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

GARRY HAWKINS a/k/a
GARY HAWKINS,

Petitioner,

v. No. 2:17-cv-02715-MSN-tmp

TAMMY FORD,

Respondent.

ORDER OF DISMISSAL;
ORDER DENYING CERTIFICATE OF APPEALABILITY;
ORDER CERTIFYING APPEAL NOT TAKEN IN GOOD FAITH;
AND
ORDER DENYING LEAVE TO PROCEED *IN FORMA PAUPERIS* ON APPEAL

Before the Court is the Petition under 28 U.S.C. § 2254 for a writ of habeas corpus by a person in state custody filed by Petitioner Garry Hawkins a/k/a Gary Hawkins, Tennessee Department of Correction ("TDOC") register number 375638, who is confined at the Northeast Correctional Complex ("NECX") in Mountain City, Tennessee, (Petition ("Pet."), ECF No. 1), and the Answer filed by Respondent (Answer, ECF No. 10). As discussed more fully below, the issues Petitioner raises in the habeas petition fall into three categories: 1) whether the claim presents a violation of federal law; 2) whether the state court identified and applied the correct federal legal principles; and 3) whether the claim is procedurally defaulted. For the reasons discussed below, the petition is **DISMISSED**.

I. STATE COURT PROCEDURAL HISTORY

On August 10, 2012, a Shelby County Criminal Court jury convicted Petitioner Hawkins of one count of first-degree murder in the perpetration of aggravated child neglect and one count of aggravated child neglect. (Record ("R."), Minutes ("Mins."), ECF No. 9-1 at PageID 64.)

The trial court sentenced Hawkins to life in prison for the murder conviction and twenty-two years in prison for the aggravated child neglect conviction, to be served concurrently. (R., Judgments ("J."), ECF No. 9-1 at PageID 79–80.) Hawkins appealed. (R., Notice of Appeal, ECF No. 9-1 at PageID 85.) The Tennessee Court of Criminal Appeals ("TCCA") affirmed. *State v. Hawkins*, No. W2012-02185-CCA-R3-CD, 2014 WL 1571810 (Tenn. Crim. App. Apr. 17, 2014), *perm. app. denied* (Tenn. Sept. 24, 2014).

On May 21, 2015, Hawkins filed a *pro se* petition in Shelby County Criminal Court pursuant to the Tennessee Post-Conviction Procedure Act, Tenn. Code Ann. §§ 40-30-101 to 122. (R., Pet. for Post-Conviction Relief, ECF No. 9-17 at PageID 1134–48.) On October 16, 2015, appointed counsel filed an amended petition. (R., Am. Pet., ECF No. 9-17 at PageID 1152–61.) The post-conviction court conducted an evidentiary hearing and denied relief in an order entered on March 4, 2016. (R., Order, ECF No. 9-17 at PageID 1167–74.) Hawkins appealed. (R., Notice of Appeal, ECF No. 9-17 at PageID 1175.) The TCCA affirmed. *Hawkins v. State*, No. W2016-00723-CCA-R3-PC, 2017 WL 28229755 (Tenn. Crim. App. June 30, 2017). Petitioner Hawkins did not file an application for permission to appeal to the Tennessee Supreme Court.

II. FEDERAL COURT PROCEDURAL HISTORY

On September 27, 2017, Petitioner Hawkins filed this petition pursuant to 28 U.S.C. § 2254 challenging his state convictions. (Petition ("Pet."), ECF No. 1 at PageID 1–28.) On December 4, 2017, United States District Judge Sheryl H. Lipman directed Respondent to file a response to the petition. (Order, ECF No. 6.) On January 30, 2018, Respondent filed the state court record and an answer to the petition. (Record ("R."), ECF No. 9, Answer, ECF No. 10.) On November 20, 2018, the case was reassigned to the undersigned judge. (Order, ECF No. 15.)

A. Federal Habeas Issues

In the petition, Hawkins raises the following issues[1]:

1. The evidence was insufficient to support his convictions for first-degree murder and aggravated child neglect (Pet., ECF No. 1 at PageID 5);

2. The trial court erred by admitting evidence of Petitioner's prior conviction for child abuse (*Id.* at PageID 7);

3. Petitioner's trial counsel performed deficiently by:

    a. failing to object to the jury instruction on circumstantial evidence (*Id.* at PageID 25–28);

    b. failing to object to the admission of unfairly prejudicial witness testimony (*Id.* at 8, 25–28);

    c. failing to object to the State's improper closing argument (*Id.* at 8, 23); and

    d. committing cumulative errors. (*Id.* at 10).

Issues 1 and 2 were reviewed by the TCCA on direct appeal and are exhausted. (R., Brief ("Br.") of the Appellant, ECF No. 9-11 at PageID 893.) Issues 3b-3d were presented to the TCCA in the post-conviction appeal and are exhausted. (R., Br. of the Appellant, ECF No. 9-21 at PageID 1841.) Issue 3a has never been reviewed by the Tennessee courts and is procedurally defaulted.

III. <u>THE EVIDENCE</u>

On direct appeal, the Tennessee Court of Criminal Appeals ("TCCA") summarized the evidence presented at Hawkins' trial:

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1. Petitioner Hawkins' reply clarifies that he is incorporating by reference the argument and supporting cases from his appellate brief in the direct appeal. (Reply, ECF No. 12 at PageID 1944.)

The victim in this case, S.I., was the 18–month–old daughter of Shamira Ivory, who lived with Defendant at the time of S.I.'s death. Shamira Ivory was pregnant with S.I. when she moved to Memphis from Atlanta in December, 2006. Ms. Ivory testified that while living in Georgia, she gave birth to a son who was removed from her custody at the age of six months due to Ms. Ivory's lack of stability and mental health issues. Ms. Ivory had "two or three" more children removed from her custody at birth. She testified that she moved to Memphis before S.I.'s birth so that the baby would not be taken by authorities. When Ms. Ivory first moved to Memphis, she lived with her mother, Mary Richardson. She then moved in with a cousin for three months. S.I. was born on February 19, 2007, while Ms. Ivory was living with her cousin. Ms. Ivory later lived with a man named Bobby Torrence for a year. She testified that during that time, S.I. was healthy except for an ear infection and that she received regular "well baby" examinations. Ms. Ivory missed an appointment, however, for Ivory to be examined for "low weight gain." Ms. Ivory and Torrence separated, and she moved in with Tyrone McNeil, by whom she became pregnant. Ms. Ivory subsequently left McNeil and was homeless until she moved into a home owned by her adoptive mother, Vera Corley. Ms. Ivory and S.I. lived there with Ms. Corley's son and daughter. Defendant also lived there and slept on the couch. Ms. Corley's son and daughter moved out of the house in early September.

Ms. Ivory and Defendant began a relationship after she moved into the house. Ms. Ivory testified about an incident when she and Defendant were having sex while S.I. was on the bed with them. S.I. touched Defendant and Defendant "said it felt good to him." Ms. Ivory did not tell police about the incident because she was afraid of losing custody of S.I. Ms. Ivory testified about another incident when Defendant kicked Ms. Ivory in the stomach while she was pregnant because he wanted her to get off the couch. On another occasion, Ms. Ivory came home and Defendant "grabbed [her] and smelled [her] private part" because Defendant "thought [Ivory] had been sleeping with Big Homey [Ralphael Harris]."

On September 17, 2008, S.I. was fine when she woke up that morning. Ms. Ivory stayed in the bedroom while Defendant fed S.I. Mexican food. S.I. then went to the bedroom and stayed with Ms. Ivory until 8:00 p.m. When they got up, Ms. Ivory made pancakes and fed S.I. at the dining room table. She testified that S.I. ate well, was playing, and had no bruises on her stomach. At around 9:00 p.m., Ms. Ivory left S.I. with Defendant, while Ms. Ivory went to a store to buy cigarettes. Ms. Ivory's friend, Ralphael "Big Homey" Harris, drove her to the store. She testified that she was gone for approximately 10 to 15 minutes. Ms. Ivory told police that S.I. was "screaming and hollering" when she left to go to the store. She testified that S.I. was "spoiled" and always cried when Ms. Ivory left her.

Ms. Ivory testified that when she returned home from buying cigarettes, she saw S.I. lying on the couch "covered in throw up." Defendant was sitting on

the other couch, and he told her the baby had vomited. Ms. Ivory got a towel to clean S.I. She saw two small bruises on S.I.'s stomach. Ms. Ivory left the house again and walked to Walgreen's to buy Sprite and Pedialyte. She testified that she "was worried but [S.I.] usually throws up anyway. She has a problem with that anyway." Ms. Ivory thought S.I. had a stomachache. When she returned from the store, she tried to give S.I. the Pedialyte, but S.I. would not swallow. S.I.'s eyes were rolling back in her head, and her head was moving back and forth. S.I. was unresponsive when Ms. Ivory splashed water on her face and rubbed ice on her forehead. Ms. Ivory called Ms. Corley, who told her to call 911. Ms. Ivory testified that Defendant also told her to call 911, but Defendant did not seem very concerned. Ms. Ivory called 911, and Defendant left when they heard sirens.

Ralphael Harris testified that he went to the house where Defendant and Ms. Ivory lived, looking for Ms. Ivory's adoptive brother. Defendant answered the door and told him that Ms. Ivory was in the bathroom. Harris stayed on the front porch because he and Defendant were "like water and oil." Harris testified that Defendant was jealous of him. Ms. Ivory offered to buy Harris "loose" cigarettes in exchange for a ride to the store. When Ms. Ivory came to the door, Harris saw S.I. "tagging along at [her] leg." He testified that the child "wasn't as cheerful as she always would be" but that she "looked healthy." Harris drove Ms. Ivory to the store, waited while she made her purchase, and drove her back home. They were gone for approximately 12 minutes.

