to test the murder weapon. The TCCA reasoned that Petitioner had not shown that trial counsel in fact possessed the

murder weapon in the first place. The weapon that counsel retrieved at Petitioner's directive ended up not matching Petitioner's description of the murder weapon:

COX¹⁴: And the handgun that was found, you went and shot that at some point?

GUIBAO: That's correct.

COX: And what was the purpose of that?

GUIBAO: He had told me that the gun that he fired in the course of the incident giving rise to this had a hair trigger on it, meaning that it didn't take very much pressure on the trigger and that is -- when I fired it, I didn't find that to be the case.

COX: But he told you the weapon he used during the incident, as you referred to it, had a hair trigger?

GUIBAO: Correct.

(ECF No. 20-14 at PageID 1211.) What is more, *Strickland*'s presumption of reasonableness extends to "strategic decisions -- including whether to hire an expert." *Dunn v. Reeves*, 594 U.S. 731, 739 (2021) (citing *Harrington*, 562 U.S. at 104). See also *Esparza v. Sheldon*, 765 F.3d 615, 624 (6th Cir. 2014) (rejecting the petitioner's argument that his attorney could have "impeached [an adverse witness] more effectively by calling an expert" because "[t]his is precisely the sort of tactical judgment *Strickland* counsels against second-guessing" (citing *Strickland*, 466 U.S. at 689)); *Samatar v. Clarridge*, 225 F. App'x 366, 372 (6th Cir. 2007) ("the failure to call an expert and instead rely on cross-examination does not constitute ineffective assistance of counsel even if the wisdom of such an approach is debatable") (citation and quotation omitted).

¹⁴ Melanie Cox served as Assistant District Attorney General on behalf of the Shelby County District Attorney's Office during post-conviction trial proceedings in Petitioner's case. (ECF No. 20-13 at PageID 1073.)

Second, the state court record supports the TCCA's determination that Petitioner had not shown *Strickland* prejudice in counsel's failure to hire a ballistics expert to test the murder weapon. As in state post-conviction appellate proceedings, Petitioner in the § 2254 Petition does not demonstrate *how* ballistics expert testimony—and, to that end, specifically *what type* of ballistics expert testimony—would have cast doubt on the State's case. See *Nelson II*, 2019 WL 3777030, at *10 (“petitioner, however, did not present the firearm in question or the results of any such testing at the post-conviction hearing and, therefore, cannot establish prejudice”). See also *Stewart v. Wolfenbarger*, 468 F.3d 338, 353 (6th Cir. 2006) (state court's rejection of IAC claim was not unreasonable when the petitioner failed to present any credited evidence in the post-conviction hearing about how a witness would have testified at trial); *Troglin v. Westbrooks*, No. 1:12-cv-41, 2014 WL 5810312, at *11 (E.D. Tenn. Nov. 7, 2014) (“Given petitioner's failure to offer testimony at the post-conviction hearing to demonstrate prejudice flowed from the absence of expert testimony at trial, the state court did not unreasonably apply *Strickland* when it rejected this claim”); *Martin v. Mitchell*, 280 F.3d 594, 608 (6th Cir. 2002) (ruling that petitioner did not show prejudice from failure to retain ballistics expert where he failed to establish “how the retention of experts ... would have been beneficial to his defense”).

For these reasons, the TCCA's determination that trial counsel's failure to retain a ballistics expert did not prejudice Petitioner was not contrary to or an unreasonable application of *Strickland* and was based on a reasonable determination of facts in light of the evidence presented in state court. Claim 9 is without merit and is **DENIED**.

5. **CLAIM 10: IAC BY DENYING DISCOVERY ACCESS TO PETITIONER**

Petitioner contends that trial counsel was ineffective by failing to provide Petitioner access to discovery. (ECF No. 1 at PageID 8.) Petitioner claims that if he had reviewed discovery, “he

would have seen the issues with the crime scene while the case was still under investigation prior to trial.” (ECF No. 1-1 at PageID 44.)

Petitioner raised this issue during post-conviction appellate proceedings. *Nelson II*, 2019 WL 37777030, at *10. (See also ECF No. 20-16 at PageID 1296; ECF No. 20-12 at PageID 1035.)

The TCCA rejected Petitioner’s argument, explaining:

The petitioner claims trial counsel failed to provide him with pre-trial discovery. Both the petitioner and trial counsel testified they reviewed the discovery together and trial counsel expressed concern with the petitioner about having a copy of the discovery in his jail cell. While the petitioner claimed he continued to ask for discovery after that conversation, trial counsel testified the petitioner did not ask again. In its order denying post-conviction relief, the post-conviction court specifically found trial counsel’s “testimony credible.” We will not second-guess the trial court’s credibility determination.

