CAPITAL CASE

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

FARRIS GENNER MORRIS,

Petitioner

vs.

TONY MAYS, Warden

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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No. 16-6661

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FARRIS GENNER MORRIS,

Petitioner-Appellant,

v.

TONY MAYS, Warden,

Respondent-Appellee.

ORDER

Before: BOGGS, SILER, and CLAY, Circuit Judges.

Farris Morris, a Tennessee prisoner under sentence of death, appeals the district court judgment that denied his Rule 59(e) motion to alter or amend the judgment entered by the district court following this court's decision in his prior appeal, *Morris v. Carpenter*. 802 F.3d 825 (6th Cir. 2015), *cert. denied*, 137 S. Ct. 44 (2016). In his motion and amended motion, Morris argued that he was entitled to litigate claims of ineffective assistance of trial and appellate counsel under *Martinez v. Ryan*, 566 U.S. 1 (2012). The district court denied Morris's motion and denied a Certificate of Appealability (COA). In his COA application, Morris asks that he be allowed to appeal four claims and sub-claims of ineffective assistance of counsel because they are debatable and *Martinez* overcomes their default: 9N/24; 9P/27; 9K/21A, 21B, 21C, and 21D; and 10A-10D.

This litigation began when Morris filed an amended petition for a writ of habeas corpus in January 2008. The district court ruled that Morris received ineffective assistance of counsel in the sentencing phase, denied his guilt-phase claims, and granted him a conditional writ in 2011. Morris then applied to this court for a COA on the claim that trial counsel was ineffective for

failing to investigate and present a state-of-mind defense, and "all guilt-phase claims raised in Petitioner's Amended Petition." This court certified Morris the one claim argued in the COA application, and ruled that Morris had waived consideration of his other guilt-phase claims by failing to argue them.

While the appeal was being briefed, Morris filed a motion to remand. He argued that he could show cause to excuse the default of substantial claims of ineffective assistance of trial counsel under *Trevino v. Thaler*, 569 U.S. 413 (2013), and *Martinez*. This court denied the motion in October 2013. In September 2015, this court affirmed the district court's decision to deny Morris's guilt-phase ineffective assistance of trial counsel claims, vacated the district court's decision to grant relief on Morris's sentencing-phase ineffective assistance of trial counsel claims, and remanded the case to the district court for denial of the writ. *Morris*, 802 F.3d at 845. The court denied en banc rehearing. The Supreme Court denied Morris's petition for a writ of certiorari on October 4, 2016, and this court issued the mandate the same day.

The district court entered an order and judgment denying Morris's petition on October 5, 2016. The order read as follows: "The habeas petition filed on behalf of Petitioner Farris Genner Morris is DENIED, pursuant to the order of the United State [sic] Court of Appeals for the Sixth Circuit dated September 23, 2015, and the mandate issued on October 4, 2016." Morris filed a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e) on November 8, 2016. He argued that he had not received application of *Martinez* to substantial claims of ineffective assistance of counsel. Morris filed a motion to amend or correct his motion to alter judgment on January 23, 2017, seeking to add procedurally defaulted claims of ineffective assistance of appellate counsel.

The district court denied Morris's motion to alter or amend the judgment and his motion to amend by order entered March 13, 2017. The court held that this court's mandate was to deny Morris's writ, and that further consideration of Morris's claims would exceed the scope of the Sixth Circuit's mandate. The district court also held that *Martinez* and *Trevino* did not justify Rule 59(e) relief because the cases did not constitute an intervening change in the law or

controlling authority, and Morris had the opportunity to raise them on appeal before the Sixth Circuit remanded the case for denial of the writ. Finally, the district court held that Morris was not entitled to Rule 59(e) relief for manifest injustice because the claims he wanted reviewed were not substantial. The district court denied Morris a COA.

A COA may issue only if the applicant has made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). The applicant must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). When the district court has denied a claim on a procedural ground without reaching the underlying constitutional issue, a COA may issue only if the prisoner shows both: (1) that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right; and (2) that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Kissner v. Palmer*, 826 F.3d 898, 901–02 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 1081 (2017).

Upon review, we conclude that jurists of reason could not disagree with the district court's decision. *See Miller-El*, 537 U.S. at 327; *Slack*, 529 U.S. at 484. Morris did not identify any clear error, new evidence, change in the controlling law, or manifest injustice that would justify relief under Rule 59(e) or deviation from this court's prior mandate. *See Henderson v. Walled Lake Consol. Sch.*, 469 F.3d 479, 496 (6th Cir. 2006); *United States v. Moored*, 38 F.3d 1419, 1421 (6th Cir. 1994). First, the district court did not commit a clear error of law by entering the order in accordance with the Sixth Circuit's remand instructions. Indeed, that was precisely what was legally required. *See Moored*, 38 F.3d at 1421 ("[T]he mandate rule . . . requires lower courts to adhere to the command of a superior court."). Second, Morris did not present any "new evidence" that would justify relief under Rule 59(e). Morris himself acknowledges that this court has already held that the "new evidence" Morris refers to in his application was "fully adjudicated on the merits in state court." *Morris*, 802 F.3d at 844. Third,

Morris fails to identify an "intervening change of controlling law." His reliance on *Martinez* and *Trevino* is misplaced because the court discussed the application of these cases in the prior proceeding; hence, they cannot represent an "intervening change of controlling law." *See id.* Indeed, this court's decision on Morris's appeal expressly rejected Morris's argument that *Martinez* and *Trevino* required review of mitigation evidence not presented in post-conviction proceedings. *Id.* Further, while Morris's appeal was pending, this court denied his motion to remand for *Martinez* review of some of the same claims he raised in his Rule 59(e) motion. Finally, Morris cannot show that the district court's decision was clearly erroneous and would result in manifest injustice because the claims he wants reviewed are not substantial or are otherwise barred from review. Jurists of reason would not find it debatable that the district court followed the law of the case and this court's mandate when it denied Morris's Rule 59(e) motion. *See Miller-El*, 537 U.S. at 327; *Slack*, 529 U.S. at 484.

For the foregoing reasons, Morris's application for a COA is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

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

FARRIS GENNER MORRIS, Petitioner, vs. ROLAND COLSON, Warden, Riverbend Maximum Security Institution, Respondent.	)	No. 07-1084-JDB-egb

ORDER DENYING PETITION PURSUANT TO 28 U.S.C. § 2254

The habeas petition filed on behalf of Petitioner Farris Genner Morris is DENIED, pursuant to the order of the United State Court of Appeals for the Sixth Circuit dated September 23, 2015, and the mandate issued on October 4, 2016. (Electronic Case Filing Nos. 70 & 74.)

IT IS SO ORDERED, this 5th day of October, 2016.

s/ J. DANIEL BREEN
J. DANIEL BREEN
CHIEF UNITED STATES DISTRICT JUDGE

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

FARRIS GENNER MORRIS, Petitioner, v. BRUCE WESTBROOKS, Warden, Riverbend Maximum Security Institution, Respondent.	)	No. 07-1084-JDB-egb

ORDER DENYING MOTION TO ALTER OR AMEND JUDGMENT

On November 8, 2016, Petitioner, Farris Genner Morris, through counsel, filed a motion to alter or amend the judgment, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, seeking the consideration of certain ineffective assistance of trial counsel claims under *Martinez v. Ryan*, 566 U.S. 1 (2012). (Electronic Case Filing ("ECF") No. 77.) On November 22, 2016, Respondent, Bruce Westbrooks[1] filed a response. (ECF No. 80.) On December 7, 2016, Morris filed a reply. (ECF No. 82.) On December 13, 2016, Morris filed a notice of supplemental authority in support of the motion to alter or amend. (ECF No. 83.) On January 23, 2017, Morris filed an amendment to his motion seeking the application of *Martinez* to his ineffective assistance of appellate counsel claims, based on the grant of certiorari in *Davila v. Davis*, ___ S.

[1]The proper respondent to a habeas petition is the petitioner's custodian. *Rumsfeld v. Padilla*, 542 U.S. 426, 434-35 (2004). Petitioner is in custody at Riverbend Maximum Security Institution ("RMSI") where Bruce Westbrooks is the warden. *See* Tennessee Felony Offender Information Lookup, https://apps.tn.gov/foil/search.jsp (last visited Feb. 14, 2017); *see* Tennessee Department of Correction, http://www.tn.gov/correction/institutions/rmsi.html (last visited Feb. 14, 2017). The Clerk is DIRECTED to record the respondent as RMSI Warden Bruce Westbrooks. The Clerk is also DIRECTED to terminate all references to Roland Colson as the respondent.

Ct. ___, 2017 WL 125677 (U.S. Jan. 13, 2017). (ECF No. 84.) For the reasons stated, Morris's motion to alter or amend judgment is DENIED.

In *Coleman v. Thompson*, 501 U.S. 722, 757 (1991), the United States Supreme Court stated that ineffective assistance of post-conviction counsel did not serve as cause to overcome procedural default of habeas claims. *Coleman* was the law at the time this Court ruled on Morris's ineffective assistance of counsel claims.

In 2012, the Supreme Court decided *Martinez*, 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, 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.

Martinez, 566 U.S. at 17. The Supreme Court 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, 133 S. Ct. 1911, 1918 (2013) (alterations in original) (internal quotation marks omitted).

Martinez considered an Arizona law that did not permit ineffective assistance of trial claims to be raised on direct appeal. *Martinez*, 566 U.S. at 4. In its subsequent decision in *Trevino*, the Supreme Court extended its holding in *Martinez* to states in which a "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal . . . ." *Trevino*, 133 S. Ct. at 1921. *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).

Morris asserts that *Martinez* was decided after the Court rendered its initial judgment granting relief, and the Sixth Circuit denied the motion to remand for application of *Martinez*. Petitioner argues that *Martinez* has never been applied to his defaulted substantial ineffective-assistance of trial counsel claims and that the Court should alter or amend its judgment to consider his substantial claims under *Martinez*. As examples of the "very serious claims" that have not been analyzed based on *Martinez*, Morris provides his allegations about counsel's failure to:

- object to unconstitutional jury instructions, including instructions that allowed jurors to convict Morris even if, in his disordered mental state, he did not intend to kill or did not possess the *mens rea* required for first degree murder (Amended Petition, ECF No. 12, at ¶ 9K, incorporating ¶¶ 21B-21D);

- strike jurors Atkins and Bowman, who demonstrated bias against Morris (*id.* ¶¶ 9L & 9M);

- object, under *Batson v. Kentucky*, to the prosecution's strike of African-American juror Savanna Ingram for racial reasons (*id.* ¶ 9N); and

- object to the systematic exclusion of African-Americans and women as grand jury forepersons in Madison County, Tennessee (*id.* ¶ 9P, incorporating ¶ 27).

(ECF No. 77 at PageID 6404; *see* ECF No. 12 at PageID 116-17, 127-28, 133-34.)[2]

Petitioner's ineffective assistance of appellate counsel claims in Amended Petition ¶¶ 11(B-H) were procedurally defaulted, and he now seeks review under *Martinez* based on the grant of certiorari in *Davila.*

He asserts that the Court should ultimately grant relief on his procedurally defaulted ineffective assistance of counsel claims. The inmate contends that his claims are "substantial" and that he has cause under *Martinez* and can show prejudice to overcome the procedural default.

I. RELEVANT PROCEDURAL HISTORY

On April 26, 2007, Morris filed a *pro se* petition pursuant to 28 U.S.C. § 2254. (ECF No. 1) Through counsel, he amended the petition on January 11, 2008. (ECF No. 12.) On September 29, 2011, the Court determined that Petitioner was denied the effective assistance of counsel at sentencing and granted the petition in part. (ECF No. 58 at PageID 1124.)

The parties appealed. (ECF Nos. 62 & 63.) On March 1, 2012, Morris filed an application for a certificate of appealability ("COA") on his guilt-phase habeas claims, particularly the guilt-phase ineffective assistance of counsel claims. (Case No. 11-6322, Doc. No. 30 (6th Cir. Mar. 1, 2012).[3] He stated that his habeas petition was the first opportunity to present the procedurally defaulted ineffective assistance of counsel claims and that the Sixth Circuit "should await the Supreme Court's decision in *Martinez* before determining whether Petitioner's claims are defaulted." (*Id.* at 26-30.)

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[2]Morris states that additional ineffectiveness claims were presented and procedurally defaulted. However, he does not specifically request the application of *Martinez* or argue those claims in the instant motion. Therefore, the Court will not address the application of *Martinez* to these claims for purposes of this motion.

[3]Petitioner did not specifically address any of the ineffective assistance of trial counsel claims raised in the instant motion in his application for a COA. He failed to raise any issues about the ineffective assistance of appellate counsel claims in his application for a COA.

Martinez was decided on March 20, 2012, while the application for a COA was pending. On September 13, 2012, the Sixth Circuit granted in part and denied in part Morris's application for a COA. (Doc. No. 41-2.) The court stated:

> The case will proceed on the Warden's appeal and on Morris's claim that his trial counsel were ineffective in the guilt phase for failing to investigate and present a state-of-mind defense to the charge of first-degree intentional, deliberate, premeditated murder. Morris has waived consideration of his other guilt-phase claims by failing to argue them in his COA application.

(*Id.*)

On July 24, 2013, the inmate filed a motion to remand the case to the district court based on *Trevino*, which had been decided two months earlier on May 28, 2013. (Doc. No. 65-1.) He sought remand to determine cause and prejudice for the default of his ineffectiveness claims related to trial counsel's failure to:

- object to jury instructions regarding reasonable doubt;
- challenge race and gender discrimination in the selection of the grand jury foreperson; and
- raise a *Brady* claim about the State's pre-trial consultation with its expert witness O.C. Smith.

(*Id.* at 1, 8-10.) Respondent argued that two of the three claims were not raised in the petition; that *Martinez* and *Trevino* were not timely raised as to the other claim; and that Morris's ineffective assistance claims are not substantial. On October 30, 2013, the Sixth Circuit denied the motion to remand. (Doc. 82-2.) The Sixth Circuit subsequently, but while Petitioner's appeal was pending, held "that ineffective assistance of post-conviction counsel can establish cause to excuse a Tennessee defendant's procedural default of a substantial claim of ineffective assistance at trial" under *Martinez*. *See Sutton*, 745 F.3d at 795-96.

On September 23, 2015, the Sixth Circuit affirmed the denial of Morris's guilt-phase ineffectiveness claims, vacated the grant of habeas relief for the sentencing phase ineffective assistance claims, and remanded the case "for a denial of the writ in accordance with this decision." (Doc. 126-2 at 26.)[4] The Sixth Circuit denied en banc rehearing. (Doc. 133.) The Supreme Court denied the petition for writ of certiorari on October 4, 2016. (Doc. 136.) The Sixth Circuit issued a mandate on October 4, 2016. (No. 07-1084, ECF No. 74.) Consistent with that mandate, this Court denied the petition, and a judgment was entered. (ECF No. 75 at PageID 6401; *see* ECF No. 76 at Page ID 6402.)

II. THE STANDARDS

There are two standards relevant to the Court's consideration of Morris's motion: (1) the mandate rule; and (2) the standard for a motion to alter or amend judgment under Fed. R. Civ. P. 59.

