

No. 17-5536

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ESAU MILLINER,

Petitioner-Appellant,

v.

KATHY LITTERAL, Warden,

Respondent-Appellee.

FILED
Mar 05, 2018
DEBORAH S. HUNT, Clerk

ORDER

Esau Milliner, a Kentucky prisoner proceeding pro se, appeals the district court's judgment denying his habeas corpus petition, filed pursuant to 28 U.S.C. § 2254. Milliner has filed an application for a certificate of appealability and a motion for leave to proceed in forma pauperis.

In January 2007, a jury convicted Milliner of murder and first-degree burglary. *See Milliner v. Commonwealth*, No. 2008-CA-002138-MR, 2010 WL 2132737, at *2 (Ky. Ct. App. May 28, 2010). The convictions arose from a fight between Milliner and Kendrick Coleman that resulted in Coleman's death. During Milliner's trial, Demetria Brock testified that she had dated both Milliner and Coleman and that she was not sure which man was the father of her youngest child. On January 25, 2006, the day of the fight, Brock was living in a house with Coleman and her children. Brock had previously taken her youngest child to visit Milliner, and she was supposed to take him to see Milliner again that day. Milliner called Brock's cell phone several times on the 25th, but Brock did not answer. Around 8:30 p.m., Milliner called the house phone and Brock picked up. Milliner said "bitch I'm gonna kill you" and "don't hang up the phone" before the phone went dead.

Brock was the only eyewitness to the fight between Coleman and Milliner, and she testified as follows. At around 11:00 p.m. on the night of January 25, 2006, someone began banging on the door of her home and ringing the doorbell repeatedly. After several minutes, Coleman unlocked the door. As he did so, Milliner pushed his way in despite attempts by Coleman and Brock to keep him out. Milliner and Coleman began fighting inside the entryway. Brock did not see any weapons at that point, but eventually Coleman entered the kitchen and grabbed knives. Milliner then threw a speaker at Coleman and charged him. Brock saw Coleman swing the knives and aim them at Milliner. As the two men were holding onto each other, Milliner said something to Coleman and Coleman laughed. Milliner responded "nigger don't laugh at me," but Coleman kept laughing. Milliner then stabbed Coleman in the neck. After this, Milliner left.

After the jury returned guilty verdicts, Milliner entered into a sentencing agreement with the government. Pursuant to that agreement, the trial court sentenced Milliner to life in prison without the possibility of parole for twenty-five years for the murder conviction and a concurrent term of twenty years of imprisonment for the burglary conviction. *See Milliner*, 2010 WL 2132737, at *2. Milliner also waived his right to appeal. In October 2007, Milliner filed a pro se motion to vacate his sentence. The Jefferson Circuit Court denied the motion, the Kentucky Court of Appeals affirmed, and the Kentucky Supreme Court denied leave to appeal. *See id.* at *1, *8. In 2011, Milliner filed a second motion to vacate, which the Jefferson Circuit Court denied. The Kentucky Court of Appeals affirmed. *Milliner v. Commonwealth*, No. 2011-CA-002021, 2013 WL 489803, at *1 (Ky. Ct. App. Feb. 8, 2013).

Milliner then filed a federal habeas petition raising eleven grounds for relief. He argued that trial counsel performed ineffectively by (1) failing to present evidence showing that he acted in self-defense, (2) failing to ensure that the jury was instructed on the elements of extreme emotional disturbance ("EED"), (3) erroneously advising him that accepting a sentencing agreement automatically waived his right to appeal, (4) failing to object to prosecutorial misconduct, (5) coercing him to sign the sentencing agreement, (6) waiving Milliner's right to

testify without consulting him, (7) failing to present a viable defense to the first-degree burglary charge, and (8) conceding during closing arguments that Milliner "was the 'initial aggressor.'" He also contended that: (9) the Commonwealth used peremptory challenges to excuse eligible African-American jurors in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986); (10) his sentencing agreement was the product of false or perjured testimony; and (11) trial counsel performed ineffectively by failing to conduct an adequate pretrial investigation. The district court subsequently granted Milliner leave to supplement his habeas petition to argue that (12) trial counsel performed ineffectively by failing to object to the inadequate polling of the jury, and appellate counsel performed ineffectively by failing to raise the issue on appeal.

