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

MICHAEL G. UPSHAW, Petitioner, vs. WARDEN GLEN TURNER, Respondent.	)	No. 05-2097-JPM/dkv

ORDER DENYING APPLICATION FOR LEAVE TO PROCEED IN FORMA PAUPERIS
ORDER OF DISMISSAL
ORDER DENYING CERTIFICATE OF APPEALABILITY
AND
ORDER CERTIFYING APPEAL NOT TAKEN IN GOOD FAITH

Petitioner Michael G. Upshaw, Tennessee Department of Correction prisoner number 304427, an inmate at the Hardeman County Correctional Facility ("HCCF") in Whiteville, Tennessee, filed a habeas corpus petition on February 1, 2005, under 28 U.S.C. § 2254 and paid the filing fee. Upshaw also filed a motion to proceed in forma pauperis. Because the filing fee has been paid, the motion to proceed in forma pauperis is DENIED as moot.

I. STATE COURT PROCEDURAL HISTORY

Following a jury trial in the Shelby County Criminal Court, Petitioner was convicted of second degree murder. On or around June 24, 1999, he was sentenced to twenty-four (24) years of

incarceration. His conviction and sentence were affirmed on appeal. State v. Upshaw, 2001 WL 29456 (Tenn. Crim. App. Jan. 11, 2001), perm. app. denied (Tenn. May 21, 2001).

In November of 2001, Petitioner filed a pro se petition pursuant to the then-current version of the Tennessee Post-Conviction Procedure Act, Tenn. Code Ann. §§ 40-30-201 to -222, in the Shelby County Criminal Court. Counsel was appointed, and an evidentiary hearing was conducted on August 28, 2003. The post-conviction court denied relief by order dated November 3, 2003. The Tennessee Court of Criminal Appeals affirmed the denial of the post-conviction petition. Upshaw v. State, 2004 WL 2821226 (Tenn. Crim. App. Dec. 8, 2004). Petitioner did not seek permission from the Tennessee Supreme Court to appeal the Court of Criminal Appeals' judgment.

The Court of Criminal Appeals summarized the facts underlying the criminal charge as follows:

> On November 3, 1997, at around 4:00 p.m., the victim, Sammy Douglas Thomasson, and a friend, Carmen Corum, drove to the intersection of Percy and Delta Streets in Memphis to purchase $10 worth of crack cocaine. The two had been using illegal drugs together for some five months and routinely visited that area of Memphis to make their purchases. At about 8:00 p.m. on the date of the offense, the victim and Ms. Corum had used all of their supply of crack cocaine and went "riding around" in their Hyundai Excel, waiting to pick up Ms. Corum's paycheck so they could buy more drugs. They returned to the Percy/Delta area, but were unable to find any of their usual suppliers. As they were about to drive away, several men in a four-door gray car flagged them down and asked if they "wanted anything." Ms. Corum testified that when the victim answered "no," the men

blocked their path so they could not drive away. A man, whom Ms. Corum described as wearing a red and white jacket, stepped out of the gray car from the backseat and ordered her and the victim to get out of the car. Ms. Corum testified that the victim put the car in reverse and that when the assailant raised a gun, she ducked inside the car and heard a gunshot. A bullet struck the victim in the head. The car, which continued to move backwards, ran over a ditch and stopped in a neighboring yard.

Mario Merritt, a witness for the state, testified that at approximately 8:00 p.m. on the night in question, he was driving through the Percy/Delta area, accompanied by the defendant and two other individuals. He acknowledged that they were in the area to sell drugs and that they flagged down the victim and Ms. Corum to see if they were interested in buying. In his statement to police, Merritt admitted that he blocked the victim's car with his own and then noticed the defendant step out [of] the backseat. Merritt recalled that the defendant was armed with a pistol which he carried in the front of his pants. Merritt also stated that he then saw the defendant walk to the driver's side of the victim's car and shoot the victim in the head. Merritt acknowledged that, afterward, he and another of his companions hid the murder weapon and, three weeks later, buried it.

Officer Paul Bishop testified that he was riding a trolley on the night of November 3rd when he received a call that a shooting had occurred. While it only took about a minute for him to reach the Percy/Delta area, by the time he arrived, the entire vicinity was deserted. Officer Bishop recalled that he found a red Hyundai backed into a ditch and, on closer examination, saw the victim slumped into the passenger's seat. There was a bullet hole in his left temple. When the officer examined the interior of the car, he found a purse belonging to Ms. Corum on the floorboard. Officer Bishop found no weapons inside the vehicle.

Officer Dwight Woods was present when the defendant made a statement to the police. He testified that the defendant received *Miranda* warnings and signed a waiver of those rights. In his statement to the police, the defendant confessed that he shot the victim once with his .38 caliber pistol. The defendant claimed that he had fired his weapon because Merritt told him that the victim

> "ran off" with some money and because he believed the victim was going to shoot first. He contended that when he approached the victim's car, he became "paranoid" because the victim "drew for somethin[g]."

Upshaw, 2001 WL 29456 at *1-*2.

II. PETITIONER'S FEDERAL HABEAS CLAIMS

In this federal habeas petition, Upshaw raises the following issues:[1]

1. Whether the trial court abused its discretion by overruling Petitioner's motion to suppress his statement because he was not able to voluntarily and intelligently waive his *Miranda* rights;

2. Whether the trial court abused its discretion by allowing photographs of the victim to be introduced into evidence because any probative value was substantially outweighed by the danger of unfair prejudice;

3. Whether the trial court erred by denying Petitioner's motion for judgment of acquittal at the close of the proof because the necessary corroborating testimony was inconsistent and not sufficiently reliable to sustain a conviction beyond a reasonable doubt;

4. Whether the trial court erred by finding that the evidence was sufficient to support a conviction of murder in the second degree because the court's ruling was in large part based on its incorrect recollection of the testimony;

5. Whether the trial court abused its discretion by refusing to instruct the jury on the lesser included offenses of voluntary manslaughter and criminally negligent homicide because, taken in the

[1] The Court notes that Upshaw's petition essentially presents the identical issues he raised on direct appeal and in his appeal of the denial of his post-conviction petition. In fact, his supporting memorandum consists of photocopied pages of the relevant portions of his briefs to the Tennessee Court of Criminal Appeals on direct and post-conviction review.

light most favorable to the existence of the lesser offense, the state's proof allowed for the conclusion that Petitioner fired a gun under the belief that he was about to be shot by the victim;

6. Whether the trial court abused its discretion by declining to weigh the applicable mitigating factors against the statutory aggravators and sentencing Petitioner excessively; and

7. Whether Petitioner's right to effective assistance of counsel was violated because trial counsel allegedly failed to 1) properly advise Petitioner with regard to release eligibility during plea negotiations; 2) properly cross-examine witnesses; and 3) provide adequate legal counsel by encouraging Petitioner to proceed to trial with no witnesses.