A. The Mandate Rule

The mandate rule is a specific application of the law-of-the-case doctrine and relevant to Petitioner's motion because it defines the district court's actions on remand. *See United States v. Campbell*, 168 F.3d 263, 265 (6th Cir. 1999); *see also Huffman v. Saul Holdings Ltd. P'ship*, 262 F.3d 1128, 1132 (10th Cir. 2001) (The mandate informs the district court of what it must do to implement the appellate decision on remand and limits further proceedings to the scope of the mandate. The lower court "must comply strictly with the mandate rendered by the reviewing court" and "may not deviate" from the mandate.) "The trial court must implement both the letter

[4]The judgment states that the Sixth Circuit remanded the case "to the district court for the denial of the writ of habeas corpus in accordance with the opinion of this court." (ECF No. 70 at PageID 6314.)

and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces." *Mason v. Mitchell*, 729 F.3d 545, 550 (6th Cir. 2013).

The Sixth Circuit has stated that "[t]he mandate rule has two components -- the limited remand rule, which arises from action by an appellate court, and the waiver rule, which arises from action (or inaction) by one of the parties." *United States v. O'Dell*, 320 F.3d 674, 679 (6th Cir. 2003). The mandate rule forecloses relitigation of issues expressly or impliedly decided by the appellate court. *Id.*; *see Allard Enter., Inc. v. Advanced Programming Res., Inc.*, 249 F.3d 564, 570 (6th Cir. 2001) (the lower court "may consider those issues not decided expressly or impliedly by the appellate court or a previous trial court"). The district court is prohibited from reopening on remand an issue that was ripe for review on appeal but not raised by the appellant unless the mandate can reasonably be interpreted as permitting the district court to do so. *O'Dell*, 320 F.3d at 679; *see, e.g.*, *Engel Indus., Inc. v. The Lockformer Co.*, 166 F.3d 1379, 1383 (Fed. Cir. 1999) ("An issue that falls within the scope of the judgment appealed from but is not raised by the appellant in its opening brief on appeal is necessarily waived.").

The difference between a limited mandate and a general mandate is the presence of limiting language. *O'Dell*, 320 F.3d at 680. In *United States v. Guzman*, 48 F. App'x 158, 160-61 (6th Cir. 2002), the Sixth Circuit outlined the distinctions between a general and limited remand based on the appellate mandate:

> Limited remands explicitly outline the issues to be addressed by the district court and create a narrow framework within which the district court must operate. General remands, in contrast, give district courts authority to address all matters as long as remaining consistent with the remand. Though it is not always easy to distinguish the two types of remand, district courts can follow certain guidelines, including whether specific language in the remand clearly limits the scope of subsequent proceedings, whether the appellate court explicitly articulated the reasons for its remand, whether the appellate court articulated the prescribed chain of events with particularity, and whether multiple issues are involved (which, if present, suggest a general mandate). Overall, in the absence of an explicit

> limitation, the remand order is presumptively a general one, and the language used to limit the remand should be, in effect, unmistakable.

Id. (internal citations & quotation marks omitted).

There are exceptions for departure from the mandate rule when: (1) "the evidence in a subsequent trial is substantially different"; (2) "controlling authority has subsequently made a contrary decision of the law applicable to such issues"; or (3) the "decision was clearly erroneous and would work a manifest injustice." *Waste Mgmt. of Ohio, Inc. v. City of Dayton*, 169 F. App'x 976, 987 (6th Cir. 2006). Even where the mandate does not contemplate resurrecting an issue, the trial court possesses "some limited discretion" to reopen the issue under these "very special circumstances." *Id.* n.3.

B. Motion to Alter or Amend

A motion filed pursuant to Fed. R. Civ. P. 59(e) allows a court to alter or amend a judgment. The purpose of the rule is "to allow the district court to correct its own errors, sparing the parties and appellate courts the burden of unnecessary appellate proceedings." *Howard v. United States*, 533 F.3d 472, 475 (6th Cir. 2008) (quoting *York v. Tate*, 858 F.2d 322, 326 (6th Cir. 1988)). To grant a motion filed pursuant to the rule, "there must be (1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice." *Betts v. Costco Wholesale Corp.*, 558 F.3d 461, 474 (6th Cir. 2009) (quoting *Henderson v. Walled Lake Consol. Schs.*, 469 F.3d 479, 496 (6th Cir. 2006)) (internal quotation marks omitted). The Sixth Circuit has repeatedly held that "Rule 59(e) motions cannot be used to present new arguments that could have been raised prior to judgment." *See Howard*, 533 F.3d at 475. "Rule 59(e) allows for reconsideration; it does not permit parties to effectively re-argue a case." *Id.* (internal quotation marks omitted). A motion to alter or amend is an extraordinary remedy that should be granted sparingly. *Cole v. Lester*, No. 3:12-CV-00704,

2015 WL 1650275, at *1 (M.D. Tenn. Apr. 14, 2015). "The grant or denial of a Rule 59(e) motion is within the informed discretion of the district court . . ." *Betts*, 558 F.3d at 467 (quoting *Scotts Co. v. Central Garden & Pet Co.*, 403 F.3d 781, 788 (6th Cir. 2005)).

III. ANALYSIS

The Court's determination of the motion to alter or amend judgment is based on: (1) the mandate rule and (2) the standard for a motion to alter or amend under Rule 59. The analysis includes: (1) the scope of the mandate; (2) the legal effect of *Martinez*; (3) Morris's diligence in pursuing relief; and (4) whether the Court's failure to review the issues would result in manifest injustice.

A. Scope of the Mandate

Petitioner argues that the Sixth Circuit's mandate was limited to its opinion, an opinion that simply does not address the ineffective assistance issues. He contends that the issues raised in the instant motion were not decided by the Sixth Circuit and are not embraced by any appellate mandate to this Court. He further claims that this circumstance falls within an exception to the mandate rule that allows a district court to decide issues if there has been an intervening decision or law or if a decision on a particular issue is clearly erroneous and would work a manifest injustice. As such, the inmate insists that this Court has "the power and discretion to do justice now." (ECF No. 82 at PageID 6479.)

Respondent counters that this Court's 2016 judgment was not the result of clear legal error, but was "in full accord with the Sixth Circuit's mandate." (ECF No. 80 at PageID 6468.) The warden argues that the Court's judgment was consistent with and compelled by the Sixth Circuit's mandate and does not represent a clear error of law. He maintains that a remand directing a specific, narrow course of action is a limited remand and forecloses relitigation of

issues expressly or impliedly decided by the appellate court. According to the Respondent, the Sixth Circuit remanded this case for the denial of the writ of habeas corpus and the Court was bound to follow that directive.

In *Hargrave-Thomas v. Yukins*, 450 F. Supp. 2d 711, 721 (E.D. Mich. 2006), the court stated that "any action other than a dismissal . . . would be inconsistent with this [c]ourt's authority" based on "the limited remand for entry of an order dismissing the petition." *Hargrave-Thomas* held that the petitioner's request for relief based on Fed. R. Civ. P. 60(b) was a deviation from the Court of Appeals' limited mandate. *Id.* at 722. Further, the court noted:

> This [c]ourt, as an inferior court, is plainly subject to the review of the Court of Appeals for the Sixth Circuit. *See* 28 U.S.C. § 1291. As such, by its very nature, this [c]ourt has no authority to reconsider the judgment of an appellate court. Restated, the very essence of the relationship between this [c]ourt and the Court of Appeals for the Sixth Circuit precludes this [c]ourt from altering any decision made by the Court of Appeals. No relief may be granted to [p]etitioner to the extent that she is asking this [c]ourt to directly grant relief from the appellate decision.

Id. at 720.

The remand in the instant case was limited to a denial of the writ consistent with the Sixth Circuit's opinion and required no further action from the district court. The appellate court used specific language and prescribed a chain of events that was to take place at the district court level.

The *Martinez* issue was ripe for review while Morris's claims were on appeal. However, he waived appellate review of his guilt-phase ineffective assistance of trial counsel claims on direct appeal. The Sixth Circuit denied remand of his case for the purposes of *Martinez* review, by implication, denying him the potential equitable relief that the *Martinez* opinion provided. Given the procedural history of this case, the multiple opportunities that Petitioner had to raise *Martinez/Trevino* arguments while the case was on direct appeal over a span of nearly five years,

and the fact that the district court is bound by the mandate issued by the Sixth Circuit, further consideration of Morris's claims would exceed the scope of the mandate. *See O'Dell*, 320 F.3d at 679.

To the extent Morris attempts to rely on an exception to the mandate rule, none apply for the reasons stated below.

B. Evidence

The inmate does not make an argument that he is entitled to relief based on newly discovered evidence for purposes of either Rule 59 or in support of finding an exception to the mandate rule. However, he provides affidavits from post-conviction counsel and an investigator, grand jury records, census statistics, and district attorney notes about voir dire in support of his motion.

C. The Effect of *Martinez*

There is an exception for departure from the mandate rule based on controlling authority that has subsequently made a contrary decision of the law applicable to the issues and the possibility of Rule 59 relief based on an intervening change in controlling law. Combining factors one and three for Rule 59 relief, Morris contends that there is a clear error of law in light of the intervening decision in *Martinez*. He argues that *Martinez* is an intervening change in controlling law since the Court's prior judgment. The reason for amending or modifying a judgment in light of intervening law, asserts Petitioner, is to ensure that the court's judgment reflects the application of the governing law to the facts.

The warden responds that *Martinez* was announced more than three years before the entry of judgment and is not an intervening change in the law. He insists that Rule 59 does not provide an avenue to raise new legal arguments that could have been raised before judgment was

entered. Respondent notes that Morris presented his argument to the Sixth Circuit, and the court's rejection of the *Martinez* arguments forecloses consideration of the procedurally defaulted claims.

Despite Morris's assertions about the change in law, *Martinez* can provide *equitable* relief. *Martinez*, 566 U.S. at 16. The Sixth Circuit has stated that *Martinez* and *Trevino* are "not a change in the constitutional rights of criminal defendants, but rather an adjustment of an equitable ruling by the Supreme Court as to when federal statutory relief is available" and do not rise to the level of an extraordinary circumstance that would otherwise justify post-judgment relief under Fed. R. Civ. P. 60(b)(6). *McGuire v. Warden, Chillicothe Corr. Inst.*, 738 F.3d 741, 750-51 (6th Cir. 2013). *Martinez* has been held to be a change in decisional law that does not constitute an extraordinary circumstance meriting Rule 60(b)(6) relief. *See Abdur'Rahman v. Carpenter*, 805 F.3d 710, 714 (6th Cir. 2015), *cert. denied sub nom. Abdur'Rahman v. Westbrooks*, 2017 WL 737825 (U.S. Feb. 27, 2017); *Henness v. Bagley*, 766 F.3d 550, 557 (6th Cir. 2014), *cert. denied* 135 S. Ct. 1708 (2015). The Sixth Circuit has further stated that "neither *Martinez* nor *Trevino* sufficiently changes the balance of the factors for consideration under Rule 60(b)(6) to warrant relief." *Henness*, 766 F.3d at 557; *Wright v. Warden, Riverbend Maximum Sec. Inst.*, 793 F.3d 670, 672 (6th Cir. 2015) (per curiam), *cert. denied sub nom. Wright v. Westbrooks*, 136 S. Ct. 1660 (2016); *see also Strouth v. Carpenter*, No. 3:00-cv-00836, 2014 WL 1394458, at *4 (M.D. Tenn. Apr. 9, 2014) ("*Martinez* is not a *per se* rule entitling the petitioner in every habeas action to another review").

As stated above, *Martinez*, *Trevino*, and *Sutton* were all decided before this case was remanded to the district court. Morris was not diligent in raising those arguments in the appeal process. Courts have barred relief under Rule 59(e) where the claim sought to be asserted was

not truly based on "intervening" law and could have been raised previously. *See Hutton v. Mitchell*, No. 1:05 CV 2391, 2013 WL 4060136, at *2 (N.D. Ohio Aug. 9, 2013) ("Hutton could have raised these issues before this [c]ourt's ruling, but he did not. The arguments, therefore, are barred."); *see also Hammonds v. Sharp*, No. 1:05-CV-831-WKW, 2015 WL 1346829, at *5 (M.D. Ala. Mar. 24, 2015) ("Hammonds could have raised a *Martinez* issue before the court's March 27, 2012 ruling, but he did not. Thus, Hammonds's *Martinez* argument is barred.").

This Court in, *Thomas v. Morgan*, No. 2:04-cv-02231-JDB-dkv, 2016 WL 1030153 (W.D. Tenn. Mar. 10, 2016), denied a motion to alter and amend the judgment based on *Martinez*, stating

> Thomas relies on *Martinez* [] and *Trevino* [] to support his fifth, sixth, and seventh proposed grounds for relief alleging ineffective assistance of counsel during his initial "collateral proceedings." . . . But none of these cases establishes a new rule of constitutional law. *Martinez* is an equitable ruling rather than a constitutional one.

Thomas, 2016 WL 1030153, at *2 (internal citations & some quotation marks omitted). The Court relied on its ruling on Thomas's motion pursuant to Rule 60(b)(6) to also deny his motion to alter or amend the judgment, noting that *Martinez* and *Trevino* do "not embody the type of extraordinary or special circumstance that warrants relief . . ." *Id.* at *4-5.[5]

Similarly, the Court finds that, in the instant case, *Martinez* and *Trevino* did not constitute an intervening change in the law or controlling authority to warrant an exception to the mandate or Rule 59 relief. Further, Morris had ample opportunity to raise these issues on appeal before the case was remanded for denial of the writ.

[5]Despite the Sixth Circuit's reluctance to grant post-judgment equitable relief pursuant to Rule 60(b)(6) based on *Martinez*, the district court for the Eastern District of Tennessee, relying on *McGuire*, stated "[t]here is little doubt that the *Martinez* and *Trevino* decisions represent an intervening change in law, allowing a court to review its judgment under Fed. R. Civ. P. 59(e)." *Harris v. Carpenter*, No. 3:97-CV-407, 2015 WL 1034744, at *1 (E.D. Tenn. Mar. 10, 2015).

D. Manifest Injustice

"Manifest injustice, as contemplated by Rule 59(e), is an amorphous concept with no hard line definition." *In re Cusano*, 431 B.R. 726, 734 (B.A.P. 6th Cir. 2010) (quoting *In re Henning*, 420 B.R. 773, 785 (Bankr. W.D. Tenn. 2009)) (internal quotation marks omitted). "[C]ourts have established various guidelines to be used on a case-by-case basis to determine whether the necessary manifest injustice has been shown." *Id.*

> A movant seeking Rule 59(e) relief must be able to show an error in the trial court that is direct, obvious, and observable. The movant must also be able to demonstrate that the underlying judgment caused them some type of serious injustice which could be avoided if the judgment were reconsidered. Essentially, the movant must be able to show that altering or amending the underlying judgment will result in a change in the outcome in their favor. . . . Generally, relief under Rule 59(e) is an extraordinary remedy restricted to those circumstances in which the moving party has set forth facts or law of a strongly convincing nature that indicate that the court's prior ruling should be reversed. Essentially, a showing of manifest injustice requires that there exists a fundamental flaw in the court's decision that without correction would lead to a result that is both inequitable and not in line with applicable policy.

In re Henning, 420 B.R. at 785 (internal citations & quotation marks omitted). A determination of manifest injustice is, "by definition, a fact-specific analysis that falls squarely within the discretionary authority of the [c]ourt," requiring it to "weigh the importance of bringing litigation to a firm conclusion and the need to render fair and just rulings." *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 809 (N.D. Ohio 2010).