Paramedics responded to a call made at 11:29 p.m. They found S.I. lying on her back on a couch, and she was unresponsive, had no pulse, and was not breathing. They began resuscitation. S.I. remained unresponsive. Paramedic Patrick McDevitt observed that S.I.'s abdomen was distended and bruised. Ms. Ivory told McDevitt that those "spots" had just come up. Paramedics transported S.I. to the hospital. Dr. James Anderson O'Donnell, II, testified that S.I. arrived at the emergency room "in full cardiopulmonary arrest" and was receiving chest compressions and being ventilated. Dr. O'Donnell administered several doses of epinephrine to try to restart S.I.'s heart, but was unsuccessful. Shortly after midnight, Dr. O'Donnell stopped resuscitation efforts.

Ms. Ivory told investigators that she went to the store and returned home to find S.I. not feeling well. She stated that she then went to Walgreens to buy Sprite and Pedialyte, and that she left S.I. home with Defendant both times. Ms. Ivory gave investigators her receipt from Walgreens. Investigators also interviewed Ralphael Harris, who stated that he picked up Ms. Ivory at her house and drove her to the store to buy cigarettes. Sergeant Joseph Peel reviewed "about four hours worth of video" from the store, but did not see Ms. Ivory or Harris enter the store. Sergeant Peel also reviewed video from Walgreens that confirmed that Ms. Ivory entered the store at 10:07 p.m. and purchased Pedialyte

and Sprite 14 minutes later. The Walgreens store was located a third of a mile from Ms. Ivory's house.

Sergeant William Merritt, of the Memphis Police Department homicide squad, interviewed Defendant on September 18, 2008. Defendant stated that S.I. ate pancakes around 8:00 p.m., and an hour later the child began to vomit. He stated that he told Ms. Ivory to call 911, but Ms. Ivory was afraid of losing custody of S.I. Defendant stated that he, Ms. Ivory, and S.I. were home all day. Sergeant Merritt confronted Defendant about Ms. Ivory's statement that she had left the house twice to go to the store, and Defendant "became pretty agitated, very angry, very argumentative." Defendant told Sergeant Merritt that he was never alone with S.I. because he was falsely accused of breaking a child's leg in 1996 and went to prison for it. Defendant also stated that he did not wait for paramedics to arrive "because the child was not his and was not his problem."

The manager at the McDonald's where Defendant worked testified that Defendant was scheduled to work at 6:00 a.m. on September 18, 2008. Defendant called between 11:00 p.m. and 12:00 a.m. and said that he would not be able to work "because something happened at home." She testified that Defendant sounded "normal" and that he "always had a loud . . . excited type voice."

Lieutenant Donald Crow testified that after detectives took Ms. Ivory's statement, and Ms. Ivory had been released, he answered a phone call from Latasha Frazier, who sounded "frantic," stating that Ms. Ivory was "trying to leave town," that police "needed to stop her," and that Ms. Ivory had admitted to killing S.I. Frazier told Lieutenant Crow that she had seen Ms. Ivory abuse the child and that five other children had been removed from Ms. Ivory's custody in another state. Lieutenant Crow, of the felony response unit, passed the information to the homicide unit. He testified that homicide detectives did not follow up with an interview of Frazier.

Latasha Frazier testified that she knew Ms. Ivory from "the neighborhood," and she never saw Ms. Ivory abuse S.I. She testified that Ms. Ivory moved away from the neighborhood when S.I. turned one year old. She saw Ms. Ivory with S.I. when Ms. Ivory came back to the neighborhood for visits, and S.I. looked normal and healthy.

Ms. Frazier testified that a mutual friend, Kristina Owens, called her around 6:00 a.m. on September 18, and told her that Ms. Ivory was at Ms. Owens' house and the "baby had got killed." Frazier and Owens arranged a three-way call with Ms. Ivory, and Ms. Ivory stated that "she was scared and she was trying to get some money so she can go out of town." Frazier then called the police and reported that Ms. Ivory planned to leave town. Frazier denied telling Lieutenant Crow that she saw Ms. Ivory abuse S.I., but she acknowledged that she told him Ms. Ivory had five other children who were taken from her custody. Frazier also

> denied telling Lieutenant Crow that Ms. Ivory had admitted killing the baby. About an hour after Frazier called, police picked her up, and she directed them to the house where Ms. Ivory was located.
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> Kristina Owens testified that Ms. Ivory came to her house on the morning of September 18 and told her that Defendant killed S.I. Ms. Ivory said that she left S.I. with Defendant while she went to the store, and when she returned S.I. was throwing up.
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> Dr. Karen Elizabeth Chancellor, Chief Medical Examiner for Shelby County, performed an autopsy on the victim. Dr. Chancellor testified that at the time of her death, S.I. weighed 21 pounds and was 21 inches in length. Dr. Chancellor testified that S.I. was "small for her age" and that she was "in the lower fifth percentile" of children her age for weight and height. Dr. Chancellor observed scars and healing scratches on S.I.'s head, arm, and abdomen. Dr. Chancellor observed multiple bruises on S.I.'s abdomen and chest. There were also bruises on both lungs and blood in her abdominal cavity and chest cavity. There were multiple tears of the small intestine. Dr. Chancellor observed discoloration on the left side of S.I.'s forehead. An internal examination revealed that there was an area of hemorrhaging to the deep scalp tissue, causing the discoloration. Dr. Chancellor found bruises on the internal tissue in S.I.'s thighs that were not visible externally on her skin. Dr. Chancellor determined that S.I.'s injuries were caused by blunt force trauma as a result of multiple impacts. Dr. Chancellor opined that S.I. received "at least ten blows to the abdomen and there were separate blows to the chest[, thighs, wrist, and head.]" Dr. Chancellor testified that the bruises on the victim's body appeared to be recent. Dr. Chancellor determined that the manner of death was homicide.

State v. Hawkins, 2014 WL 1571810, at *1–*4.

The TCCA opinion on post-conviction appeal summarized the evidence presented at the post-conviction hearing and the post-conviction trial court's ruling:

> At the March 3, 2016 post-conviction hearing, trial counsel testified that he represented the Petitioner during his trial and on appeal. During the Petitioner's trial, trial counsel remembered that the Petitioner's co-defendant testified about "some inappropriate contact" between the Petitioner and the victim. Specifically, the co-defendant was asked "What did you and [the Petitioner] fight over," and her response was that while she and the Petitioner were having sex, the victim touched the Petitioner on his "balls" and the Petitioner said "it felt good to him." Trial counsel acknowledged that he did not object to this testimony, and he was unaware that the co-defendant would provide this testimony at trial. Trial counsel stated that he had filed a motion in limine to prevent any testimony regarding prior child abuse by the Petitioner, but he was

unaware that the co-defendant would testify about this incident. When asked whether it was a strategic decision not to object to the co-defendant's testimony, trial counsel explained that he believed the co-defendant was not a credible witness and that her testimony was not "bad" for the Petitioner.

He explained that his defense theory was that the co-defendant was lying to the police about the Petitioner's involvement and "made up . . . stories to protect herself" and that she was the person responsible for the victim's death. Trial counsel testified that his plan was to "come back around and cross-examine her on why she didn't tell the police this story." Trial counsel testified that he only had "split second" to decide whether to object and that he made the "choice to see where it went." He clarified that the co-defendant's testimony "was a problem," but he chose to not "draw attention" to her testimony by objecting. Trial counsel believed that he cross-examined the co-defendant about her statement and "attempted to impeach her." Trial counsel stated that he waived any issues with the co-defendant's statement on appeal because he did not object to the statement at trial.

Next, post-conviction counsel read an excerpt of the State's closing argument, which included the following remark: "[The Petitioner] is guilty. There is no question about that, we don't need to argue about that and frankly that is not why we are here." Post-conviction counsel asked trial counsel if it was "some kind of strategy" not to object to the State characterizing the Petitioner as "guilty." Trial counsel testified that, at the time, "it was very difficult . . . to make those contemporaneous objections at the trial level" because an objection would not be "supported at either the trial level, or the Court of Criminal Appeals level." Because he thought an objection would not be successful at trial and that he would not be successful on appeal, he chose not to object to the State's remarks. However, trial counsel stated that he would treat such comments differently today because there is additional case law to allow defense attorneys to object to such comments during closing argument.

On cross-examination, trial counsel reiterated that the co-defendant's testimony regarding the "inappropriate contact" between the victim and the Petitioner was a complete surprise to trial counsel, and he was not expecting her to provide such testimony. Trial counsel explained that he had to "quickly balance" whether there was some way he could use this statement to his advantage during cross-examination or object to the statement and ultimately decided to cross-examine the co-defendant about this testimony. With regards to the State's remark during closing argument that the Petitioner was "guilty," trial counsel stated that this remark was close to being "objectionable" and that it "was discomforting when it was said."

On redirect examination, post-conviction counsel read another portion of the State's closing argument, which included the following remark: "[The

> Petitioner] is the . . . same kind of guy that would say, not my baby, not my problem, the same kind of cold blooded guy that would punch a little girl, that's about this tall and weighs about twenty-one pounds in the abdomen, time and time again." Post-conviction counsel asked if trial counsel would object to such a remark today, and trial counsel's response seemed to imply that this court would "not do anything about the argument," but he did not provide a reason for failing to raise an objection.
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> The Petitioner testified that he had reviewed his petition for post-conviction relief with post-conviction counsel, but the Petitioner stated that he did not want to testify about any of the grounds raised in his petition.
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> The post-conviction court took the matter under advisement, and on March 3, 2016, the court issued a written order denying relief. The post-conviction court concluded that trial counsel made a strategic decision not to object to the co-defendant's testimony regarding the "inappropriate contact" between the Petitioner and the victim, and the State's remarks during closing argument.[2] The post-conviction court also noted that trial counsel was not asked "why" he failed to object to any portion of the closing argument. The court found that "[t]he decisions of a trial attorney as to whether to object to opposing counsel's arguments are often primarily tactical decisions." The post-conviction court determined that the Petitioner failed to established deficient performance or prejudice, and also noted that "since the[se] matters were not properly contested at the time of trial, they would have been deemed 'waived' for purposes of appellate review . . . Counsel pursued his strongest issues in the direct appeal." It is from this order that the Petitioner now timely appeals.