III. ANALYSIS OF THE MERITS

A. Waiver and Procedural Default

Twenty-eight U.S.C. § 2254(b) states, in pertinent part:

(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that–

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

Thus, a habeas petitioner must first exhaust available state remedies before requesting relief under § 2254. E.g., Granberry v.

Greer, 481 U.S. 129, 133-34 (1987); Rose v. Lundy, 455 U.S. 509, 519 (1982); Rule 4, Rules Governing Section 2254 Cases in the United States District Courts ("Section 2254 Rules"). A petitioner has failed to exhaust his available state remedies if he has the opportunity to raise his claim by any available state procedure. 28 U.S.C. § 2254(c); Preiser v. Rodriguez, 411 U.S. 475, 477, 489-90 (1973).

To exhaust his state remedies, the petitioner must have presented the very issue on which he seeks relief from the federal courts to the courts of the state that he claims is wrongfully confining him. Picard v. Connor, 404 U.S. 270, 275-76 (1971); Rust v. Zent, 17 F.3d 155, 160 (6th Cir. 1994). "[A] claim for relief in habeas corpus must include reference to a specific federal constitutional guarantee, as well as a statement of the facts which entitle the petitioner to relief." Gray v. Netherland, 518 U.S. 152, 162-63 (1996). "'[T]he substance of a federal habeas corpus claim must first be presented to the state courts.'" Id. at 163 (quoting Picard, 404 U.S. at 278). A habeas petitioner does not satisfy the exhaustion requirement of 28 U.S.C. § 2254(b) "by presenting the state courts only with the facts necessary to state a claim for relief." Id.

Conversely, "[i]t is not enough to make a general appeal to a constitutional guarantee as broad as due process to present the 'substance' of such a claim to a state court." Id. When a

petitioner raises different factual issues under the same legal theory he is required to present each factual claim to the highest state court in order to exhaust his state remedies. O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999); see also Pillette v. Foltz, 824 F.2d 494, 496 (6th Cir. 1987). He has not exhausted his state remedies if he has merely presented a particular legal theory to the courts without presenting each factual claim. Pillette, 824 F.2d at 497-98. The claims must be presented to the state courts as a matter of federal law. "It is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made." Anderson v. Harless, 459 U.S. 4, 6 (1982); see also Duncan v. Henry, 513 U.S. 364, 366 (1995) (per curiam) ("If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court.").

Moreover, the state court decision must rest primarily on federal law. Coleman v. Thompson, 501 U.S. 722, 734-35 (1991). If the 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, the petitioner ordinarily is barred by this procedural default from seeking federal habeas review. Wainwright v. Sykes, 433 U.S. 72,

87-88 (1977). However, the state-court decision need not explicitly address the federal claims; instead, it is enough that the petitioner's brief squarely presents the issue. Smith v. Digmon, 434 U.S. 332 (1978) (per curiam); see also Baldwin v. Reese, 541 U.S. 27, 30-32 (2004) (a federal habeas claim is fairly presented to a state appellate court only if that claim appears in the petitioner's brief).

When a petitioner's claims have never been actually presented to the state courts but a state procedural rule prohibits the state court from extending further consideration to them, the claims are deemed exhausted, but procedurally barred. Coleman, 501 U.S. at 752-53; Teague v. Lane, 489 U.S. 288, 297-99 (1989); Wainwright v. Sykes, 433 U.S. at 87-88; Rust, 17 F.3d at 160.

A petitioner confronted with either variety of procedural default must show cause for the default and that he was prejudiced in order to obtain federal court review of his claim. Teague, 489 U.S. at 297-99; Wainwright v. Sykes, 433 U.S. at 87-88. Cause for a procedural default depends on some "objective factor external to the defense" that interfered with the petitioner's efforts to comply with the procedural rule. Coleman, 501 U.S. at 752-53; Murray v. Carrier, 477 U.S. 478, 488 (1986).

A petitioner may avoid the procedural bar, and the necessity of showing cause and prejudice, by demonstrating "that failure to consider the claims will result in a fundamental miscarriage of

justice." Coleman, 501 U.S. at 750. The petitioner must show that "'a constitutional violation has probably resulted in the conviction of one who is actually innocent.'" Schlup v. Delo, 513 U.S. 298, 327 (1995) (quoting Murray, 477 U.S. at 496). "To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." Id.

B. Legal Standard for Merits Review

The standard for reviewing a habeas petitioner's constitutional claims on the merits is enunciated in 28 U.S.C. § 2254(d). That section provides as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

This Court must determine whether the state court adjudications of the claims that were decided on the merits were either "contrary to" or an "unreasonable application of" "clearly established" federal law as determined by the United States Supreme Court. This Court must also determine whether the state court decision with

respect to each issue was based on an unreasonable determination of the facts in light of the evidence presented in the state proceeding.

1. § 2254(d)(1)

The Supreme Court has issued a series of decisions setting forth the standards for applying § 2254(d)(1).[2] In (Terry) Williams v. Taylor, 529 U.S. 362, 404 (2000), the Supreme Court emphasized that the "contrary to" and "unreasonable application of" clauses should be accorded independent meaning. A state-court decision may be found to violate the "contrary to" clause under two circumstances:

> A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. . . . A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent. Accordingly, in either of these two scenarios, a federal court will be unconstrained by § 2254(d)(1) because the state-court decision falls within that provision's "contrary to" clause.