Morris contends that, because this is a capital case, it would be a "manifest injustice" to be denied application of *Martinez* to his ineffective assistance of trial and appellate counsel claims. (ECF No. 77 at PageID 6407.) He asserts that he had been denied the application of governing law and that justice is not served when any party, especially one sentenced to death, is denied such an application.

Respondent contends that there is no manifest injustice in declining to disturb the final judgment where the Sixth Circuit has considered and rejected Petitioner's request to remand the case to this Court. There is, he insists, no manifest injustice in denying the same request now. He further asserts that Morris had the opportunity to press his *Martinez* argument in the Sixth Circuit and Rule 59 does not provide a vehicle to avoid the appellate court's adverse ruling. A review of the claims at issue assists in determining whether a manifest injustice would occur from the Court's failure to alter or amend the judgment in this case.

1. Ineffective Assistance of Trial Counsel Claims

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 (1984). To demonstrate deficient performance by counsel, a petitioner must demonstrate 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[, citing *Strickland*.] 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.

Harrington v. Richter, 562 U.S. 86, 104 (2011) (internal citations & quotation marks omitted).

To demonstrate prejudice, a prisoner must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.[6] "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "It is not enough to show that the errors had some conceivable

[6]"[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.*

effect on the outcome of the proceeding." *Richter*, 562 U.S. at 104-05. "Counsel's errors must be so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* "Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Ky.*, 559 U.S. 356, 371 (2010).

a. Unconstitutional Jury Instructions (Amended Petition ¶ 9K, incorporating ¶¶ 21B-21D)

In Amended Petition ¶ 9K, Morris alleged that his trial counsel failed to object to improper jury instructions in ¶ 21. The Court determined that Petitioner's allegations of ineffective assistance related to the jury instructions, with the exception of the one about the reasonable doubt jury instruction, were procedurally defaulted. He seeks review under *Martinez* of the allegations for his claims of ineffective assistance of counsel as it relates to Amended Petition ¶ 21(B-D). Petitioner's post-conviction counsel, Paul Morrow, states that he did not raise ineffective assistance of trial counsel claims about the intent guilt-phase jury instructions and the capacity to premeditate and that his failure to raise those issues was not a tactical decision.

In Amended Petition ¶ 21B, the inmate argued that, at the guilt phase, the court instructed the jury that it could find the required element of an "intentional" killing, but in defining "intentionally," instructed the jury that "[a] person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result." (ECF No. 66-14 at PageID 2752, 2756.) The instruction stated:

> A person acts intentionally with respect to the nature of his conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.

(*Id.* at PageID 2752.)

Morris insists that his trial counsel ineffectively failed to object to unconstitutional jury instructions regarding intent. He asserts that the jury was instructed that it could find the essential element of "intent" by merely finding that he intended to engage in conduct that caused the death of Erica Hurd. Petitioner contends that the instruction is a classic violation of *Sandstrom v. Montana*, 442 U.S. 510 (1979), because first-degree murder in Tennessee requires a specific intent to kill. The instruction, according to the inmate, allows the mere intent to act to supply specific intent to kill. He maintains that his mental state was heavily disputed at trial, and the instruction was highly prejudicial because it allowed mere intent to act to supply the specific intent to kill.

At the time of Morris's trial, "intentional" was defined as the "conscious objective or desire to engage in the conduct or cause the result." Tenn. Code Ann. § 39-11-302(a) (1991). The Sixth Circuit has held that similar instructions do not violate the Constitution. *See Longwell v. Arnold*, 371 F. App'x 582, 584, 588 (6th Cir. 2010) (instruction that "[a] person acts intentionally with respect to a result or to conduct when his conscious objective is to cause that result or to engage in that conduct" was a "sufficient instruction on the element of intent"). Counsel's failure to object to a jury instruction that is a correct statement of the law does not constitute deficient performance under *Strickland*. *See Moore v. Steward*, 948 F. Supp. 2d 826, 852 (W.D. Tenn. 2013) (denying habeas relief for ineffective assistance related to a jury instruction that was a correct statement of the law); *Fears v. Bagley*, No. 1:01-cv-183, 2008 WL 2782888, at *35 (S.D. Ohio July 15, 2008) ("[T]he instruction was not erroneous. His trial counsel was not ineffective in failing to object, and his appellate counsel's failure to appeal a correct instruction is not ineffective assistance.").

In Amended Petition ¶ 21C, Morris complains about the guilt-phase instruction that the jury determine whether he was "capable of premeditation," arguing that the appropriate constitutional inquiry is whether he actually premeditated. (ECF No. 12 at PageID 128.) Petitioner contends that this instruction relieved the prosecution of its burden of proof. The Court determined that the allegations in ¶ 21C were procedurally defaulted.

The trial court instructed the jury on first-degree murder and the essential elements of an unlawful killing, intent, deliberation and premeditation. The court stated that "[a] premeditated act is one done after the exercise of reflection and judgment" and defined "premeditation" as follows:

> "Premeditation" means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill preexist in the mind of the accused for any definite period of time. It is sufficient that it preceded the act however short the interval as long as it was the result of reflection and judgment.
>
> The mental state of the accused at the time he allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation.
>
> . . .
>
> Furthermore, premeditation can be found if the decision to kill is first formed during the heat of passion, but the accused commits the act after the passion has subsided.

(*Id.*) Further, the trial court stated that "the required mental state for first degree murder is expressed in terms of intentional, deliberate and premeditated." (*Id.* at PageID 2757-58.)

The instruction is a correct statement of the law. *See State v. Willis*, No. E2012-01313-CCA-R3-DD, 2015 WL 1207859, at *87 (Tenn. Crim. App. Mar. 13, 2015) (the "capable of premeditation" language is a correct statement of the law), *aff'd* 496 S.W.3d 653 (Tenn. 2016), *cert. denied* ___ S. Ct. ___, 2017 WL 856225 (No. 16-6995) (U.S. Mar. 6, 2017); *see also Cockrell v. Edwards*, No. 99-4003, 2000 WL 876543, at *1 (6th Cir. June 22, 2000) (denying

habeas relief where the jury instruction was a correct statement of the law). The instruction makes it clear that there must be evidence of premeditation to find Morris guilty of first degree murder. The prosecution is not relieved of its burden of proof, and counsel's performance is not deficient for failing to object to a correct jury instruction. The allegations in Amended Petition ¶ 9K as it relates to ¶ 21C are not substantial under *Martinez*.

The Court determined that the allegations in Amended Petition ¶ 9K, as it relates to ¶ 21D about the intoxication jury instruction concerning *mens rea*, were without merit, and therefore *Martinez* does not apply to these claims.

b. Juror Atkins (Amended Petition ¶ 9L)

In Amended Petition ¶ 9L, Morris alleges that his trial counsel failed to strike Juror Atkins who stated that he knew the victim Charles Ragland's uncle and that Ragland's uncle stated that Petitioner should be executed. Petitioner argues that Atkins admitted to a prejudice against criminal defendants who do not testify and to outside knowledge of the case that created a bias against Morris. He contends that his trial counsel never challenged Atkins for cause or exercised a peremptory challenge to have him removed from the panel.

The Court denied the claim as procedurally defaulted. Although the inmate asserts that he is entitled to relief based on this claim, he makes no argument in his motion to demonstrate that the specific claim is substantial.

Previously, Morris insisted that Atkins worked with a cousin of Ragland, who had worked at the plant, and that Atkins said "a defendant should testify if he's accused of a crime." (ECF No. 50 at PageID 590.) Petitioner compared Atkins's statement to the juror at issue in *Franklin v. Anderson*, 434 F.3d 412, 421 (6th Cir. 2006), where the Sixth Circuit determined that

a juror should have been excluded as biased because she gave the impression that she could not faithfully apply the law.

The voir dire transcript does not show that Atkins was actually biased. Specifically, it states:

> MR. WOODALL: . . . Now, have you read or heard anything about this case that has caused you to form an opinion as to the guilt or innocence of this defendant?
>
> MR. ATKINS: Well, sir, one of the victim's relatives is a cousin that works with me where I work and he had mentioned something about it, you know. As far as opinions, I listen to everything before I make an opinion. I make my own opinions or at least I try my best to make my own decisions.
>
> MR. WOODALL: All right. So what you're telling me is that yes you heard something about this case –
>
> MR. ATKINS: Yes, sir.
>
> MR. WOODALL: -- but you have not, based on what you've heard, formed an opinion and you will listen to all the proof in this case before you determine in your mind whether the defendant's guilty or not guilty.
>
> MR. ATKINS: That's right, sir.
>
> MR. WOODALL: All right. The second question. On the finding of guilt of murder in the first degree, the State's going to ask you to impose the death penalty in this case. Can you consider the death penalty fairly along with other forms of punishment?
>
> MR. ATKINS: Yes, sir, I can, sir.
>
> . . .
>
> MR. WOODALL: But you would follow the law and the instructions –
>
> MR. ATKINS: Yes, sir.

(ECF No. 66-7 at PageID 1647-49.)

Atkins was asked what he had heard about the case and specifically what Ragland's relative told him:

MR. GOOGE: . . . Have you heard anything about this case?

MR. ATKINS: No, sir, not other than what I told the Judge a while ago about the relative that works with me, you know. He had mentioned something about it.

MR. GOOGE: All right. Do you remember what he mentioned?

MR. ATKINS: Well, sir, he told me he thought the man was guilty, you know. He asked me what I thought about it. I really hadn't heard that much about the case, you know, to know enough about it to ---

. . .

MR. GOOGE: Do you still work with that relative?

MR. ATKINS: Yes, sir, he works with me.

MR. GOOGE: Okay. Now, let me ask you this. If you go back there to work after you serve on this jury, is that going to make it difficult for you to work with him if you served on this jury?

MR. ATKINS: No, sir, it won't bother me. We associate and talk where I work with him. It's the same department, but, I mean –

MR. GOOGE: All right.

MR. ATKINS: -- because I'm here, you know, the Judge has instructed to keep it – you know, I don't believe in telling what I know, you know, or whatever.

MR. GOOGE: Okay. Do you remember what he said besides he thought the man was guilty?

MR. ATKINS: That's about all he told me.

MR. GOOGE: Okay. Did he say anything about what kind of punishment he thought he ought to get or anything like that?

MR. ATKINS: He said he ought to get the death penalty.

. . .

MR. GOOGE: Okay. And how did that affect you when he said that?

MR. ATKINS: You know, I just told him, I said, "Well, I don't know[,"] you now. That's all I said to him. You know, I said, "I don't really know what to say about it, you know, because I don't know much about it."

> . . .
>
> MR. ATKINS: He had told me that – as I said, I think he said – mentioned he was his cousin and worked at the same plant out there, but I can't place him, the victim. I can't place him unless he's working out at another – like I said, I've been there thirteen years. I can't remember the victim ever working out there. He may have, I don't know, because it's two different sides of the plant, you know. I don't know.
>
> MR. GOOGE: . . . Have you formed an opinion about the case based on what you might have heard?
>
> MR. ATKINS: No, sir. I can't really say.

(*Id.* at PageID 1653-55.)

Atkins answered questions about what punishment would be appropriate if Morris were found guilty:

> I'd have to hear the evidence of the defendant. You know, get everything together before I could make my opinion. You know, I couldn't just say what I would really say right now until I heard the evidence of the defendant.

(*Id.* at PageID 1656-57.)

When asked about the defendant testifying at trial, Atkins responded that it was not necessary for Morris to testify. Further, when asked "[w]ould you feel like you'd have to hear from him before you would rule in his favor," Atkins responded,

> Well, I wouldn't say that would determine my verdict as far as, you know, against him, but I think a defendant should testify if he's accused of a crime. As serious as it is, I think he should testify.

(*Id*. at PageID 57.)

Counsel are "accorded particular deference when conducting voir dire," and their actions are considered to be trial strategy. *Hughes v. United States*, 258 F.3d 453, 457 (6th Cir. 2001). A strategic decision cannot be the basis for a claim of ineffective assistance **"**unless counsel's

decision is shown to be so ill-chosen that it permeates the entire trial with obvious unfairness." *Miller v. Francis*, 269 F.3d 609, 615-16 (6th Cir. 2001).

Morris claims that Atkins was a biased juror because of his connection to a victim's relative who was Atkins's co-worker, Atkins's opinion about the murder, and his statement that the defendant should testify. However, to maintain an ineffective assistance claim for failure to strike a biased juror, Petitioner must show that the jury was "actually biased against him." *See Hughes*, 258 F.3d at 458. "Actual bias" is "bias in fact -- the existence of a state of mind that leads to an inference that the person will not act with entire impartiality." *Id.* at 463 (internal quotation marks omitted).

The relevant question for juror impartiality is "did [the] juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed." *See Patton v. Yount*, 467 U.S. 1025, 1036 (1984). The Supreme Court standard states:

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin v. Dowd, 366 U.S. 717, 723 (1961).

Although Charles Ragland reportedly worked at the same plant as Atkins, the juror did not know or recall ever meeting him. Atkins openly acknowledged his co-worker's comments about Morris and explained that these statements did not influence his opinion about the trial. The juror stated that he would "have to hear the evidence" to form his opinion. Even though Atkins stated that he thought Petitioner should testify about this serious crime, he noted that it would not affect his verdict. Taking the voir dire in context, Atkins demonstrated that he was

not influenced by his co-worker and was willing to look at the evidence and follow the court's instructions. Further, Atkins's limited knowledge of the case before voir dire does not warrant habeas relief. *See Miller*, 269 F.3d at 616-17 (denying habeas relief where juror's prior knowledge of the case through her employment was not extensive or detailed).

Attorney Morrow makes no comment about Atkins in his declaration. He merely states, "As to any claims of ineffective assistance of counsel that I failed to raise during post-conviction proceedings, I had no tactical reason for not raising such issues." (ECF No. 77-1 at PageID 6413.) Petitioner has not demonstrated ineffective assistance of post-conviction counsel based on this limited statement.

The inmate has not established that counsel's performance was deficient for failure to strike Atkins as a juror. He has not shown actual bias because Atkins stated he would make a determination based on the evidence and the trial court's instructions. *See Hughes*, 258 F.3d at 459 (citing juror assurances of impartiality that dispel bias). Morris's claim is not substantial, and *Martinez* does not overcome the procedural default of this claim.

c. Juror Bowman (Amended Petition ¶ 9M)

Petitioner alleges that his counsel was ineffective for failing to strike Juror Tommy D. Bowman, who was also the foreperson. He contends that Bowman had formed an opinion about his guilt or innocence and could not set aside his opinion and listen to the proof. Bowman had read and heard about the case. Morris avers that the local paper had given "extensive detailed coverage to the crimes" and his history, including an editorial calling for prosecution and a severe sentence to remedy his release on a minimal bond for another crime only three weeks before the murders. (ECF No. 12 at PageID 116.) The inmate notes that the juror stated that the killings were "an unfortunate thing" and that Bowman believed the death penalty was a deterrent

to crime. (*Id.* at PageID 116-17.) Morris insists that, as a result of counsel's failure to strike Bowman, the juror led the deliberations to adjudge him guilty based on a preexisting opinion about the case and a predisposition to render a death sentence. Morris maintains that Bowman had "a misunderstanding of the basis for a death sentence – deterrence versus punishment." (*Id.* at PageID 117.)