Nelson II, 2019 WL 37777030, at *10.

Respondent argues that the TCCA’s rejection of Claim 10 was not unreasonable. (ECF No. 21 at PageID 1425.)

Claim 10’s IAC contention lacks merit. The TCCA’s rejection of this claim was not contrary to or an unreasonable application of clearly established federal law and was not based on an unreasonable determination of facts in light of the evidence presented in the state court. Trial counsel testified at the post-conviction hearing that: (1) he brought discovery to Petitioner because he wanted to show him “how it fit everything [Petitioner] told” counsel (ECF No. 20-13 at PageID 1150); (2) he and Petitioner talked extensively about how the discovery fit the description of the crime Petitioner provided (*id.*); and (3) Petitioner “helped me through the discovery in making everything jell.” (*Id.*) The post-conviction trial court credited this testimony, (ECF No. 20-12 at PageID 1052), and the TCCA stated that it would not second-guess that determination. *Nelson II*, 2019 WL 3777030, at *10. Like the TCCA, this Court will not reweigh the credibility determinations of the post-conviction trial court.

What is more, Petitioner has not rebutted with any evidence—much less clear and convincing evidence—trial counsel’s testimony that he shared discovery with Petitioner. (*See* ECF No. 1 at PageID 8; ECF No. 1-1 at PageID 44.) Claim 10’s IAC contention about trial counsel’s performance as to discovery lacks merit and is **DENIED**.

6. CLAIM 11: IAC BY FAILING TO FILE PRETRIAL MOTIONS

In Claim 11, Petitioner contends that trial counsel was ineffective by failing to file pretrial motions. (ECF No. 1 at PageID 8–9.)

Petitioner raised this issue during post-conviction appellate proceedings. *Nelson II*, 2019 WL 37777030, at *11. (*See also* ECF No. 20-16 at PageID 1296.) The TCCA rejected Petitioner’s claim, explaining:

The petitioner argues trial counsel failed to file pre-trial motions. The petitioner, however, provided no proof to support any of these claims [...] Having found no deficiency, the petitioner is not entitled to relief.

Nelson II, 2019 WL 37777030, at *10 (internal citation omitted).

Respondent argues that the TCCA’s rejection of Claim 11 was not unreasonable. (ECF No. 21 at PageID 1426.)

Claim 11’s IAC contention lacks merit. By not identifying a single pretrial motion that Petitioner believes trial counsel should have filed, or explaining why such a motion would have successfully altered the outcome of trial, Petitioner has not demonstrated that trial counsel’s performance was deficient. Furthermore, Petitioner has neither argued nor demonstrated that trial counsel’s failure to file specific “pretrial motions” prejudiced the outcome of his trial. *See, e.g., Troglin*, 2014 WL 5810312, at *11 (“Given petitioner’s failure to offer [evidence] at the post-conviction hearing to demonstrate prejudice flowed from the [performance of trial counsel],

the state court did not unreasonably apply *Strickland* when it rejected this claim"). Petitioner has not satisfied his burden to show that the TCCA's decision was objectively unreasonable.

What is more, Claim 11 is also not properly pled under Habeas Rule 2(c). Claim 11 does not identify the type of pretrial motions Petitioner thinks counsel should have filed. (*Id.*; ECF No. 1-1 at PageID 45.) Because Petitioner does not set forth any facts to support the allegations of Claim 11, he fails to satisfy Habeas Rule 2(c).

For these reasons, Claim 11 is non-meritorious and is **DENIED**.

6. **CLAIM 12: IAC BY FAILING TO SUBMIT PETITIONER'S CAR REPAIR ESTIMATES AND RENTAL CAR RECEIPTS**

Petitioner contends that trial counsel rendered IAC when he failed to submit (1) the repair estimates on Petitioner's vehicle and (2) specific receipts regarding the rental car he drove in Memphis. (ECF No. 1 at PageID 9; ECF No. 1-1 at PageID 45.) He says that:

[t]he theory of the State's case was that Nelson purposely rented a vehicle so he could come to Memphis and murder his girlfriend and their unborn child. It was necessary to put forward Nelson's reasoning as to why he would need to rent a vehicle. Nelson rented a vehicle because his personal vehicle needed numerous repairs. Showing the reasoning behind the car rental negates the issue of premeditation. However, [trial counsel] chose not to enter that information even though it was provided to him.