Id. at 405-06 (citations omitted); see also Price v. Vincent, 538 U.S. 634, 640 (2003); Lockyer v. Andrade, 538 U.S. 63, 73 (2003); Bell v. Cone, 535 U.S. 685, 694 (2002).[3] The Supreme Court has

[2] By contrast, there is a dearth of caselaw concerning the standards for applying § 2254(d)(2).

[3] The Supreme Court has emphasized that this standard "does not require citation of our cases—indeed, it does not even require awareness of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam) (emphasis in original).

emphasized the narrow scope of the "contrary to" clause, explaining that "a run-of-the-mill state-court decision applying the correct legal rule from our cases to the facts of a prisoner's case would not fit comfortably within § 2254(d)(1)'s 'contrary to' clause." Williams, 529 U.S. at 406; see also id. at 407 ("If a federal habeas court can, under the 'contrary to' clause, issue the writ whenever it concludes that the state court's application of clearly established federal law was incorrect, the 'unreasonable application' test becomes a nullity.").

A federal court may grant the writ under the "unreasonable application" clause "if the state court correctly identifies the governing legal principle from [the Supreme Court's] decisions but unreasonably applies it to the facts of the particular case." Cone, 535 U.S. at 694; see also Andrade, 538 U.S. at 75; Williams, 529 U.S. at 409.[4] "[A]n unreasonable application of federal law is different from an incorrect application of federal law." Williams, 529 U.S. at 410.[5] "[A] federal habeas court making the

[4] Although the Supreme Court in Williams recognized, in dicta, the possibility that a state-court decision could be found to violate the "unreasonable application" clause when "the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply," 529 U.S. at 407, the Supreme Court expressed a concern that "the classification does have some problems of precision," id. at 408. The Williams Court concluded that it was not necessary "to decide how such 'extension of legal principle' cases should be treated under § 2254(d)(1)," id. at 408-09, and, to date, the Supreme Court has not had occasion to revisit the issue. See Williams v. Coyle, 260 F.3d 684, 699-700 (6th Cir. 2001), cert. denied, 536 U.S. 947 (2002).

[5] See also Andrade, 538 U.S. at 75 (lower court erred by equating "objectively unreasonable" with "clear error"; "These two standards, however, are not the same. The gloss of clear error fails to give proper deference to

'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." Id. at 409.[6]

Moreover, § 2254(d)(1) refers to "clearly established" federal law, "as determined by the Supreme Court of the United States." This provision "expressly limits the source of law to cases decided by the United States Supreme Court." Harris v. Stovall, 212 F.3d 940, 944 (6th Cir. 2000). As the Sixth Circuit explained:

> This provision marks a significant change from the previous language by referring only to law determined by the Supreme Court. A district court or court of appeals no longer can look to lower federal court decisions in deciding whether the state decision is contrary to, or an unreasonable application of, clearly established federal law.

Herbert v. Billy, 160 F.3d 1131, 1135 (6th Cir. 1999)(citing 17A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4261.1 (2d ed. Supp. 1998)); see also Harris, 212 F.3d at 944 ("It

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state courts by conflating error (even clear error) with unreasonableness."); Woodford v. Visciotti, 537 U.S. 19, 25 (2002) (per curiam) (holding that the lower court "did not observe this distinction [between an incorrect and an unreasonable application of federal law], but ultimately substituted its own judgment for that of the state court, in contravention of 28 U.S.C. § 2254(d)."); Cone, 535 U.S. at 698-99 ("For [a habeas petitioner] to succeed . . . , he must do more than show that he would have satisfied Strickland's test if his claim were being analyzed in the first instance, because under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied Strickland incorrectly."); Williams, 529 U.S. at 411 ("Under § 2254(d)(1)'s 'unreasonable application' clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.").

[6] See also Brown v. Payton, 125 S. Ct. 1432, 1442 (2005) ("Even were we to assume the '"relevant state-court decision applied clearly established federal law erroneously or incorrectly,"' . . . there is no basis for further concluding that the application of our precedents was 'objectively unreasonable.'") (citations omitted).

was error for the district court to rely on authority other than that of the Supreme Court of the United States in its analysis under § 2254(d).”). Finally, in determining whether a rule is “clearly established,” a habeas court is entitled to rely on “the holdings, as opposed to the dicta, of [the Supreme] Court’s decisions as of the time of the relevant state-court decision.” Williams, 529 U.S. at 412.

2. § 2254(d)(2)

There is almost no case law about the standards for applying § 2254(d)(2), which permits federal courts to grant writs of habeas corpus where the state court’s adjudication of a petitioner’s claim “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.” In a decision applying this standard, the Supreme Court observed that § 2254(d)(2) must be read in conjunction with 28 U.S.C. § 2254(e)(1), which provides that a state court’s factual determinations are presumed to be correct unless rebutted by clear and convincing evidence. Miller-El v. Dretke, 125 S. Ct. 2317, 2325 (2005).[7] It appears that the Supreme Court has, in effect, incorporated the standards applicable to the “unreasonable application” prong of § 2254(d)(1). Rice v. Collins, 126 S. Ct. 969, 976 (2006)(“Reasonable minds reviewing the record

[7] But cf. Rice v. Collins, 126 S. Ct. 969, 974 (2006) (recognizing that it is unsettled whether there are some factual disputes where § 2254(e)(1) is inapplicable).

might disagree about the prosecutor's credibility, but on habeas review that does not suffice to supersede the trial court's credibility determination."). That is consistent with the approach taken by the Sixth Circuit, which stated, in an unpublished decision, that

> a federal habeas court may not grant habeas relief under § 2254(d)(2) simply because the court disagrees with a state trial court's factual determination. Such relief may only be granted if the state court's factual determination was "objectively unreasonable" in light of the evidence presented in the state court proceedings. Moreover . . . , the state court's factual determinations are entitled to a presumption of correctness, which is rebuttable only by clear and convincing evidence.