A magistrate judge recommended dismissing Milliner's habeas petition because grounds 1 through 5 were meritless and grounds 6 through 12 were procedurally defaulted. Over Milliner's objections, the district court adopted the magistrate judge's report and recommendation and dismissed Milliner's habeas petition. It declined to issue a certificate of appealability on any ground. Milliner now seeks a certificate of appealability on grounds 1 through 11. He affirmatively waives appellate review of ground 12.

A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner may meet this standard by showing that reasonable jurists could debate whether the petition should have been determined in a different manner or that the issues presented were "adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). If the petition was denied on procedural grounds, the petitioner must show "at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), if a state court previously adjudicated a petitioner's claims on the merits, a district court may not grant habeas relief unless the state court's adjudication of the claim resulted in "a decision that was contrary

to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *see Harrington v. Richter*, 562 U.S. 86, 100 (2011). Where AEDPA deference applies, this court, determining whether to issue a certificate of appealability, must evaluate the district court's application of § 2254(d) to determine "whether that resolution was debatable amongst jurists of reason." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

All of the claims that the district court addressed on the merits alleged that trial counsel performed ineffectively. To establish ineffective assistance of counsel, a petitioner must show both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish prejudice, a petitioner must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

I. Ground One

In his first ground for relief, Milliner argued that his two attorneys performed ineffectively by failing to present evidence to support the theory that he killed Coleman in self-defense. Specifically, he contended that counsel should have presented evidence showing that Coleman had attacked him with a knife on a prior occasion—an incident that Brock witnessed. In his application for a certificate of appealability, Milliner raises an additional argument—that counsel should have introduced blood spatter evidence showing that his blood was found outside of Coleman's residence. Because Milliner did not raise this second argument in the district court, it is not properly before this court. *See United States v. Ellison*, 462 F.3d 557, 560 (6th Cir. 2006).

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Before presenting its evidence, the Commonwealth asked the trial judge to prohibit the defense from eliciting any testimony regarding prior acts of violence. The prosecutor argued that evidence of specific acts of violence could not be introduced unless they were used to show that Milliner feared Coleman. She argued that, because Milliner was not going to testify, "there's no one who can testify to [Milliner's] fear." One of Milliner's attorneys responded that he did not

intend to introduce any evidence of prior acts of violence unless the Commonwealth “open[ed] the door to it.”

Under Kentucky law, prior acts of violence are admissible if they are “offered to prove that the defendant so feared the victim that he believed it was necessary to use physical force (or deadly physical force) in self-protection.” *Saylor v. Commonwealth*, 144 S.W.3d 812, 815 (Ky. 2004). This exception is not contingent on the defendant testifying about that fear—the only requirement is that there be “proof that the defendant knew of such matters at the time of the alleged homicide or assault.” *Id.* at 816 (quoting Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 2.15[4][d], at 106 (4th ed. LexisNexis 2003)). But even assuming that defense counsel performed deficiently because he was acting under an erroneous assumption that the prior act of violence was inadmissible under Kentucky law, Milliner is entitled to a certificate of appealability only if reasonable jurists could debate the district court’s conclusion that his defense was not prejudiced. Milliner has not made such a showing. The prior physical confrontation between Coleman and Milliner occurred in February 2005, *see Milliner*, 2010 WL 2132737, at *3,—almost one year before the altercation that led to Coleman’s death—and any argument that Milliner was still afraid of Coleman would have been severely undermined by the uncontested fact that Milliner went to Coleman’s home after dark, banged on his front door, and pushed his way inside. Under these circumstances, reasonable jurists would agree that Milliner cannot make the requisite showing of prejudice.

II. EED Jury Instruction

In his second ground for relief, Milliner argued that trial counsel performed ineffectively by failing to request a jury instruction on the defense of EED. Milliner waived appellate review of this claim because he did not address it in his objections to the magistrate judge’s report and recommendation. *See Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Miller v. Currie*, 50 F.3d 373, 380 (6th Cir. 1995). Regardless, the claim does not warrant a certificate of appealability. Under Kentucky law, an EED instruction is warranted only if a reasonable jury could find, based on the evidence, “that [the defendant] acted violently because of ‘a temporary state of mind so enraged,

inflamed, or disturbed as to overcome [his] judgment, and to cause [him] to act uncontrollably from [an] impelling force of the extreme emotional disturbance rather than from evil or malicious purposes.”” *Holland v. Commonwealth*, 466 S.W.3d 493, 503 (Ky. 2015) (quoting *McClellan v. Commonwealth*, 715 S.W.2d 464, 468-69 (Ky. 1986)). Because Milliner did not testify and there was no other evidence in the record regarding his mental state at the time of the attack, reasonable jurists could not debate the district court’s conclusion that the Kentucky Court of Appeals did not unreasonably apply *Strickland* or unreasonably determine the facts when it denied relief on this claim.