(*Id.*; see also ECF No. 1-1 at PageID 17, 20, and 45.)

Petitioner raised this issue during post-conviction appellate proceedings. *Nelson II*, 2019 WL 37777030, at *10. (See also ECF No. 20-16 at PageID 1297; ECF No. 20-12 at PageID 1036.)

The TCCA rejected Petitioner's claim, explaining:

The petitioner informed trial counsel, and testified at trial, that he rented a car to travel to Memphis because his regular vehicle was "broken down" and being serviced. The petitioner provided trial counsel with an estimate for the repairs to his car and a receipt for his rental car. According to the petitioner, trial counsel should have used the estimate and receipt to rebut the State's theory that the petitioner drove to Memphis in a rental car established premeditation. The

petitioner introduced both documents as exhibits during the post-conviction hearing.

[****]

Regarding the rental vehicle, an Enterprise representative testified at trial that the petitioner frequently rented vehicles from Enterprise. Trial counsel could not recall whether the petitioner provided receipts as proof the petitioner's vehicle was inoperable. When asked if such receipts would have bolstered the petitioner's testimony that he rented the car not with intent to murder the victim but because his car was inoperable, trial counsel testified, "[i]t could have. I can't say."

[****]

The petitioner next argues trial counsel failed to put on evidence regarding the fact the petitioner's vehicle needed repairs and rented a car for that reason, but trial counsel explained he presented a witness from Enterprise who testified at trial about the petitioner's frequent car rentals. While trial counsel could not remember whether the petitioner provided him with a copy of the estimate to repair the petitioner's vehicle, the petitioner has failed to show how he was prejudiced by the omission of that additional piece of information especially in light of the testimony the petitioner regularly rented cars for his travels.

Nelson II, 2019 WL 37777030, at *6, *7, *10.

Respondent argues that the TCCA's rejection of Claim 12 was not unreasonable. (ECF No. 21 at PageID 1428.)

Claim 12 is nonmeritorious. Petitioner argues that demonstrating his reason for renting a car to drive to Memphis—*i.e.*, his personal vehicle needed repairs—negates the element of premeditation. (ECF No. 1-1 at PageID 45.) However, trial counsel testified at the post-conviction hearing that an employee from Enterprise Rental Car demonstrated Petitioner had rented cars from that location on three previous occasions—meaning Petitioner had a practice of renting cars for reasons other than repairs to his own vehicle. (ECF No. 20-13 at PageID 1155; ECF No. 20-3 at PageID 607.) His car rental on the date at issue during trial did not serve to conclusively rule out premeditation. Trial counsel's failure to submit the repair estimates and rental receipt was not deficient performance. *See Strickland*, 466 U.S. at 687–88 (counsel is to be afforded a presumption

that his actions were the product of “sound trial strategy” and undertaken with the exercise of reasonable professional judgment); *see also Moreland v. Robinson*, 813 D.3d 315, 329 (6th Cir. 2016) (“Counsel’s performance is not deficient when counsel fails to use evidence that ‘would be of little help’ to the defendant”) (quoting *Strickland*, 466 U.S. at 699).

The TCCA’s conclusion about Claim 12 was not unreasonable. That court’s credibility determination about trial counsel’s testimony as to Petitioner’s rental receipt is entitled to great deference during habeas review. *See Marshall v. Lonberger*, 459 U.S. 422, 434 (1983); *Rice v. Collins*, 546 U.S. 333, 342 (2006); *Howell v. Hodge*, 710 F.3d 381, 386 (6th Cir. 2013); *Bates v. Carlton*, No. 2:09-cv-120, 2012 WL 3524901, at *9 (E.D. Tenn. Aug. 14, 2012). What is more, Petitioner’s repair estimate was obtained over two weeks prior to the Incident and does not indicate that the repairs were ever made. (ECF No. 20-15 at PageID 1237.) For these reasons, Claim 12 is **DENIED**.