Young v. Hofbauer, 52 Fed. Appx. 234, 236 (6th Cir. Dec. 2, 2002) (citing 28 U.S.C. § 2254(e)(1));[8] see also Stanley v. Lazaroff, 01-4340, 2003 WL 22290187, at *9 (6th Cir. Oct. 3, 2003); Jackson v. Holland, No. 01-5720, 2003 WL 22000285, at *7 (6th Cir. Aug. 21, 2003) ("Though the Supreme Court has not yet interpreted the 'unreasonable determination' clause of § 2254(d)(2), based upon the reasoning in Williams, it appears that a court may grant the writ if the state court's decision is based on an objectively unreasonable determination of the facts in light of the evidence presented during the state court proceeding.")(citing Torres v. Prunty, 223 F.3d 1103, 1107-08 (9th Cir. 2000)).

IV. ANALYSIS OF PETITIONER'S CLAIMS

[8] See also Sumner v. Mata, 449 U.S. 539, 546-47 (1981) (applying presumption of correctness to factual determinations of state appellate courts).

A. Failure to Suppress Petitioner's Statement (Claim 1)

Petitioner claims that the trial court abused its discretion in failing to suppress his confession because, allegedly, he "was not able to voluntarily and intelligently waive his *Miranda* rights." Specifically, Petitioner claims that he was illiterate at the time he signed the waiver and statement and that he therefore relied upon the interrogating officers to read the statement to him, and that they did not read any statement to him in which he admitted any culpability for the offense.

In addressing this claim on direct review, the Tennessee Court of Criminal Appeals summarized the evidence as follows:

> At the hearing on the motion to suppress, Lieutenant Douglas M. Swauncy of the Memphis Police Department testified that he assisted Sergeant D.E. Woods in the January 24, 1998, interrogation of the defendant. Lt. Swauncy recalled that the defendant was informed of his *Miranda* rights before any questions were submitted. He testified that the defendant read aloud from the *Miranda* form and initialed each right. He stated that the defendant acknowledged that he understood his rights, expressed a desire to make a statement, and never asked for an attorney. Lt. Swauncy maintained that he neither threatened the defendant nor promised anything in exchange for his statement. On cross-examination, Lt. Swauncy testified that the entire interrogation lasted approximately two-and-one-half hours, that there were two to three breaks in that time, that both he and Sergeant Woods were out of uniform, and that neither was carrying a gun. He acknowledged that the defendant at one point during the interrogation indicated that he was tired and sleepy.
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> Lieutenant Sammie Howell Ballard testified that he assisted Lt. Swauncy and Sgt. Woods by reading aloud the defendant's statement, including his *Miranda* rights. Lt. Ballard stated that when a suspect is brought into custody who is unable to read or cannot read very well,

> the policy is for two officers to take the statement and a third officer to read the statement back to the suspect before asking for a signature. Lt. Ballard stated that he read the confession aloud and that he witnessed the defendant sign the document.
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> The defendant, who testified at the suppression hearing, claimed that he asked Lt. Swauncy for a lawyer several times, but was told he could not use the telephone. He contended that he was not advised of his rights, that he did not know what he was signing or initialing, and that he was nervous throughout the ordeal. On cross-examination, the defendant admitted he could read "a little" and was able to graduate from high school, obtain a driver's license, and find employment at the Memphis airport. While he claimed that at one point the police threatened to "hide" him away from his family and friends, he conceded that he was never threatened.

Upshaw, 2001 WL 29456 at *2-*3. The trial court denied Petitioner's motion to suppress the statement, concluding that, though Petitioner may not have been able to read or write very well, he sufficiently comprehended his *Miranda* rights and freely waived them prior to making the statement. On appeal, the Tennessee Court of Criminal Appeals upheld the trial court's admission of the statement, holding that the evidence adequately supported the trial court's conclusion that defendant's waiver was voluntary. Id. at *3-*4. The appellate court also noted that "illiteracy or difficulties in comprehension and understanding would not, in and of themselves, render the defendant's statement involuntary." Id. at *4. The Court of Criminal Appeals further found that Petitioner's claim that he thought he was signing a document which contained only innocent facts was not supported by the record. Id. Finally, the Court rejected Petitioner's claim

that "extreme stressors" to which he had allegedly been subjected prior to and during the interrogation rendered the statement involuntary. Id.

Petitioner repeats all of the factual allegations addressed and rejected by the state courts in his habeas petition. Petitioner focuses his challenge on the factual findings of the state courts in concluding that his statement was voluntarily given.

"[C]laims regarding *Miranda* waivers must demonstrate not only that the confession was [not] voluntary but also that the confession was [not] knowing and intelligent. To determine whether the confession was knowing and intelligent, we apply a totality of the circumstances test to ascertain whether [the petitioner] understood his right to remain silent and to await counsel. The inquiry is not whether 'a criminal suspect know[s] and understand[s] every possible consequence of a waiver of the Fifth Amendment privilege.'" Clark v. Mitchell, 425 F.3d 270, 283 (6th Cir. 2005)(quoting Colorado v. Spring, 479 U.S. 564, 573 (1987)). Furthermore, the mere fact of Petitioner's purported diminished literacy is not, alone, sufficient to invalidate a waiver of his *Miranda* rights. Clark, 425 F.3d at 283-84 (finding that persons with mental retardation and below average I.Q. may validly waive *Miranda* rights).

