No. 17-5824

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Mar 29, 2019
DEBORAH S. HUNT, Clerk

YAQOB TAFAN THOMAS,

Petitioner-Appellant,

v.

JOSEPH P. MEKO, WARDEN,

Respondent-Appellee.

ORDER

BEFORE: COLE, Chief Judge; GRIFFIN and KETHLEDGE, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

*Judge Thapar recused himself from participation in this ruling.

Can court usurp authority of legislative intent to violate due process?

Duncan v. Henry, 513 US 364 (1995)

acts complained of must be of such quality as necessarily prevents a fair trial?
Lisbena v. California, 314 US 219 (1941)

Conn v. Johnson, 460 US 73 (1983)
HN 6 / ☆

Fed R App. Proc R 44

(b) challenge to state challenge.

US Sct R 12
writ of Cert
- volume kills (less is more)
- mistakes fatal

US v. Lewis, 475 F2d 571 (5th Cir 1972)

Fulford v. Klein, 529 F2d 377 (5th Cir 1976)
Cannot overrule previous panel's decision absent SCOTUS authority and en banc required)

28 USCS § 46 Assignment of Judges

Niches v. McCormick, 929 F2d 507
only en banc can overrule 6 Cir. precedent — US v. Evans, 991 F2d 524 (4th Cir)

US v. Shaaban, 514 F.3d 697 (Cir 7. 2008)
Just (but is any fed.) adequately communicate to client to replace any pre-trial troubles or issues

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 17-5824

Filed: April 08, 2019

YAQOB TAFAN THOMAS

Petitioner - Appellant

v.

JOSEPH P. MEKO

Respondent - Appellee

MANDATE

Pursuant to the court's disposition that was filed 02/14/2019 the mandate for this case hereby issues today.

COSTS: None

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 19a0021p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

YAQOB TAFAN THOMAS,

Petitioner-Appellant,

v.

JOSEPH P. MEKO, Warden,

Respondent-Appellee.

No. 17-5824

Appeal from the United States District Court
for the Eastern District of Kentucky at Lexington.
No. 5:11-cv-00148—William O. Bertelsman, District Judge.

Argued: December 6, 2018

Decided and Filed: February 14, 2019

Before: COLE, Chief Judge; GRIFFIN and KETHLEDGE, Circuit Judges.

COUNSEL

ARGUED: Kevin M. Lamb, WILMER CUTLER PICKERING HALE AND DORR LLP, Washington, D.C., for Appellant. James C. Shackelford, OFFICE OF THE ATTORNEY GENERAL OF KENTUCKY, Frankfort, Kentucky, for Appellee. **ON BRIEF:** Kevin M. Lamb, WILMER CUTLER PICKERING HALE AND DORR LLP, Washington, D.C., for Appellant. James C. Shackelford, OFFICE OF THE ATTORNEY GENERAL OF KENTUCKY, Frankfort, Kentucky, for Appellee.

OPINION

KETHLEDGE, Circuit Judge. Yaqob Thomas was convicted of murder in Kentucky state court. He now seeks federal habeas relief, arguing that the Kentucky definition of murder

violates due process because it prescribes two mental states—intent to kill and extreme indifference to human life—as alternative means for the mens rea element of that offense. The district court rejected that argument, and so do we.

I.

In 2002, Thomas and Gregory Baltimore arranged to buy cocaine from Dionte Burdette at a Waffle House in Lexington, Kentucky. The three men ate a meal and then got into Burdette's car, with Thomas in the back seat and the others up front. Soon Thomas grabbed Burdette from behind, held a gun to his head, and demanded the cocaine. When Burdette refused, Thomas shot him in the leg. Burdette then said the cocaine was across the street with his partner. Thomas shot Burdette three more times, after which both Thomas and Baltimore fled from the scene. Burdette died soon afterward.

Thomas was thereafter charged with murder, and a jury found him guilty. The trial court sentenced him to 40 years' imprisonment. The Kentucky Court of Appeals affirmed, and the Kentucky courts otherwise denied post-conviction relief.