7. CLAIM 13: IAC BY NOT OFFERING EVIDENCE OF THE VICTIM’S VIOLENCE TOWARD PETITIONER

Petitioner contends that trial counsel rendered IAC when he did not offer evidence of the Victim’s past violence toward Petitioner, to show the necessity of self-defense. (ECF No. 1 at PageID 10; ECF No. 1-1 at PageID 45–47.) He argues that “[a]dditional testimony regarding [V]ictim’s aggression towards Nelson, and that she was always the first aggressor would have bolstered Nelson’s theory of self-defense. However, [trial counsel] did not put forth all of the provided witnesses at trial in order to show the true nature of [the Victim] and why Nelson would feel the need to protect himself.” (*Id.*)

Petitioner raised this issue during post-conviction appellate proceedings. *Nelson II*, 2019 WL 37777030, at *6, *10. (*See also* ECF No. 20-16 at PageID 1297–99; ECF No. 20-12 at PageID

1038.) The TCCA rejected Petitioner's claim, explaining that trial counsel did not render deficient performance:

The petitioner also claimed [before the post-conviction trial court that] trial counsel should have called more witnesses to testify regarding the victim's acts of aggression and violence towards the petitioner. The petitioner agreed the four witnesses called at trial supported his theory of self-defense, but he felt there were more witnesses that should have been called. However, the petitioner admitted he did not provide trial counsel with the names of these individuals but "[thought] his parents did." He also failed to provide their names at the post-conviction hearing.

[****]

The petitioner also claims trial counsel failed to present evidence of the victim's violence towards the petitioner to show he acted in self-defense. At the hearing, trial counsel disagreed, stating he presented four character witnesses to this effect, each of whom trial counsel believed testified successfully for the defense. Additionally, the petitioner failed to present additional witnesses to support this claim at the hearing.

Id. The TCCA determined "found no deficiency" in counsel's performance, without reaching a determination as to *Strickland* prejudice. *Id.* at *11.

Respondent argues that the TCCA's rejection of Claim 13 was not unreasonable. (ECF No. 21 at PageID 1430.)

Claim 13 lacks merit. At trial, Petitioner himself testified about numerous altercations in which the Victim was allegedly the initial aggressor. *See Nelson I*, 2013 WL 12185279, at *3. The state court record demonstrates that trial counsel also investigated witnesses who could testify about the Victim's past aggression towards Petitioner, and counsel in fact called those witnesses to so testify. Amanda Hill, Pamela Young, Trella King, and Shayla Grant testified about confrontations between Petitioner and the Victim. *Id.* at *4-5. At the post-conviction hearing, trial counsel said that he believed that the testimony of these witnesses bolstered the self-defense theory. (ECF No. 20-13 at PageID 1159.) Trial counsel also believed that their testimony went "beautifully." (*Id.* at PageID 1159.) Thus, the record contradicts Claim 13's allegation of trial

counsel's deficient performance. This Court will not second guess trial counsel's tactical and strategic decisions made after pretrial preparation.

Furthermore, Petitioner has not demonstrated that counsel's performance prejudiced Petitioner at trial. Petitioner did not (1) identify the additional witnesses he says counsel should have presented about the Victim's aggression, or (2) describe the testimony that these witnesses would have given. Without such evidence, Petitioner has not carried his burden of demonstrating *Strickland* prejudice from trial counsel's failure to call such "provided witnesses." (ECF No. 1 at PageID 10.) *See Stewart*, 468 F.3d at 353 (concluding that state court's rejection of IAC claim was not unreasonable when petitioner failed to present any credited evidence in the post-conviction hearing about how a witness would have testified at trial). *See also Troglin*, 2014 WL 5810312, at *11.

The TCCA's rejection of Claim 13 was not contrary to or an unreasonable application of *Strickland* and its progeny, and was based on a reasonable determination of the facts in light of the evidence presented.

What is more, Claim 13 is also not properly pled under Habeas Rule 2(c). Petitioner does not identify specifically the "provided witnesses" whom he thinks counsel should have called to testify about the Victim's aggression. (ECF No. 1 at PageID 10; ECF No. 1-1 at PageID 45-47.)

For these reasons, Claim 13 lacks merit and is **DENIED**.

8. CLAIM 14: IAC BY NOT INVESTIGATING PETITIONER'S CELL PHONE RECORDS

Petitioner contends that trial counsel rendered IAC when he failed to investigate Petitioner's cell phone records. (ECF No. 1 at PageID 10-11; ECF No. 1-1 at PageID 47-48.) He argues that his "phone records set up a time line of [his] activities on the day of the shooting. This would give context to the jury of [his] state of mind on that day and that it was not to murder [the

Victim] or her unborn baby.” (ECF No. 1 at PageID 10.) He says further that his “phone records coincided with his testimony of contacting several other women prior to contacting [the Victim]. Nelson’s phone records reflect that he and [the Victim] had not communicated for months prior to the day of the shooting.” (ECF No. 1-1 at PageID 47.) He argues that he “told [counsel] about his phone records and [counsel] never reviewed those records.” (ECF No. 1-1 at PageID 18.)