In this case, the totality of the circumstances demonstrates

that Petitioner waived his *Miranda* rights voluntarily, knowingly, and intelligently. Both the trial court and Court of Criminal Appeals determined that Petitioner was sufficiently aware of his *Miranda* rights and voluntarily waived those rights prior to entering his plea. Specifically, the trial and appellate courts credited the credibility of the interrogating officers above that of Petitioner regarding whether Petitioner was read the portion of his statement containing his *Miranda* rights. Even Petitioner testified that the officers read every line of the statement aloud before he signed it. Upshaw, 2001 WL 29456 at *4. The state courts also determined that the only testimony at the suppression hearing regarding the "extreme stressors" inflicted on Petitioner, that he was tired and sleepy during part of the interrogation, was insufficient to render the statement involuntary. These findings are entitled to a presumption of correctness that may be rebutted only be the presentation of clear and convincing evidence to the contrary. Benge v. Johnson, 474 F.3d 236, 241 (6th Cir. 2007). Petitioner has clearly failed to rebut the state courts' findings with clear and convincing evidence. Under the totality of the circumstances, the state courts' finding that Petitioner's waiver was voluntary, knowing, and intelligent was not "'objectively unreasonable' in light of the evidence presented in the state court proceedings." Young, 52 Fed. Appx. at 236; Clark, 425 F.3d at 283-84. Accordingly, Petitioner's claim challenging the trial court's

failure to suppress his statement is DENIED.

B. Failure to Suppress Photographs of the Victim (Claim 2)

Petitioner claims that the trial court abused its discretion in admitting into evidence "four photographs, which depict the deceased victim and the interior of his car at various angles," because the probative value of the photographs was far outweighed by their prejudicial effect on the jury. Upshaw, 2001 WL 29456 at *4. The Tennessee Court of Criminal Appeals determined that two of the photographs, " a closeup of the victim's foot and the vehicle's floor panel and a closeup of shattered glass on the driver's side seat," were not prejudicial to Petitioner and were probative in rebutting Petitioner's claim of self defense because they demonstrated that no weapon was found in the car. Id. at *5. The other two photographs, which depicted the victim's body from separate angles, were determined to be more probative than prejudicial because "each photo gave the jury a better understanding of what occurred on the night in question . . . [in that] [t]heir content helps to clarify certain particulars of the crime." Id. at *5-*6. The Court of Criminal Appeals was careful to note that the pictures, though perhaps somewhat prejudicial, were not overly so because they depicted very little blood given the nature of the crime and their probative value.

In simply reproducing his state-court brief on this issue, Petitioner has failed to articulate a federal constitutional claim

concerning the state courts' evidentiary rulings because his brief to the state courts is based on state evidentiary law. Accordingly, this claim is likely defaulted. See Duncan, 513 U.S. at 366 ("If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court."). Furthermore, the Court notes that to the extent that the claim is a challenge of the general correctness of the state court's conclusion under the principles of Tennessee's law of evidence, this Court lacks jurisdiction over the claim in habeas corpus. Frazier v. Huffman, 343 F.3d 780, 789 (6th Cir. 2003).

Putting aside these substantial procedural hurdles, this claim nonetheless lacks merit. "[A] violation of a state's evidentiary rule warrants habeas corpus relief only when such violation results in the denial of fundamental fairness, and concomitantly, a violation of due process." Brown v. O'Dea, 227 F.3d 642, 645 (6th Cir. 2000). In Frazier, the Sixth Circuit affirmed the denial of habeas corpus relief on a claim challenging an Ohio trial court's admission of certain photographs of a murder victim. The photographs were admitted at trial to illustrate, in part, "the nature of the encounter that immediately preceded" the victim's death. 343 F.3d at 789. This is essentially the basis cited by the Court of Criminal Appeals for the admission of the subject

photographs in this case. The appellate court determined that the pictures were probative of Petitioner's theory of self-defense, that the victim was shot through the driver's side glass window, and the type of gunshot wound suffered by the victim. Upshaw, 2001 WL 29456 at *5-*6. This finding by the Court of Criminal Appeals is not an objectively unreasonable determination of the facts in light of the evidence produced at trial. Notably, the Sixth Circuit has affirmed, on habeas corpus review, the admission of far more gruesome, and hence more prejudicial, photographs of a murder victim than those at issue in this case. See Biros v. Bagley, 422 F.3d 379, 391 (6th Cir. 2005)(concluding that state court decision affirming the admission of "three photographs - depicting [the victim's] severed head, her severed head held near her torso and severed breast, and her torso with the severed head and severed breast replaced on torso," was not unreasonable application of Supreme Court precedent because the photographs refuted the petitioner's account of the victim's death). Accordingly, the Court concludes that the Tennessee Court of Criminal Appeals' decision affirming the trial court's admission of the four subject photographs was not contrary to or an unreasonable application of Supreme Court precedent. Petitioner's claim challenging the admission of the photographs is DENIED.

C. Error in Denying Petitioner's Motion for Judgment of Acquittal (Claim 3)

Petitioner contends that the trial court erred in denying his

motion for acquittal at the close of the state's proof because various witnesses' testimonies were allegedly inconsistent and the evidence was not sufficient to sustain his conviction. It does not appear that this claim was preserved for appellate review in the state courts and, hence, has been defaulted for purposes of federal habeas review. While one of the four issues preserved for appellate review by Petitioner concerned the alleged general insufficiency of the evidence, none involved an assertion of error in the trial court's denial of Petitioner's motion for judgment of acquittal. See Upshaw, 2001 WL 29456 at *1. Moreover, in Petitioner's brief to the Tennessee Court of Criminal Appeals on this claim, he articulates no federal constitutional claim concerning the denial of his motion for acquittal. Thus, because Petitioner has not presented this claim to the state courts with "reference to a specific federal constitutional guarantee," Gray, 518 U.S. at 162-63, and, further, does not appear to have even preserved the claim for review on direct appeal, the claim is deemed unexhausted for federal habeas purposes and is procedurally defaulted. Accordingly, Petitioner's claim challenging the trial court's denial of his motion for judgment of acquittal is DISMISSED.

D. Challenge to the Trial Court's Ruling on the Sufficiency of the Evidence (Claim 4)

Petitioner claims that the trial court's finding that the evidence was sufficient to support his conviction for second degree

murder was erroneous. Petitioner's brief couches this claim within an allegation of trial court error in denying Petitioner's motion for a new trial. Once again, Petitioner's brief to the state court fails to articulate a federal constitutional violation regarding the trial court's findings on the sufficiency of the evidence, and, hence, this claim would appear to be procedurally defaulted on habeas review. Gray, 518 U.S. at 162-63.