III. Right to Appeal

In his third ground for relief, Milliner argued that trial counsel performed ineffectively by incorrectly advising “him that his acceptance of a sentencing agreement automatically waived or forfeited his right to file an appeal concerning errors that occurred during the guilt/innocence phase of trial.” He argued that, under Kentucky law, he retained the right to appeal his convictions (as opposed to his sentence) because he had not “bargained [the right] away.”

The Kentucky Court of Appeals found that accepting a sentencing agreement does not automatically waive a defendant’s right to appeal his convictions. *Milliner*, 2010 WL 2132737, at *8. Because Milliner alleged that counsel advised him to the contrary, reasonable jurists could debate whether trial counsel performed ineffectively. But again, Milliner must also show that reasonable jurists could debate whether he made the requisite showing of prejudice.

To show prejudice in a case involving a plea agreement, a petitioner must “show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Although this case involves a sentencing agreement rather than a plea agreement, an analogous standard should apply: Milliner must show a reasonable probability that, but for counsel’s error, he would have rejected the sentencing agreement and proceeded to the penalty phase of the trial. Reasonable jurists would agree that Milliner cannot make such a showing. By accepting the plea agreement, Milliner avoided the possibility that the trial court would sentence him to death.

Furthermore, the face of the sentencing agreement states that Milliner waived his right to appeal; the trial court informed Milliner that, by entering into the sentencing agreement, he was waiving his right to appeal; and Milliner stated under oath that he understood that he was waiving his right to appeal. Accordingly, this claim does not deserve encouragement to proceed further.

IV. Prosecutorial Misconduct

In his fourth ground for relief, Milliner argued that his attorneys performed ineffectively by failing to object to the prosecutor's repeated insinuations throughout her closing argument that Milliner had stated to Coleman or Brock, "How dare you disrespect me," because there was no evidence that he made such a statement. Milliner also argued that defense counsel should have objected to the prosecutor's playing tapes of three 911 calls for the jury because the tapes were inflammatory and cumulative.

It is clear from the context of the prosecutor's statements during closing argument that she was not stating that Milliner actually uttered the words "how dare you disrespect me," but was simply driving home her argument that Milliner intended to kill Coleman because he believed that Coleman and Brock had disrespected him. Because prosecutors may "argue reasonable inferences from the evidence," reasonable jurists could not debate the district court's conclusion that the Kentucky Supreme Court did not unreasonably determine the facts or unreasonably apply clearly established federal law when it concluded that trial counsel did not perform deficiently by failing to object. *Byrd v. Collins*, 209 F.3d 486, 535 (6th Cir. 2000) (quoting *United States v. Collins*, 78 F.3d 1021, 1040 (6th Cir. 1996)).

With respect to the 911 tapes, the Kentucky Court of Appeals found that counsel did not perform deficiently by failing to object because the "prejudicial quality [of the tapes] did not outweigh their probative value" and, therefore, the tapes were admissible under Kentucky law. *Milliner*, 2010 WL 2132737, at *7. On federal habeas review, this court must defer to that determination. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005). As a result, reasonable jurists could not debate the district court's conclusion that counsel did not perform deficiently by failing

to object because any objection would have been meritless. *See Krist v. Foltz*, 804 F.2d 944, 946-47 (6th Cir. 1986).

V. Sentencing Agreement

In his fifth ground for relief, Milliner argued that counsel performed ineffectively by coercing him into signing a sentencing agreement that waived his sentencing hearing and failing to ensure that he entered the agreement knowingly. Because Milliner affirmatively waived this issue in his objections to the magistrate judge's report and recommendation, he cannot now raise the issue on appeal.

VI. Procedural Default of Grounds 6 Through 11

The district court found that Milliner procedurally defaulted grounds 6 through 11. In his application for a certificate of appealability, Milliner does not challenge that finding, but he argues that the district court should have excused the default because failing to address his claims would result in a miscarriage of justice and because post-conviction counsel performed ineffectively by failing to raise these claims.