Respondent argues that the TCCA’s rejection of Claim 14 was not unreasonable. (ECF No. 21 at PageID 1431–32.)

Petitioner raised this issue during post-conviction appellate proceedings. *Nelson II*, 2019 WL 37777030, at *10. (See also ECF No. 20-16 at PageID 1299; ECF No. 20-12 at PageID 1035–36.) The TCCA rejected that claim, explaining that counsel did not render deficient performance:

The petitioner next argues trial counsel failed to investigate and introduce the petitioner’s cell phone records to show he spoke to several people in Memphis before contacting the victim. However, trial counsel stated several witnesses testified at trial to speaking with the petitioner the day of the murder, thus eliminating the need for the records.

Nelson II, 2019 WL 37777030, at *10. The TCCA determined “found no deficiency” in counsel’s performance, without reaching a determination as to *Strickland* prejudice. *Id.* at *11.

Claim 14 lacks merit. Trial counsel indicated at the post-conviction hearing that he did not see any value in introducing Petitioner’s phone records at trial. (ECF No. 20-13 at PageID 1155–56.) He said that Petitioner wanted to introduce them to show that he called other individuals while in Memphis and to show exactly where he was at various times of the day. (*Id.* at PageID 1156.) However, trial counsel explained that there was a live witness to testify to all of that:

LEFFLER: [I]f I thought the phone records would have made a big difference, we would have done something about them. But I think what he wanted from the phone records was that he was calling these other people when he was in Memphis and those people testified ... [T]hey testified that there was phone conversation between him and them while he was in Memphis on the day of the incident.

COX: So from your review, everything that the records would show, you had a live witness to testify about in the sense that --

LEFFLER: Either I did or the State did. Right.

(*Id.* at PageID 1156–57.)

The record demonstrates that trial counsel introduced evidence of Petitioner’s “timeline of activities” (ECF No. 1 at PageID 10)—through witnesses rather than cell phone records. Counsel’s tactical decision is presumed to be part of “sound trial strategy” undertaken in the exercise of reasonable professional judgment. *See Strickland*, 466 U.S. at 687–88. There is no basis to conclude the TCCA’s conclusion about Claim 14 was an unreasonable application of *Strickland*.

Because the TCCA’s rejection of Claim 14 was not contrary to or an unreasonable application of *Strickland* and its progeny and was based on a reasonable determination of the facts in light of the evidence presented, Claim 14 lacks merit and is **DENIED**.

9. CLAIM 15: IAC BY NOT PREPARING PETITIONER TO TESTIFY

Petitioner contends that trial counsel rendered IAC when he failed to prepare him to testify in his own defense. (ECF No. 1 at PageID 11; ECF No. 1-1 at PageID 48.) In support of Claim 15, Petitioner contends that counsel “admitted during the proof that he did not prepare Nelson adequately for his own testimony.” (ECF No. 1-1 at PageID 48.) Petitioner says he felt “rushed and upset when [trial counsel] purposely cut [his] testimony short and told [him that he] needed to finish quickly. Nelson felt that he could not testify fully about the day in question, thereby hurting his credibility at trial.” (*Id.*)

Respondent argues that the TCCA’s rejection of Claim 15 was not unreasonable. (ECF No. 21 at PageID 1433.)

Petitioner raised this issue during post-conviction appellate proceedings. *Nelson II*, 2019 WL 37777030, at *10-11. (*See also* ECF No. 20-16 at PageID 1299; ECF No. 20-12 at PageID

1038.) The TCCA rejected the claim, explaining that Petitioner had adduced no proof of (1) trial counsel's deficient performance or (2) prejudice to Petitioner from counsel's performance:

The petitioner asserts trial counsel failed to prepare the petitioner to testify in his own defense. Trial counsel again disagreed, stating he prepared the petitioner as best he could and that he thought the petitioner did "fine" during his testimony. Within this context, the petitioner was unable to recall the details he allegedly omitted from his testimony as a result of being unprepared [...] A petitioner cannot succeed on a cumulative error claim when the petitioner cannot show that trial counsel's performance was deficient. Having found no deficiency as to any of the aforementioned issues, the petitioner is not entitled to relief.

Nelson II, 2019 WL 37777030, at *10–11.

