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

PAUL FLANNIGAN,	§	
Petitioner,	§	
vs.	§	No. 05-2269-JPM-tmp
TONY PARKER,	§	
Respondent.	§	

ORDER OF DISMISSAL
ORDER DENYING CERTIFICATE OF APPEALABILITY
AND
ORDER CERTIFYING APPEAL NOT TAKEN IN GOOD FAITH

Petitioner Paul Flannigan, Tennessee Department of Corrections prisoner number 326664, an inmate at West Tennessee State Penitentiary in Henning, Tennessee, filed a pro se petition, pursuant to 28 U.S.C. § 2254, for habeas corpus relief on April 11, 2005. On April 26, 2007, the Court entered an order directing Respondent to respond to the petition. On June 27, 2007, Respondent filed a motion to dismiss and the state court record. For the reasons stated below, the petition for habeas corpus relief is DISMISSED.

I. STATE COURT PROCEDURAL HISTORY

Following a jury trial in Shelby County, Tennessee, Petitioner was convicted of "one count of attempted first degree murder, two counts of especially aggravated robbery, three counts of aggravated

rape, and one count of aggravated burglary. He received an effective sentence of 125 years." State v. Flannigan, 2002 WL 1483205 at *1 (Tenn. Crim. App. 2002), perm. to appeal denied, (Tenn. 2002). On appeal, Petitioner challenged the sufficiency of the evidence supporting his convictions and alleged various errors in the calculation of his sentences. The Court of Criminal Appeals concluded that insufficient evidence supported one of the aggravated rape convictions, but upheld all other convictions. Id. at *4. Respecting Petitioner's claims of sentencing error, the Court of Criminal Appeals held that the trial court had incorrectly applied some of Tennessee's statutory enhancement factors to each count of conviction in determining a sentence. After applying the correct factors and affirming the imposition of consecutive sentences, the appellate court arrived at an effective sentence of ninety-three years. Id. at *7.

Petitioner filed a petition for post-conviction relief in the state courts arguing that his conviction and sentence should be vacated because 1) he received the ineffective assistance of trial and appellate counsel; and 2) he was a victim of prosecutorial misconduct. Petitioner's post-conviction claims centered largely on perceived flaws in the indictments, jury verdicts, orders of judgment, and minute entries entered in his case. Petitioner was appointed counsel but subsequently moved for the dismissal of counsel and refused to allow the filing of an amended petition for post-conviction relief. The post-conviction court dismissed the

petition for failure to state a colorable claim warranting post-conviction relief. On appeal, the Court of Criminal Appeals affirmed. Flannigan v. State, 2005 WL 491529 at *3 (Tenn. Crim. App. 2005). Petitioner did not seek permission to appeal to the Tennessee Supreme Court.

II. PETITIONER'S FEDERAL HABEAS CLAIMS

Petitioner appears to raise the following claims in his habeas petition:

a. that he was denied the effective assistance of counsel because counsel failed to 1) "present a defense to each alleged offense;" 2) "failed to call witness investigate the defendant's story as to what happened;" and 3) failed to challenge the court's jurisdiction based on the alleged faulty indictments, minutes, and jury verdict forms;

b. "that the Tennessee Supreme Court has failed to properly consider these issues;"

c. that the "jury was supposed to consider any enhancement factors to increase sentence;" and

d. he "should have been given an evidentiary hearing."

III. LEGAL STANDARDS APPLICABLE TO HABEAS PETITIONS

A. Waiver and Procedural Default

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

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

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

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

> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

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

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

satisfy the exhaustion requirement of 28 U.S.C. § 2254(b) "by presenting the state courts only with the facts necessary to state a claim for relief." Id.

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

Moreover, the state court decision must rest primarily on federal law. Coleman v. Thompson, 501 U.S. 722, 734-35 (1991).

If the state court decides a claim on an independent and adequate state ground, such as a procedural rule prohibiting the state court from reaching the merits of the constitutional claim, the petitioner ordinarily is barred by this procedural default from seeking federal habeas review. Wainwright v. Sykes, 433 U.S. 72, 87-88 (1977). However, the state-court decision need not explicitly address the federal claims; instead, it is enough that the petitioner's brief squarely presents the issue. Smith v. Digmon, 434 U.S. 332 (1978) (per curiam); see also Baldwin v. Reese, 541 U.S. 27, 30-32 (2004) (a federal habeas claim is fairly presented to a state appellate court only if that claim appears in the petitioner's brief).