Hawkins v. State, 2017 WL 2829755, at *3–*4.

IV. <u>LEGAL STANDARDS</u>

Federal courts have authority to issue habeas corpus relief for persons in state custody under 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). A federal court may grant habeas relief to a state prisoner "only on the

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2. The Petitioner raised two additional arguments in his petition for post-conviction relief. However, a footnote in the Petitioner's brief states, "[b]ased on the record on appeal, including the testimony elicited during the post-conviction evidentiary hearing, Appellant chooses not to address grounds (3) and (4) in this brief." The post-conviction court addressed all of the Petitioner's issues in its order denying relief; however, this opinion will focus solely on the two issues addressed in the Petitioner's brief.

ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

A. Exhaustion and Procedural Default

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 court to the state courts pursuant to 28 U.S.C. § 2254(b) and (c). *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). The petitioner must "fairly present"[3] each claim to all levels of state court review, up to and including the state's highest court on discretionary review, *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). Tennessee Supreme Court Rule 39 eliminated the need to seek review in the Tennessee Supreme Court to "be deemed to have exhausted all available state remedies." *Adams v. Holland*, 330 F.3d 398, 402 (6th Cir. 2003); *see Smith v. Morgan*, 371 F. App'x 575, 579 (6th Cir. 2010).

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 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 procedural default doctrine ordinarily bars a petitioner from seeking federal habeas review. *Wainwright v. Sykes*, 433 U.S. 72, 81–82 (1977); *see*

3. For a claim to be exhausted, "[i]t 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) (per curiam) (internal citation omitted). Nor is it enough to make a general appeal to a broad constitutional guarantee. *Gray v. Netherland*, 518 U.S. 152, 163 (1996).

Walker v. Martin, 562 U.S. 307, 315 (2011) ("A federal habeas court will not review a claim rejected by a state court if the decision of the state court rests on a state law ground that is independent of the federal question and adequate to support the judgment") (internal quotation marks and citation omitted)).[4] In general, a federal court "may only treat a state court order as enforcing the procedural default rule when it unambiguously relied on that rule." *Peoples v. Lafler*, 734 F.3d 503, 512 (6th Cir. 2013).

If a petitioner's claim has been procedurally defaulted at the state level, the petitioner must show cause to excuse his failure to present the claim and actual prejudice stemming from the constitutional violation or 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 v. Thompson*, 501 U.S. 722, 750 (1991). The latter showing requires a petitioner to 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; *see also House v. Bell*, 547 U.S. 518, 536–39 (2006) (restating the ways to overcome procedural default and further explaining the actual innocence exception).

B. Merits Review

Pursuant to Section 2254(d), where a claim has been adjudicated in state courts on the merits, a habeas petition should only be granted if the resolution 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

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4. The state-law ground may be a substantive rule dispositive of the case, or a procedural barrier to adjudication of the claim on the merits. *Walker*, 562 U.S. at 315. A state rule is an "adequate" procedural ground if it is "firmly established and regularly followed." *Id.* at 316 (quoting *Beard v. Kindler*, 558 U.S. at 60–61 (2009)). "A discretionary state procedural rule . . . can serve as an adequate ground to bar federal habeas review . . . even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others." *Id.* (quoting *Kindler*, 558 U.S. at 54.) (internal quotation marks and citations omitted).

> (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). Petitioner carries the burden of proof on this "difficult to meet" and "highly deferential [AEDPA] standard," which "demands that state-court decisions be given the benefit of the doubt." *Cullen*, 563 U.S. at 181 (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011), and *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam)).

Review under § 2254(d)(1) is limited to the record before the state court that adjudicated the claim on the merits. *Cullen*, 563 U.S. at 182. 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). An "unreasonable application" of federal law occurs when the state court "identifies the correct governing legal principle from" the Supreme Court's decisions "but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 412–13. The state court's application of clearly established federal law must be "objectively unreasonable" for the writ to issue. *Id.* at 409. The writ may not issue merely because the habeas court, "in its independent judgment," determines that the "state court decision applied clearly established federal law erroneously or incorrectly." *Renico v. Lett*, 559 U.S. 766, 773 (2010) (citing *Williams*, 529 U.S. at 411).

There is minimal case law addressing whether, under § 2254(d)(2), a decision was based on "an unreasonable determination of the facts." In *Wood v. Allen*, 558 U.S. 290, 301 (2010), the Supreme Court stated that a state-court factual determination is not "unreasonable" merely

because the federal habeas court would have reached a different conclusion.[5] *Wood v. Allen*, 558 U.S. 290, 301 (2010). In *Rice v. Collins*, 546 U.S. 333 (2006), the Court explained that "[r]easonable minds reviewing the record might disagree" about the factual finding in question, "but on habeas review that does not suffice to supersede the trial court's . . . determination." *Rice*, 546 U.S. at 341– 42.

The Sixth Circuit has described the § 2254(d)(2) standard as "demanding but not insatiable" and has emphasized that, pursuant to § 2254(e)(1), the state court factual determination is presumed to be correct absent clear and convincing evidence to the contrary. *Ayers v. Hudson*, 623 F.3d 301, 308 (6th Cir. 2010). A state court adjudication will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented during the state court proceeding. *Id.* (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)); *see also Hudson v. Lafler*, 421 F. App'x 619, 624 (6th Cir. 2011) (same).

C. Ineffective Assistance

A claim that ineffective assistance of counsel has deprived a defendant of his Sixth Amendment right to counsel is controlled by the standards stated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To succeed on this claim, a movant must demonstrate two elements: 1) "that counsel's performance was deficient," and 2) "that the deficient performance prejudiced the defense." *Id.* "The benchmark for judging any claim of ineffectiveness must be whether

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5. In *Wood*, the Supreme Court granted certiorari to resolve whether, to satisfy § 2254(d)(2), "a petitioner must establish only that the state-court factual determination on which the decision was based was 'unreasonable,' or whether § 2254(e)(1) additionally requires a petitioner to rebut a presumption that the determination was correct with clear and convincing evidence." *Wood*, 558 U.S. at 299. The Court found it unnecessary to reach that issue, and left it open "for another day." *Id.* at 300–01, 304 (citing *Rice v. Collins*, 546 U.S. 333, 339 (2006), in which the Court recognized that it is unsettled whether there are some factual disputes to which § 2254(e)(1) is inapplicable).

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." *Id.* at 686.

Recently, the Sixth Circuit opined that this standard is "even more difficult to meet in habeas cases, where the review that applies to *Strickland* claims is 'doubly deferential.'" *Tackett v. Trierweiler*, 956 F.3d 358, 373 (6th Cir. 2020) (citing *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)). "The question is not whether a federal court believes the state court's determination under the *Strickland* standard was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Id.* (internal quotation marks and citation omitted).

To establish deficient performance, a person challenging a conviction "must show that counsel's representation fell below an objective standard of reasonableness." *Strickland,* 466 U.S. 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." *Id.* 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.

To demonstrate prejudice, a petitioner must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.[6] "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. "It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. "Counsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Harrington v. Richter*, 562 U.S. 86,

6. If a reviewing court finds a lack of prejudice, it need not determine whether, in fact, counsel's performance was deficient. *Strickland*, 466 U.S. at 697.

104 (2011) (quoting *Strickland*, 466 U.S. at 687); *see also 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.").

The deference accorded a state-court decision under 28 U.S.C. § 2254(d) is magnified when reviewing an ineffective assistance claim:

> Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both "highly deferential," *id.*, at 689; *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7 (1997), and when the two apply in tandem, review is "doubly" so, *Knowles* [*v. Mirzayance*], 556 U.S., at 123, 129 S. Ct. at 1420 [(2009)]. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. 556 U.S., at 123, 129 S. Ct. at 1420. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.

Harrington, 562 U.S. at 105.

A criminal defendant is entitled to the effective assistance of counsel on direct appeal. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). The failure to raise a nonfrivolous issue on appeal does not constitute *per se* ineffective assistance of counsel, as "[t]his process of winnowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536 (1986) (internal quotation marks and citation omitted). Claims of ineffective assistance of appellate counsel are evaluated using the *Strickland* standards. *Smith v. Robbins*, 528 U.S. 259, 285–86 (2000) (applying *Strickland* to claim that appellate counsel rendered ineffective assistance by failing to file a merits brief); *Smith v. Murray*, 477 U.S. at 535–36 (failure to raise issue on appeal). To establish that appellate counsel was ineffective, a prisoner

> must first show that his counsel was objectively unreasonable in failing to find arguable issues to appeal - that is, that counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them. If [the prisoner] succeeds in such a showing, he then has the burden of demonstrating prejudice. That is, he must show a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief, he would have prevailed on his appeal.

Smith v. Robbins, 528 U.S. at 285 (citation omitted).[7]

An appellate counsel's ability to choose those arguments that are more likely to succeed is "the hallmark of effective appellate advocacy." *Matthews v. Parker*, 651 F.3d 489, 523 (6th Cir. 2011) (quoting *Caver v. Straub*, 349 F.3d 340, 348 (6th Cir. 2003)). It is difficult to show that appellate counsel was deficient for raising one issue, rather than another, on appeal. *See id.* at 523–24. "In such cases, the petitioner must demonstrate that the issue not presented was clearly stronger than issues that counsel did present." *Id.* Defendant must show that "there is a reasonable probability that inclusion of the issue would have changed the result of the appeal." *McFarland v. Yukins*, 356 F.3d 688, 699 (6th Cir. 2004).