As with the allegations in Amended Petition ¶ 9L, the Court determined that this claim was procedurally defaulted. The only argument made related to Bowman in the motion to alter or amend judgment is to compare him to potential juror Savanna Ingram (*see* Amended ¶ 9N) and note that Bowman's daughter had a drug problem. Petitioner argued that the prosecution treated Ingram different from Bowman although both men had relatives with drug problems.

During voir dire, the juror initially said that he had formed an opinion about the case. He had read and heard about the case "a while back" but not "since the Judge instructed us not to." (ECF No. 66-6 at PageID 1540.) Bowman did not remember much about the case other than "it happened behind Muse Park where I play ball all the time and I remember the area, but other than that, just the allegations all that I know about." (*Id.* at PageID 1547.) He first heard about the case in the newspaper, but he did not "put a lot of stock in The Jackson Sun." (*Id.*) He said, "I thought it was a very unfortunate thing to happen, but I didn't form any opinions." (*Id.* at PageID 1548.)

Bowman asserted that he had not formed an opinion as to guilt or innocence, would listen to all the proof, and render a fair and impartial decision. He stated that he could fairly consider the death penalty. When asked about his feelings concerning the death penalty, he responded as follows:

> Well, I really believe it's a deterrent to crime, but before I could consciously form that opinion, it would be beyond a shadow of a doubt that that person did commit

> that crime. The last thing I would ever want to do is send somebody to a death sentence and have a doubt that that person really did that.

(*Id.* at PageID 1548-49.)

Morris's counsel advised the juror about the three possible sentences available if his client were found guilty. Counsel then asked how he would consider those penalties:

> MR. GOOGE: . . . Let me ask you this. If you were convinced without any doubt – let's say that you were convinced without a doubt that someone committed a first degree murder, bearing in mind that there are three possible penalties, including the death penalty and the other two I've talked about where you have the option of locking somebody up the rest of their natural life as an option --
>
> MR. BOWMAN: Yes, sir.
>
> MR. GOOGE: -- then would you automatically vote for the death penalty in every murder case where you felt they were guilty or would you consider those other two?
>
> MR. BOWMAN: Well, you say every case. I guess I would – I know I would have to consider the evidence and the law according to what the Judge –
>
> MR. GOOGE: Okay.
>
> MR. BOWMAN: I don't think every case. No, not every case, but maybe some of the cases if it was beyond a shadow of a doubt, no question about if this person premeditated and killed somebody.
>
> . . .
>
> MR. GOOGE: If you believe somebody has committed premeditated first degree murder beyond a shadow of a doubt, if we want to put it that way –
>
> MR. BOWMAN: Yes, sir.
>
> MR. GOOGE: -- beyond all doubt, then would you still consider all three possible punishments if there were some mitigating circumstances or some circumstances of the defendant to consider about his background and so forth or would you feel like you would have to give the death penalty?
>
> MR. BOWMAN: I wouldn't feel like I would have to. I would consider all three.
>
> MR. GOOGE: Okay. So even if you're convinced absolutely of guilt you could still consider the various types of punishment and keep an open mind.

MR. BOWMAN: Yes, sir.

(*Id.* at PageID 1550-51.)

Morrow makes no comment about Bowman in his declaration. He merely states "[a]s to any claims of ineffective assistance of counsel that I failed to raise during post-conviction proceedings, I had no tactical reason for not raising such issues." (ECF No. 77-1 at PageID 6413.) Morris has not demonstrated ineffective assistance of post-conviction counsel based on this limited statement.

Further, Petitioner has not shown that Bowman had formed an opinion about Morris's guilt or punishment or that he had a predisposition for the death sentence that prevented him from considering the evidence and the trial court's instructions on the law. The juror expressed a willingness to listen to the evidence, follow the trial court's instruction, consider the possible penalties, and make a fair and impartial determination. Morris has not established how the failure to strike Bowman was deficient performance, actual bias, or that the claim was substantial under *Martinez*.

d. Juror Savanna Ingram (Amended Petition ¶ 9N)

In Amended Petition ¶ 9N, Morris alleged that his trial counsel failed to object, under *Batson v. Kentucky*, 476 U.S. 79 (1986), and *Powers v. Ohio*, 499 U.S. 400 (1991), to District Attorney Jerry Woodall's peremptory challenge against the lone black potential juror who was not removed for cause. He incorporates by reference Amended Petition ¶ 24 into this claim. Paragraph 24 states that Morris's Sixth, Eighth and Fourteenth Amendment rights were violated because "it appears from court records that the state exercised a peremptory challenge against the one Black jury pool member who was not removed for cause, Savanna Ingram . . ." (ECF No. 12 at PageID 130-31.)

The inmate argued that the allegations in Amended Petition ¶ 9N claim were raised in the appellate stage of his post-conviction proceedings.[7] The Court determined that the allegations in ¶ 9N were procedurally defaulted because Morris made no specific allegations about the peremptory challenge used against Ingram in the state proceedings.

Petitioner admitted that the *Batson* claim in ¶ 24 was not presented in the state courts. The Court determined that the claim was procedurally defaulted and Morris did not raise his *Batson* claim on appeal to the Sixth Circuit.

Petitioner maintains that it "clearly appears" that the prosecution struck Ingram based on his race because the prosecutor's notes reveal that Ingram had relatives with drug problems but did not strike white jurors Bowman and Teresa Crouse. whose relatives also had issues with drugs or alcohol. (ECF No. 77 at PageID 6409.) Morris contends that the prosecution's disparate treatment of Ingram compared to similarly-situated white jurors demonstrates a *Batson* violation and, thus, submits that his counsel was ineffective for failing to make the *Batson* challenge. He cites the Sixth Circuit's decision in *United States v. Atkins*, 843 F.3d 625 (6th Cir. 2016), to support his claim of ineffectiveness related to his counsel's failure to challenge the striking of Ingram as pretextual and race-based.

Petitioner presented a different argument in response to the motion for summary judgment concerning the strike against Ingram:

> [B]ut for his race, Mr. Ingram was a quite favorable juror for the prosecution. In *voir dire*, Ingram told the District Attorney that he had heard about the case and had actually formed an opinion about Morris'[s] guilt. The District Attorney implicitly acknowledged that opinion to be a belief that Mr. Morris was actually guilty.

[7]If the claim were considered exhausted through the post-conviction appellate process, *Martinez* would not give Morris relief.

(ECF No. 50 at PageID 585-86 (internal citation to the record omitted).) Morris argued that Ingram was struck despite his proprosecution leanings and Ingram's belief that the inmate was guilty. Ingram stated, "[t]he way you read stuff and take it in, yeah, I've somewhat formed an opinion, yeah" and that he would "need to hear something that would change my mind." (ECF No. 66-7 at PageID 1714.)[8]

Batson established a three-part process for evaluating claims that a prosecutor used peremptory challenges in violation of the Equal Protection Clause:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

Atkins, 843 F.3d at 631 (internal citations & quotation marks omitted).

Morris did not raise the issue that Ingram purportedly was struck because he had family members with drug problems until the instant motion. This is his version of pretext, not the prosecution's statement, and these assertions were not properly pleaded under Habeas Rule 2. Although the prosecutor noted that Ingram had a brother with drug problems, the notes reveal that Ingram's "demeanor made me uneasy." (*See* ECF No. 77-4 at PageID 6463.) Additionally, the prosecutor's notes do not mention Ingram's race.

The instant case is unlike *Atkins*, where a *Batson* challenge, prima facie showing of discrimination, and race-neutral reasons for the challenge had been made. *Atkins*, 843 F.3d at 631 ("Here, the parties do not contest that Defendant made a prima facie showing of discriminatory purpose, and that the government responded with race-neutral reasons justifying its strike of Mr. Dandridge. Accordingly, we will proceed directly to *Batson* step three").

[8]A review of voir dire, in its entirety, reveals that Ingram stated that he was willing to consider evidence and adhere to the trial court's instructions.

Morris's attorney is entitled to the deference granted for his actions at voir dire. Petitioner has not shown that his counsel's actions were so ill-chosen that they permeated the entire trial with obvious unfairness.

Petitioner must also establish that he was prejudiced. Here, given the three-step process at issue, he has failed to do so, especially considering the initial statements that Ingram had formed an opinion based on what he read in the newspaper and the issues he experienced related to his brothers' drug problems.

Further, Morrow's declaration fails to address his assertions about Ingram or a potential *Batson* challenge. The inmate has failed to demonstrate ineffective assistance of post-conviction counsel.

Martinez does not require alteration or amendment of the judgment based on this claim.

e. Systematic Exclusion of African-Americans and Women as Grand Jury Forepersons (Amended Petition ¶ 9P, incorporating ¶ 27)

In Amended Petition ¶ 9P, Morris asserts that his trial counsel "failed to raise any and all claims listed in this petition." (ECF No. 12 at PageID 117.) In Amended Petition ¶ 27, Petitioner alleges that he "was denied due process, equal protection, and a jury chosen from a fair-cross-section of the community through the systematic exclusion of Blacks and women in the selection of the grand jury foreperson in Madison County, Tennessee . . ." (*Id.* at PageID 133.)[9]

In response to the motion for summary judgment, Morris addressed Amended Petition ¶ 27 and argued that the Court should deny Respondent's motion or stay and abate the proceedings

[9]In Amended Petition ¶ 11A, Morris raised a claim of ineffective assistance on direct appeal for failing to raise a claim of "discriminatory exclusion of Black persons and women from service as grand jury foreperson[s]." (ECF No. 12 at PageID 121.)

pending resolution of the claim by the state court in a motion to reopen post-conviction proceedings "which Morris intends to expeditiously pursue." (ECF No. 50 at PageID 624.) Morris stated that "the Tennessee Supreme Court has failed to recognize the Supreme Court's dictates in *Rose v. Mitchell* and *Hobby v. United States*, which hold that discrimination in the selection of the grand jury foreperson in Tennessee states a valid constitutional claim." (*Id.* at PageID 623.) He did not address the related ineffective assistance claim that he now asserts through Amended Petition ¶ 9P in response to the motion.

The Court determined that the allegations related to ¶ 27 were procedurally defaulted, noting that "Morris had not advised the Court that a motion to reopen addressing this issue has been granted in the state court" or presented "any indication that this claim is being pursued in state court." (ECF No. 58 at PageID 1105.)

Although Petitioner did not make an ineffective assistance argument related to ¶ 27 in any of the pre-judgment district court proceedings, he now contends that he has a meritorious challenge to the discrimination against blacks and women in the selection of the grand jury foreperson. Morris maintains that his counsel was ineffective for failing to raise a meritorious challenge to the indictment. However, the Tennessee courts have not provided relief for the constitutional challenge he asserts. *See State v. Bondurant*, 4 S.W.3d 662, 674-75 (Tenn. 1999) ("the role of the grand jury foreperson in Tennessee is ministerial and administrative" and "the method of selection of the grand jury foreperson is relevant only to the extent that it affects the racial composition of the entire grand jury"); *id.* (when alleging as unconstitutional the selection of a grand jury foreperson, "to establish a prima facie equal protection claim, Tennessee defendants must offer proof that racial discrimination tainted the entire grand jury."); *see also State v. Morris*, No. W1999-01628-CCA-R3-CO, 1999 WL 1531760, at *2-3 (Tenn. Crim. App.

Dec. 16, 1999) ("were we able to consider the petitioner's claim regarding the selection of a grand jury foreperson, it would be dismissed as without merit, based upon the holding in *Bondurant*"). Recently, the Tennessee Court of Criminal Appeals denied relief where a defendant asserted ineffective assistance of counsel for failure to investigate discrimination in the race and gender of the grand jury foreperson, noting where there was no "evidence establishing the composition of the grand jury as a whole or the systematic exclusion of minorities or other cognizable groups." *Jordan v. State*, No. W2015-00698-CCA-R3-PD, 2016 WL 6078573, at *64 (Tenn. Crim. App. Oct. 14, 2016).

Further, the Sixth Circuit has found a lack of support for constitutional challenges to the discrimination and the systematic of exclusion of persons based on gender in the selection of a grand jury foreperson in Tennessee, stating

> Henley also unpersuasively relies on *Rose v. Mitchell*[, 443 U.S. 545 (1979)] for the proposition that an indictment returned by [an] unconstitutionally constituted grand jury [must] be quashed. *Rose*, however, concerned an African-American defendant challenging the exclusion of African-Americans from the grand jury and relied on the principle that [a] criminal defendant is entitled to require that the State not deliberately and systematically deny to members of *his* race the right to participate as jurors in the administration of justice. Even if *Rose* reaches gender, Henley, a male, could only challenge the exclusion of other males from the grand jury. Thus, *Rose* does not alter our conclusion on Henley's due process claim.
>
> Henley also raises a Sixth Amendment fair-cross-section challenge to the foreperson of his grand jury. Regardless of the logical soundness of arguing that one person should represent a fair cross-section of a community, the Supreme Court has never allowed defendants to challenge the composition of their grand juries based on the Sixth Amendment. While some federal courts have permitted a fair-cross-section challenge to a state grand jury, we may grant Henley relief only if this right was clearly established by the Supreme Court as of 1999, and we hold that it was not.

Henley v. Bell, 487 F.3d 379, 386-87 (6th Cir. 2007) (internal citations & quotation marks omitted).

Morris has failed to plead his claim with specificity, make substantive arguments in response to the dispositive motion or in the motion to alter or amend, or provide evidence to demonstrate his entitlement to relief. In the instant case, he asserts that, for a twenty-one year period, all forepersons were white males, with no information about the composition of the grand jury as a whole. Considering the lack of support for his arguments in Tennessee law, as noted in *Bondurant*, and the lack of evidence supporting his claim, counsel cannot be deemed deficient in his performance for not presenting the argument. The claim is not substantial, and *Martinez* would not require alteration of the judgment in this case.

2. Ineffective Assistance of Appellate Counsel Claims

The Sixth Circuit, in *Hodges v. Colson*, 727 F.3d 517, 531 (6th Cir. 2013), *cert. denied sub nom. Hodges v. Carpenter*, 135 S. Ct. 1545 (No. 14-5246) (U.S. Mar. 23, 2015), held that *Martinez* does not apply to procedurally defaulted claims of ineffective assistance of appellate counsel. Despite the grant of certiorari in *Davila*, there is no controlling authority that requires reconsideration of Morris's procedurally defaulted ineffective assistance of appellate counsel claims. Consideration of *Martinez* or *Trevino* would not affect the Court's denial of these unexhausted claims.

Considering the claims before this Court and Morris's arguments, he has not demonstrated that manifest injustice would result from the Court's failure to alter or amend the judgment and further consider these claims.

IV. CONCLUSION

As stated herein, the scope of the mandate is limited in this case. Consideration of Morris's claims falls outside the scope of the mandate. The Court, in its discretion, finds no manifest injustice in the failure to reconsider these claims or other support for an exception to the

mandate rule. Petitioner is not entitled to post-judgment equitable relief under *Martinez*. The Court, in its discretion, DENIES his motion to alter or amend judgment.