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

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

comply with the procedural rule. Coleman, 501 U.S. at 752-53; Murray v. Carrier, 477 U.S. 478, 488 (1986).

A petitioner may avoid the procedural bar, and the necessity of showing cause and prejudice, by demonstrating "that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman, 501 U.S. at 750. The petitioner must show that "'a constitutional violation has probably resulted in the conviction of one who is actually innocent.'" Schlup v. Delo, 513 U.S. 298, 327 (1995)(quoting Murray, 477 U.S. at 496). "To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." Id.

B. Legal Standard for Merits Review

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

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

This Court must determine whether the state court adjudications of the claims that were decided on the merits were either "contrary to" or an "unreasonable application of" "clearly established" federal law as determined by the United States Supreme Court. This Court must also determine whether the state court decision with respect to each issue was based on an unreasonable determination of the facts in light of the evidence presented in the state proceeding.

1. § 2254(d)(1)

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

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

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

Id. at 405-06 (citations omitted); see also Price v. Vincent, 538 U.S. 634, 640 (2003); Lockyer v. Andrade, 538 U.S. 63, 73 (2003); Bell v. Cone, 535 U.S. 685, 694 (2002).[2] The Supreme Court has emphasized the narrow scope of the "contrary to" clause, explaining that "a run-of-the-mill state-court decision applying the correct legal rule from our cases to the facts of a prisoner's case would not fit comfortably within § 2254(d)(1)'s 'contrary to' clause." Williams, 529 U.S. at 406; see also id. at 407 ("If a federal habeas court can, under the 'contrary to' clause, issue the writ whenever it concludes that the state court's application of clearly established federal law was incorrect, the 'unreasonable application' test becomes a nullity.").

A federal court may grant the writ under the "unreasonable application" clause "if the state court correctly identifies the governing legal principle from [the Supreme Court's] decisions but unreasonably applies it to the facts of the particular case." Cone, 535 U.S. at 694; see also Andrade, 538 U.S. at 75; Williams, 529 U.S. at 409.[3] "[A]n unreasonable application of federal law is

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

[3] Although the Supreme Court in Williams recognized, in dicta, the possibility that a state-court decision could be found to violate the "unreasonable application" clause when "the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply," 529 U.S. at 407, the Supreme Court expressed a concern that "the classification does have some problems of precision," id. at 408. The Williams Court concluded that it was not necessary "to decide how such 'extension of legal principle' cases should be treated under § 2254(d)(1),"

different from an incorrect application of federal law." Williams, 529 U.S. at 410.[4] "[A] federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." Id. at 409.[5]

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

> This provision marks a significant change from the previous language by referring only to law determined by the Supreme Court. A district court or court of appeals no longer can look to lower federal court decisions in

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id. at 408-09, and, to date, the Supreme Court has not had occasion to revisit the issue. See Williams v. Coyle, 260 F.3d 684, 699-700 (6th Cir. 2001), cert. denied, 536 U.S. 947 (2002).

[4] See also Andrade, 538 U.S. at 75 (lower court erred by equating "objectively unreasonable" with "clear error"; "These two standards, however, are not the same. The gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness."); Woodford v. Visciotti, 537 U.S. 19, 25 (2002) (per curiam)(holding that the lower court "did not observe this distinction [between an incorrect and an unreasonable application of federal law], but ultimately substituted its own judgment for that of the state court, in contravention of 28 U.S.C. § 2254(d)."); Cone, 535 U.S. at 698-99 ("For [a habeas petitioner] to succeed . . . , he must do more than show that he would have satisfied Strickland's test if his claim were being analyzed in the first instance, because under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied Strickland incorrectly."); Williams, 529 U.S. at 411 ("Under § 2254(d)(1)'s 'unreasonable application' clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.").

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

> deciding whether the state decision is contrary to, or an unreasonable application of, clearly established federal law.

Herbert v. Billy, 160 F.3d 1131, 1135 (6th Cir. 1999)(citing 17A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4261.1 (2d ed. Supp. 1998)); see also Harris, 212 F.3d at 944 ("It was error for the district court to rely on authority other than that of the Supreme Court of the United States in its analysis under § 2254(d)."). Finally, in determining whether a rule is "clearly established," a habeas court is entitled to rely on "the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." Williams, 529 U.S. at 412.