Claim 15's IAC allegation lacks merit. Petitioner's contention that trial counsel "admitted he did not prepare Nelson adequately for his own testimony" (ECF No. 1-1 at PageID 48) is flatly contradicted by the state court record. At the post-conviction evidentiary hearing, trial counsel described particularly how he prepared Petitioner to testify:

I didn't think he did that bad [at trial]. It was described as rambling. I didn't see it as rambling [...] So I thought he was doing fine. I don't remember telling him to get off the witness stand. But I often tell my clients the best way to do this is get on and off the witness stand as quickly as you can. It's telling them how to get through cross-examination. You answer the question. You only answer the question if you understand it. You don't answer more than was asked. And that sort of thing [...] I will prepare every witness who is going to testify in any trial [...] I try to make them as good as I can make them. And some people just, I don't care what you do, they're not going to come off well. He apparently didn't come off even as well as I thought he did [...] I prepped him fairly well [...] But there comes a point at which you've prepped somebody as much as they're going to be prepped.

(ECF No. 20-13 at PageID 1158–59.)

When Petitioner was asked what he was supposedly compelled to exclude from his testimony due to inadequate preparation, he could not cite a single example:

GUIBAO: Was there ever a time -- did your attorney ever tell you to get off the stand as quickly as possible?

PETITIONER: Yes, sir.

GUIBAO: Okay. What was that about?

PETITIONER: Well, after the objection from the prosecutor and Your Honor asking me to just address -- just answer the questions. After we had a recess, he told me to just finish up the testimony and get off the stand as quick as possible. And so a lot of details I was wanting to provide were omitted in the interest of time.

GUIBAO: Can you give us an example of those details?

PETITIONER: Not off the top of my head I can't.

(*Id.* at PageID 1111.)

Since Petitioner did not present any evidence in support of Claim 15, the post-conviction trial court denied relief:

[T]here was no proof offered as to what additional testimony could have been elicited by the petitioner had he testified longer. Indeed, the main problem with the petitioner's testimony was that he would often keep testifying after answering the question, seeking to control the subject matter and not allow his attorney to guide the dialogue [...] No proof has been offered at all of any beneficial omitted testimony having been omitted merely because his attorney suggested that he get off the stand as soon as he could. The petitioner was asked whether or not he could suggest any omitted testimony that would have been of any benefit, and his answer was in the negative. No deficient performance by his attorney has been proven and, again, no prejudice has been shown to the petitioner.

(ECF No. 20-12 at PageID 1056-57.) The TCCA affirmed because Petitioner "provided no proof to support" Claim 15 and thus had not shown counsel's deficient performance. *Nelson II*, 2019 WL 3777030, at *10-11.

Likewise, Petitioner in the § 2254 Petition has not pointed to any evidence to show that trial counsel rendered deficient performance when preparing him to testify. As in state court, Petitioner offers—without more—solely his unsupported opinion that trial counsel "admitted" he "did not prepare" Petitioner to testify. (ECF No. 1-1 at PageID 48.) As shown above, the state court record refutes his opinion. (ECF No. 20-13 at PageID 1158-59.) With no facts or evidence to demonstrate (1) specifically how trial counsel should have prepared Petitioner differently and

(2) what Petitioner would have testified about (a) had his preparation been different or (b) had he not been rushed, such that the omitted testimony would have changed the outcome at trial, Petitioner has not demonstrated *Strickland* deficient performance or *Strickland* prejudice.

Based on this Court's review of the trial transcript (ECF No. 20-2; ECF No. 20-3) and the post-conviction evidentiary hearing transcript (ECF No. 20-13; ECF No. 20-14), the TCCA's determination about Claim 15's IAC allegation was not contrary to or an unreasonable determination of *Strickland* and was based on a reasonable determination of facts in light of the evidence presented in the state courts. Claim 15 lacks merit. What is more, Claim 15 is also not properly pled under Habeas Rule 2(c). Petitioner does not identify the testimony he wanted to provide at trial but was unable. (ECF No. 1 at PageID 11; ECF No. 1-1 at PageID 48.) For these reasons, Claim 15 is **DENIED**.

10. CLAIM 16: IAC BY FAILING TO MOVE FOR A MISTRIAL

Petitioner contends that trial counsel rendered IAC when he failed to move for a mistrial "after the Prosecutor stated [...] in [his] closing statement [...] that Nelson killed [the Victim] because [the Victim] would not have an abortion." (ECF No. 1-1 at PageID 48-49.) Petitioner argues that the Prosecutor's "statement in closing was only done to inflame the passions of the jury and was not reflected by the proof presented at trial. Therefore, [trial counsel] should have moved for a mistrial once those statements were uttered." (*Id.* at PageID 49.)