IT IS SO ORDERED this 13th day of March 2017.

s/ J. DANIEL BREEN
CHIEF UNITED STATES DISTRICT JUDGE

also highlights policy considerations that favor an expansive reading of § 503(b), including promoting creditor participation in Chapter 7 proceedings and rewarding Coface for taking action to remove Shapiro when it had "no way of knowing . . . that it ultimately would be successful." Maj. Op. at 819. Though Coface's actions are commendable, Coface will be compensated, as a party holding approximately 50% of the amount of the unsecured claims, for its actions. And, as the Supreme Court has cautioned before with respect to the Bankruptcy Code, it is the duty of Congress, and not the courts, to address any difficulties or "improper incentives" that may arise from the application of the plain meaning of a Code provision. *Taylor v. Freeland & Kronz,* 503 U.S. 638, 644–45, 112 S.Ct. 1644, 118 L.Ed.2d 280 (1992) (stating that it is for Congress to address any "improper incentives" that may come from the Supreme Court's interpretation of 11 U.S.C. § 522(*l*) as consistent with the language of the statute). Considerations of equity and fairness simply do not favor Coface as strongly as the petitioners and majority urge. As the only Congressional guidance we have on the interpretation of § 503(b) appears in the apparent restrictions written into § 503(b)(3)(D), we should limit claims for substantial contribution to the express language of § 503(b)(3)(D), and leave it to Congress to expand that authority to Chapter 7 proceedings if it so desires.

While I respect the majority's thoughtful analysis of this difficult issue, I ultimately must disagree with it. Because the claimed costs accrued during a Chapter 7 case, and because § 503(b)(3)(D) does not permit such costs to be considered an administrative expense under the appropriate limited construction of § 503(b), I believe that we should affirm the holdings of the bankruptcy court and district court, and deny Coface's application for administrative expenses under § 503(b).

Farris Genner MORRIS, Petitioner–Appellee/Cross–Appellant,

v.

Wayne CARPENTER, Warden, Respondent–Appellant/Cross–Appellee.

Nos. 11–6322, 11–6323.

United States Court of Appeals, Sixth Circuit.

Argued: March 3, 2015.

Decided and Filed: Sept. 23, 2015.

Rehearing En Banc Denied Nov. 19, 2015.

Background: Following affirmance of his premeditated first-degree murder conviction, aggravated rape conviction, and death sentence, 24 S.W.3d 788, and denial of his state post-conviction petition, 2006 WL 2872870, petitioner sought federal habeas relief. The United States District Court for the Western District of Tennessee, Daniel Breen, Chief Judge, 2011 WL 7758570, granted petition in part and vacated death sentence on basis of ineffective assistance of counsel at sentencing. Warden appealed, and petitioner cross-appealed.

Holdings: The Court of Appeals, Siler, Circuit Judge, held that:

(1) state court's determination, that trial counsel's failure to aggressively pursue evidence of petitioner's mental illness did not render counsel's performance deficient in guilt phase of murder trial, was not unreasonable application of federal law, and

(2) state court's determination, that trial counsel's failure to present additional mental-health testimony as mitigation evidence during sentencing phase of murder trial did not render counsel's performance deficient, was not contrary to or an unreasonable application of federal law.

Affirmed in part, vacated in part, and remanded.

1. Criminal Law ⚿1882

Counsel's performance is deficient, as required for an ineffective assistance of counsel claim, if it falls below an objective standard of reasonableness. U.S.C.A. Const.Amend. 6.

2. Criminal Law ⚿1883

Counsel's performance prejudices a defendant, as required for an ineffective assistance of counsel claim, in the guilt phase of trial if there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. U.S.C.A. Const.Amend. 6.

3. Criminal Law ⚿1888

In determining a claim of ineffective assistance of counsel, the question is whether there is any reasonable argument that counsel satisfied the deferential standard used for ineffective assistance of counsel claims. U.S.C.A. Const.Amend. 6.

4. Habeas Corpus ⚿486(1), 773

Where review is under the deferential standard used for ineffective assistance of counsel claims and the Antiterrorism and Effective Death Penalty Act (AEDPA), a federal court's review of a state court's decision on a claim of ineffective assistance of counsel is doubly deferential. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254(d).

5. Habeas Corpus ⚿765.1

If a state court's decision is contrary to federal law, the Court of Appeals reviews the habeas petitioner's claim de novo.

6. Habeas Corpus ⚿486(4)

State court's determination, that trial counsel's failure to aggressively pursue evidence of defendant's mental illness did not render counsel's performance deficient in guilt phase of murder trial, was not unreasonable application of federal law, and thus did not warrant federal habeas relief; counsel's defense strategy was to convince jury that defendant lacked mens rea to commit first-degree murder because of effects of cocaine and mental stress, counsel declined to pursue insanity defense after experts concluded defendant was competent to stand trial and sane at time of crimes, and although mitigation investigator expressed concerns about defendant's mental health, neither counsel nor psychiatrist believed he was mentally ill. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254(d).

7. Criminal Law ⚿1900, 1912

Attorneys are entitled to rely on the opinions and conclusions of mental-health experts for purposes of determining whether counsel rendered ineffective assistance. U.S.C.A. Const.Amend. 6.

8. Criminal Law ⚿1954, 1955

An attorney's failure to reasonably investigate the defendant's background and present mitigating evidence to the jury at sentencing can constitute ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

9. Criminal Law ⚿1891

To assess the reasonableness of counsel's performance in an ineffective assistance of counsel claim, the court must consider not only the evidence known to counsel, but also whether that evidence would lead a reasonable attorney to investigate further. U.S.C.A. Const.Amend. 6.

10. Criminal Law ⚿1891

When assessing the reasonableness of counsel's performance in an ineffective assistance of counsel claim, strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on the investigation. U.S.C.A. Const.Amend. 6.

11. Criminal Law ⚿1871, 1884

Courts should not second-guess counsel's strategic decisions when determining an ineffective assistance of counsel claim, and should presume that counsel's conduct is reasonable. U.S.C.A. Const.Amend. 6.

12. Criminal Law ⚿1959

To assess the potential prejudice to a defendant at sentencing for an ineffective assistance of counsel claim, the court must reweigh the evidence in aggravation against the total available mitigating evidence adduced at trial and in post-conviction proceedings to determine whether there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. U.S.C.A. Const.Amend. 6.

13. Criminal Law ⚿1961

In order to show prejudice at sentencing for an ineffective assistance of counsel claim, the petitioner must present new evidence that differs both in strength and subject matter from the evidence actually presented at sentencing, not just cumulative mitigation evidence. U.S.C.A. Const. Amend. 6.

14. Habeas Corpus ⚿482.1, 486(1)

Martinez v. Ryan, which held that ineffective assistance or absence of collateral counsel may constitute cause to excuse the procedural default of an ineffective assistance of trial counsel claim, does not apply to habeas claims that were fully adjudicated on the merits in state court because those claims are, by definition, not procedurally defaulted. U.S.C.A. Const. Amend. 6.

15. Habeas Corpus ⚿486(5)

State court's determination, that trial counsel's failure to present additional mental-health testimony as mitigation evidence during sentencing phase of capital murder trial did not render counsel's performance deficient, was not contrary to or an unreasonable application of federal law, and thus did not warrant federal habeas relief; counsel's strategy was to show that defendant would not have committed the crime if he had not been intoxicated and that he was good person who would function well in prison, mitigation witnesses testified about defendant's character, work habits, and good behavior in prison, and counsel avoided opening door to rebuttal evidence of defendant's history of drug dealing and drug use by not presenting additional mental-health testimony. U.S.C.A. Const. Amend. 6; 28 U.S.C.A. § 2254(d).

16. Sentencing and Punishment ⚿1782

Under Tennessee law, the prosecution may introduce evidence to rebut a mitigating factor raised by the defendant in penalty phase of capital trial.

17. Habeas Corpus ⚿486(1)

When reviewing a habeas petitioner's ineffective assistance of counsel claim, the Court of Appeals may entertain possible reasons for counsel's decisions even if not expressed by counsel. U.S.C.A. Const. Amend. 6.

ARGUED: Jennifer L. Smith, Office of the Tennessee Attorney General, Nashville, Tennessee, for Appellant/Cross–Appellee. Jerome C. Del Pino, Office of the Federal Public Defender for the Middle District of Tennessee, Nashville, Tennes-

see, for Appellee/Cross–Appellant. **ON BRIEF:** Andrew Hamilton Smith, Office of the Tennessee Attorney General, Nashville, Tennessee, for Appellant/Cross–Appellee. Jerome C. Del Pino, Paul R. Bottei, Office of the Federal Public Defender for the Middle District of Tennessee, Nashville, Tennessee, for Appellee/Cross–Appellant.

Before: BOGGS, SILER, and CLAY, Circuit Judges.

OPINION

SILER, Circuit Judge.

Warden Wayne Carpenter ("Carpenter") appeals the district court's order granting Farris Genner Morris's ("Morris") petition for a writ of habeas corpus in part and vacating his death sentence on the basis of ineffective assistance of counsel at sentencing. Morris cross-appeals the district court's decision to deny his claims of ineffective assistance of counsel in the guilt phase. For the following reasons, we **AFFIRM** the district court's denial of Morris's claim of ineffective assistance of counsel in the guilt phase, **VACATE** the district court's grant of habeas relief on Morris's claim of ineffective assistance of counsel in the sentencing phase, and **REMAND** to the district court.

FACTUAL BACKGROUND

The Tennessee Supreme Court summarized the facts of the case as follows:

Guilt Phase

> Charles and Angela Ragland lived in a duplex residence in Jackson, Tennessee. The defendant, Farris Genner Morris, lived with his wife in the adjoining residence.
>
> In the early morning hours of September 17, 1994, Angela Ragland arrived at her home along with her 15–year–old cousin, Erica Hurd. Charles Ragland was awake in the bedroom with the light on. Shortly after arriving, Erica went outside to retrieve something from the car. When Erica came back into the house, Angela heard a scream and saw that Morris was holding a shotgun to Erica's head.
>
> Morris pushed Erica onto the bed in the Raglands' bedroom and asked Charles "where the dope was." Charles Ragland replied that he "didn't have any" and asked Morris if he wanted money.FN4 After Morris responded that he would "find it himself," Morris fired a shot into the floor and ordered Charles Ragland to get on the floor. He placed a pillow on Ragland's head and shot him one time in the head.
>
> FN4. Angela Ragland testified that her husband did not sell or use drugs.
>
> Morris ordered Erica to get into a closet by threatening to "blow her head off." He forced Angela into another bedroom, tied her wrists and ankles, and covered the window with a mattress so that "nobody could see if they walked by." Morris then retrieved Erica from the closet. Angela Ragland testified that she heard Erica pleading for Morris not to kill her and that she heard Morris say "shut up." She testified that she heard Erica screaming and gasping for breath, and then silence.
>
> Morris returned to the bedroom and, still holding the shotgun, forced Angela Ragland to bathe him. Afterward he ordered Angela to put on a negligee and make him something to eat, which she did. Morris then forced Angela to have sexual intercourse with him "three or four times" and to perform oral sex upon him. Morris told her that he had once been "accused of raping someone and . . . if he was going to jail, he was going to go to jail for doing something." He told Angela that "society made him

the way he was" and "was the reason that he was doing what he did."

Around 6:30 a.m., Morris heard his wife in the adjoining residence and told Angela that he would let her go. He instructed her to tell police that she found the bodies of her husband and cousin when she arrived home that morning. Morris used a cloth to wipe off objects he had touched and he warned Angela not to go to the police. Angela fled to the house of a nearby friend, who drove her to the police station. The police found Morris at his home shortly thereafter and arrested him.

The bodies of Charles Ragland and Erica Hurd were later discovered in the Ragland residence. Charles Ragland had been shot in the head. Erica Hurd had been beaten and stabbed repeatedly. A blood-stained steak knife was found behind a couch and a large butcher knife with traces of blood was found in a chair in the living room. Angela Ragland testified that neither knife belonged to her or her husband. A 12–gauge pistol grip, pump action shotgun was later found underneath Morris's dresser drawer.

After being advised of and waiving his constitutional rights, Morris gave a statement to Officers Patrick Willis and James Golden of the Jackson Police Department.[ ] Morris said that on the day of the offense he had purchased and smoked $250 worth of cocaine. He admitted that he had an exchange with Charles Ragland at 1:00 a.m., just a few hours prior to the murders, in which he asked Ragland to sell him drugs and, when Ragland declined, told Ragland that "he was going to regret disrespecting me." Morris admitted that he went to his house, got his shotgun, loaded two shells into the shotgun, and waited for Ragland's wife, Angela, to get home. Morris admitted that he entered the Ragland's residence with the shotgun and demanded that Charles Ragland sell him drugs. He admitted that after Ragland said he didn't have any drugs, he fired a shot into the floor, put a pillow over the barrel of the gun and shot him in the head. Morris admitted that he put Erica Hurd in a closet and tied up Angela Ragland. Morris told officers that he intended only to tie up Erica Hurd but that he stabbed her because she acted crazy and they struggled over a knife. Morris admitted he had sexual intercourse and oral sex with Angela Ragland.

Dr. O.C. Smith, the Deputy Chief Medical Examiner for West Tennessee, testified that Charles Ragland died from a shotgun wound to the head. Dr. Smith testified that he found evidence of an "intermediate target" between the weapon and Ragland's head, but that Ragland's death was "instantaneous because the brain [was] destroyed."

Dr. Smith testified that Erica Hurd had died as a result of multiple injuries including, stab wounds, blunt trauma to the head, skull fractures, and damage to the brain. Dr. Smith found that there were 37 stab wounds, 23 of which were sustained prior to death and 14 of which were post-mortem. Dr. Smith testified that 25 of the stab wounds were to the victim's neck and face and that the force of the stabbings was great enough to cause the knife blades to bend upon striking bone.

The defense theory focused on Morris's use of crack cocaine. In addition to Morris's own statement to police, Russell Morris, the defendant's brother, testified that he saw the defendant smoking crack around 5:15 p.m. on the evening before the murders.

. . . .

The jury convicted Morris of two counts of premeditated first degree murder and one count of aggravated rape.

Penalty Phase

Dr. O.C. Smith again testified regarding his findings from the autopsy of Erica Hurd, including the blunt trauma, skull fractures, and 37 stab wounds. Dr. Smith said that the wounds would have been painful and that the stab wounds that struck bone would have caused severe pain. Dr. Smith explained that the wounds were "in areas that may be targeted, the face, the head, the chest, the back," and that they showed "sites of selection, as opposed to a random pattern of distribution." Dr. Smith, noting that some of the wounds were severe and others were superficial, testified that it "may imply an element of control ... or it may imply an element of torment by being very superficial in nature."

Several witnesses testified on behalf of the defendant. Mickey Granger, the defendant's employer, testified that Morris was a good, dependable employee who suffered a "downhill slide" in performance when accused of rape shortly before these offenses. Granger became aware of Morris's drug problem when he found a crude crack pipe fashioned from a soft drink can.

Jack Thomas, a friend of the defendant's, testified that when he visited Morris in prison, Morris admitted his responsibility for the killings but denied that he raped Angela Ragland. According to Thomas, Morris said that he had used a large amount of cocaine on the night of the offenses in an effort to overdose. Several other witnesses, including teachers and prison employees, testified that Morris is a good student, participates in class, and is punctual. Several of the witnesses testified that Morris helps others [sic] inmates, studies frequently, and uses reference material from the library. The defendant did not testify.

The jury imposed a death sentence for the first degree murder of Erica Hurd after finding that the evidence of two aggravating circumstances—that the murder was "especially heinous, atrocious or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death," and that the murder was "committed while the defendant was engaged in committing ... any first degree murder, rape, burglary or kidnapping"—outweighed mitigating evidence beyond a reasonable doubt. *See* Tenn.Code Ann. § 39–13–204(i)(5) and (7).