Thomas later filed a petition for a writ of habeas corpus in the district court. Among his claims was that his appellate counsel had been ineffective for failing to challenge the trial court's instruction to the jury on the murder charge. The district court found the petition untimely, but we reversed. On remand, the district court rejected Thomas's claims on the merits. This appeal followed.

II.

Thomas's only claim here is that his appellate counsel was ineffective for failing to argue that one of the trial court's jury instructions had violated due process. We review the district court's denial of relief on that claim de novo. *See Babick v. Berghuis*, 620 F.3d 571, 576 (6th Cir. 2010). The State argues that Thomas's claim is procedurally defaulted, but we cut to the merits because an analysis of cause and prejudice would only complicate this case. *See Storey v. Vasbinder*, 657 F.3d 372, 380 (6th Cir. 2011).

The instruction at issue concerned the mental state required to commit murder. Kentucky law recites two mental states—intent to kill and extreme indifference to human life—as alternative means that satisfy the element of mens rea for murder. *See Craft v. Commonwealth*, 483 S.W.3d 837, 841-42 (Ky. 2016); KRS § 507.020. That recitation is unremarkable: "legislatures frequently enumerate alternate means of committing a crime." *Schad v. Arizona*, 501 U.S. 624, 636 (1991) (plurality opinion). Accordingly, the trial court instructed the jury that it could convict Thomas of murder if it found that Thomas had possessed either of the alternative mental states (intent to kill or extreme indifference to human life) that satisfied the element of mens rea for murder.

When a statute specifies alternative means for satisfying a single element of an offense, the jury need not agree upon or even specify which of those means the defendant employed. *See Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016). Thus, if a statute required use of a "deadly weapon" as an element of a crime, and further provided that "use of a 'knife, gun, bat, or similar weapon'" would qualify, then a "jury could convict even if some jurors 'concluded that the defendant used a knife while others concluded he used a gun'"—so long as they all agreed that the element was met. *Id.* (brackets omitted). Accordingly, the trial court here did not instruct the jury that it needed to agree unanimously as to which of the two alternative mental states Thomas had possessed.

Thomas's claim therefore is not really an instructional one; instead his real complaint lies with the Kentucky legislature's definition of murder. Specifically, Thomas says the definition violated due process to the extent it treated intent to kill and extreme indifference to human life as alternative means for the mens rea element of murder. That complaint faces significant constitutional headwinds: a legislature's decision to treat certain facts (here, certain states of mind) as alternative means to satisfy a single element—as opposed to separate elements for separate crimes—is a "value choice[] more appropriately made in the first instance by a legislature than by a court." *Schad*, 501 U.S. at 638 (plurality opinion). Yet those value choices are subject to "the constitutional bounds of fundamental fairness and rationality." *Id.* at 645. To determine whether the Kentucky legislature passed those bounds here, we consider history, the practice of other states, and whether the means are reasonably similar in moral culpability.

See id. at 637 (plurality). In doing so, however, we recognize "a threshold presumption of legislative competence to determine the appropriate relationship between means and ends in defining the elements of a crime." *Id.* at 637-38.

The Kentucky legislature acted well within constitutional bounds here. The traditional common-law definition of murder included—as alternatives for the element of mens rea—the equivalents of intent to kill and extreme indifference to human life. *See id.* at 648 (Scalia, J., concurring); *see also* LaFave, 2 Subst. Crim. L. § 14.1 (3d ed.). And many reasonable minds—including Blackstone and the drafters of the Model Penal Code—have viewed intent to kill and extreme indifference to human life as equally culpable mental states. 4 W. Blackstone, Commentaries 198-200; Model Penal Code § 210.2 ("criminal homicide constitutes murder when . . . it is committed purposely or knowingly . . . [or] it is committed recklessly under circumstances manifesting extreme indifference to the value of human life"). Indeed the *reason* that the plurality in *Schad* recognized felony murder as reasonably equivalent to premeditated murder is that the felony murderer may be "utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim[.]" *Schad*, 501 U.S. at 644 (internal quotation marks omitted); *see also Tison v. Arizona*, 481 U.S. 137, 157 (1987) (same). What matters for purposes of culpability, then, is the indifference, not the concomitant felony. The alternative means of "extreme indifference" was therefore constitutional here.