Petitioner had testified at the post-conviction hearing that he believed the prosecutor's statement lacked proof:

GUIBAO:	And when the State alleged in its closing arguments that this was a murder to prevent someone from being pregnant, had there ever been any proof during the trial that you had made any type of statement or anyone come in and said Tarence Nelson didn't want to have a child?
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PETITIONER: No.

GUIBAO: However, the State did argue that on their closing argument, correct?

PETITIONER: Yes, sir.

[****]

GUIBAO: So that jury heard that this was a murder because you knew she was pregnant and didn't want her to have a child?

PETITIONER: Yes, sir.

(ECF No. 20-13 at PageID 1109-10.)

As relevant to Claim 16, the Prosecutor's closing remark at issue is:

[Petitioner] knew exactly what he was doing that day. [The Victim] was visibly pregnant. He didn't want a child. It didn't fit in his lifestyle. He couldn't take care of a child and be with Amanda, Shayla, Pamela, Trella, and who else he was with. That didn't fit in his lifestyle. A child was not supposed to be here. So on that day he fired two shots intentionally, thought about, purposefully. He shoots [the Victim] in the right side of her held [sic] in the back. She wasn't aiming up at him -- or aiming down at him rather because he said he was seated. He shoots her in the back of the head.

(ECF No. 20-3 at PageID 795 ("Closing Statement Comment").)

Respondent argues that the TCCA's rejection of Claim 16 was not unreasonable. (ECF No. 21 at PageID 1434.)

Petitioner raised this issue during post-conviction appellate proceedings. *Nelson II*, 2019 WL 37777030, at *10-11. (See also ECF No. 20-16, PageID 1299-1301.) The TCCA summarily rejected the claim, explaining that Petitioner simply had not adduced proof of trial counsel's deficient performance. *Id.* at *11.

Petitioner must establish that "the prosecution's conduct was both improper and so flagrant as to warrant reversal." See *Mason*, 320 F.3d at 635.

Having reviewed the state court record, the Court finds that there is no evidence in the trial transcript that the Closing Statement Comment was improper. The State's theory of the case was that Petitioner murdered the Victim because she was pregnant (*see* ECF No. 20-8 at PageID 936). The reasonable inference from the proof adduced at trial was that Petitioner committed premeditated murder because he allegedly was told initially that the Victim was pregnant, then that she was not, and then—when he found her eight months pregnant when he drove to Memphis—he shot her in not only the head but also her stomach. *See Nelson II*, 2019 WL 3777030, at * 1, *4. (*See also* ECF No. 20-13 at PageID 1145–46.) Since the Closing Statement Comment was entirely consistent with the State's theory, trial counsel was not deficient in failing to move for a mistrial based on it. The TCCA's rejection of Claim 16—based on Petitioner's failure to “show that trial counsel's performance was deficient”, *see Nelson II*, 2019 WL 3777030, at *11—was not contrary to or an unreasonable application of *Strickland* and was based on a reasonable determination of facts in light of the evidence presented in the state courts. Claim 16's IAC allegation lacks merit and is **DENIED**.

E. CLAIM 17'S ALLEGATIONS OF (A) STAND-ALONE CUMULATIVE ERROR AND (B) CUMULATIVE ERROR LEADING TO IAC

In Claim 17, Petitioner argues that “[t]he cumulative errors by Counsel during the course of his representation caused him to be ineffective which prejudiced Nelson.” (ECF No. 1-1 at PageID 44.) Respondent contends that a claim of cumulative error “is not cognizable in a federal habeas proceeding.” (ECF No. 21 at PageID 1425.)

To the extent Claim 17 presents a stand-alone claim of cumulative error, Petitioner's effort is not well taken. The Sixth Circuit has held that “post-AEDPA, not even constitutional errors that would not individually support habeas relief can be cumulated to support habeas relief.” *Hoffner v. Bradshaw*, 622 F.3d 487, 513 (6th Cir. 2010) (quoting *Moore v. Parker*, 425 F.3d 250, 256 (6th

Cir. 2005)); *see also* *Moreland v. Bradshaw*, 699 F.3d 908, 931 (6th Cir. 2012) (same); *March v. McAllister*, 573 F. App'x 450, n.5 (6th Cir. 2014); *Cross v. Stovall*, 238 F. App'x 32, 41 (6th Cir. 2007) ("The law of this Circuit is that cumulative error claims are not cognizable on habeas because the Supreme Court has not spoken on this issue[,]") (quoting *Williams v. Anderson*, 460 F.3d 789, 816 (6th Cir. 2006)). Accordingly, cumulative error is not a viable constitutional claim under 28 U.S.C. § 2254. *See Lorraine v. Coyle*, 291 F.3d 416, 447 (6th Cir. 2002) ("The Supreme Court has not held that distinct constitutional claims can be cumulated to grant habeas relief"), *amended on other grounds*, 377 F.3d 459 (6th Cir. 2002); *see also Gillard v. Mitchell*, 445 F.3d 883, 898 (6th Cir. 2006) (same).