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7. The Sixth Circuit has identified a nonexclusive list of factors to consider when assessing claims of ineffective assistance of appellate counsel:

> 1. Were the omitted issues "significant and obvious?"
> 2. Was there arguably contrary authority on the omitted issues?
> 3. Were the omitted issues clearly stronger than those presented?
> 4. Were the omitted issues objected to at trial?
> 5. Were the trial court's rulings subject to deference on appeal?
> 6. Did appellate counsel testify in a collateral proceeding as to his appeal strategy and, if so, were the justifications reasonable?
> 7. What was the appellate counsel's level of experience and expertise?
> 8. Did the petitioner and appellate counsel meet and go over possible issues?
> 9. Is there evidence that counsel reviewed all the facts?
> 10. Were the omitted issues dealt with in other assignments of error?
> 11. Was the decision to omit an issue an unreasonable one which only an incompetent attorney would adopt?

Franklin v. Anderson, 434 F.3d 412, 429 (6th Cir. 2006) (citation omitted).

"There is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." *Coleman v. Thompson*, 501 U.S. 722, 752 (1991) (internal citations omitted). Attorney error cannot constitute "cause" for a procedural default "because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must bear the risk of attorney error." *Id.* at 753 (internal quotation marks omitted). Where the State has no constitutional obligation to ensure that a prisoner is represented by competent counsel, the petitioner bears the risk of attorney error. *Id.* at 754.

In 2012, the Supreme Court decided *Martinez v. Ryan*, 566 U.S. 1 (2012), which recognized a narrow exception to the rule in *Coleman*, "[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding . . . ." *Martinez*, 566 U.S. at 17. In such cases, "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance [of counsel] at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Id.* The Supreme Court also emphasized that

> [t]he rule of *Coleman* governs in all but the limited circumstances recognized here. . . . It does not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial, even though that initial-review collateral proceeding may be deficient for other reasons.

Id. at 16. The requirements that must be satisfied to excuse a procedural default under *Martinez* are:

> (1) the claim of "ineffective assistance of trial counsel" was a "substantial" claim; (2) the "cause" consisted of there being "no counsel" or only "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 v. Thaler, 569 U.S. 413, 423 (2013) (emphasis and alterations in original).

Martinez considered an Arizona law that did not permit ineffective assistance claims to be raised on direct appeal. *Martinez*, 566 U.S. at 4. In the Supreme Court's subsequent decision in *Trevino*, the 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 . . . ." 569 U.S. at 429. *Trevino* modified the fourth *Martinez* requirement for overcoming a procedural default. *Martinez* and *Trevino* apply to Tennessee prisoners. *Sutton v. Carpenter*, 745 F.3d 787, 790 (6th Cir. 2014).

V. ANALYSIS OF PETITIONER'S CLAIMS

A. Sufficiency of the Evidence

1. The evidence was insufficient to support Hawkins' convictions for first-degree murder and aggravated child neglect. (Pet., ECF No. 1 at PageID 5.)

Hawkins alleges that the evidence presented at trial was legally and factually insufficient to support the jury verdict. (*Id.*) He incorporates by reference his argument and the supporting cases presented to the TCCA in the direct appeal. (Reply, ECF No. 12 at PageID 1944.) On direct appeal, counsel argued that 1) the uncorroborated accomplice testimony was insufficient to sustain his convictions; 2) no trial testimony established that Petitioner directly caused the victim's death or neglected the victim; 3) no evidence was presented demonstrating that Petitioner was criminally responsible for the conduct of another, that he delayed in seeking medical for the victim, or that he owed a duty of care to the victim; 4) the State failed to prove

that Petitioner caused the victim's death; and 5) Petitioner did not owe a duty of care to the victim. (R., Br. of Appellant, ECF No. 9-11 at PageID 900–09.) Respondent replies that first and fifth arguments are noncognizable, and the state court's resolution of the second, third, and fourth arguments are not contrary to or an unreasonable application of clearly established Supreme Court precedent. (Answer, ECF No. 10 at PageID 1914.)

After reviewing the evidence presented at trial, the TCCA considered Hawkins' arguments and opined:

> The jury found Defendant guilty of first-degree murder in the perpetration of aggravated child neglect. *See* Tenn. Code Ann. § 39–13–202(a)(2) (2012). As applicable to the facts of this case, aggravated child neglect is child neglect that results in serious bodily injury to the child. Tenn. Code Ann. § 39–15–402(a)(1). A person commits child neglect who "knowingly abuses or neglects a child under eighteen (18) years of age, so as to adversely affect the child's health and welfare." Tenn. Code Ann. § 39–15–401(b). "A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result." Tenn. Code Ann. § 39–11–302(b).
>
> Defendant asserts that no evidence was presented "to corroborate the allegations that Defendant was involved in any way in the death of the child." Ms. Ivory was an accomplice because she was indicted for the same offenses as Defendant. She testified against Defendant at trial. The State responds that evidence was presented to corroborate Ms. Ivory's testimony that the victim became ill after she was left alone in the care of Defendant.
>
> It is true that convictions may not be based solely upon the uncorroborated testimony of accomplices. *See State v. Robinson*, 971 S.W.2d 30, 42 (Tenn. Crim. App. 1997). However, Tennessee law requires only a modicum of evidence in order to sufficiently corroborate such testimony. *See State v. Copeland*, 677 S.W.2d 471, 475 (Tenn. Crim. App. 1984). More specifically, precedent provides that:
>
>> The rule of corroboration as applied and used in this State is that there must be some evidence independent of the testimony of the accomplice. The corroborating evidence must connect, or tend to connect the defendant with the commission of the crime charged; and, furthermore, the tendency of the corroborative evidence to connect the defendant must be independent of any

> testimony of the accomplice. The corroborative evidence must[,] of its own force, independently of the accomplice's testimony, tend to connect the defendant with the commission of the crime.

State v. Griffis, 964 S.W.2d 577, 588–89 (Tenn. Crim. App. 1997) (quoting *Sherrill v. State*, 204 Tenn. 427, 321 S.W.2d 811, 815 (Tenn. 1959), *overruled on other grounds by State v. Collier*, 411 S.W.3d 886 (Tenn. 2013)). In addition, our courts have stated that:

> The evidence corroborating the testimony of an accomplice may consist of direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. The quantum of evidence necessary to corroborate an accomplice's testimony is not required to be sufficient enough to support the accused's conviction independent of the accomplice's testimony nor is it required to extend to every portion of the accomplice's testimony. To the contrary, only slight circumstances are required to corroborate an accomplice's testimony. The corroborating evidence is sufficient if it connects the accused with the crime in question.

Id. at 589 (footnotes omitted). Furthermore, we note that the question of whether an accomplice's testimony has been sufficiently corroborated is for the jury to determine. *See id.* at 588; *State v. Maddox*, 957 S.W.2d 547, 554 (Tenn. Crim. App. 1997).

We conclude that Ms. Ivory's testimony was sufficiently corroborated. Defendant's statement to Sergeant Merritt corroborated Ms. Ivory's testimony that Defendant, S.I., and she were home all day, that no one else was present at the house on that day, and that S.I. began vomiting about an hour after eating pancakes that night. Defendant also confirmed Ms. Ivory's testimony that he left the house before the ambulance arrived. Ralphael Harris corroborated Ms. Ivory's testimony that he drove her to the store to buy cigarettes and a drink around 9:00 p.m., that Defendant was jealous of Harris, that S.I. was upset that Ivory was leaving, and that S.I. appeared healthy before they left. Sergeant Peel's review of store surveillance video from Walgreen's also corroborated Ms. Ivory's testimony that she left Defendant alone with the victim. The proof establishing Defendant's opportunity to commit the crime was sufficient to corroborate Ms. Ivory's testimony.

Defendant also asserts that "there was no trial testimony that defendant directly caused the death of the child or neglected the child." It is well-established that a defendant may be convicted based upon direct evidence, circumstantial evidence or a combination of both. *State v. Winters*, 137 S.W.3d 641, 654 (Tenn. Crim. App. 2003); *see also State v. Pendergrass*, 13 S.W.3d 389,

392–93 (Tenn. Crim. App. 1999). Both direct and circumstantial evidence are treated the same when weighing the sufficiency of such evidence. *State v. Dorantes*, 331 S.W.3d 370, 381 (Tenn. 2011). Even though different forms of evidence may establish convictions, the standard of review for the sufficiency of that evidence is the same whether the conviction is based upon direct or circumstantial evidence. *Id.* at 379. As such, all reasonable inferences from the evidence are to be drawn in favor of the State. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978); *see Tuggle*, 639 S.W.2d at 914.

Here, viewed in a light most favorable to the State, the evidence established that Defendant was alone with the victim for about 15 to 20 minutes when Ms. Ivory left with Harris. The victim was crying when Ms. Ivory left the house, but appeared otherwise healthy. Defendant was jealous of Harris and had previously accused Ms. Ivory of having sex with Harris. When Ms. Ivory returned from the store, the victim was lying in her own vomit and appeared very ill. Ms. Ivory left the victim alone with Defendant again when she went to Walgreen's to buy Pedialyte for the victim. After Ms. Ivory returned from the store, the victim became unresponsive, and Ivory called 911. Defendant left the house before paramedics arrived. The medical proof established that the victim suffered multiple blunt force trauma injuries to her abdomen, chest, and head, causing internal bleeding, which resulted in her death, and that the victim's injuries were recently inflicted. From the evidence presented, the jury could reasonably infer that Defendant abused the victim and that his actions caused serious bodily injury to the child and resulted in her death. *See* Tenn. Code Ann. §§ 39–13–202(a)(2); 39–15–401(b); 39–15–402(a)(1).

Defendant also contends that the evidence was insufficient to prove that he was criminally responsible for the conduct of another, that Defendant delayed in seeking medical care for the child, or that he owed a duty of care to the victim. Defendant's argument is based upon the premise that he was convicted under a theory of criminal responsibility for the acts of another. The State responds, however, that Defendant was directly responsible for S.I.'s injuries, and the evidence was sufficient to sustain his convictions.