A habeas court will not review procedurally defaulted claims unless the petitioner can show either (1) that failure to consider the claim would result in a "fundamental miscarriage of justice" or (2) cause for the default and actual prejudice from the alleged constitutional violation. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). The fundamental-miscarriage-of-justice exception applies when "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. 478, 496 (1986). It generally requires a petitioner to present "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). Because Milliner did not cite new evidence of his actual innocence, reasonable jurists would agree that he could not avail himself of the fundamental-miscarriage-of-justice exception.

In *Martinez v. Ryan*, 566 U.S. 1, 17 (2012), the Supreme Court held that the ineffective assistance of post-conviction counsel can serve as cause to excuse the procedural default of an

ineffective-assistance-of-trial-counsel claim where state law requires that such claims be first raised in an “initial-review” post-conviction collateral proceeding. In *Trevino v. Thaler*, 569 U.S. 413, 429 (2013), the Supreme Court extended this rule to apply to situations in which a state’s post-conviction proceedings provide the first “meaningful opportunity” to raise ineffective-assistance-of-trial-counsel claims. The “*Martinez/Trevino* exception applies in Kentucky and thus Kentucky prisoners can, under certain circumstances, establish cause for a procedural default of their [ineffective-assistance-of-trial-counsel] claims by showing that they lacked effective assistance of counsel at their initial-review collateral proceedings.” *Woolbright v. Crews*, 791 F.3d 628, 636 (6th Cir. 2015).

The district court found that grounds 9 through 11 were procedurally defaulted because, although Milliner raised them in his motion to vacate, he did not raise them in his appeal from the trial court’s denial of that motion. Reasonable jurists could not debate the district court’s conclusion that Milliner cannot rely on post-conviction counsel’s alleged ineffectiveness to establish cause for the procedural default of these claims. First, because grounds 9 and 10 are not ineffective-assistance-of-counsel claims, *Martinez* and *Trevino* do not apply. See *Martinez*, 566 U.S. at 11, 17; *Trevino*, 569 U.S. at 423, 429. Second, the rule announced in *Martinez* and *Trevino* “does not extend to ‘appeals from initial-review collateral proceedings.’” *Abdur’Rahman v. Carpenter*, 805 F.3d 710, 713 (6th Cir. 2015) (quoting *Martinez*, 566 U.S. at 16). Accordingly, grounds 9 through 11 do not deserve encouragement to proceed further.

The district court found that grounds 6 through 8 were procedurally defaulted because Milliner did not raise them in a motion to vacate that he filed pursuant to Kentucky Rule of Criminal Procedure 11.42. Although Milliner initially filed that motion pro se, a court-appointed attorney filed a supplemental motion on Milliner’s behalf. Neither Milliner’s pro se motion nor the supplemental motion filed by counsel raised grounds 6 through 8. Nevertheless, Milliner must show “that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.” *Martinez*, 566 U.S. at 14.

With respect to ground 6, Milliner alleged that his attorneys made a “unilateral decision” to waive his right to testify. “When a tactical decision is made not to have the defendant testify, the defendant’s assent is presumed,’ and if a defendant disagrees with this decision, he ‘must alert the trial court that he desires to testify or that there is a disagreement with defense counsel regarding whether he should take the stand.’” *Goff v. Bagley*, 601 F.3d 445, 471 (6th Cir. 2010) (quoting *United States v. Webber*, 208 F.3d 545, 551 (6th Cir. 2000)). The Jefferson County Circuit Court judge that presided over Milliner’s trial asked him whether he had enough time to speak with his attorneys over the course of the proceedings and Milliner said yes. Milliner did not voice any concern regarding waiver of his right to testify, and the trial court had no affirmative duty to inquire into whether Milliner knowingly and affirmatively waived his right to testify. *Webber*, 208 F.3d at 551. In these circumstances, the law presumes the defendant knowingly waived his right to testify and Milliner has not overcome that presumption.

Milliner has also failed to demonstrate prejudice. Milliner argues that he would have testified that he went into the residence out of concern for the baby and to give Brock money for the baby, among other things. But a substantial amount of trial evidence—including Brock’s own testimony—directly contradicts this narrative. Reasonable jurists could not debate the district court’s conclusion that Milliner has failed to demonstrate cause and prejudice on this ground.