2. § 2254(d)(2)

There is almost no case law about the standards for applying § 2254(d)(2), which permits federal courts to grant writs of habeas corpus where the state court's adjudication of a petitioner's claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." In a decision applying this standard, the Supreme Court observed that § 2254(d)(2) must be read in conjunction with 28 U.S.C. § 2254(e)(1), which provides that a state court's factual determinations are presumed to be correct unless rebutted by clear and convincing evidence. Miller-El v.

Dretke, 125 S. Ct. 2317, 2325 (2005).[6] It appears that the Supreme Court has, in effect, incorporated the standards applicable to the "unreasonable application" prong of § 2254(d)(1). Rice v. Collins, 126 S. Ct. 969, 976 (2006)("Reasonable minds reviewing the record might disagree about the prosecutor's credibility, but on habeas review that does not suffice to supersede the trial court's credibility determination."). That is consistent with the approach taken by the Sixth Circuit, which stated, in an unpublished decision, that

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

Young v. Hofbauer, 52 Fed. Appx. 234, 236 (6th Cir. Dec. 2, 2002) (citing 28 U.S.C. § 2254(e)(1));[7] see also Stanley v. Lazaroff, 01-4340, 2003 WL 22290187, at *9 (6th Cir. Oct. 3, 2003); Jackson v. Holland, No. 01-5720, 2003 WL 22000285, at *7 (6th Cir. Aug. 21, 2003)("Though the Supreme Court has not yet interpreted the 'unreasonable determination' clause of § 2254(d)(2), based upon the reasoning in Williams, it appears that a court may grant the writ

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

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

if the state court's decision is based on an objectively unreasonable determination of the facts in light of the evidence presented during the state court proceeding.")(citing Torres v. Prunty, 223 F.3d 1103, 1107-08 (9th Cir. 2000)).

IV. ANALYSIS OF PETITIONER'S CLAIMS

A. Claim 1: Ineffective Assistance of Counsel

Petitioner first claims that counsel was ineffective for failing to "present a defense to each alleged offense;" failing to "call witnesses [to] investigate the defendant's story as to what happened;" and failing to challenge the trial court's jurisdiction based on the alleged defective indictments, minutes, and jury verdict forms. Respondent claims that each of Petitioner's claims of ineffective assistance is procedurally defaulted from federal habeas corpus review. Respecting the first two allegations, pertaining to counsel's alleged failure to "present a defense" and "call witnesses," Respondent asserts that Petitioner has failed to present these claims in the state courts. Respecting the latter allegation concerning counsel's failure to challenge the trial court's jurisdiction based on perceived flaws in the indictment, minutes, and jury verdict forms, Respondent contends that, while the claim was presented in Petitioner's post-conviction petition and on appeal, it is nonetheless defaulted because Petitioner did not seek permission to appeal the Court of Criminal Appeals' judgment to the Tennessee Supreme Court.

Respondent's contention that Petitioner has defaulted his allegations pertaining to counsel's failure to "present a defense" and "call witnesses" is correct. Petitioner has wholly failed to present these claims in the state courts, and he has not demonstrated cause or prejudice for his default. Thus, these allegations are procedurally barred from review in federal habeas corpus. Accordingly, Petitioner's claims that counsel was ineffective for failing to "present a defense" and "call witnesses" are DISMISSED.

Respondent's assertion of default with respect to Petitioner's remaining allegation of ineffectiveness is not well-taken. Respondent maintains that Petitioner has defaulted his claim alleging ineffectiveness based on counsel's failure to challenge the indictments, minutes, and jury verdict forms because he failed to request permission from the Tennessee Supreme Court to appeal the Court of Criminal Appeals' judgment denying relief on this claim. Without citation to authority, Respondent concludes that Petitioner was required to seek this discretionary appeal in order to exhaust state remedies. However, Tennessee Supreme Court Rule 39 reads, in pertinent part, as follows:

> In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967, a litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals

> or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim.

See also Adams v. Holland, 330 F.3d 398, 401-02 (6th Cir. 2003)(holding that relief by discretionary appeal to the Tennessee Supreme Court is unavailable because "Rule 39 clearly removed Tennessee Supreme Court review as an antecedent for habeas purposes. By its terms, Rule 39 dictates that once the Court of Criminal Appeals has denied a claim of error, 'the litigant shall be deemed to have exhausted all available state remedies available for that claim.'"). Thus, Petitioner was not required to seek discretionary review in the Tennessee Supreme Court in order to exhaust claims considered by the Court of Criminal Appeals. Accordingly, Petitioner's claim that counsel was ineffective for failing to challenge the indictments, minutes, and jury verdicts is not defaulted for purposes of federal habeas review. The Court will proceed to consider the claim on its merits.