In Tennessee, "criminal responsibility is not a separate, distinct crime. It is solely a theory by which the State may prove the defendant's guilt of the alleged offense . . . based upon the conduct of another person." *State v. Lemacks*, 996 S.W.2d 166, 170 (Tenn. 1999). A defendant convicted under a criminal responsibility theory "is guilty in the same degree as the principal who committed the crime" and "is considered to be a principal offender of the crime for the purposes of due process and our criminal law." *Id.* at 171.

Generally, "[a] person is criminally responsible as a party to an offense, if the offense is committed by the person's own conduct, by the conduct of another for which the person is criminally responsible, or by both." Tenn. Code Ann. §

39–11–401(a). Tennessee Code Annotated section 39–11–402(2) provides that a person is criminally responsible for the actions of another when, "[a]cting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense." In order to be found criminally responsible, "[n]o particular act need be shown, and the defendant need not have taken a physical part in the crime." *State v. Caldwell*, 80 S.W.3d 31, 38 (Tenn. Crim. App. 2002).

Although the trial court instructed the jury as to criminal responsibility, Defendant was charged as the principal actor in this case. The State's theory at trial, as evidenced by the State's opening statement, closing argument, and the proof presented by the State, was that Defendant's actions caused the victim's death. Defendant's argument on appeal is premised upon the belief that he was convicted under a theory of criminal responsibility. However, that is not the case here.

The trial court correctly instructed the jury as follows: "A defendant is criminally responsible as a party to a criminal offense if the offense was committed by the defendant's own conduct, by the conduct of another for which the defendant is criminally responsible or by both." (Emphasis added). It is clear from the record that Defendant was charged with felony murder for the death of the victim while perpetrating aggravated child neglect, which is defined earlier in this analysis. Defendant's argument that the evidence is insufficient to prove that he "'solicit[ed], direct[ed], aid[ed], or attempt[ed] to aid another person to commit the offense' of aggravated child neglect" is misplaced.

Defendant also argues that the State failed to prove that Defendant caused the victim's death by delaying medical care for her. Defendant cites *State v. John Barlow*, No. W2008–01128–CCA–R3–CD, 2010 WL 1687772 (Tenn. Crim. App., Apr.26, 2010). In *Barlow*, the defendant was convicted of aggravated child abuse and aggravated child neglect. A panel of this court reversed the defendant's conviction for aggravated child neglect after finding that the State failed to prove its theory that Barlow's delay in seeking medical attention for the victim constituted aggravated child neglect because it worsened the victim's brain injury, which was the basis for the aggravated child abuse conviction. *Id.* at *11. The State, in this case, pursued a conviction based on two alternative theories of culpability, murder in the perpetration of aggravated child neglect and murder in the perpetration of aggravated child abuse. However, both offenses were based on the same criminal behavior, Defendant's beating of the victim which resulted in the victim's death. The jury convicted Defendant of the former, murder in the perpetration of aggravated child neglect, which we have already concluded is supported by the evidence. The State did not present any proof or argument demonstrating that the harm to the victim resulted from Defendant's delay in seeking medical treatment for her. Defendant's argument is again misplaced.

> Likewise, Defendant's assertion that the State failed to prove that Defendant owed a legal duty of care to the victim is also misplaced. Defendant relies upon *State v. Larry E. Rathbone and Veronda Gean Fleeman*, No. E2007–00602–CCA–R3–CD, 2008 WL 1744581 (Tenn. Crim. App., Apr.16, 2008), in which a panel of this court reversed defendant Fleeman's convictions for criminal responsibility for child rape, attempted child rape, and aggravated sexual battery because the State failed to establish that Fleeman had a legal duty to protect the victim from the harm caused by her co-defendant Rathbone. In that case, unlike this case, Fleeman was charged and convicted under the theory of criminal responsibility, specifically that she had a duty to prevent the commission of the offense. *See* Tenn. Code Ann. § 39–11–402(3). In that case, evidence was presented that Fleeman, Rathbone's girlfriend, was present when Rathbone committed offenses against the victim, but Fleeman did not say anything or otherwise try to prevent the offenses from occurring. As we have already stated, the State's theory in this case was that Defendant directly caused the victim's injuries, and the evidence presented at trial was sufficient to support his convictions.

State v. Hawkins, 2014 WL 1571810, at *5–*8.

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 it is found 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). This standard requires a federal district court to examine the evidence in the light most favorable to the State. *Id.* at 326 ("a federal habeas corpus court faced with a record of conflicting facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.").

The TCCA began the analysis of Petitioner's five arguments by citing state cases applying the *Jackson* standard. *State v. Hawkins*, 2014 WL 1571810, at *4. Hawkins does not articulate how the TCCA's decision was contrary to *Jackson v. Virginia*. (Pet., ECF No. 1 at

PageID 5.) Petitioner incorporates and reasserts the argument that was unsuccessful on direct appeal. (Reply, ECF No. 12 at PageID 1944.) Hawkins' legal conclusions do not satisfy his burden of demonstrating that the state court's resolution of his issues was based on an unreasonable determination of the facts. Hawkins' arguments establish, at most, that the jury was required to determine whether Shamira Ivory's testimony was sufficiently corroborated. The jury concluded that the testimonies of Sergeants Merritt and Peel, and Ralphael Harris were sufficient to corroborate Ivory's testimony that she left Petitioner Hawkins alone with the victim, giving Hawkins the opportunity to commit the crime.

The jury was also required to determine whether the evidence, whether direct or circumstantial or a combination of both, was sufficient to establish Hawkins' guilt of abusing the victim and causing serious bodily injury resulting in her death. The state court determined that the evidence presented at trial supported a reasonable inference that Hawkins caused the serious bodily injuries that resulted in the victim's death.

Petitioner's second, fourth, and fifth arguments were rejected by the TCCA because Hawkins was not convicted under a theory of criminal responsibility and was not convicted of delaying medical treatment. He was convicted as the principal actor who knowingly abused the victim and who caused serious bodily harm resulting in the victim's death.

Based on this Court's review of the transcript of Hawkins' trial (R., Trial Transcript ("Tr."), ECF Nos. 9-3, 9-4, 9-5, 9-6, and 9-7), the TCCA correctly concluded that the testimony and circumstantial evidence were more than sufficient to permit the jury to find that Hawkins was guilty of first-degree felony murder in the perpetration of aggravated child neglect and aggravated child neglect. Hawkins' challenge to the sufficiency of the evidence is without merit and is **DENIED**.

B. Trial Court Error

2. The trial court erred by admitting evidence of Petitioner's prior conviction for child abuse. (Pet., ECF No. 1 at PageID 7.)

Petitioner Hawkins argued on direct appeal that the trial court should not have allowed the State to elicit testimony that Petitioner had pled guilty to a misdemeanor child abuse case twelve to thirteen years prior. (R., Br. of Appellant, ECF No. 9-11 at PageID 909–15.) Respondent replies that this claim is noncognizable because it alleges an error of state law. (Answer, ECF No. 10 at PageID 1921.)

The TCCA addressed this claim on direct appeal and opined:

> Defendant next contends that the trial court erred by allowing evidence that Defendant was previously convicted of child abuse. Defendant is specifically referring to testimony that during an interview with Defendant, Defendant told detectives that he was not alone with the victim because he would never be alone with a child since he was "falsely accused of breaking a child's leg" in 1996, for which he "went to prison." The State responds that evidence of Defendant's prior conviction was relevant to establish Defendant's identity as the perpetrator and to show Defendant's guilty knowledge.
>
> The general rule is that evidence of a defendant's prior conduct is inadmissible, especially when previous crimes or acts are of the same character as the charged offense, because such evidence is irrelevant and "invites the finder of fact to infer guilt from propensity." *State v. Hallock*, 875 S.W.2d 285, 290 (Tenn. Crim. App. 1993). Tennessee Rule of Evidence 404(b) permits the admission of evidence of prior conduct if the evidence of other acts is relevant to a litigated issue such as identity, intent, or rebuttal of accident or mistake, and the probative value outweighs the danger of unfair prejudice. Tenn. R. Evid. 404(b), Advisory Comm'n Cmts.; *see State v. Parton*, 694 S.W.2d 299, 303 (Tenn. 1985); *State v. Hooten*, 735 S.W.2d 823, 824 (Tenn. Crim. App. 1987). However, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait." Tenn. R. Evid. 404(b). Before admitting evidence under Rule 404(b), the rule provides that: (1) upon request, the court must hold a hearing outside the jury's presence; (2) the court must determine that the evidence is probative on a material issue and must, if requested, state on the record the material issue and the reasons for admitting or excluding the evidence; (3) the court must find proof of the other crime, wrong, or

act to be clear and convincing; and (4) the court must exclude the evidence if the danger of unfair prejudice outweighs its probative value. Tenn. R. Evid. 404(b).

In a jury-out hearing, the trial court heard argument by the parties regarding the admissibility of the portion of Defendant' statement to detectives, in which Defendant claimed he was not alone with the victim and that he would never be alone with any child because he was falsely accused of breaking a child's leg in 1996 and went to prison. In denying Defendant's motion to exclude the statement, the trial court found that the evidence was "highly relevant," that the proof of the prior bad act was clear and convincing, and that the probative value of the evidence was not outweighed by any danger of unfair prejudice.