In ground 7, Milliner argued that trial counsel performed ineffectively by failing to defend against the first-degree burglary charge. Milliner has not indicated what trial counsel could have done differently to defend him against the burglary charge besides putting him on the stand (ground 6). Milliner may not rely on conclusory allegations of ineffective assistance of counsel alone to present in a meritorious *Strickland* claim—judicial review of lawyer’s performance is highly deferential and we apply a strong presumption that a lawyer’s conduct falls within the range of reasonable professional assistance. *Tinsley v. Million*, 399 F.3d 796, 802 (6th Cir. 2005). Reasonable jurists could not debate the district court’s conclusion that trial counsel adequately defended Milliner’s burglary charge.

In ground 8, Milliner argued that trial counsel performed ineffectively by conceding during closing arguments that Milliner was the "initial aggressor." Milliner alleged that this effectively conceded his guilt to both the murder charge and the burglary charge. Counsel did concede during closing arguments that Milliner was the "initial aggressor," that he "put himself there," and that he "had no business being over there at 11:00 at night to see his kid." These statements could have been construed by jurors as an admission that Milliner entered Coleman's home "with the intent to commit a crime," which would have effectively conceded his guilt on the burglary charge. Ky. Rev. Stat. § 511.020(1). Nevertheless, it appears that counsel's strategy was to argue that, although Milliner was the initial aggressor, he retained his right to defend himself because Coleman fought back with such force that Milliner feared for his life. Kentucky law allows the use of deadly force in such a situation. *See* Ky. Rev. Stat. § 503.060(3)(a). In light of the evidence presented at trial, and because Milliner was facing the death penalty on the murder charge, counsel could have reasonably believed that defending against the murder charge to avoid a possible death penalty was more important than defending against the burglary charge. *See Florida v. Nixon*, 543 U.S. 175, 190-92 (2004). Accordingly, reasonable jurists could not debate the district court's conclusion that post-conviction counsel did not perform deficiently by failing to raise this argument because the underlying ineffective-assistance-of-trial-counsel claim was meritless. *See Krist*, 804 F.2d at 946-47.

For the foregoing reasons, this court **DENIES** Milliner's application for a certificate of appealability and motion to leave to proceed in forma pauperis.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ESAU MILLINER,

Petitioner-Appellant,

v.

KATHY LITTERAL, Warden,

Respondent-Appellee.

FILED
Jul 20, 2018.
DEBORAH S. HUNT, Clerk

O R D E R

Before: ROGERS, KETHLEDGE, and NALBANDIAN, Circuit Judges.

Esau Milliner, a Kentucky prisoner proceeding pro se, petitions for rehearing of this court's order of March 5, 2018, denying his application for a certificate of appealability. The application for a certificate of appealability arose from the district court's order denying Milliner's petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. Milliner has also filed a motion to appoint counsel.

The majority of Milliner's petition for rehearing simply reiterates arguments that he raised in the district court and in his application for a certificate of appealability. Beyond that, Milliner argues that this court (1) erred in stating that the victim, Kendrick Coleman, was living at Demetria Brock's house when the murder occurred and (2) failed to account for the fact that Brock had a personal protection order against Coleman.

Upon review, we conclude that the court did not act under any misapprehension of law or fact in denying Milliner's application for a certificate of appealability. *See* Fed. R. App. P. 40(a)(2). Accordingly, the petition for rehearing and the motion to appoint counsel are **DENIED**.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

ESAU MILLINER,

Petitioner,

v.

Civil Action No. 3:13-cv-373-DJH-CHL

JOSEPH MEKO, Warden,

Respondent.

* * * * *

ORDER

Esau Milliner filed a petition for writ of habeas corpus under 28 U.S.C. § 2254. (Docket No. 1) The respondent filed an answer, opposing Milliner's petition. (D.N. 6) The Court referred the matter to Magistrate Judge Colin H. Lindsay, who submitted his Findings of Fact, Conclusions of Law, and Recommendation on July 18, 2016. (D.N. 31) Judge Lindsay recommended that the Court deny and dismiss Milliner's petition with prejudice and deny Milliner's request for a certificate of appealability. (*Id.*, PageID # 748) The petitioner timely filed objections to Judge Lindsay's report on August 8, 2016. (D.N. 32) For the reasons set forth below, the petitioner's objections will be overruled. After careful consideration, the Court will adopt in full Judge Lindsay's Findings of Fact, Conclusions of Law, and Recommendation. (D.N. 31)

I.