Notwithstanding the lack of a federal constitutional argument in the brief, the Court of Criminal Appeals correctly set forth the federal constitutional test for evaluating the sufficiency of the evidence after a jury verdict of guilt:

> This court does not reweigh or reevaluate the evidence. The jury's verdict, therefore, will only be disturbed if, after a consideration of the evidence in the light of most favorable to the state, a rational trier of fact could not have found the essential elements of the crime beyond a reasonable doubt.

Upshaw, 2001 WL 29456 at *6 (citing Jackson v. Virginia, 443 U.S. 307 (1979)). In its analysis, the Court of Criminal Appeals determined that Petitioner's confession "established all of the elements of the offense," and that other evidence offered by the state sufficiently corroborated the statement. Specifically, the Court noted that portions of Petitioner's statement were corroborated by the testimonies of Mr. Merritt, one of the companions in the car with Petitioner, and Ms. Corum, the passenger in the car with the victim. Id. at *7. Without finding any express inconsistency between the testimonies of Merritt and Corum,

as asserted by Petitioner, the Court of Criminal Appeals noted that the evidence offered to corroborate Petitioner's confession need not be, in and of itself, sufficient to support the conviction. Id. (citing Opper v. United States, 348 U.S. 84 (1954)). This aspect of the state court's decision was not contrary to or an unreasonable application of Supreme Court precedent. See Opper, 348 U.S. at 89-91; United States v. Pennell, 737 F.2d 521, 536-38 (6th Cir. 1984)(applying Opper). The Court of Criminal Appeals' finding that Petitioner's confession established the essential elements of the crime and was sufficiently corroborated by independent evidence is not an "objectively unreasonable determination of the facts in light of the evidence presented" at trial. Accordingly, Petitioner's claim that the evidence is insufficient to support his conviction is DENIED.

E. Failure to Instruct the Jury on Voluntary Manslaughter and Criminally Negligent Homicide (Claim 5)

Petitioner claims that the trial court's failure to instruct the jury on the purportedly lesser included offenses of voluntary manslaughter and criminally negligent homicide affected the outcome of his trial and warrants reversal of his conviction. Once again, Petitioner's brief on the issue is limited to a discussion of state statutory and case law. Petitioner, therefore, has not presented the Court with a discernible federal constitutional argument in support of this claim. At the conclusion of its argument on this issue, the brief cites to Beck v. Alabama, 447 U.S. 625, 633-34

(1980), for the proposition that "the proper instruction of lesser included offenses is necessary to give full effect to the protections embodied in the criminal standard of proof." However, Beck is inapposite because the Supreme Court's holding is concerned only with capital cases. Beck establishes that the jury in a death penalty case must be given the option of convicting on lesser-included noncapital offenses in addition to the death-eligible offense. Id. at 637-38. In Beck, the Supreme Court remarked that it has "never held that a defendant is entitled to a lesser included offense instruction as a matter of due process." Id. at 637. Thus, the Sixth Circuit has determined that the rule of Beck implements the Eighth Amendment and that it is "not required to extend Beck to noncapital cases." Bagby v. Sowders, 894 F.2d 792, 797 (6th Cir. 1990). Rather, in a noncapital case, the failure to give a lesser included offense instruction is cognizable in habeas corpus review only if it amounts to "a fundamental defect as inherently results in a miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure." Id.; see also Samu v. Elo, 14 Fed.Appx. 477, 479 (6th Cir. 2001)("Only if the failure to instruct on lesser included offenses results in a miscarriage of justice or a fundamental defect in due process, will this type of error merit habeas relief."); Williams v. Hofbauer, 3 Fed.Appx. 456, 458 (6th Cir. 2001)("A claim for failure to instruct in a noncapital case is reviewable in a habeas corpus

action only if the failure results in a miscarriage of justice or constitutes an omission inconsistent with the rudimentary demands of fair procedure.").

In this case, Petitioner has not demonstrated that the failure to instruct the jury on voluntary manslaughter and criminally negligent homicide resulted in a fundamental defect amounting to a miscarriage of justice or an omission inconsistent with the demands of fair procedure. Petitioner's brief, excepting the inapposite reference to Beck, focuses exclusively on whether he was entitled to the instruction as a matter of state statutory law and precedent. The Court of Criminal Appeals surveyed its case law interpreting Tenn. Code Ann. § 40-18-110(a) and ultimately determined that Petitioner was not entitled to an instruction on criminally negligent homicide and that any error in failing to charge the jury on voluntary manslaughter "did not affect the verdict to the prejudice of the defendant," and was harmless in any event. Upshaw, 2001 WL 29456 at *9-*10. The Court of Criminal Appeals did not address any purported federal constitutional right to have the alleged lesser included offenses charged in this case. Because Petitioner has articulated no federal constitutional claim related to the trial court's failure to offer instructions on purportedly lesser included offenses and the trial court's failure to do so did not effect a miscarriage of justice or otherwise evince a fundamental defect in due process, this claim is DENIED.

F. Excessive Sentence in Light of Failure to Weigh Purportedly Applicable Mitigating Factors (Claim 6)

Petitioner claims that the trial court sentenced him excessively because it failed to consider the purportedly applicable mitigating factors of his relative youth, "sparse criminal history," employment, the fact that he is a high school graduate who was supporting a small family, and that he acted under extreme provocation. The Court of Criminal Appeals rejected Petitioner's arguments, concluding that the "mitigating factors alleged by defendant are [not] applicable" because the evidence adduced at trial negated Petitioner's argument as to provocation and the trial court was not required to give any weight to the other factors cited by Petitioner. Upshaw, 2001 WL 29456 at *11.

In his brief, Petitioner does not present any federal constitutional argument in support of his contention that he was sentenced excessively or that the state courts were required to give effect to the mitigating factors he offered at sentencing. Thus, this claim appears to be procedurally defaulted. Moreover, the claim is wholly lacking in merit. "The Eighth Amendment does not require consideration of mitigating factors at sentencing in non-capital cases." Engle v. United States, 26 Fed.Appx. 394, 397 (6th Cir. 2001). Similarly, due process does not require the consideration of mitigating factors in noncapital proceedings. Hawkins v. Riveland, 1993 WL 148090 at *2 (9th Cir. 1993)(citing United States v. LaFleur, 971 F.2d 200, 211-12 (9th Cir. 1992)).