Thomas contends the Kentucky definition of murder is irrational nonetheless, because most other states treat extreme indifference to human life as grounds for second-degree murder, not first. But the Constitution does not mandate adoption of a Uniform Penal Code. *See Martin v. Ohio*, 480 U.S. 228, 236 (1987) (the constitutionality of a state's criminal law is not determined "by cataloging the practices of other states"); *Patterson v. New York*, 432 U.S. 197, 210-11 (1977) (same). And here, for the reasons stated above, the Kentucky definition of murder stands on solid historical and moral ground.

Thomas's remaining arguments are insubstantial. Thomas says that Kentucky's definition of murder is irrational because, he says, intent to kill and extreme indifference to human life are mutually exclusive mental states. But that hardly matters; due process does not require the jurors' findings as to alternative means for an element to be factually consistent with

each other. *See Mathis*, 136 S. Ct. at 2249; *Schad*, 501 U.S. at 649-50 (Scalia, J., concurring). Thomas also says that Kentucky's definition made the prosecution's burden of proof at trial too easy, by allowing the jury to choose between two mental states rather than one. But the same was true in *Schad*—or (more generally) in any case where a criminal statute prescribes alternative means for a single element. *See, e.g., Mathis*, 136 S. Ct. at 2249. Thomas further contends that, if the jury had been forced to agree upon a single mental state, the jury might have deliberated longer than it did—in which case, he says, it might have convicted him only of some lesser offense. But due process ensures minimum "procedural safeguards," not maximum jury deliberation. *See Patterson*, 432 U.S. at 210.

Finally, Thomas argues that Kentucky's definition of murder violates the rule that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). But the fact that the jury needed to find here was that Thomas either intended to kill his victim or possessed extreme indifference as to whether he killed him. *See, e.g., Gribbins v. Commonwealth*, 483 S.W.3d 370, 376-77 (Ky. 2016). The jury made that finding, and hence there was no *Apprendi* violation.

The district court's judgment is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17-5824

YAQOB TAFAN THOMAS,

Petitioner - Appellant,

v.

JOSEPH P. MEKO, Warden,

Respondent - Appellee.

FILED
Feb 14, 2019
DEBORAH S. HUNT, Clerk

Before: COLE, Chief Judge; GRIFFIN and KETHLEDGE, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Kentucky at Lexington.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION AT LEXINGTON

CIVIL ACTION NO. 2011-148 - WOB-HAI

YAQOB TAFAN THOMAS **PETITIONER**

VS. **ORDER**

JOSEPH P. MEKO **RESPONDENT**

This matter is before the court on the Report and Recommendation of the United States Magistrate Judge (Doc. 102), and having considered *de novo* those objections filed thereto by plaintiff (Doc. 104), and the court having sufficiently considered the matter, and being advised,

IT IS ORDERED that the objections be, and they hereby are, **overruled**; that the Report and Recommendation be, and it hereby is, **adopted** as the finding of fact and conclusions of law of this court; that the petition for a writ of habeas corpus under 28 U.S.C. § 2254 (Doc. 88) be, and it hereby is, **dismissed with prejudice**; that this matter is **dismissed**, with prejudice, and **stricken** from the docket of this court. No certificate of appeability shall issue herein. A separate judgment shall enter concurrently herewith.

This 29th day of June, 2017.

Signed By:
William O. Bertelsman WOB
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
LEXINGTON

YAQOB TAFAN THOMAS, Petitioner, v. JOSEPH P. MEKO, Respondent.	)	No. 5:11-CV-148-WOB-HAI RECOMMENDED DISPOSITION & ORDER

*** *** *** ***

On remand from the Sixth Circuit, the Court returns to state prisoner Yaqob Thomas's petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus. Pursuant to local practice and 28 U.S.C. § 636(b)(1)(B), this matter has been referred to the undersigned for a recommended disposition.