To the extent Claim 17 presents a claim of cumulative error by trial counsel leading to IAC, Petitioner's contention still does not warrant relief. "[T]he right to effective assistance of counsel may in a particular case be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial." *Murray v. Carrier*, 477 U.S. 478, 496 (1986); *see also Christopher v. United States*, 605 F. App'x 533, 536 (6th Cir. 2015) ("A claim of ineffective assistance can hinge on one allegation or, as here, the cumulative effect of several"). However, "[i]t is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." *Harrington v. Richter*, 562 U.S. 86, 111, (2011). Examining an ineffective assistance of counsel claim requires the court to consider "the combined effect of all acts of counsel found to be constitutionally deficient, in light of the totality of the evidence in the case." *See United States v. Dado*, 759 F.3d 550, 563 (6th Cir. 2014). This Court examines the combined effect of all acts of counsel found to be constitutionally deficient, in light of the totality of evidence in the case. *Lundgren*, 440 F.3d at 770.

Here, considered in the aggregate, the alleged errors of trial counsel were not reasonably likely to have affected the outcome of Petitioner's case. See *United States v. Pamatmat*, 756 F. App'x 537, 547 (6th Cir. 2018). As demonstrated above in this Order, the IAC allegations of Claims 3 and 10 – 16 that underlie Claim 17's contention of cumulative error leading to IAC have been shown to be without merit. See *Keith v. Mitchell*, 455 F.3d 662, 679 (6th Cir. 2006) (holding that where the individual claims are all essentially meritless, cumulative error cannot be shown); *Seymour v. Walker*, 224 F. 3d 542, 557 (6th Cir. 2000) (same).

Petitioner has not demonstrated that (1) counsel's performance was ineffective as to Claims 3 and 10 – 16 individually considered or (2) counsel's performance, considering Claims 3 and 10 – 16 claims cumulatively, amounts to IAC. Claim 17 is **DENIED** as without merit.

F. CONCLUSION

For the reasons explained in this Order, the claims in the § 2254 Petition (ECF No. 1; ECF No. 1-1) are: non-cognizable in federal habeas; procedurally defaulted; without merit; or improperly pled. Therefore, the § 2254 Petition is **DENIED** in its entirety.

G. 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, 335 (2003); *Bradley v. Birkett*, 156 F. App'x 771, 772 (6th Cir. 2005). The Court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to a § 2254 petitioner. Rule 11, § 2254 Rules. 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 omitted); *see also Henley v. Bell*, 308 F. App’x 989, 990 (6th Cir. 2009) (per curiam) (same). A COA does not require a showing that the appeal will succeed. *Miller-El*, 537 U.S. at 337; *Caldwell v. Lewis*, 414 F. App’x 809, 814–15 (6th Cir. 2011). Courts should not issue a COA as a matter of course. *Bradley*, 156 F. App’x at 773.

In this case, there can be no question that (1) Claim 1’s state evidentiary challenge and Claim 2 are not cognizable in federal habeas; (2) Claim 1’s due process challenge and Claim 6 are procedurally defaulted because Petitioner did not exhaust those claims by fairly presenting them to the TCCA; (3) Claims 4 and 5 are procedurally defaulted because those claims were barred from state court review due to Petitioner’s failure to follow a state court procedural rule; (4) Claim 3 and Claims 7 – 16 are without merit; and (5) Claims 11, 13, and 15 are also improperly pled under Habeas Rule 2(c). Because any appeal by the Petitioner on the issues raised in his § 2254 Petition does not deserve attention, the Court **DENIES** a COA.

Rule 24(a)(1) of the Federal Rules of Appellate Procedure 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 Federal Rule of Appellate Procedure 24(a),

that any appeal in this matter would not be taken in good faith and leave to appeal *in forma pauperis* is **DENIED**.¹⁵

IT IS SO ORDERED, this 31st day of March, 2025.

s/ Mark S. Norris

MARK S. NORRIS

UNITED STATES DISTRICT JUDGE

¹⁵ If the 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 thirty (30) days of the date of entry of this Order. See Fed. R. App. P. 24(a)(5).

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