On appeal, Defendant argues that the trial court failed to satisfy the second prong of the test by failing to state on the record a material issue to which the evidence was relevant. The State responds that Rule 404(b) requires the trial court to make such a finding only upon request, and Defendant did not make a request. *See* Tenn. R. Evid. 404, Advisory Comm'n Cmts. ("Then the judge must decide what material issue other than character forms a proper basis for relevancy. If the objecting party requests, the trial judge must state on the record the issue, the ruling, and the reason for ruling the evidence admissible."). The trial court found the objected to statement to be relevant as to Defendant's "explanation," implicitly his explanation for why he was never alone with the victim. The trial court gave the following jury instruction, which addresses the material issue for which the trial court found the evidence to be relevant, after the evidence was presented through Sergeant Merritt's testimony:

> If you find from the proof that the defendant has committed a crime other than that for which he is on trial you may not consider this evidence to prove his propensity to commit the crime that he is on trial for. This evidence may only be considered by you for the limited purpose of determining whether it provides the complete story of the crime, and is necessary for a complete account thereof and/or if it tends to establish or relates to the defendant's denial of his guilt, motivation and explanation of his actions and his denial of his opportunity for or lack of opportunity to commit the crime.

We conclude that the trial court substantially complied with the procedural prerequisites of Rule 404(b) in this case. "If the procedures in Rule 404(b) are substantially followed, the trial court's decision will be given great deference and will be reversed only for an abuse of discretion." *State v. James*, 81 S.W.3d 751, 759 (Tenn. 2002). An abuse of discretion only occurs if the trial court "applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining." *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999) (citations omitted).

In his statement to detectives, Defendant claimed that he was never alone with the victim and offered a reason for his denial that he was not alone with her. The objected to testimony regarding a portion of Defendant's statement is as follows:

> [Sergeant Merritt]: [Defendant] told us that he was never alone with her. I asked him why and he told me that back in 1996 that he was falsely accused of breaking a child's leg, that he went to prison for that and that after that he made it a point that he was never going to be with anyone else's child or a child that was not his. He was not going to be alone with a child that was not his.

A material issue at trial was whether Defendant was alone with the victim during the time period when the fatal injuries were inflicted upon the victim. In his statement to police, Defendant denied that he was ever alone with the victim during the pertinent time period, and the objected to statement is relevant to support Defendant's assertion that he was not alone with the victim. In addition, the statement is relevant to show that Defendant left the scene when he heard the sirens because he had been previously "falsely accused." The fact that these examples of relevancy might under some circumstances usually cause a defendant, rather than the State, to offer the proof is not the determinative factor. If evidence is relevant, its relevancy does not depend upon which party elicits the proof. However, even if relevant to prove some material fact other than "propensity" evidence, in order to be properly admissible the proof must get over the hurdle of Tennessee Rule of Evidence 404(b)(4), which provides that the trial court "must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice." (Emphasis added).

On appeal, the State asserts that the objected to statement was relevant to show Defendant's identity as the person who committed the murder and the aggravated child neglect of the victim and to show Defendant's "guilty knowledge" that he had committed the offenses and/or that the offenses had been committed. In its brief the State offers the following argument in support of this theory:

> The defendant's statement was relevant on the issue of the defendant's identity and his guilty knowledge. The defendant claimed that he did not harm the victim; therefore, the State had the burden of proving that the defendant was, in fact, the individual guilty of these crimes. In his statement to the police, the defendant claimed that he was never alone with the victim and put forth a prior "false accusation" and conviction as the foundation for this claim. Whether the defendant was alone with the victim at the time she was injured was a material issue in this case. Therefore,

> his statement was relevant to the issues of identity and guilty knowledge—material issues other than propensity. The statement was highly probative and the probative value was not outweighed by the danger of unfair prejudice[.]

We are not persuaded by the State's argument. The only way the statement could show Defendant's identity as the perpetrator and Defendant's "guilty knowledge" is if the statement is used as propensity evidence, i.e., Defendant has done it before and therefore he did it again.

In the trial court, the State's argument as to the relevancy did not mention identity of Defendant or Defendant's guilty knowledge as a basis for relevance. The prosecutor stated,

> I understand the Court has to make a ruling, it's certainly relevant. The fact that he made the statement in the first place that he was never alone with the child, the fact that when confronted with evidence from the police officers that we know otherwise that he, again, he stuck by that story then became argumentative and attempted to bolster his story with this explanation it's critical to our case.
>
> I mean, just what he said was the reason that he didn't leave, the fact that he didn't leave that's the whole story, that's the whole picture. It's prejudicial but not overly prejudicial. He could have said any story, that's the one he chose in his mind would best serve to convince the police that he was never left alone with the child.
>
> He could have said I didn't like the child, he could have said I don't babysit children that I didn't father. That's his version of the events, and it just seems, you know—I don't know—to hold that back from the jury the entire reason.
>
> So I guess he's going to take the stand and, you know—if he does—if we don't get it in then he takes the stand and we don't know what happened, whether or not he'll leave the door open but we'll obviously have to have some ruling from the Court about what is going to be allowed on cross examination because that's the kind of thing we would normally go into, not the underlying but just being left alone with a child which Shamira Ivory is going to testify he had watched the child on several occasions.
>
> And this was not an unusual circumstance, and this is odd that he would say it didn't happen, hadn't happened since the 90's.

> We conclude that the trial court erred by allowing into evidence that portion of Defendant's statement which explains why Defendant was never alone with the victim, under the mandate of Tennessee Rule of Evidence 404(b)(4). In balancing the risk of unfair prejudice against the minimal probative value, we conclude that the danger of unfair prejudice outweighed the probative value of the evidence. However, we further conclude that the trial court's error was harmless. When undertaking a harmless error analysis, this court must consider whether "an error more probably than not had a substantial and injurious impact on the jury's decision-making." *State v. Rodriguez*, 254 S.W.3d 361, 372 (Tenn. 2008). "The line between harmless and prejudicial error is in direct proportion to the degree of the margin by which the proof exceeds the standard required to convict beyond a reasonable doubt." *State v. Carter*, 714 S.W.2d 241, 248 (Tenn. 1986). Here, there was sufficient proof that Defendant was alone with the victim and that the victim's injuries were sustained during that time period. Ms. Ivory testified that she left Defendant alone with the child. Her testimony was corroborated by Mr. Harris' testimony as well as the store surveillance video. Medical proof established that the victim's injuries were inflicted shortly before her death. The evidence established that Defendant refused to render aid to the victim and that he left the house before police and paramedics could arrive. Although this is a very close issue, we conclude that the trial court's error in admitting prior bad act evidence was harmless.

State v. Hawkins, 2014 WL 1571810, at *8–*12.

Claims that the state courts misapplied Tennessee evidentiary rules during the trial are not cognizable in a federal habeas petition. *See* 28 U.S.C. § 2254(a) (a federal court may grant habeas relief to a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States"); *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) ("it is not the province of a federal habeas court to reexamine state-court determinations on state- law questions"); *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)). This claim was not addressed as a violation of Hawkins' federal constitutional rights on direct appeal. (R., Br. of the Appellant, ECF No. 9-11 at PageID 909–15.) Hawkins has failed to properly exhaust any federal constitutional claim in

state court. Because no further avenue exists for exhausting the claim as a federal constitutional claim, it is barred by procedural default. The TCCA resolved the claim by reference to Tennessee rules governing the admissibility of evidence. As exhausted in the Tennessee courts, Issue Two is noncognizable and is **DENIED**.

C. Ineffective Assistance

3(a) Petitioner's trial counsel performed deficiently by failing to object to the jury instruction on circumstantial evidence. (Pet., ECF No. 1 at PageID 25-28.)

Petitioner Hawkins contends that trial counsel provided ineffective assistance by failing to object to the trial court's instruction on circumstantial evidence. (Pet., ECF No. 1 at PageID 25.) Hawkins alleges that the jury instruction was not based on the law in effect at the time of his crimes. (*Id.* at 25–27.) Respondent replies that this claim is procedurally defaulted because Hawkins failed to raise it in state court. (Answer, ECF No. 10 at PageID 1924.) Petitioner contends the default should be excused under *Martinez* because "[p]ost conviction counsel should have included the issue as a claim of ineffective assistance of trial counsel." (Pet., ECF No. 1 at PageID 28.) Respondent responds that *Martinez* cannot excuse the default because the claim is not substantial. (Answer, ECF No. 10 at PageID 1925.)

Ineffective assistance 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. *Sutton v. Carpenter*, 745 F.3d 787, 791 (6th Cir. 2014). To qualify as "substantial" under *Martinez*, a claim must have "some merit" based on the controlling standard for ineffective assistance of counsel. *Martinez v. Ryan*, 566 U.S. 1, 14 (2012).

In 2011, the Tennessee Supreme Court adopted the standard for circumstantial evidence established by the United States Supreme Court in *Holland v. United States*, 348 U.S. 121, 140 (1954):

> "Circumstantial evidence . . . is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more."

State v. Dorantes, 331 S.W.3d 370, 380–81 (Tenn. 2011) (quoting *Holland*). The adoption of the *Holland* standard resulted in the rejection of previous Tennessee case law that "purportedly required the State to prove facts and circumstances 'so strong and cogent as to exclude every other reasonable hypothesis save the guilty of the defendant, and that beyond a reasonable doubt.'" *Id.* at 380 (quoting *State v. Crawford*, 270 S.W.2d 610, 612 (Tenn. 1971)). The Tennessee Supreme Court determined that, "[i]n practice, the distinction between the federal standard and the 'reasonable hypothesis' language used in our state has rarely made a difference; therefore, there has been little reason to refine out standard of review by voicing disapproval of much of the terminology used in *Crawford*." *Id.* at 381.

Hawkins was tried in 2012, after *Dorantes* was decided. His crime, however, was committed on September 17, 2008. The trial court instructed the jury:

> One type of evidence is called direct evidence and the other type is called circumstantial evidence. Direct evidence is those parts of the testimony admitted in court which referred to what happened and was testified to by witnesses who saw or heard what happened first hand.
>
> If witnesses testified about what themselves [sic] saw or heard they presented direct evidence. Circumstantial evidence is all the testimony and exhibits which give you clues about what happened in an indirect way. It consists of all the evidence which is not direct evidence. Do not assume that direct

> evidence is always better than circumstantial evidence. According to our laws direct evidence is not necessarily better than circumstantial evidence.
>
> Either type of evidence can prove a fact if it is convincing enough. A defendant may be convicted on direct evidence, circumstantial evidence or both.