On January 17, 2007, Esau Milliner was convicted by a jury in Jefferson County, Kentucky Circuit Court of murder and burglary in the first degree. (D.N. 6, PageID # 65) During the penalty phase, Milliner agreed to accept the Commonwealth's sentencing offer of "life without the possibility of parole for twenty-five years for the murder conviction and twenty years for the burglary conviction," rather than leaving the decision to a jury. (D.N. 31, PageID #

752) As part of the agreement, Milliner waived the sentencing proceeding and “his right to appeal his case to a higher court.” (*Id.*) Following a hearing in which a judge questioned Milliner to ensure that he understood the agreement and the waiver of his rights, the Jefferson Circuit Court accepted the agreement and sentenced Milliner accordingly. (*Id.*; D.N. 32, PageID # 836–37)

On October 24, 2007, Milliner filed a “Motion to Vacate Judgment and Sentence on a Plea of Guilty Pursuant to [Kentucky] Rule of Criminal Procedure 11.42 and Notice of Additional Claim under [Kentucky] Civil Rule 60.02(e) and (f),” claiming that his conviction and sentence were “obtained in violation of due process of law.” (D.N. 6-6, PageID # 351) Specifically, Milliner made several claims of ineffective assistance of counsel and alleged that his guilty plea was not voluntary. (*Id.*) Additionally, Milliner requested that counsel be appointed. (D.N. 31, PageID # 753) Six months later, on April 21, 2008, Milliner’s appointed counsel filed a supplemental motion in support of his motion to vacate, asserting six additional grounds of ineffective assistance of counsel and related claims. (*Id.*, PageID # 753–54).

The Jefferson Circuit Court denied Milliner’s motions. (*Id.*) The court explained that many of Milliner’s arguments were improper because “virtually all of Defendant’s arguments are of the kind that would be addressed in appeal” and Milliner waived his right to appeal in his sentencing agreement. (D.N. 6-8, PageID # 515) Additionally, the Court found that Milliner’s “assertions fail[ed] to meet the legal standards” because he “has not shown any deficiency in trial counsel’s representation that rises to such a level as to prejudice the defense or call into question the legality or fundamental fairness of the trial.” (*Id.*)

Milliner appealed the denial of his motions to the Kentucky Court of Appeals. (D.N. 31, PageID # 754) That court affirmed the decision of the Jefferson Circuit Court. (*Id.*, PageID #

755) Milliner filed a motion for discretionary review with the Supreme Court of Kentucky, but that motion was denied on June 8, 2011. (*Id.*)

In July 2011, Milliner filed a pro se "Motion for Relief Pursuant to CR 60.02(f)" in Jefferson Circuit Court. (*Id.*) Milliner again raised several ineffective assistance of counsel claims and argued that his sentence violated the Fourteenth Amendment and Ky. Rev. Stat. § 532.025. (*Id.*) The Jefferson Circuit Court denied the motion, and Milliner appealed the denial to the Kentucky Court of Appeals. (*Id.*) The Kentucky Court of Appeals again affirmed the Jefferson Circuit Court's ruling. (*Id.*)

II.

On April 1, 2013, Milliner filed a petition for writ of habeas corpus in this Court pursuant to 28 U.S.C. § 2254. (*Id.*, PageID # 756) The petition sets forth the following claims:

(1) ineffective assistance of trial counsel for failing to present evidence to support his self-defense theory at trial; (2) ineffective assistance of trial counsel for failing to ensure that the jury was instructed on the elements of extreme emotional distress; (3) ineffective assistance of trial counsel for providing Milliner with erroneous advice that resulted in Milliner making an unknowing and involuntary waiver of his right to appeal; (4) ineffective assistance of counsel for failing to object to improper argument and offers of proof during closing argument and failing to object to the playing of the 911 tapes; (5) ineffective assistance of counsel for coercing Milliner to sign a sentencing agreement that waived his sentencing hearing; (6) ineffective assistance of counsel for waiving without consultation Milliner's right to testify ; (7) ineffective assistance of counsel for failing to prepare or present a defense to the charge of first degree burglary; (8) ineffective assistance of counsel for stating in closing argument that Milliner was the initial aggressor; (9) systematic removal of eligible African-American jurors in violation of *Batson v. Kentucky*; (10) the sentencing agreement should be set aside because it was the product of false/perjured testimony; (11) ineffective assistance of counsel for failing to conduct a pretrial investigation; and (12) ineffective assistance of counsel for failing to challenge the jury verdict and request polling of the jury.