Thomas was convicted of murdering Dionte Burdette and tampering with physical evidence. The Kentucky Supreme Court described the murder as follows:

> On December 29, 2002, [Thomas] met with Gregory Baltimore regarding a cocaine purchase. Baltimore arranged for [Thomas] to purchase seven ounces of cocaine from Burdette for $7,000. [Thomas] was to pay Baltimore $2,000 for this arrangement.
>
> [Thomas] and Baltimore met Burdette at a Waffle House in Lexington. After they ate, the three men entered Burdette's SUV. According to Baltimore, [Thomas] was in the backseat. After circling the parking lot several times, [Thomas] grabbed Burdette from behind and held a handgun to Burdette's head, demanding the cocaine. With the handgun pointed in a downward direction, [Thomas] shot Burdette once in the leg. [Thomas] once again demanded the cocaine, and Burdette replied that it was located with his partner across the street. [Thomas] shot Burdette three more times, and Burdette rolled out of the driver's side door. [Thomas] and Baltimore then left the vehicle and ran. According to Baltimore, when they stopped running for a moment, [Thomas] threatened to kill him if he said anything. Baltimore noticed [Thomas] throw the gun into some bushes.

Thomas v. Com., No. 2005-SC-85-MR, 2006 WL 141607, at *1 (Ky. Jan. 19, 2006); *accord Thomas v. Meko*, 828 F.3d 435, 437 (6th Cir. 2016).

According to the Kentucky Court of Appeals:

> The record reflects that Gregory Baltimore testified at trial to the above events. Also, Donna Brooks, mother of the victim, testified at trial that [Thomas] confessed to shooting the victim. Moreover, a forensic pathologist testified that the victim had been shot four times, once in the knee and three times in the chest. The pathologist opined that the gunshot wounds were consistent with the victim being shot by a person in the backseat of a vehicle.

Thomas v. Com., No. 2007-CA-1197-MR, 2008 WL 682521, at *2 (Ky. Ct. App. Mar. 14, 2008).

Thomas filed his original federal *pro se* petition on April 26, 2011.[1] At the time, Thomas still had matters pending in state court (*see* D.E. 46 at 2-4), so his petition was stayed (D.E. 16) until his state appeals were resolved in August 2013 (*see* D.E. 46 at 4; D.E. 33 at 5). On May 8, 2014, the undersigned recommended that Thomas's petition be dismissed as untimely on the basis that his second and third state post-conviction motions were not "properly filed," and thus did not toll the federal habeas statute of limitations. D.E. 46. The District Court adopted that recommendation. D.E. 51. Thomas appealed, and, on July 7, 2016, the federal Court of Appeals reversed. D.E. 71; *Thomas*, 828 F.3d at 440. The Sixth Circuit held that, because the Kentucky appellate court addressed the merits of part of Thomas's second post-conviction motion rather than dismissing it as procedurally barred, the motion was properly filed for purposes of 28 U.S.C. § 2244(d)(2). *Thomas*, 828 F.3d at 437-39.

On remand, Thomas moved for appointment of counsel (D.E. 75, 76), which was denied (D.E. 81). Thomas was allowed to amend his petition. D.E. 87. The Warden answered,

[1] Although Petitioner's petition was not docketed by the Clerk until April 29, 2011, Petitioner declared under penalty of perjury that he placed the petition in the prison's mailing system on April 26, 2011. D.E. 1 at 15. Thus, the Court treats the petition as having been filed on April 26, 2011. *See Towns v. United States*, 190 F.3d 468, 469 (6th Cir. 1999) (citing *Houston v. Lack*, 487 U.S. 266, 270-72 (1988)).

asserting that all of Thomas's claims are procedurally barred. D.E. 94. Thomas replied. D.E. 97.

The current operative petition is the amended petition at Docket Entry 88, which includes ten grounds for relief and a memorandum in support. On September 6, 2016, Thomas moved to amend his petition to include a "final ground." D.E. 89. The unopposed motion was granted, and the Court considers the final, eleventh, ground as part of the amended petition. D.E. 92.