Thus, even if Petitioner's claim alleging an excessive sentence were not procedurally defaulted, the Court of Criminal Appeals' decision affirming his sentence is not contrary to or an unreasonable application of Supreme Court precedent. Accordingly, this claims is DENIED.

G. Ineffective Assistance of Counsel

Petitioner claims that trial counsel rendered ineffective assistance due to her failure to 1) properly advise Petitioner regarding release eligibility during plea negotiations; 2) properly cross-examine witnesses; and 3) provide adequate legal counsel in that she encouraged him to go to trial with no witnesses rather than plead guilty. Following a discussion of the standards governing ineffectiveness claims in habeas corpus cases, the Court will examine each of Petitioner's allegations in turn.

A claim that ineffective assistance of counsel has deprived a defendant of his Sixth Amendment right to counsel is controlled by the standards enunciated in Strickland v. Washington, 466 U.S. 668, 687 (1984):

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the

> conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

In order to demonstrate deficient performance by counsel, a defendant must demonstrate that "counsel's representation fell below an objective standard of reasonableness." Id. at 688.

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Id. at 689 (citation omitted); see also Coe v. Bell, 161 F.3d 320, 342 (6th Cir. 1999)("The specifics of what Coe claims an effective lawyer would have done for him are too voluminous to detail here. They also largely miss the point: just as (or more) important as what the lawyer missed is what he did not miss. That is, we focus on the adequacy or inadequacy of counsel's actual performance, not counsel's (hindsight) potential for improvement."); Adams v. Jago, 703 F.2d 978, 981 (6th Cir. 1983)("a defendant 'has not been denied effective assistance by erroneous tactical decisions if, at the time, the decisions would have seemed reasonable to the competent

trial attorney'")(citations omitted).

A prisoner attacking his conviction bears the burden of establishing that he suffered some prejudice from his attorney's ineffectiveness. Lewis v. Alexander, 11 F.3d 1349, 1352 (6th Cir. 1993); Isabel v. United States, 980 F.2d 60, 64 (1st Cir. 1992). "[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. at 697.

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." Id. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. Additionally, however, in analyzing prejudice,

> the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of the challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated.

Lockhart v. Fretwell, 506 U.S. 364, 368 (1993)(citing United States v. Cronic, 466 U.S. 648, 658 (1984)); see also Strickland, 466 U.S. at 686 ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be

relied on as having produced a just result."). "Thus analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." Lockhart, 506 U.S. at 369.

1. Failure to Properly Advise Petitioner Concerning Release Eligibility During Plea Negotiations

Petitioner raised this claim during post-conviction review. The Court of Criminal Appeals held as follows:

> At the post-conviction hearing, trial counsel explained that she communicated the State's offer of fifteen years in exchange for a guilty plea to second degree murder to the [Petitioner]. [Petitioner] agreed to the offer, and trial counsel prepared the plea agreement form, which reflected service of the sentence at 30% as a Range I offender. Trial counsel was then reminded by the prosecutor that second degree murder was classified as a violent crime which required service at 100%. The [Petitioner] was advised of the mistake, and as a result, rejected the State's plea offer and requested that his case proceed to trial. Because we find that the mistake was corrected, no prejudice is shown.

Upshaw v. State, 2004 WL 2821226 at *2.[9] Because Petitioner's memorandum is simply a photocopy of the brief submitted to the Tennessee Court of Criminal Appeals on this issue, he has not demonstrated how the Court of Criminal Appeals' decision is incorrect under the standards of review mandated by § 2254(d).

[9] The Court notes that Petitioner did not seek permission from the Tennessee Supreme Court to appeal the Court of Criminal Appeals' judgment affirming the denial of his post-conviction relief application. Petitioner's claims are, nevertheless, exhausted for purposes of habeas review. See Adams v. Holland, 330 F.3d 398, 401-02 (6th Cir. 2003) (holding that Tenn. Sup. Ct. R. 39 establishes that a request for discretionary appeal to the Supreme Court from the judgment of the Court of Criminal Appeals is not required to exhaust claims for federal habeas purposes).

Indeed, Petitioner cannot make such a showing in this case, because, as held by the Court of Criminal Appeals, counsel's error was corrected and did not prejudice Petitioner. In short, Petitioner was given an offer that was too good to be true, and when counsel's error was corrected Petitioner chose not to accept the actual plea agreement offered by the state. The prejudice suffered by Petitioner, if any, amounts to nothing more than frustration with his inability to obtain a lawfully unenforceable plea agreement that was briefly promised by counsel. While Petitioner's disappointment with that set of facts is understandable, there is no constitutionally recognized prejudice as a result. The Court of Criminal Appeals' judgment denying this claim is, therefore, not contrary to or an unreasonable application of Supreme Court precedent nor an unreasonably objective determination of the facts in light of the evidence presented at the post-conviction hearing. Accordingly, Petitioner's allegation of ineffectiveness related to counsel's advice on release eligibility is DENIED.

2. Failure to Properly Cross-Examine Witnesses

Petitioner claims trial counsel failed to properly cross-examine some witnesses and wholly failed to even attempt a cross-examination of other crucial witnesses. The Court of Criminal Appeals rejected this claim, stating as follows:

> The [Petitioner] contends that trial counsel failed to properly cross-examine Mario Merritt, Karen Corum, and

> "two other witnesses" who are not identified. He asserts that trial counsel should have cross-examined "Mario Merritt [who] testified that Appellant didn't shoot the victim." The proof at trial, however, clearly established that Merritt identified the [Petitioner] as the shooter. With regard to Corum, the proof at trial established that Corum was unable to identify the [Petitioner] as the person who shot the victim. Thus, it is unclear what further benefit could have been obtained from cross-examination of this witness, nor does the [Petitioner] provide any suggestion in his brief. The post-conviction court found that the extent or absence of cross-examination of the various State's witnesses by trial counsel was governed by chosen trial strategy. The facts do not preponderate against this finding.