(R., Trial Tr., ECF No. 9-7 at PageID 666.)

Hawkins contends that "the State of Tennessee failed to place Petitioner on 'Notice' that direct and circumstantial evidence were equivalents," resulting in prejudice and "violating the prohibition against ex post facto laws under both the Tennessee and United States' constitutions." (Pet., ECF No. 1 at PageID 26.) Respondent replies that the trial court correctly used the standard adopted in *Dorantes*. (Answer, ECF No. 10 at PageID 1925.)

The Tennessee Supreme Court and the TCCA began utilizing the same standard for direct and circumstantial evidence shortly after *Dorantes* was decided for cases where the crimes occurred before January 2011. *See State v. Sisk*, 343 S.W.3d 60, 62 (Tenn. 2011) (crimes committed in 2006); *State v. Parker*, 350 S.W.3d 883, 888, 903 (Tenn. 2011) (crimes committed in 2003); *State v. Martinez*, 372 S.W.3d 598, 601, 604–05 (Tenn. Crim. App. 2011) (crimes committed in 2008). Hawkins' argument is unavailing because the Ex Post Facto Clause of neither constitution applies to judicial decisions. *See generally* U.S. Const. art. 1 §§ 9, 10; Tenn. Const. art. 1, § 11; *Rogers v. Tennessee*, 532 U.S. 451, 456 (2001). The Supreme Court has held that challenges to retroactive applications of judicial decisions must proceed under due process, not the Ex Post Facto Clause. *See Rogers*, 532 U.S. at 460–62.

Trial counsel does not perform deficiently by failing to raise meritless objections. Post-conviction counsel does not perform deficiently by failing to raise meritless issues. This claim is not substantial, therefore, Petitioner cannot not satisfy the requirements to overcome the procedural default of this issue. Issue 3(a) is barred by procedural default and is **DENIED**.

3(b) Petitioner's trial counsel performed deficiently by failing to object to the admission of unfairly prejudicial testimony. (Pet., ECF No. 1 at 8, 25, 28.)

Hawkins alleges that trial counsel provided ineffective assistance by failing to object to the admission of unfairly prejudicial witness testimony. (*Id.* at 8, 25, 28.) On post-conviction appeal, Hawkins argued that trial counsel allowed the co-defendant to testify about an alleged incident where the victim touched the Petitioner's "balls," and he said "it felt good to him." (R., Br. of Appellant, ECF No. 9-21 at PageID 1847.) Hawkins contended that the testimony was irrelevant, inadmissible, and unfairly prejudicial. (*Id.* at PageID 1850–52.) Respondent replies that the decision of the TCCA was not objectively unreasonable. (Answer, ECF No. 10 at PageID 1927.)

The TCCA identified the proper standard for analyzing the claims, *Strickland v. Washington*, 466 U.S. 688 (1984). *Hawkins v. State*, 2017 WL 2829755, at *5. As stated previously, the *Strickland* court set out a two-prong test for determining when a counsel's assistance is so deficient that it requires a conviction to be set aside:

> 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 defendant must show that 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.

Strickland, 466 U.S. at 687.

Recently, the Sixth Circuit opined that this standard is "even more difficult to meet in habeas cases, where the review that applies to *Strickland* claims is 'doubly deferential.'" *Tackett v. Trierweiler*, 956 F.3d 358, 373 (6th Cir. 2020) (citing *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)). "The question is not whether a federal court believes the state court's determination

under the *Strickland* standard was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Id.* (internal quotation marks and citation omitted). With this framework in mind, the Court turns to the TCCA's findings of fact and conclusions law.

The TCCA addressed Petitioner's claim, stating:

> The Petitioner argues that trial counsel was ineffective for failing to object to inadmissible testimony from his co-defendant, the victim's mother. He asserts that trial counsel allowed the co-defendant to testify about an alleged incident where the victim touched the Petitioner's "balls", and he said "it felt good to him." The Petitioner further contends that this evidence was "both wholly irrelevant and highly prejudicial to [the] Petitioner," and trial counsel's failure to object "contributed to the State's ability to impugn [the] Petitioner's character in a manner not allowed by Tennessee [l]aw." The State responds that trial counsel's decision was strategic and that trial counsel provided effective assistance of counsel. We agree with the State.
>
> At the post-conviction hearing, trial counsel testified that he decided not to object to this testimony and instead cross-examined the co-defendant about this incident. He further testified that he did not want to "draw attention" to the statement by objecting and decided that a thorough cross-examination was the appropriate decision. It is well established that this court will not "'second guess' tactical and strategic choices pertaining to defense matters or to measure a defense attorney's representation by '20–20 hindsight.'" *Henley v. State*, 960 S.W.2d 572, 579 (Tenn. 1997) (quoting *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982)). The post-conviction court concluded that trial counsel's decision was strategic and that trial counsel's performance was not deficient. We agree, and conclude that the record shows that trial counsel made a well-informed and reasoned decision under the circumstances not to object to the testimony at issue. The Petitioner has failed to establish either deficient performance or prejudice resulting therefrom. He is not entitled to relief.

Hawkins v. State, 2017 WL 2829755, at *6.

Hawkins does not explain how the TCCA's determination of this claim was an improper application of *Strickland*. Trial counsel testified that "[t]he co-defendant was represented by counsel, so there was no chance for us to conduct any interviews pre-trial with her." (R., Post-conviction Tr., ECF No. 9-18 at PageID 1186.) Counsel explained that he had no knowledge that she would give that answer to the State's question. (*Id.* at PageID 1187.) Counsel testified

that he did not believe the co-defendant was a very credible witness and "it appeared that she was piling on [Hawkins] and making stuff up, because if that had been something that had happened and the reason for her anger at him, it would have been in her statement to the police." (*Id.* at PageID 1187–88.) Counsel made the strategic decision to "cross-examine her on why she didn't tell police this story. Because that was the basis of our defense, she was the one that was lying to the police about [Hawkins'] involvement in hurting the child, when, in fact, she was the one and now she has made up these stories to protect herself." (*Id.* at PageID 1188.)

Counsel's decision was a reasonable strategic choice based on his observations of the co-defendant during her courtroom testimony. Based on this Court's review of the post-conviction testimony (R., Post-conviction Tr., ECF No. 9-18), Hawkins has failed to establish that his trial counsel's strategic decision was deficient or that he suffered any prejudice from counsel's performance. Deference to the state court decision on this issue is appropriate.

Petitioner Hawkins also contends that counsel should have objected to the co-defendant's testimony that Hawkins tried "to harm or kill Ms. Ivory's unborn child." (Pet., ECF No. 1 at PageID 28.) Respondent replies that this aspect of Issue 3(b) is procedurally defaulted because it was not presented to the state courts. (Answer, ECF No. 10 at PageID 1930.) Petitioner contends that the default should be excused under *Martinez*. (Pet., ECF No. 1 at PageID 28.) Respondent replies that the claim is not substantial. (Answer, ECF No. 10 at PageID 1930.)

After eliciting the co-defendant's testimony about the touching incident, the prosecutor asked the co-defendant about any other "unpleasant" incidents with Petitioner. (R. Trial Tr., ECF No. 9-6 at PageID 493.) The co-defendant testified that Hawkins kicked her in the stomach because he wanted her to get up off the couch. (*Id.*)

Hawkins' trial attorney had no opportunity to interview the co-defendant before trial and the testimony about the incident was brief. Had counsel objected the only remedy was a curative instruction. Counsel agreed with the post-conviction court during the evidentiary hearing that a curative instruction "is a legal fiction" "like un-ringing a bell." (*Id.* at PageID 1189–90.) Petitioner Hawkins cannot establish that there is a reasonable probability that, but for this testimony, the outcome of the trial would have been different. The procedural default of this portion of Issue 3(b) is not excused under *Martinez* because the claim is insubstantial. Issue 3(b) is **DENIED**.

3(c) Petitioner's trial counsel performed deficiently by failing to object to the State's improper closing. (Pet., ECF No. 1 at 8, 23.)

In the post-conviction appeal, Petitioner Hawkins contended:

> Only a few lines into its opening statement, the State had already begun to mislead the jury with an incorrect statement of law and procedure: "He's guilty. There's no question about that. We don't need to argue about that, and frankly that's not why we're here. This statement indicated that the jury did not need to consider Hawkins' guilty or innocence. Next, when commenting on Petitioner's character, the prosecutor asserted that Hawkins was "the same kind of cold blooded guy that would punch a little girl that's about this tall and weighs about twenty-one pounds, in the abdomen time and time again. This comment was an improper disparagement of Petitioner's character.
>
> During rebuttal, the State argued that the jury should disregard impeaching evidence of a critical witness and "write a letter complaining because this is your city, that is your Police Department. But don't let him [Petitioner] get away with it because of a screw-up by police." Finally, the State asked the jury to return a guilty verdict because they were good community members: ". . . you write up the verdict and then you come back out there and you look at him and be proud that you're able to tell him that we, . . . the jury, find you guilty of murder in the perpetration of aggravated child abuse."

(R., Br. of Appellant, ECF No. 9-21 at PageID 1853–54 (citations omitted).) Respondent replies that the decision of the TCCA was neither objectively unreasonable nor based on an unreasonable determination of the facts. (Answer, ECF No. 10 at PageID 1933.)