An additional motion to amend remains pending. D.E. 98. Filed in December 2016, this motion asserts that Thomas "missed some crucial law that this Court should consider," and seeks to supplement certain arguments in his amended petition. *Id.* The Warden, invoking Charles Dickens's *Bleak House*, objects to this motion on the grounds of unreasonable delay and futility. D.E. 99. The Court agrees with the Warden. Thomas has been freely permitted to amend his petition in the past. And the current motion adds nothing to his amended petition that would change the Court's analysis. The motion will be denied.

Jones v. Bacon defendant rule; fair to Callahan did waive!!

I. PROCEDURAL BACKGROUND

On November 8, 2004, following a jury trial in Fayette Circuit Court, Thomas was convicted of murder and tampering with physical evidence. D.E. 9-1. He was sentenced to forty years of incarceration. *Id.* Represented by counsel, Thomas appealed his convictions to the Supreme Court of Kentucky, which affirmed his convictions by a Memorandum Opinion dated January 19, 2006. D.E. 9-8; *Thomas.*, 2006 WL 141607.

Thomas then filed his first, *pro se*, state post-conviction motion in Fayette Circuit Court on May 25, 2006. D.E. 9-9. Accompanied by a memorandum (D.E. 9-10), this motion raised various issues of ineffective assistance of trial counsel. The trial court appointed counsel, who failed to supplemented the motion. D.E. 9-11. The trial court denied the motion without a hearing. D.E.

9-13. Thomas appealed *pro se*, and the Court of Appeals affirmed. D.E. 9-20; *Thomas*, 2008 WL 682521. The Supreme Court of Kentucky denied discretionary review on October 15, 2008. D.E. 33-13.

Thomas filed his second state post-conviction motion on March 26, 2009. D.E. 9-21. This motion consisted of a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), that the government had suppressed the printed program from the victim's funeral. D.E. 9-22. This motion was denied on January 14, 2010. D.E. 9-25. Thomas appealed, and the Court of Appeals affirmed. D.E. 9-36; *Thomas v. Com.*, No. 2010-CA-227-MR, 2011 WL 2553519 (Ky. Ct. App. June 10, 2011). Thomas did not seek Supreme Court review of this ruling.

While Thomas's second state post-conviction motion was still being litigated, he filed a third state post-conviction motion on February 18, 2011. D.E. 33-1. This motion contained claims of ineffective assistance of appellate counsel. *Id.* The trial court denied the motion. D.E. 33-5. The Kentucky Court of Appeals affirmed on the basis that Kentucky only began recognizing claims of ineffective assistance of appellate counsel in 2010—too late to aid Thomas. D.E. 33-11; *Thomas v. Com.*, No. 2012-CA-66-MR, 2012 WL 5457648 (Ky. Ct. App. Nov. 9, 2012). The Kentucky Supreme Court denied discretionary review on August 21, 2013. D.E. 33-12. Martinez v. Ryan qual relief ???

On April 26, 2011 (while his second and third post-conviction motions were still being litigated), Thomas filed his petition with this Court. D.E. 1. Thomas also filed a state habeas corpus petition on January 9, 2015. D.E. 94-2 at 96. That petition was dismissed (*id.* at 158), and the Court of Appeals affirmed on July 22, 2016 (*id.* at 160).

II. LEGAL STANDARDS

A. PROCEDURAL DEFAULT

Procedural default is a threshold rule; courts generally consider procedural default before addressing the merits of a habeas petition. *Lovins v. Parker*, 712 F.3d 283, 294 (6th Cir. 2013). The rule is related to the statutory requirement that a habeas petitioner must exhaust any available state-court remedies before bringing a federal petition. *Id.* (citing 28 U.S.C. § 2254(b), (c)). Both the exhaustion and procedural default rules have the purpose of ensuring that state courts have the opportunity to address federal constitutional claims "in the first instance" before the claims are raised in federal habeas proceedings. *Coleman v. Thompson*, 501 U.S. 722, 732 (1991). A petitioner may procedurally default a claim by failing to raise it in state court and failing to pursue it through the state's ordinary appellate review procedures. *Williams v. Mitchell*, 792 F.3d 606, 613 (6th Cir. 2015).