Upshaw, 2004 WL 2821226 at *2. Left with nothing but the brief already reviewed by the Court of Criminal Appeals, this Court is cabined with the same deficiencies cited by that court. Despite the numerous allegations of sub-standard and ineffectual advocacy lodged by Petitioner, he has not set forth one sustainable allegation of prejudice. He has not shown how counsel could have affected the outcome of his trial with a more vigorous cross-examination of the witnesses discussed in the brief. He therefore has failed to rebut the state courts' judgments that the extent and absence of trial counsel's cross-examination was a matter of trial strategy, and he has not demonstrated constitutionally ineffective assistance of counsel. The Court of Criminal Appeals' decision denying this allegation of ineffectiveness is not contrary to or an unreasonable application of Supreme Court precedent, and it is not an unreasonable determination of the facts in light of the evidence presented at the post-conviction hearing. Accordingly, this claim

of ineffectiveness is DENIED.

3. Failure to Provide Adequate Legal Counsel by Encouraging Petitioner to Proceed to Trial Rather than Plead Guilty

The Court of Criminal Appeals addressed this claim, holding as follows:

> Finally, the [Petitioner] argues that trial counsel "failed to provide adequate legal counsel by encouraging the [Petitioner] to go to trial with no witnesses despite the State's proof and instead of pleading guilty to the negotiated plea offer." First, we are constrained to note that nowhere in the record does the proof indicate that trial counsel "encouraged [Petitioner] to go to trial." On the contrary, the record is clear that the [Petitioner], at the trial level, advised the trial court that it was his desire to "proceed to go to trial." Moreover, at the post-conviction hearing, the [Petitioner] testified that he chose to go to trial because the State "didn't have enough evidence against [him]." For these reasons, we find [Petitioner's] allegation of deficient performance without merit.

Upshaw, 2004 WL 2821226 at * 3. Having thus failed to show deficient performance, Petitioner cannot demonstrate ineffective assistance of counsel. The Court of Criminal Appeals' decision denying this allegation of ineffective assistance is not contrary to or an unreasonable application of Supreme Court precedent and, further, is not an objectively unreasonable determination of the facts in light of the evidence presented at the post-conviction hearing. Accordingly, this allegation of ineffective assistance of counsel is DENIED.

Because it "plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to

relief in the district court," summary dismissal prior to service on the Respondent is proper. Rule 4, Section 2254 Rules. The Petition is DISMISSED.

V. APPELLATE ISSUES

The Court must also determine whether to issue a certificate of appealability ("COA"). Twenty-eight U.S.C. § 2253(a) requires a district court to evaluate the appealability of its decision denying a § 2254 habeas petition and to issue a certificate of appealability ("COA") only if "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); see also Fed. R. App. P. 22(b); Lyons v. Ohio Adult Parole Auth., 105 F.3d 1063, 1073 (6th Cir. 1997) (district judges may issue certificates of appealability under the AEDPA). No § 2254 petitioner may appeal without this certificate.

In Slack v. McDaniel, 529 U.S. 473, 483-84 (2000), the Supreme Court stated that § 2253 is a codification of the standard announced in Barefoot v. Estelle, 463 U.S. 880, 893 (1983), which requires a showing 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.'" Slack, 529 U.S. at 484 (quoting Barefoot, 463 U.S. at 893 & n.4).

The Supreme Court recently cautioned against undue limitations on the issuance of certificates of appealability:

> [O]ur opinion in Slack held that a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application of a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in Slack would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner "'has already failed in that endeavor.'"

Miller-El v. Cockrell, 537 U.S. 322, 337 (2003) (quoting Barefoot, 463 U.S. at 893). Thus,

> [a] prisoner seeking a COA must prove "'something more than the absence of frivolity'" or the existence of mere "good faith" on his or her part. . . . We do not require petitioners to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.

Id. at 338 (quoting Barefoot, 463 U.S. at 893); see also id. at 342 (cautioning courts against conflating their analysis of the merits with the decision of whether to issue a COA; "The question is the debatability of the underlying constitutional claim, not the resolution of that debate.").[10]

In this case, Petitioner's claims are clearly without merit for the reasons previously stated. Because he cannot present a

[10] By the same token, the Supreme Court also emphasized that "[o]ur holding should not be misconstrued as directing that a COA always must issue." Id. at 337. Instead, the COA requirement implements a system of "differential treatment of those appeals deserving of attention from those that plainly do not." Id.

question of some substance about which reasonable jurists could differ, the Court DENIES a certificate of appealability.

The Sixth Circuit has held that the Prison Litigation Reform Act of 1995, 28 U.S.C. § 1915(a)-(b), does not apply to appeals of orders denying § 2255 motions. Kincade v. Sparkman, 117 F.3d 949, 951 (6th Cir. 1997). Rather, to appeal in forma pauperis in a § 2254 case, and thereby avoid the appellate filing fee required by 28 U.S.C. §§ 1913 and 1917, Petitioner must seek permission from the district court under Federal Rule of Appellate Procedure 24(a). Kincade, 117 F.3d at 952.[11] Rule 24(a) provides that a party seeking pauper status on appeal must first file a motion in the district court, along with a supporting affidavit. Fed. R. App. P. 24(a)(1). However, Rule 24(a) also provides that if the district court certifies that an appeal would not be taken in good faith, or otherwise denies leave to appeal in forma pauperis, Petitioner 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 certificate of appealability, the Court determines that any appeal would not be taken in good faith. It is therefore CERTIFIED, pursuant to Fed. R. App. P. 24(a), that any appeal in this matter is not taken in good faith, and leave to appeal in forma pauperis

[11] Effective April 9, 2006, the appellate filing fee increased from $255 to $455.

is DENIED. Accordingly, if Petitioner files a notice of appeal, he must also pay the full $455 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.

IT IS SO ORDERED this 30th day of April, 2007.

/s/ Jon P. McCalla
JON PHIPPS MCCALLA
UNITED STATES DISTRICT JUDGE