The jury imposed a sentence of life without parole for the murder of Charles Ragland after finding that the evidence of two aggravating circumstances—that the defendant "knowingly created a great risk of death to two or more persons other than the victim murdered during the act of murder" and that the murder was committed while the defendant was engaged in committing any "first degree murder, rape, burglary or kidnapping"—did not outweigh mitigating evidence beyond a reasonable doubt. Tenn.Code Ann. § 39–13–204(i)(3) and (7). In a separate sentencing hearing, the trial court imposed a 25–year sentence for the aggravated rape conviction and ordered that it be served consecutively to the sentence of life without parole.

State v. Morris, 24 S.W.3d 788, 792–94 (Tenn.2000).

PROCEDURAL HISTORY

The Tennessee Court of Criminal Appeals affirmed Morris's convictions and sentences, *State v. Morris,* No. 02C01–9801–CC–00012, 1999 WL 51562 (Tenn.

Crim.App. Feb. 5, 1999), the Tennessee Supreme Court affirmed, *Morris,* 24 S.W.3d at 816, and the United States Supreme Court denied certiorari, *Morris v. Tennessee,* 531 U.S. 1082, 121 S.Ct. 786, 148 L.Ed.2d 682 (2001). In 2001, Morris filed a state post-conviction petition, and after an evidentiary hearing, the trial court denied the petition. In 2006, the Tennessee Court of Criminal Appeals affirmed that decision. *Morris v. State,* No. W2005–00426–CCA–R3–PD, 2006 WL 2872870 (Tenn.Crim.App. Oct. 10, 2006).

In 2007, Morris filed a pro se petition for a writ of habeas corpus. The district court appointed counsel, and counsel filed an amended petition in 2008. Morris raised claims of ineffective assistance of counsel in the pretrial, guilt, and sentencing phases of trial and on appeal. He claimed that the trial court violated his rights against self-incrimination, to a jury drawn from a fair cross section of the community, to a fair and impartial jury, and to due process. He also alleged that the prosecution violated his rights to due process, exculpatory evidence in its possession, a jury drawn from a fair cross section of the community, and a fair and impartial jury. Finally, Morris claimed that the selection of the foreperson of the grand jury and the deliberations of the petit jury violated his constitutional rights.

The district court denied Morris's request for an evidentiary hearing and granted the state's motion for summary judgment in part and denied it in part. It found that Morris received ineffective assistance of counsel in the sentencing phase and granted him a conditional writ, but it denied Morris's other claims and denied him a certificate of appealability ("COA").

We granted a COA on Morris's claim that trial counsel was ineffective in the guilt phase for failing to investigate and to present a state-of-mind defense to the charge of first-degree intentional, deliberate, premeditated murder. Also before us is the government's appeal of the district court's grant of a conditional writ of habeas corpus with respect to the sentencing phase.

STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a district court shall not grant a habeas petition on a claim that was decided on the merits in state court unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or ... 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).

DISCUSSION

I. Testimony About Morris's Mental State and Sentence

A. Testimony Presented at the Guilt Phase

Prior to trial, the court ordered that Morris be examined to determine his competency to stand trial and whether he could pursue an insanity defense. Dr. Richard Drewery ("Dr. Drewery") and Dr. Richard Pullen ("Dr. Pullen") concluded that Morris was competent and that there was no basis for an insanity defense. During the guilt phase of the trial, Morris's counsel presented testimony from pharmacologist Dr. Robert Parker ("Dr. Parker") and psychiatrist Dr. William Bernet ("Dr. Bernet"). Dr. Parker was an assistant professor of pharmacology at the University of Tennessee. He testified that within ten to fifteen seconds of smoking crack cocaine, the user experiences euphoria, becomes very excited, speaks rapidly, and sweats profusely. The user also may be-

come suspicious and paranoid, lose inhibition, suffer impaired judgment, and experience enhanced sex drive and performance. The euphoric effects last ten to thirty minutes, while the other effects last longer. Dr. Parker explained that a binge is when a crack user tries to maintain his high by taking more and more crack. The euphoria is replaced by intense anxiety, irritability, fear, suspicion, and paranoia. Binging on crack increases the risk of violent or homicidal behavior. Some crack users experience delusions and hallucinations. Extensive use can cause mania—heightened mental and physical activity—and psychosis—a lost concept of reality. After a user stops ingesting crack, he experiences a crash. A crash is characterized by an intense craving for more cocaine, profound depression, exhaustion, suicidal thoughts, paranoia, anxiety, and irritability.

Dr. Parker testified that Angela Ragland's ("Angela") and Morris's statements to the police regarding Morris's behavior were consistent with crack cocaine ingestion. Angela described Morris as moving around a lot, acting very excited, and sweating. Morris said he was very agitated and upset because he perceived that Charles Ragland ("Ragland") had disrespected him. Dr. Parker testified that it was hard to say whether Morris was under the acute effects of crack or was crashing when he committed the crimes. He said that someone taking crack from Friday at 5:00 p.m. until midnight could still have effects Saturday at 5:20 p.m., when Morris gave his statement. On cross-examination, Dr. Parker testified that a person who has taken crack is not usually violent or homicidal in the crash stage.

Dr. Bernet, the medical director of the University of Vanderbilt's Psychiatric Hospital, took Morris's medical history, examined him, and testified at trial. He also reviewed police reports, interviews, and reports by Drs. Drewery, Pullen, and Parker. Dr. Bernet testified that Morris's life was pretty stable prior to September 1994. Morris was accused of rape and worried that the charge would result in his going to prison and would destroy his relationship with his wife and children. On September 16, 1994, Morris was upset and thought about killing himself by overdosing on cocaine. Physically, he experienced a rush, his heart rate increased, he sweated profusely, and he spoke rapidly. Psychologically, he became highly agitated and paranoid. Morris argued with Ragland and came to believe that Ragland was capable of killing Morris and his family. Dr. Bernet said that Morris felt threatened by Erica Hurd ("Hurd") and first stabbed her accidentally. He attributed the rest of the stabbings to Morris's agitation and overreaction. Dr. Bernet also noted that Morris behaved irrationally after killing Ragland and Hurd. Morris had Angela bathe him, did not kill her although she could identify him, and went to his home next door and waited for the police. However, Morris also wiped his fingerprints off items in the house. Dr. Bernet testified that Morris's cocaine intoxication may have prevented him from premeditating and forming the specific intent to murder Ragland and Hurd, and that he was under extreme mental and emotional disturbance.

The trial court instructed the jury on first- and second-degree murder. Morris's counsel presented an intoxication defense. The court instructed the jurors that if they found Morris was intoxicated to the extent that he could not have possessed the required culpable mental state, then he could not be guilty of the offense charged. The jury found Morris guilty of two counts of first-degree murder and one count of aggravated rape.

B. Testimony Presented at the Penalty Phase

The state called one witness, Dr. O.C. Smith, during the penalty phase. Dr. O.C.

Smith, the medical examiner, testified about the nature and extent of Hurd's injuries. Referring to photos and a chart, Dr. O.C. Smith described blunt force injuries to Hurd's head and stab wounds to her face, neck, abdomen, and back. He said the blunt force injuries and most of the stab wounds occurred while Hurd was alive, and the remaining stab wounds were inflicted after she died. Dr. O.C. Smith testified that the stab wounds Hurd received while she was alive would have been painful and described the wounds that hit bone as causing severe pain. He also testified that the nature and location of the stab wounds implied control, targeting, and torment. On cross-examination, Dr. O.C. Smith acknowledged that he could not be certain there were control wounds, that the blunt force to Hurd's head could have rendered her unconscious, and that she would not have felt pain if comatose.

Morris's trial counsel presented six witnesses at the penalty phase. Morris's former employer at a funeral home and cemetery, Mickey Granger ("Granger"), testified that Morris was a good and dependable employee. According to Granger, Morris suffered a "downward slide" in performance after he was accused of rape. Granger testified that Morris was very concerned that he would lose his wife, and the rape charge was all he talked about. Granger was not aware that Morris used drugs before the rape charge.

Next, Jack Thomas ("Thomas"), Morris's friend from work, testified. When Thomas visited Morris in prison, Morris admitted to Thomas that he killed Ragland and Hurd. According to Thomas, Morris said that he had sex with Angela, but did not rape her. Morris told Thomas that he bought a lot of cocaine on the night of the offenses in an effort to overdose. Morris said he was going to be charged for something he did not do and did not want to live any longer. For about thirty to forty minutes, Morris contemplated killing Angela but he "cam[e] back to his right frame of mind" and decided to let her go.

Three prison employees, Robert Griffin, Anna Campbell, and Brenda Russell, also testified on behalf of Morris. They said that Morris participated actively in classes, helped other inmates, did extra work, and was an excellent student. Finally, Morris's counsel submitted a letter from Frank Brasher ("Brasher"), one of Morris's former employers. According to Brasher, Morris worked for him for about a year and a half in the late 1980s, performed his duties satisfactorily, was prompt, and was courteous.

Ultimately, the jury imposed a death sentence for the murder of Hurd and life without parole for Ragland's murder.

C. Post–Conviction Testimony

After Morris's conviction and sentence, he filed a post-conviction petition in state court. At the evidentiary hearing, Morris's post-conviction counsel presented witnesses, including the testimony of: (1) his former employer, Granger; (2) his brother, Russell Morris; (3) his three trial counsel, George Googe ("Googe"), Daniel Taylor ("Taylor"), and Jesse Ford, III ("Ford"); (4) his mitigation investigator, Gloria Shettles ("Shettles"); (5) mental health experts, Dr. Pamela Auble ("Dr. Auble"), Dr. Murray Smith ("Dr. Smith"), and Dr. George Woods ("Dr. Woods"); and (6) affidavits by friends and relatives.

Granger testified that Morris could dig more graves in a day than other workers and preferred to work alone. He said that Morris had mood swings and was easily offended if he thought someone was ignoring or disrespecting him. Morris talked to Granger about problems with his role in society. Granger believed Morris had good relationships with his brother and

father, but a poor relationship with his mother. He found indications that Morris drank and smoked crack on the job. Granger said that Morris called him shortly before he was arrested to say that he would not be coming to work because of an injury to his finger. Morris did not mention the killings.

Morris's brother, Russell Morris, testified that their father's girlfriend lived with the family for a time. According to Russell Morris, their mother had mood swings and was hardest on Morris because he would not walk away when she and he argued. She kicked Morris out of the house several times. Russell Morris testified that Morris complained about society to him and got upset when people ignored him. Russell Morris acknowledged that Morris drank alcohol and used drugs, and that their mother drank.

Googe testified that Morris's case was the first death penalty case he tried. Googe reviewed a defenders' death-penalty manual and attended seminars on capital litigation. He had worked with co-counsel Taylor on at least four other murder cases.

Googe found Morris to be a good client and very cooperative. He was very talkative and sometimes volatile. Morris told him he did not want his family contacted, and neither Googe nor Taylor contacted Morris's relatives when they had the opportunity. Googe said Morris's childhood was unremarkable, and that school records were not helpful.

Googe's defense theory was that Morris had diminished capacity because he took crack cocaine and tried to overdose. Googe contacted Dr. Parker to testify about the effects of cocaine generally, both at the suppression hearing about Morris's statement to the police and in the guilt phase. Shettles, the mitigation investigator, told Googe and Taylor that she thought Morris possibly needed a doctor's care for a mental disorder, that he had severe mood swings, was easily excited, may have experienced a drug-induced psychosis, "had a screw loose" and may have been manic depressive. She recommended consulting a neuropsychologist. Googe acknowledged that Shettles told him her concerns about Morris but did not think that Morris was losing control.

The subject of cocaine's effect on Morris was left to Dr. Bernet, a psychiatrist. Googe wanted Dr. Bernet to testify about Morris's cocaine withdrawal and how it disturbed his ability to form the intent to commit murder. Googe provided Dr. Bernet with the criminal complaint against Morris, the police department's incident report, an interview with Angela, Morris's statement to the police, and Morris's interviews with Drs. Drewery and Pullen, who had examined Morris for competency and sanity. Googe acknowledged that law enforcement officers were present when Dr. Drewery examined Morris and that Morris was in handcuffs and agitated. When asked about Morris's comments to Dr. Drewery that Morris was unable to make decisions properly and did not have total control of his mind, Googe said that the defense team used this as part of its strategy to portray Morris's acts as things he would not have done ordinarily. Based on Dr. Bernet's evaluation, Googe did not think Morris had a mental illness. Googe also testified that he did not consider Dr. Drewery's findings helpful as mitigation evidence. According to Googe, there was nothing in the experts' reports that would have led him to investigate bipolar disorder.

Googe testified that Taylor told an investigator to ask Morris's wife if he had mental problems. Morris's wife told Googe and Taylor that Morris had a mental disorder, severe mood swings, a very bad temper, and was easily excited. Googe said that Morris became agitated

about certain issues, but Morris did not agree with mitigation investigator Shettles that he was losing control. Googe was not aware that Morris had mood swings on the job. Googe was questioned about Shettles's recommendation that Morris be examined by a neuropsychologist and her belief that Morris was possibly manic depressive. There was also a note from Googe to Shettles saying that they "may not need a psychologist." Googe did not know if Shettles's concerns about Morris's mental health were relayed to Dr. Bernet. He did not know why Dr. Bernet did not get investigative notes about Morris. When asked whether Morris had received head injuries, Googe said Morris had mentioned a car accident but did not say it was a problem. A note Googe wrote indicated that Morris was in a car wreck and had suffered two gun-shot wounds and a head injury. Googe was shown a note from Taylor, which indicated that Morris was in five major car accidents and had a lump on his head.

Googe also testified that Dr. Bernet interviewed Morris and repeated that Morris did not want his wife involved in the case. Morris's wife told Googe that Morris had mood swings after using drugs. Googe stated that nothing in Dr. Drewery's report suggested that Morris was bipolar or had a mental illness. Googe relied on Dr. Bernet's evaluation of Morris, and although lay people had suggested Morris seemed manic depressive, Dr. Bernet did not think so. Based upon the experts who evaluated Morris, Googe saw no reason to pursue the issue of whether Morris was bipolar.

Taylor, Googe's co-counsel, worked as an assistant public defender with Googe beginning in July 1993. Morris's case was Taylor's twenty-fifth trial and his first death-penalty case. He reviewed a Tennessee public defenders' death-penalty manual, attended death-penalty seminars, and met with the head of the public defenders' capital division. Taylor was the defense team's primary contact with Shettles. Shettles was to research Morris's life history, interview potential mitigation witnesses, and assist with jury selection. Taylor described Morris as excited, animated, and very loud but not disrespectful. Morris did not want to talk about the facts of the case.

Taylor was asked about school, prison, and military records. He responded that some of the information about Morris's education was sketchy and that he did not recall anything about Morris's military records. The defense team had two investigators in addition to the mitigation specialist. The investigators conducted interviews and gathered documents about the events leading to Morris's arrest. Before Morris's case, Taylor had not used a psychological expert in a jury trial. He found pharmacologist Dr. Parker through the University of Tennessee. Taylor's notes indicated that Dr. Parker could not be conclusive as to the motion to suppress Morris's statement to the police but would be very helpful during trial. Dr. Parker talked with Morris briefly before trial, but not before the suppression hearing. Taylor also worked with Dr. Bernet, who evaluated Morris's mental health and the effect of drugs on Morris's ability to premeditate. Taylor was concerned about two issues: premeditation and Morris's competency at the time he gave his statement. He reviewed Dr. Drewery's report, prison records, and a letter from Morris's employer.