> To avoid procedural default, the petitioner must "exhaust" all state-court remedies. Exhaustion requires "fair presentation" of the federal claim to the state courts, including the state court of appeals and the state supreme court. State prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process. To fairly present a federal claim, a state prisoner is required to present the state courts with both the *legal* and factual basis for the claim. If a prisoner failed to exhaust his or her state court remedies and state law would no longer permit the petitioner to raise the claim when he or she files a petition for habeas relief in federal court, the claim is procedurally defaulted.

Id. (citations and some quotation marks omitted).

A petitioner may overcome default by showing "cause" and "prejudice" for failing to exhaust. *Id.* "[O]nly where a prisoner is impeded or obstructed in complying with the State's established procedures will a federal habeas court excuse the prisoner from the usual sanction of default." *Martinez v. Ryan*, 566 U.S. 1, 13 (2012).

In this case, Thomas filed a direct appeal, followed by three post-conviction motions (and a state habeas petition that is only at issue in Ground Eleven). Three special rules related to "cause" are significant in this case. First, Thomas may establish cause for a procedural default of a claim of ineffective assistance of trial counsel ("IATC") if the cause for the default was the ineffective assistance of *appellate* counsel on state direct review. *Smith v. Robbins*, 528 U.S. 259 (2000). The standards for proving ineffective assistance of appellate counsel will be discussed in the next section.

The second special rule applies to claims in which the petitioner alleges that the ineffectiveness of *post-conviction* counsel provides cause for default. "Although an attorney's errors in post-conviction collateral review proceedings do not generally constitute cause to excuse default," there is an exception, which applies in Kentucky. *Brizendine v. Parker*, 644 F. App'x 588, 592 (6th Cir. 2016). Under the rule announced in *Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2013), "Kentucky prisoners can, under certain circumstances, establish cause for a procedural default of their IATC 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). To invoke this *Martinez/Trevino* exception, the petitioner must establish that (1) his post-conviction counsel was ineffective and (2) his underlying claims alleging ineffective assistance of trial counsel are "substantial," which is to say that they have "some merit." *Brizendine*, 644 F. App'x at 592 (quoting *Martinez*, 566 U.S. at 13). The rule does not encompass "attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review." *Martinez*, 566 U.S. at 16. Thus, Thomas may only invoke this

Martinez/Trevino exception for claims that post-conviction counsel—at the trial court level, not on appeal—was ineffective. @ trial level fails to supplement

The third special rule concerns procedurally defaulted claims of ineffective assistance of appellate counsel ("IAAC"). Thomas raised no IAAC claims in his initial state post-conviction motion. But he raises IAAC claims here in Grounds Three, Four, and Ten. Kentucky did not recognize a right to effective assistance of appellate counsel until the 2010 case of *Hollon v. Com.*, 334 S.W.3d 431, 433 (Ky. 2010), *as modified on denial of reh'g* (Apr. 21, 2011). This decision was rendered after Thomas's direct appeal was finished. *See Thomas v. Com.*, No. 2005-SC-85-MR, 2006 WL 141607, at *1 (Ky. Jan. 19, 2006). Kentucky's *Hollon* decision does not apply retroactively. *Sanders v. Com.*, 339 S.W.3d 427, 435 (Ky. 2011); *Hollon*, 334 S.W.3d at 439.

Because Kentucky courts did not recognize IAAC claims before *Hollon*, post-conviction attorneys were likely to consider such claims futile, and thus decline to raise them. However, the third special rule that affects this case is that perceived futility does not constitute cause to excuse a procedural default. *Bousley v. United States*, 523 U.S. 614, 623 (1998). "[F]utility cannot constitute cause if it means simply that a claim was 'unacceptable to that particular court at that particular time.'" *Id.* (quoting *Engle v. Isaac*, 456 U.S. 107, 130 n.35 (1982)). A petitioner must exhaust federal constitutional claims in state court even if the state courts are expected to be "unsympathetic to the claim." *Franklin v. Bradshaw*, 695 F.3d 439, 455 (6th Cir. 2012) (quoting *Engle*, 456 U.S. at 130). The consequence of this rule is that Thomas cannot overcome the default of his IAAC claims, Grounds Three, Four, and Ten. To be clear, Thomas raised IAAC claims in his third post-conviction motion, but the Kentucky Court of Appeals

rejected them on the basis that *Hollon* did not apply retroactively. *Thomas*, 2012 WL 5457648, at *1.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