(*Id.*) Judge Lindsay addressed each of the twelve claims in his Findings of Facts, Conclusions of Law, and Recommendation. (See D.N. 31)

With respect to the first five grounds, Judge Lindsay concluded that Milliner failed to prove an ineffective assistance of counsel claim. For ground one, Judge Lindsay found no issue with the Kentucky Court of Appeals' holding that "Milliner's counsel made a tactical choice" to not introduce a self-defense theory. (*Id.*, PageID # 766-68) Furthermore, Milliner could not show that the trial outcome would have been different had the evidence been introduced. (*Id.*, PageID #768-69) Similarly, for ground two, the Kentucky Court of Appeals held that Milliner being stabbed by the victim during the altercation did not support a claim of extreme emotional distress. (*Id.*, PageID # 770) Judge Lindsay concluded that Milliner failed to show that the Kentucky Court of Appeals' ruling was unreasonable. (*Id.*, PageID # 772-75)

For ground three, while Milliner claimed that he received bad advice from counsel, causing his waiver of appeal to be unknowing and involuntary, Judge Lindsay found that "[t]he evidence does not support such a conclusion." (*Id.*, PageID # 778) With respect to the fourth ground, the Kentucky Court of Appeals found that the failure of Milliner's counsel to object during closing arguments and to the admission of 911 tapes "did not rise to the level of ineffective assistance of counsel." (*Id.*, PageID # 780) As with grounds one and two, Judge Lindsay held that the Kentucky Court of Appeals' conclusions were not unreasonable. (*Id.*, PageID # 782, 785) For ground five, Judge Lindsay found "no evidence that Milliner was coerced into signing the sentencing agreement or waiving his sentencing hearing." (*Id.*, PageID # 791)

Judge Lindsay found that Milliner procedurally defaulted grounds six, seven, and eight. For each ground, the Kentucky Court of Appeals found that Milliner failed to comply with Kentucky Rule of Criminal Procedure 11.42, which provides that a "motion [] state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the

motion shall conclude all issues that could reasonably have been presented in the same proceeding.” Ky. R. Crim. P. 11.42. Because the Kentucky Court of Appeals relied on an adequate and independent state ground, Judge Lindsay concluded that Milliner procedurally defaulted these claims. (D.N. 31, PageID # 794, 800–01, 803)

Judge Lindsay found that grounds nine, ten, and eleven were also procedurally defaulted because Milliner failed to raise these claims in state court and pursue them “through the state’s ordinary appellate review procedure.” (*Id.*, PageID # 808) Each of these claims was raised in Milliner’s motion to vacate, but was not raised in his supplemental motion to vacate and his post-conviction counsel did not address these claims in his appellate brief. (*Id.*, PageID # 807–08)

Finally, for ground twelve, Judge Lindsay again concluded that Milliner procedurally defaulted. (*Id.*, PageID # 813) Judge Lindsay found that Milliner failed to raise this claim “in any state-court proceeding, including the Motions to Vacate,” despite having knowledge of the facts supporting his claim during trial. (*Id.*)

For these reasons, Judge Lindsay recommended that the Court deny and dismiss Milliner’s petition and deny his request for a certificate of appealability as to each claim. (*Id.*)

Milliner filed objections to Judge Lindsay’s Findings of Facts, Conclusions of Law, and Recommendation. (D.N. 32) Milliner argues that Judge Lindsay provided a “biased version” of the facts. (*Id.*, PageID # 822) Milliner states that he has attempted to convey his account during “earlier stages of the underlying litigation” and must now “reiterate his version of the events.” (*Id.*) In his objections, Milliner provides his account of the procedural history of the case while intermittently noting his disagreements with Judge Lindsay.

III.

The Court reviews Milliner's objections to Judge Lindsay's report de novo. Fed. R. Civ. P. 72(b)(3). As Milliner himself acknowledges, his objections are a reiteration of his version of events and earlier arguments that have been thoroughly considered and addressed by Judge Lindsay. (See D.N. 32, PageID # 822)

In relevant part, the Antiterrorism and Death Penalty Act provides:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

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

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

28 U.S.C. § 2254(d).

The majority of Milliner's argument relates to his ineffective assistance of counsel claims. The Supreme Court has articulated a two-part test for demonstrating ineffective assistance of counsel: (1) "the defendant must show that counsel's representation fell below an objective standard of reasonableness," and (2) "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687–94 (1984).