Taylor asked Shettles to question Morris's wife about any mental problems. Morris's wife said that Morris had a mental disorder and mood swings, was easily excited, and had a very bad temper after he used drugs. Morris did not want defense counsel to contact his family. Taylor

denied that Morris lost control, but acknowledged that sometimes their conversations got off track. Through Shettles's investigation, Taylor learned that Morris's grandfather committed suicide and that Morris received an other than honorable discharge from the Army. Shettles recommended that Morris be seen by a neuropsychologist, which prompted Taylor to contact Dr. Bernet. Shettles was concerned about Morris's courtroom demeanor and said that Morris had a screw loose and was possibly manic depressive. Taylor did not recall that Morris had any head injuries.

According to Taylor, the defense's theory was that Morris was under the influence of cocaine and lacked the *mens rea* to commit murder. Taylor said that the defense team hired Dr. Parker to testify about the effects of cocaine for the suppression hearing and as related to Morris's ability to premeditate. With regard to mitigation, Taylor said they presented six witnesses, and the jury also heard from Drs. Parker and Bernet in the guilt phase. Taylor said he did not mention manic depression or head injuries to Dr. Bernet, but recalled expressing his concern about Morris's demeanor. Dr. Bernet examined Morris in March 1996, before Shettles voiced her concerns. Taylor said he relied on the evaluations of Drs. Parker and Bernet.

Ford, the third member of the defense team, entered the case in September 1996 as a consultant on trial strategy. Morris's trial was Ford's first death-penalty case. Ford unsuccessfully sought a plea deal for Morris. Although he had no direct contact either with Dr. Parker or with Dr. Bernet, Ford testified that the defense team did not think they needed another mental-health evaluation after receiving their evaluations. Ford testified that if he had had doubt about Morris's mental status, he would have had Morris examined. He stated that he did not discuss a need for further mental-health examinations of Morris because of what Dr. Bernet said.

Shettles, the mitigation specialist, began working on Morris's case in February 1996. She had attended death-penalty seminars and had a limited role in previous death-penalty cases. With regard to Morris's case, she said she was not proactive and did not know it was the attorneys' first death-penalty case. She identified weaknesses in the mitigation investigation in Morris's case: the attorneys did not have his birth or pediatric records, they had only minimal school records, they did not follow up to identify his teachers, and they did not obtain his military records. Shettles said that Morris had a history of taking and dealing drugs, including LSD and PCP. She did not tell Morris's attorneys that they needed more information but would have done so by the time she testified today. She said there was a concern about the cost of the investigation.

After an interview with Morris in February 1996, Shettles wrote in a note that Morris was very verbal, had difficulty focusing, and was losing control. Shettles said there was no follow-up after she learned that Morris's grandfather committed suicide, and she did not follow up on his work history. She thought Morris had some side effects from using cocaine, possibly experienced drug-induced psychosis, and had neuropharmacological issues. Shettles recommended having a neuropharmacologist evaluate Morris and said he may have been manic depressive. She was not asked to contact an expert witness. Shettles interviewed Morris's mother and brother in person and other family members by phone. Shettles did not learn that Morris's mother had thrown him out of the house or that she had mood swings. Shettles said that there should have been additional in-person interviews with Morris's family. She did not meet with de-

fense counsel as a team, did not talk to Dr. Bernet, and did not interview Morris's wife. Shettles assisted with jury selection and attended the trial to keep Morris calm and focused. She described him as agitated, very loud, and unable to control his arms.

Neuropsychologist Dr. Auble met with Morris three times in early 2002. She found that Morris was not malingering and concluded that he had some impairments in memory, motor skills, and mental functioning. Dr. Auble found that Morris's IQ was ninety. He had difficulty inhibiting responses, and she could not tell if it was because of frontal lobe damage or a mood disorder. She said that Morris had suffered blows to the head, was chemically dependent, paranoid, and suspicious. Dr. Auble was not asked to do personality testing, and did not make a formal diagnosis for bipolar disorder. Morris did not receive a CAT scan.

Addiction specialist Dr. Smith also evaluated Morris at post-conviction counsel's request. He reviewed the trial transcripts, Dr. Auble's report, and statements by Morris's family and friends. Morris told Dr. Smith he was falsely accused of rape and his name was in the newspaper. He was distressed by this because he feared he would lose his wife and family and violate his probation. Morris said that he bought $250 of cocaine, perhaps to kill himself, and ingested it over the course of thirteen hours. Dr. Smith termed this a normal crack binge.

According to Dr. Smith, Morris had a verbal and physical confrontation with Ragland. Morris told Dr. Smith that Ragland threatened him, that he thought Ragland was a crack user and dealer, and that he decided he needed to kill Ragland. Dr. Smith agreed that Morris's behavior after the effects of cocaine should have worn off was irrational. He listed characteristics of Morris that were not necessarily related to his drug use: he was hypomanic, grandiose, insomnious, hypersexual, and easily distracted. Hypomanic behavior is characterized by irritability, hyperactivity, racing thoughts, risk-taking, hypersexuality, and a decreased need for sleep. Dr. Smith suspected Morris suffered from bipolar disorder and brain damage at the time of the crimes, said that Morris experienced a cocaine-induced psychosis, and thought that Morris was under the delusions that killing Ragland made sense and that Angela consented to sex with him. He also found evidence of frontal-lobe dysfunction. Based on his assessment, Dr. Smith believed Dr. Parker erred by attributing Morris's crimes only to intoxication because his symptoms far exceeded the effects of intoxication. Dr. Smith opined that the cocaine, coupled with a pre-existing mental illness, caused Morris to go from hypomania to mania to psychosis. He said that Morris was able to premeditate at the time of the crimes but was delusional.

On cross-examination, Dr. Smith testified that Morris is hypomanic most of the time but was manic when he killed Ragland and Hurd. According to Dr. Smith, Morris displayed hypomanic behavior when Dr. Smith saw him in 2003. He acknowledged that there was no record that Morris was ever hospitalized for mental illness. He said irritability could be accounted for by paranoia, that paranoia can be caused by cocaine, and that paranoia can lead to delusion. Dr. Smith said that Morris would need to see a psychiatrist to be diagnosed as bipolar. He had never seen Morris depressed, did not have evidence of manic or depressive episodes prior to the homicides, and acknowledged that there was no direct evidence that Morris met the criteria for bipolar disorder before the killings. Dr. Smith disagreed with Dr. Bernet that it was the

effects of cocaine that caused Morris to commit the crimes.

Neuropsychologist Dr. Woods interviewed Morris in February 2002. He reviewed the testing done by the other mental health experts, affidavits by Morris's friends and family, his school records, and his military records. Dr. Woods diagnosed Morris as having bipolar disorder. He testified that bipolar disorder is characterized by phases of mania and depression, and includes manic, hypomanic, euthymic, and depressive behavior. The criteria for hypomania include problems sleeping, distractibility, racing thoughts, and rapid, pressured speech. Hypomania is the same as mania but without delusions and hallucinations. A person could stay in one stage of bipolar disorder his whole life, and one manic episode could be attributed to bipolar disorder. Someone with hypomania can do good work and appear normal. Dr. Woods found Morris's military records significant because of Morris's short stay in the Army. He noted that several of Morris's family and friends remarked that Morris spoke rapidly and was moody. Some commented that Morris's mother was moody and acted strangely, that Morris's grandfather committed suicide, that Morris's father brought his mistress and her children to live with Morris's family, that Morris used drugs, and that Morris's son had periods of depression and agitation.

Dr. Woods commented that Dr. Bernet did not have Morris's social history because he did not talk to Shettles and focused on the crime rather than an overall view of Morris's mental health. He stated that the documents Dr. Bernet reviewed would not have given him insight into Morris's bipolar disorder and that bipolar symptoms could be missed in a two-and-one-half hour interview. Dr. Woods described Morris's behavior as acting on a plan in service of the delusion that Ragland needed to die. He said that Morris's head injuries could have impaired his functioning, that he experienced an interplay of drugs and mental illness, and that cocaine amplified his psychotic state. Dr. Woods agreed that Morris was able to premeditate, understood the consequences of rape, and had never been treated for bipolar disorder. From a review of Dr. Bernet's notes, Dr. Woods found that Dr. Bernet considered, but did not diagnose, bipolar disorder. Dr. Woods acknowledged that Morris was not being treated for bipolar disorder in prison.

Morris's post-conviction counsel also submitted affidavits by Morris's friend Greg Longmeyer, his aunt Flossie Mayes, his nephew David Morris, Donna Marie Owens (the sister of his first child's mother), his stepson James Kevin Stevens, and Anita Louise Owens Stewart, the mother of his first child. These witnesses stated that: Morris spoke quickly and profusely; his mother was moody and behaved strangely; Morris took drugs and was moody; and Morris's behavior resembled that of his mother. Stewart, who had worked in a mental hospital, thought that Morris's mother was bipolar.

Neuropsychologist Dr. James Walker ("Dr. Walker") testified for the state. He reviewed the evaluations by the other mental-health experts as well as Morris's and Angela's statements and the affidavits submitted by Morris's friends and family. Dr. Walker met with Morris four times and administered psychological tests. He found that Morris did not have obsessions or delusions, that Morris's thinking was logical, and that his intelligence was low-average.

Morris told Dr. Walker that he was the victim of social injustice most of his life. Dr. Walker said that Morris's thinking was logical. He was defensive on the personal-

ity-assessment inventory, mistrustful, and egocentric. He had conflicts with authority and was cynical. Morris denied ever having hallucinations, including on the night of the crimes. He told Dr. Walker that he had been shot and hit in the head but never lost consciousness. He took no medications and had not received psychiatric treatment. Morris admitted taking PCP and LSD and drinking up to twelve beers a day. Dr. Walker learned from other sources that Morris had abused amphetamines. Morris was arrested many times in St. Louis for selling drugs, and moved to Jackson, Tennessee to get away from that lifestyle. He worked nine or ten years as a grave digger. Morris was arrested for assaulting a man and waving a shotgun at a woman. At the time of the crimes, Morris lived with his wife, children, and step-children. He engaged in multiple extramarital affairs. According to a prison evaluation that Dr. Walker reviewed, Morris had performed poorly in school, had trouble with thinking, had a constricted affect, was defensive, rigid, complained constantly, and was potentially paranoid and anti-social.

The account of the crimes Morris gave to Dr. Walker differed from his statement to the police. Morris told Dr. Walker that he smoked $500 of crack in twelve hours and drank twenty-four beers and some liquor. He said he was very upset and used cocaine for the first time in order to take his life. Morris told Dr. Walker that Ragland threatened him and his wife with harm. He was angry at the disrespect and determined to take Ragland's life. He entered the house, got Ragland to apologize, and shot him. Morris planned to leave but noticed Hurd behind him. Morris told Dr. Walker that he hit Hurd with a gun, and that Hurd must have fallen on a knife. Morris said the police fabricated the evidence that he stabbed Hurd thirty-seven times. He said cocaine made him paranoid and nervous. Dr. Walker concluded that Morris was intoxicated on cocaine and alcohol on the night of the crimes and that intoxication was a very powerful factor affecting his behavior. Morris's problems with thinking and reasoning also played a role. Dr. Walker diagnosed Morris as being paranoid and anti-social with a history of hypomania. He placed Morris in the Bipolar II category. Dr. Walker said there is a range of bipolar disorders—all of which involve difficulty in regulating mood—with Bipolar I being more severe than Bipolar II. Dr. Walker found that Morris did not experience cocaine-induced psychosis.

II. Guilt Phase

On appeal, Morris argues that the district court erred when it determined that trial counsel's ineffective assistance did not prejudice him in the guilt phase of trial because the court ignored the impact of his psychiatric and cognitive impairments on his capacity to act with the state of mind necessary for first-degree murder. We disagree.

A. Background

In his post-conviction petition, Morris alleged that his trial counsel failed to investigate and present evidence of his background and mental impairments that would have shown him incapable of the *mens rea* required for first-degree murder. The Tennessee trial court held an evidentiary hearing and denied Morris relief. The trial court found that Morris's counsel conducted a thorough and proper investigation and adequately prepared for trial. Counsel had no reason to believe that Morris had a mental or physical disease, defect, or condition that would have supported an insanity defense, prevented him from having culpable intent, or mitigated the crimes. Morris had never been treated for mental illness and had lived a rea-

sonably normal life. Counsel had every reason to believe that Dr. Bernet would have recommended an evaluation by a neuropsychologist or neuropsychiatrist if doing so would have aided in the defense. Accordingly, the trial court concluded that counsel made an informed decision to pursue the theory that Morris was unable to form the intent to commit the crimes charged because of preexisting mental-health problems exacerbated by the use of a large amount of cocaine, and counsel reasonably relied upon lay proof of Morris's abnormal behavior and expert proof by Drs. Parker and Bernet. Ultimately, counsel's strategy was reasonable, and the opinions of Morris's post-conviction experts were contradicted by the facts of the case that showed motive, intent, deliberation, premeditation, and mental competence.

The Tennessee appellate court adopted the trial court's findings and affirmed the decision to deny Morris's claim. The court quoted and cited *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), for the elements of an ineffective assistance of counsel claim. *Morris*, 2006 WL 2872870, at *44, *62. Morris's guilt- and penalty-phase ineffective-assistance-of-counsel claims relied on similar allegations, and the state court addressed both claims in the section of the opinion devoted to Morris's guilt-phase claims. The court reasoned that it "cannot conclude that had Dr. Bernet been in possession of [additional] information that he would have made the same diagnosis as Dr. Woods and/or the impact of such a diagnosis would have such effect upon the jury as to alter the outcome." *Id.* at *54. After reviewing the information known by counsel and the trial testimony, the court held that Morris's trial counsel could not "be faulted for failing to provide an expert that would have diagnosed the Petitioner with Bipolar Disorder." *Id.* The court noted that the jury heard two versions of events: the defense's theory that Morris lacked specific intent for premeditation because of his cocaine intoxication and mental impairments and the government's theory that Morris planned to get back at his neighbor and acted deliberately. *Id.* at *51–54.

The federal district court reviewed the decision of the Tennessee Court of Criminal Appeals *de novo* out of concern that the state court had misapplied *Strickland* and considered evidence Morris submitted to the district court. *Morris v. Bell*, No. 07–1084–JDB, 2011 WL 7758570, at *25 (W.D.Tenn. Sept. 29, 2011) (order).

The district court found that the state court recited both parts of the *Strickland* standard correctly, but omitted the phrase "reasonable probability" when analyzing whether Morris had shown prejudice from his counsel's performance. *Id.* at *22–23. The district court held that Morris's trial counsel's performance in the guilt phase was deficient because they failed to investigate and obtain an appropriate social history, failed to supply such information to their expert witnesses, and failed to determine whether they needed other experts. *Id.* at *27. However, the court held that Morris did not establish prejudice because his actions demonstrated that he had the *mens rea* to be convicted of first-degree murder. *Id.* Accordingly, there was not a reasonable probability that the verdict would have been different with the additional information. *Id.*

B. *Strickland* Analysis

[1, 2] To prevail on a claim of ineffective assistance, Morris must show both that his counsel's performance was deficient and that the deficient performance prejudiced his defense. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. Counsel's performance is deficient if it falls below an objective standard of reasonableness.