1. Applicable Legal Standards

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

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth

> Amendment. Second, the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

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

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

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

effective assistance by erroneous tactical decisions if, at the time, the decisions would have seemed reasonable to the competent trial attorney'")(citations omitted).

A prisoner attacking his conviction bears the burden of establishing that he suffered some prejudice from his attorney's ineffectiveness. Lewis v. Alexander, 11 F.3d 1349, 1352 (6th Cir. 1993); Isabel v. United States, 980 F.2d 60, 64 (1st Cir. 1992). "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant." Strickland, 466 U.S. at 697. If a reviewing court finds a lack of prejudice, it need not determine whether, in fact, counsel's performance was deficient. Id. at 697.

To demonstrate prejudice, a prisoner must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. Additionally, however, in analyzing prejudice,

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

Lockhart v. Fretwell, 506 U.S. 364, 368 (1993)(citing United States v. Cronic, 466 U.S. 648, 658 (1984)); see also Strickland, 466 U.S. at 686 ("The benchmark for judging any claim of ineffectiveness

must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."). "Thus analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." Lockhart, 506 U.S. at 369.

2. Application

Respondent contends that Petitioner has failed to show that the Court of Criminal Appeals' decision affirming the denial of his claims of ineffective assistance of counsel is contrary to, or an unreasonable application of, Supreme Court precedent. Respondent is correct. During post-conviction review, Petitioner alleged that counsel was ineffective for failing to challenge the validity of the indictments, minutes, and jury verdict forms under provisions of Tennessee constitutional and statutory law. The state courts considered Petitioner's state-law challenges to those documents, rejected his arguments, and concluded that counsel was not ineffective as alleged. Flannigan, 2005 WL 491529 at *2-*3. Because it is not the function of this Court to "reexamine state-court determinations on state-law questions," Estelle v. McGuire, 502 U.S. 62, 68 (1991), this Court must defer to the state courts' findings that the indictments, minutes, and jury verdict forms complied with state law. Because Petitioner's state law allegations of error are without merit, he cannot demonstrate deficient performance or prejudice and the Court of Criminal

Appeals' decision denying his ineffective assistance of counsel claim is therefore not contrary to, or an unreasonable application of, Supreme Court precedent. Accordingly, this claim is DISMISSED.

B. Claim 2: The Adequacy of the Tennessee Supreme Court's Review

Petitioner's second enumerated claim reads as follows:

> The Tennessee Supreme Court has failed to properly consider these issues. Petitioner know of (2) other inmates that has filed on this same issue and the Tennessee Supreme Court gave no opinion just a blank denial. Kenneth White & Corey Kennerly.

It appears that the "issues" referred to in the second claim are the perceived defects in the indictments, minutes, and jury verdict forms that Petitioner challenged in post-conviction review and discussed in his ineffective assistance claim. Petitioner does not allege that the Supreme Court's review of his claims was inadequate. Indeed, it is clear from the record that he did not seek Supreme Court review of these "issues" during post-conviction proceedings. Nor is Petitioner allowed to seek habeas relief on the basis of the purported inadequate review allegedly given to Mr. White's and Mr. Kennedy's claims. Thus, to the extent Petitioner intends that Claim 2 set forth an independent claim of constitutional error related to the purported inadequacy of review afforded by the Tennessee Supreme Court, he has failed to state a claim cognizable in federal habeas corpus. Even in the event that he could state a federal habeas corpus claim based on this allegation, he has clearly defaulted the claim due to his failure

to pursue the claim in the state courts. Accordingly, this claim is DISMISSED.

C. Claim 3: Unconstitutionally Enhanced Sentence

Petitioner claims that the

> jury was supposed to consider any enhancement factors to increase sentence. Having a right to a jury determine any enhancement factors that increased my sentence. This was done by the judge and for a first time offender with "no" criminal record at all and to receive an excessive amount of time was wrong. Should have been done by a reasonable doubt and not a preponderance of evidence.

Respondent asserts that this claim appears to be based on the Supreme Court's decision in Blakely v. Washington, 542 U.S. 296 (2004),[8] and is defaulted because Petitioner did not present the claim on direct appeal or during post-conviction review. Respondent is correct. Petitioner has failed to properly present his claim of Sixth Amendment sentencing error pursuant to Blakely to the state courts. Thus, it is barred from federal habeas corpus review. Accordingly, this claim is DISMISSED.