The Kentucky Court of Appeals found that Milliner failed to establish an ineffective assistance of counsel claim. (D.N. 31, PageID # 765–92) The Court concludes that Judge Lindsay correctly determined that the Kentucky Court of Appeals' holdings were not contrary to, or an unreasonable application of, *Strickland*. (*Id.*) While Milliner clearly disagrees with some

of his counsel's decisions and advice, or lack thereof, there is no evidence "that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687–88. Rather, counsel provided Milliner with the necessary information and made tactical decisions as required by the trial process. (See D.N. 31, PageID # 766–81, 804–05)

Additionally, the Court agrees with Judge Lindsay's analysis and conclusion that Milliner's remaining claims were procedurally defaulted. (*Id.*, PageID # 792–818) As Judge Lindsay explained, "if a habeas petitioner fails to comply with a state procedural rule, and that failure provides an adequate and independent ground for the state's denial of relief, then federal review is barred." (*Id.*, PageID # 759 (citing *Dretke v. Haley*, 541 U.S. 386, 392 (2004); *Coleman v. Thompson*, 501 U.S. 722, 729–30 (1991); *Harris v. Reed*, 489 U.S. 255, 262 (1989))) A petitioner may also procedurally default a claim "by failing to raise a claim in state court and pursue that claim through the state's ordinary appellate review procedures." (*Id.*, PageID # 761 (citing *Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006)) (internal quotation marks omitted))

Nevertheless, a Court will entertain a procedurally-defaulted claim if a petitioner can show cause and prejudice for the default. *See Dretke*, 541 U.S. at 388. "The cause and prejudice standard is a two-part test in which the petitioner must: (1) present a substantial reason to excuse the default, . . . and (2) show that he was actually prejudiced as a result of the claimed constitutional error." *Martin v. Mitchell*, 280 F.3d 594, 603 (6th Cir. 2002) (citing *Coleman*, 501 U.S. at 754; *United States v. Frady*, 456 U.S. 152, 167–69 (1982)).

With respect to grounds six, seven, and eight of Milliner's petition, the Kentucky Court of Appeals found that Milliner failed to comply with Kentucky Rule of Criminal Procedure 11.42. By relying on Rule 11.42, the court provided an independent and adequate state-law

ground for its decision. Additionally, Milliner has not shown cause and prejudice for the default. *See Dretke*, 541 U.S. at 388; *Martin*, 280 F.3d at 603. Therefore, this Court will not review the state court's decision. *See Dretke*, 541 U.S. at 392; *Coleman*, 501 U.S. at 729–30; *Harris*, 489 U.S. at 262.

Judge Lindsay correctly found grounds nine, ten, and eleven to be procedurally defaulted because Milliner raised them in his motion to vacate but failed to pursue these claims on appeal and did not establish cause and prejudice for the default. (D.N. 31, PageID # 806–11) *See Dretke*, 541 U.S. at 388; *Martin*, 280 F.3d at 603. Similarly, ground twelve is also procedurally barred because, as Judge Lindsay noted, Milliner did not raise this claim in any state-court proceedings. (*Id.*, PageID # 813) Even if Milliner were to return to state court and raise this claim, it would be barred by Kentucky Rule of Criminal Procedure 11.42 and “his appeal would be untimely.” (*Id.*) Also, Milliner has not shown cause and prejudice. *See Dretke*, 541 U.S. at 388; *Martin*, 280 F.3d at 603.

Finally, the Court agrees with Judge Lindsay that Milliner is not entitled to a certificate of appealability. (D.N. 31, PageID # 818–19) As Judge Lindsay explained, a certificate of appealability “may be issued to a habeas petitioner seeking to vacate his or her conviction only if the applicant has made a substantial showing of the denial of a constitutional right.” (*Id.*) Milliner has failed to make the necessary showing regarding a denial of his constitutional rights. (*See id.*) Therefore, the Court will deny the certificate of appealability as to each of Milliner’s twelve claims.

IV.

For the reasons explained above, and the Court being otherwise sufficiently advised, it is hereby

ORDERED as follows:

- (1) The objections of petitioner Esau Milliner (D.N. 32) are **OVERRULED**.
- (2) The Findings of Fact, Conclusions of Law, and Recommendation of the United State Magistrate Judge (D.N. 31) are **ACCEPTED** and **ADOPTED IN FULL**.
- (3) Milliner's petition for habeas relief (D.N. 1) is **DISMISSED** with prejudice and is **STRICKEN** from the Court's docket.
- (4) A certificate of appealability is **DENIED** as to each claim asserted in the petition.

April 10, 2017



**David J. Hale, Judge
United States District Court**