Abby v. Howe, 742 F.3d 221, 226 (6th Cir.2014). Counsel's performance prejudices a defendant in the guilt phase if "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Hinton v. Alabama*, —— U.S. ——, 134 S.Ct. 1081, 1089, 188 L.Ed.2d 1 (2014) (quoting *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052).

[3–5] "The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington v. Richter*, 562 U.S. 86, 105, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). Where review is under *Strickland* and AEDPA, a federal court's review of a state court's decision on a claim of ineffective assistance of counsel is "doubly deferential." *Burt v. Titlow*, —— U.S. ——, 134 S.Ct. 10, 13, 187 L.Ed.2d 348 (2013) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 131 S.Ct. 1388, 1403, 179 L.Ed.2d 557 (2011)). If the state court's decision is contrary to federal law, this court reviews the petitioner's claim *de novo*. *See Dyer v. Bowlen*, 465 F.3d 280, 284 (6th Cir.2006).

[6] The conclusion of the Tennessee Court of Criminal Appeals that Morris's counsel's performance was not deficient was not an unreasonable application of *Strickland* because counsel satisfied *Strickland*'s deferential standard. *See Harrington*, 562 U.S. at 105, 131 S.Ct. 770. By adopting the trial court's findings, the Tennessee Court of Criminal Appeals held that Morris's counsel's performance was not deficient because their investigation and preparation were thorough, and that counsel had no reason to believe that Morris was suffering from a mental condition that would have prevented him from forming the requisite intent. *Morris*, 2006 WL 2872870, at *54. Accordingly, AEDPA deference applies to this aspect of Morris's claim.

[7] Morris's counsel satisfied *Strickland*'s standard. *See Harrington*, 562 U.S. at 105, 131 S.Ct. 770. Counsel's strategy was to convince the jury that Morris lacked the *mens rea* to commit first-degree murder because of the effects of cocaine and mental stress. They declined to pursue an insanity defense after the court-appointed experts concluded that Morris was competent to stand trial and sane at the time of the crimes. Counsel retained two qualified experts, a pharmacologist and a psychiatrist, to testify about the effects of cocaine generally and the effects on Morris on the night in question. Dr. Parker testified that Morris's actions and mental state, including paranoia and delusions, were consistent with his account of binging on crack. Dr. Bernet stated that Morris's cocaine intoxication may have left him incapable of premeditating and forming the intent to murder Hurd. Although the testimony of Drs. Parker and Bernet did not persuade the jurors, it supported counsel's theory that Morris lacked the requisite *mens rea*. Attorneys are entitled to rely on the opinions and conclusions of mental-health experts. *See McGuire v. Warden, Chillicothe Corr. Inst.*, 738 F.3d 741, 758 (6th Cir.2013); *Black v. Bell*, 664 F.3d 81, 104–05 (6th Cir.2011). None of Drs. Drewery, Pullen, and Bernet indicated that Morris suffered from bipolar disorder or any other mental illness. Given the evidence against Morris and the unavailability of a plea deal or an insanity defense, Morris's counsel reasonably chose to rely on their experts and argue that he lacked the *mens rea* for first-degree murder of Hurd.

Morris's post-conviction evidence demonstrated that lay people who had contact with him suspected he had mental problems, and Drs. Auble, Smith, and Woods identified mental impairments and disorders. Drs. Woods, Smith, and Walker diagnosed Morris as bipolar, and Dr. Woods

said that Dr. Bernet lacked the background information to diagnose Morris. Since Morris did not call Drs. Drewery, Pullen, or Bernet as witnesses in the post-conviction evidentiary hearing, there is no evidence that the doctors wanted more information about Morris's background or that Morris refused to cooperate. As the district court found, there were red flags that could have led Morris's counsel to investigate further. *See Wiggins v. Smith*, 539 U.S. 510, 527, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003); *Hodges v. Colson*, 727 F.3d 517, 542 (6th Cir.2013). The mitigation investigator expressed concern about Morris's mental health and passed on Morris's wife's comments. Had counsel passed on more information to Dr. Bernet, he may have discovered more of Morris's problems. But neither counsel nor Dr. Bernet believed Morris was mentally ill. However, in light of counsel's reasonable efforts to put together a plausible defense based on cocaine intoxication, their failure to be more aggressive in pursuing evidence of free-standing mental illness does not, by itself, render their performance constitutionally deficient.

Giving proper deference to the state court's decision and counsel's judgment, Morris has not shown that the state court's decision was unreasonable. *See Burt*, 134 S.Ct. at 13; *Pinholster*, 131 S.Ct. at 1403; *Abby*, 742 F.3d at 226; *Williams v. Anderson*, 460 F.3d 789, 800 (6th Cir.2006). Accordingly, because counsel's performance was not constitutionally deficient, we need not address the prejudice prong of the *Strickland* analysis.

III. Sentencing Phase

The district court granted habeas relief on Morris's claim of ineffective assistance of counsel in the sentencing phase, and the government cross appeals. On appeal, the government argues that the district court erred because the state court reasonably determined that Morris failed to establish a diagnosable illness and that counsel consulted with three mental-health experts who strategically chose not to rely on that theory. We agree.

A. Background

In post-conviction proceedings, Morris argued that counsel failed to investigate his mental illness and failed to properly use a mitigation specialist. According to Morris, counsel should have had him examined by mental-health experts to determine the existence of a brain injury or mental impairment. Counsel also should have brought out his childhood poverty, neglect, abuse, and exposure to violence, drugs, and alcohol. Finally, Morris argued that counsel failed to provide Drs. Bernet or Parker with pertinent information and failed to present expert or lay mitigation testimony.

The Tennessee Court of Criminal Appeals noted that the claim was intertwined with Morris's guilt-phase claim and again cited and quoted *Strickland*'s two-part test. *Morris*, 2006 WL 2872870, at *60–62. The appellate court adopted the trial court's finding on performance that Morris's counsel conducted a thorough and proper investigation and had no reason to believe Morris was suffering from a mental disease, defect, or condition that would have mitigated his crimes. *Id.* at *64. The court also concluded that counsel was entitled to rely on Dr. Bernet's judgment about whether an evaluation by a neuropsychiatrist or neuropsychologist was needed. *Id.* at *56. Turning to prejudice, the court stated that: "A defendant must demonstrate 'a reasonable probability that, but for counsel's [unprofessional] errors, the result of the proceeding would have been different.' The Petitioner has failed to meet this standard." *Id.* at *62 (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052). Considering the aggravating circum-

stances, the Tennessee Court of Criminal Appeals noted that "we cannot conclude that had expert testimony that the Petitioner suffered from Bipolar Disorder II been presented to the jury that a sentence other than death would have been imposed." *Id.* at *54. The court recognized that the additional mitigation evidence Morris presented in post-conviction proceedings was double-edged because it showed both a history of personality problems in Morris and his family and a history of drug abuse and illegal activity. *Id.* at *61–62.

The federal district court reviewed Morris's claim *de novo* out of concern that the state court improperly applied *Strickland*'s prejudice prong. *Morris*, 2011 WL 7758570 at *25. The district court found that there was substantial information that should have caused counsel to investigate further whether Morris was mentally ill and how cocaine and alcohol affected his cognitive abilities. *Id.* at *28. It noted that the mitigation specialist's investigation was limited, that Dr. Bernet's testimony was not used in mitigation, and that there was no mitigation proof about Morris's background, family history, brain damage or mental illness. *Id.* Accordingly, the district court found that there was a reasonable probability that one juror would have voted against the death penalty had Morris's counsel presented the available mitigation evidence. *Id.*

B. *Strickland* Analysis

[8–11] "An attorney's failure to reasonably investigate the defendant's background and present mitigating evidence to the jury at sentencing can constitute ineffective assistance of counsel." *Goodwin v. Johnson*, 632 F.3d 301, 318 (6th Cir.2011) (citing *Wiggins*, 539 U.S. at 521–22, 123 S.Ct. 2527). To assess the reasonableness of counsel's performance, "[t]he court must consider not only the evidence known to counsel, but also whether that evidence 'would lead a reasonable attorney to investigate further.' " *Hodges*, 727 F.3d at 542 (quoting *Wiggins*, 539 U.S. at 527, 123 S.Ct. 2527). "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on the investigation." *Wiggins*, 539 U.S. at 528, 123 S.Ct. 2527 (quoting *Strickland*, 466 U.S. at 690–91, 104 S.Ct. 2052). Courts should not second-guess counsel's strategic decisions, and should presume that counsel's conduct is reasonable. *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052; *Jackson v. Bradshaw*, 681 F.3d 753, 760 (6th Cir.2012). "The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington*, 562 U.S. at 105, 131 S.Ct. 770.

[12, 13] To assess the potential prejudice to a defendant at sentencing, the court must reweigh the evidence in aggravation against the total available mitigating evidence adduced at trial and in post-conviction proceedings, *see Wiggins*, 539 U.S. at 534, 123 S.Ct. 2527, to determine "whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052; *see also Porter v. McCollum*, 558 U.S. 30, 39–40, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009); *Wong v. Belmontes*, 558 U.S. 15, 19–20, 130 S.Ct. 383, 175 L.Ed.2d 328 (2009). The petitioner must present new evidence that differs both in strength and subject matter from the evidence actually presented at sentencing, not just cumulative mitigation evidence. *Jackson*, 681 F.3d at 770; *Phillips v. Bradshaw*, 607 F.3d 199, 216 (6th Cir. 2010).

As a threshold matter, Morris argues on appeal that the Supreme Court's decisions

in *Martinez v. Ryan*, —— U.S. ——, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), and *Trevino v. Thaler*, —— U.S. ——, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013), allow him to rely on evidence he produced in the district court. In *Martinez*, the Court held that ineffective assistance or absence of collateral counsel may constitute cause to excuse the procedural default of an ineffective-assistance-of-trial-counsel claim. 132 S.Ct. at 1320.[1]

[14] However, *Martinez* and *Trevino* do not apply to Morris's case because he did not procedurally default his ineffective-assistance-of-trial-counsel claims. Morris presented his ineffective assistance of trial counsel claims in state post-conviction proceedings. The Tennessee Court of Criminal Appeals denied them on the merits. *Morris*, 2006 WL 2872870, at *54, *62. *Martinez* does not apply to claims that were fully adjudicated on the merits in state court because those claims are, by definition, not procedurally defaulted. *Detrich v. Ryan*, 740 F.3d 1237, 1246 (9th Cir.2013).

[15] The decision of the Tennessee Court of Criminal Appeals to deny Morris's claim was not an unreasonable application of *Strickland*. Morris's counsel's strategy was to make the case that Morris would not have committed the crimes if he had not been intoxicated and that he was basically a good person who would function well in prison. Counsel hired experts in pharmacology and psychology, investigators, and a mitigation specialist. The defense team investigated Morris's background, to an extent, and relied on mental-health experts' opinions to form their strategy. To the extent that Morris failed to provide defense counsel and the mental-health experts with background information, counsel cannot be blamed. *See Fautenberry v. Mitchell*, 515 F.3d 614, 625 (6th Cir.2008); *Hicks v. Collins*, 384 F.3d 204, 215 (6th Cir.2004). Based upon the experts' findings, counsel presented testimony in the guilt phase to show how cocaine intoxication and withdrawal can affect the user's ability to reason and that Morris may have been unable to form the intent to commit murder. They did not present new expert testimony at sentencing, but the experts' testimony was already before the jury. In closing arguments, Morris's counsel attempted to connect the guilt- and penalty-phase evidence. Morris's counsel were entitled to rely upon the assessments performed by mental-health experts in forming their strategy. Mitigation witnesses testified about Morris's character, work habits, and good behavior in prison. *See McGuire*, 738 F.3d at 758; *Black*, 664 F.3d at 104–05. There is a reasonable argument that counsel satisfied *Strickland*'s deferential standard. *See Harrington*, 562 U.S. at 105, 131 S.Ct. 770.

[16, 17] By not presenting additional mental-health testimony in the mitigation phase, counsel avoided opening the door to rebuttal evidence of Morris's history of drug dealing, drug use, and other illegal acts. *See Wong*, 558 U.S. at 25–27, 130 S.Ct. 383 (finding that introduction of additional mitigation evidence could have invited rebuttal evidence that petitioner was responsible for a second murder); *Bell v. Cone*, 535 U.S. 685, 700, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002) (noting counsel's fear that calling witnesses from petitioner's childhood or time in the Army could have led to prosecutor's introducing evidence about respondent's criminal history); *Sutton v. Bell*, 645 F.3d 752, 763–64 (6th Cir.2011) (holding that state court reason-

1. *Martinez* and *Trevino* apply to cases in Tennessee. *Sutton v. Carpenter*, 745 F.3d 787, 795–96 (6th Cir.2014).

ably considered the possibility that presenting evidence of petitioner's troubled background could have opened the door to rebuttal evidence of his prior drug use and violent acts). Under Tennessee law, the prosecution may introduce evidence to rebut a mitigating factor raised by the defendant. *Carter v. Bell*, 218 F.3d 581, 598–600 (6th Cir.2000); *Cozzolino v. State*, 584 S.W.2d 765, 768 (Tenn.1979). This court may entertain possible reasons for counsel's decisions even if not expressed by counsel. *See Pinholster*, 131 S.Ct. at 1407. Accordingly, the risk of rebuttal evidence is a valid consideration whether or not Morris's counsel considered it.

The Supreme Court and this court have denied habeas relief on similar claims. *See Pinholster*, 131 S.Ct. at 1405–06 (concluding that state court's denial of deficient-performance claim was not unreasonable because counsel consulted a psychiatrist who found no brain damage, petitioner bragged about his criminal activities, and counsel reasonably chose to rely on seeking sympathy for petitioner's mother); *Bell*, 535 U.S. at 698–702, 122 S.Ct. 1843 (finding Tennessee Court of Criminal Appeals's denial of ineffective-assistance-of-counsel claim not an unreasonable application of *Strickland* because, even though trial counsel offered no mitigation evidence at the penalty phase, counsel called jury's attention to guilt-phase evidence that was presented to support insanity defense); *Black*, 664 F.3d at 104–05 (holding that petitioner who alleged that counsel should have hired a psychiatrist who would have diagnosed him with brain damage did not show ineffective assistance of counsel because counsel had him evaluated by mental-health experts and had no reason to believe that further investigation would have produced mitigation evidence); *Carter v. Mitchell*, 443 F.3d 517, 526–30 (6th Cir.2006) (finding no ineffective assistance of counsel at mitigation because counsel used a qualified psychologist and post-conviction evidence did not establish that trial counsel missed probative mental-health evidence).

Here, the conclusion of the Tennessee Court of Criminal Appeals that Morris's counsel's performance was not deficient was not contrary to or an unreasonable application of federal law. *See* 28 U.S.C. § 2254(d); *Berghuis v. Thompkins*, 560 U.S. 370, 378, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010). Accordingly, because counsel's performance was not constitutionally deficient, we need not address the prejudice prong of the *Strickland* analysis.

AFFIRMED in part and VACATED in part, and this case is REMANDED to the district court for a denial of the writ in accordance with this decision.

UNITED STATES of America, Plaintiff–Appellee,

v.

Michael GIORGIO, Defendant–Appellant.

No. 14–4193.

United States Court of Appeals, Sixth Circuit.

Sept. 25, 2015.

Background: Following denial of motion to withdraw guilty plea in the United States District Court for the Northern District of Ohio, Patricia A. Gaughan, J., 2014 WL 5431324, defendant was convicted of soliciting money from "straw campaign donors" in violation of federal campaign-