The TCCA addressed this issue, stating:

> Next, the Petitioner argues that trial counsel was ineffective for failing to object to the State's remarks during closing argument. The Petitioner contends that trial counsel should have objected to the following remarks: (1) "[The Petitioner's] guilty. There's no question about that. We don't need to argue about that, and frankly that's not why we're here. . . ." and (2) "[The Petitioner] is the same kind of guy, the same kind of guy that would say, not my baby, not my problem, the same kind of cold blooded guy that would punch a little girl, that's about this tall and weighs about twenty-one pounds in the abdomen, time and time again." Later, during its rebuttal, the Petitioner claims the State argued that the jury "should disregard impeaching evidence of a critical witness," and the jury should return a guilty verdict because they were "good community members." The Petitioner asserts that the "collective impact of these statements prejudicially undermined the fundamental fairness of [the Petitioner's] trial." The State contends that trial counsel reasonably decided not to object during the State's closing argument and that the Petitioner failed to establish that trial counsel was ineffective. We agree with the State.
>
> The Tennessee Supreme Court has stated that closing argument is a "valuable privilege that should not be unduly restricted." *Terry v. State*, 46 S.W.3d 147, 156 (Tenn. 2001) (citing *State v. Sutton*, 562 S.W.2d 820, 823 (Tenn. 1978) (citation omitted)). As a result, attorneys have considerable leeway in arguing their positions during closing argument. *Id.* The closing argument, however, "must be temperate, must be predicated on evidence introduced during the trial of the case, and must be pertinent to the issues being tried." *Russell v. State*, 532 S.W.2d 268, 271 (Tenn. 1976). Furthermore, "the reviewing court must indulge a strong presumption that the [counsel's] conduct falls within the range of reasonable professional assistance and may not second-guess the tactical and strategic choices made by counsel unless those choices were uninformed by inadequate preparation." *Gregory Paul Lance v. State*, No. M2005–01765–CCA–R3–PC, 2006 WL 2380619, at *6 (Tenn. Crim. App. Aug. 16, 2006) (internal citations omitted).
>
> In denying relief, the post-conviction court concluded that trial counsel made a strategic decision not to object and that the Petitioner offered no evidence as to "why" trial counsel failed to object. *See Robby Lynn Davidson v. State*, No. M2005–02270–CCA–R3–PC, 2006 WL 3497997, at *7 (Tenn. Crim. App. Dec. 4, 2006) (concluding that "[t]he decisions of a trial attorney as to whether to

object to opposing counsel's arguments are often primarily tactical decisions."). Citing *State v. Sexton*, 386 S.W.3d 371, 429 (Tenn. 2012), the post-conviction court found that "without testimony from trial counsel as to 'why' he chose not to object to a statement, the court must assume it was a valid tactical decision."

The Petitioner raised several issues with the State's closing argument, but during the post-conviction hearing, trial counsel was only questioned about one specific portion of the State's closing argument. Post-conviction counsel asked trial counsel if it was "part of some kind of strategy to let [the State] say that [the Petitioner] is guilty," and trial counsel responded that the State was typically allowed to make such comments during closing, and an objection would have been unsuccessful. Moreover, trial counsel testified that this remark was "close" to being "objectionable," but ultimately decided not to object. The post-conviction court concluded, and we agree, that trial counsel made a strategic decision not to object. *See Henley*, 960 S.W.2d at 579 (quoting *Hellard*, 629 S.W.2d at 9). The Petitioner is not entitled to relief.

The Petitioner also argues that trial counsel should have objected when the State referred to the Petitioner as a "cold blooded guy that would punch a little girl, that's about this tall and weighs about twenty-one pounds in the abdomen, time and time again." The Petitioner also claims that the State's remarks on rebuttal were improper and trial counsel was ineffective for failing to object. The Petitioner argues that this statement was an "improper disparagement of [the] Petitioner's character." However, at the post-conviction hearing, trial counsel's response was vague and did not provide a clear explanation for his decision not to object. Moreover, there is no testimony from trial counsel explaining why he did not object to the State's remarks during its rebuttal. Based on the record before us, we cannot conclude that trial counsel was deficient. *See State v. Sexton*, No. M2004–03076–CCA–R3–CD, 2007 WL 92352, at *5 (Tenn. Crim. App. Jan. 12, 2007). The burden was on the Petitioner to establish trial counsel's deficient performance, and the Petitioner failed to meet that burden. We agree with the post-conviction court's conclusion that "without testimony from trial counsel as to 'why' he chose not to object to a statement, the court must assume it was a valid tactical decision." Accordingly, he is not entitled to relief.

Hawkins v. State, 2017 WL 2829755, at *6–*7.

Hawkins does not explain how the TCCA's determination of these claims was an improper application of *Strickland*. Counsel testified during the post-conviction hearing as follows:

And you were asking about a quote from the prosecutor and the reason why I didn't object. I think this trial was around 2012. We didn't start getting

> any decent support from the Court of Criminal Appeals on the unprofessional closings out of the D.A.'s office until that time. I had recently come back from the Court of Criminal Appeals, prior to this trial, a few years before this one . . . where I watched the Criminal Appeals completely take apart and destroy Ross Dyer for about thirty minutes on the closing arguments of the Shelby County District Attorney's office and threaten him with – if he didn't go back and tell them to stop doing it they would overturn the case. When the opinion came out it was almost entirely silent, as to that. And it was the most – to the point it was so bad to the point where I was embarrassed for them. I really – I don't even think I said two words the entire oral argument.
>
> The law at the time and the support from the Court of Criminal Appeals being non-existent, the habit, if you will, of the defense attorneys, at that time, was one in which – and I am sure, wrong – was that the State was going to get away with just about anything they wanted to say and I think we objected to it, all we were doing was drawing attention and we are not going to be supported either at the trial level, or the Court of Criminal Appeals level.
>
> I personally witnessed it and personally watched the Court of Criminal Appeals completely destroy the A.G.'s Office and then do nothing about it in the opinion. So it was very difficult for us at that time to make those contemporaneous objections at the trial level, with any hopes, at all, with having beneficial outcome to our client and to our case.

(R., Post-conviction Tr., ECF No. 9-18 at PageID 1192–93.)

Counsel's failure to object during the prosecutor's closing argument was a strategic decision based on his past experiences with such objections in the Shelby County Criminal Courts and the TCCA. Counsel's decision was a reasonable strategic choice. Hawkins has failed to establish any prejudice from counsel's decision. Deference to the state court decision on this issue is appropriate. Issue 3(c) is **DENIED**.

3(d) Petitioner's trial counsel performed deficiently by committing cumulative errors. (Pet., ECF No. 1 at 10.)

Petitioner Hawkins contends that trial counsel's cumulative errors entitle him to relief. (Pet., ECF No. 1 at PageID 10.) Respondent replies that the TCCA's determination of this issue

was correct and the claim is not cognizable on habeas corpus review. (Answer, ECF No. 10 at PageID 1934.)

The TCCA opined:

> Finally, the Petitioner argues that the cumulative effect of trial counsel's errors entitles him to relief because it is "reasonably probable that [the] Petitioner's trial and direct appeal could have had a significantly different outcome." The cumulative error doctrine recognizes that in some cases there may be multiple errors committed during the trial proceedings, which standing alone constitute harmless error; however, considered in the aggregate, these errors undermined the fairness of the trial and require a reversal. *State v. Hester*, 324 S.W.3d 1, 76 (Tenn. 2010). However, the cumulative error doctrine properly applies only where there has been more than one actual error. *Id.*; *See also*, *Tracy F. Leonard v. State*, No. M2006–00654–CCA–R3–PC, 2007 WL 1946662, at *21 (Tenn. Crim. App. Sept. 13, 2007) ("[A] Petitioner who has failed to show that he received constitutionally deficient representation on any single issue may not successfully claim that his constitutional right to counsel was violated by the cumulative effect of such counsel's errors."). Because the Petitioner has failed to prove deficient representation on any issue, he cannot successfully claim that the cumulative effect of counsel's performance violated his constitutional rights. The Petitioner is not entitled to relief.

Hawkins v. State, 2017 WL 2829755, at *8.

Cumulative error is not a viable constitutional claim under 28 U.S.C. § 2254. *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); *Moore v. Parker*, 425 F.3d 250, 256 (6th Cir. 2005) (same). Additionally, the Court has rejected the substantive claims on the merits or as barred by procedural default. This claim is **DENIED**.

The issues raised in this petition are noncognizable, without merit, and barred by procedural default. The petition is **DISMISSED WITH PREJUDICE**. Judgment shall be entered for Respondent.

VI. 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). The Court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to a § 2254 petitioner. Rule 11, Rules Governing Section 2254 Cases in the United States District Courts. A petitioner may not take an appeal unless a circuit or district judge issues a COA. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22(b)(1). A COA may issue only if the petitioner has made a substantial showing of the denial of a constitutional right, and the COA must indicate the specific issue or issues that satisfy the required showing. 28 U.S.C. §§ 2253(c)(2)–(3). A "substantial showing" is made when the petitioner demonstrates that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El*, 537 U.S. at 336 (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)); *Henley v. Bell*, 308 F. App'x 989, 990 (6th Cir. 2009) (per curiam) (holding a prisoner must demonstrate that reasonable jurists could disagree with the district court's resolution of his constitutional claims or that the issues presented warrant encouragement to proceed further).

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) (same). Courts should not issue a COA as a matter of course. *Bradley v. Birkett*, 156 F. App'x 771, 773 (6th Cir. 2005) (quoting *Slack*, 537 U.S. at 337).

In this case, there can be no question that the claims in this petition are noncognizable, without merit, and barred by procedural default. Because any appeal by Petitioner on the issues raised in this petition does not deserve attention, the Court **DENIES** a certificate of appealability.

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 would not be taken in good faith and leave to appeal *in forma pauperis* is **DENIED**.[8]

IT IS SO ORDERED, this 5th day of February, 2021.

s/ Mark Norris
MARK S. NORRIS
UNITED STATES DISTRICT JUDGE

8. If Petitioner files a notice of appeal, he must pay the full $505 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).