D. Claim 4: Entitlement to an Evidentiary Hearing

Petitioner's last claim asserts that

> I should have been given an evidentiary hearing. I was afraid and did not know the law under a lot of stress needed a hearing and more time to find more issues so I could be more comfortable with lawyer. Please I need help.

[8] Indeed, in a letter in response to Respondent's motion to dismiss, Petitioner asserts that "[t]ruely I didn't receive a fair sentence based on Blakely v. Washington." Letter, doc. no. 18 (July 8, 2007).

It is unclear whether Petitioner intends to assert an independent claim of constitutional error based on some alleged denial of an evidentiary hearing in the state courts, or whether he is simply imploring this Court to order such a hearing. In either case, he has failed to state a claim of constitutional error cognizable in habeas corpus. First, the record reflects that Petitioner was given an evidentiary hearing on his state petition for post-conviction relief. Moreover, Petitioner refused the assistance of appointed counsel in preparing his post-conviction pleadings and representing him at the hearing. Thus, any claim that he was denied a hearing to which he was entitled is, in addition to being defaulted, without merit. To the extent he claims he is entitled to a hearing on his federal habeas corpus petition, he has failed to state a habeas corpus claim relating to constitutional error resulting in his conviction and sentence. Furthermore, for the reasons given above, his petition is clearly without merit and he is therefore not entitled to an evidentiary hearing in support of the petition. Accordingly, this claim is DISMISSED.

Because it appears, based on the petition, the Respondent's answer, and the record in this case, that Petitioner is not entitled to habeas corpus relief, his petition pursuant to 28 U.S.C. § 2254 is DISMISSED.

V. APPELLATE ISSUES

The Court must also determine whether to issue a certificate of appealability ("COA"). Twenty-eight U.S.C. § 2253(a) requires

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

In Slack v. McDaniel, 529 U.S. 473, 483-84 (2000), the Supreme Court stated that § 2253 is a codification of the standard announced in Barefoot v. Estelle, 463 U.S. 880, 893 (1983), which requires a showing that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "'adequate to deserve encouragement to proceed further.'" Slack, 529 U.S. at 484 (quoting Barefoot, 463 U.S. at 893 & n.4).

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

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

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

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

Id. at 338 (quoting Barefoot, 463 U.S. at 893); see also id. at 342 (cautioning courts against conflating their analysis of the merits with the decision of whether to issue a COA; "The question is the debatability of the underlying constitutional claim, not the resolution of that debate.").[9]

In this case, Petitioner's claims are clearly defaulted and/or without merit for the reasons previously stated. Because Petitioner cannot present a claim of constitutional error about which reasonable jurists could differ, the Court DENIES a certificate of appealability.

The Sixth Circuit has held that the Prison Litigation Reform Act of 1995, 28 U.S.C. § 1915(a)-(b), does not apply to appeals of orders denying § 2255 motions. Kincade v. Sparkman, 117 F.3d 949, 951 (6th Cir. 1997). Rather, to appeal in forma pauperis in a § 2254 case, and thereby avoid the appellate filing fee required

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

by 28 U.S.C. §§ 1913 and 1917, Petitioner must seek permission from the district court under Federal Rule of Appellate Procedure 24(a). Kincade, 117 F.3d at 952.[10] Rule 24(a) provides that a party seeking pauper status on appeal must first file a motion in the district court, along with a supporting affidavit. Fed. R. App. P. 24(a)(1). However, Rule 24(a) also provides that if the district court certifies that an appeal would not be taken in good faith, or otherwise denies leave to appeal in forma pauperis, Petitioner must file his motion to proceed in forma pauperis in the appellate court. See Fed. R. App. P. 24(a) (4)-(5).

In this case, for the same reasons the Court denies a certificate of appealability, the Court determines that any appeal would not be taken in good faith. It is therefore CERTIFIED, pursuant to Fed. R. App. P. 24(a), that any appeal in this matter is not taken in good faith, and leave to appeal in forma pauperis is DENIED. Accordingly, if Petitioner files a notice of appeal, he must also pay the full $455 appellate filing fee or file a motion to proceed in forma pauperis and supporting affidavit in the Sixth Circuit Court of Appeals within thirty (30) days.

IT IS SO ORDERED this 4th day of September, 2007.

s/ JON PHIPPS McCALLA
UNITED STATES DISTRICT JUDGE

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