An ineffective-assistance-of-counsel claim presents a mixed question of law and fact. *Mitchell v. Mason*, 325 F.3d 732, 738 (6th Cir. 2003). To successfully assert an ineffective-assistance claim, a defendant must prove both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Pough v. United States*, 442 F.3d 959, 964 (6th Cir. 2006). NEVER GIVEN A HEARING NEED HAGE 7 RULE

To prove deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. A defendant meets this burden by showing "that counsel's representation fell below an objective standard of reasonableness" as measured under "prevailing professional norms" and evaluated "considering all the circumstances." *Id.* at 688. However, a reviewing court may not second-guess trial counsel's strategic decisions. *Moss v. Hofbauer*, 286 F.3d 851, 859 (6th Cir. 2002). Thus, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689 (internal quotations omitted). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.*

In order to prove prejudice under the second prong of *Strickland*, a 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*, 466 U.S. at 694. Thus, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691. When evaluating prejudice, courts generally must consider the "totality of the evidence." *Id.* at 695. Courts may approach the *Strickland* analysis in any order, and an insufficient showing on either prong ends the inquiry. *Id.* at 697.

IAAC claims are also subject to analysis under *Strickland*. *Smith v. Robbins*, 528 U.S. 259, 285 (2000). This includes the presumption that counsel provided reasonable professional assistance. *Hutton v. Mitchell*, 839 F.3d 486, 501 (6th Cir. 2016). Counsel does not have to "raise every possible issue in order to render constitutionally effective assistance." *Id.* In this case, Thomas argues his appellate counsel on his first state appeal was ineffective for failing to raise certain issues on appeal. In *Smith*, the Supreme Court counseled that "appellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." *Smith*, 528 U.S. at 288. IAAC is "difficult" to demonstrate. *Id.* "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." *Id.* (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)). Thus, to demonstrate deficient performance, Thomas must show that the issues he raises are "clearly stronger" than the ones his appellate counsel raised. *Hutton*, 839 F.3d at 501; *Bourne v. Curtin*, 666 F.3d 411, 414 (6th Cir. 2012); *Hoffner v. Bradshaw*, 622 F.3d 487, 505-06 (6th Cir. 2010).

Thomas's appellate counsel raised the following issues: (1) that the trial court improperly denied his motion to strike a venire person for cause because of his knowledge of Thomas's prior criminal history; (2) that the trial court erred by failing to grant a mistrial on

account of improper bolstering of Donna Brooks's testimony; (3) that the trial court erred by refusing to instruct the jury on voluntary intoxication; and (4) that the trial court should have suppressed Thomas's incriminating statements to Donna Brooks. D.E. 9-2 at 2-6.

C. DEFERENCE TO STATE COURT MERIT DETERMINATIONS

The state courts addressed the merits of some of Thomas's claims. The Antiterrorism and Effective Death Penalty Act, Pub L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA"), requires "heightened respect" for legal and factual determinations made by state courts. *See Herbert v. Billy*, 160 F.3d 1131, 1134 (6th Cir. 1998). Section 2254(d), as amended by AEDPA, provides:

> 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).

This is a "highly deferential" standard of review that is "difficult to meet." *Cullen v. Pinholster*, 563 U.S. 170, 131 S. Ct. 1388, 1398 (2011). All of the state court's factual findings are presumed to be correct, and can be rebutted only by "clear and convincing evidence." *Mitchell v. Mason*, 325 F.3d 732, 737-38 (6th Cir. 2003), *cert. denied*, 543 U.S. 1080 (2005); 28 U.S.C. § 2254(e)(1). Legal conclusions made by state courts also receive substantial deference under AEDPA. "[A] federal habeas court may overturn a state court's application of federal law only if it is so erroneous that there is no possibility fairminded jurists could disagree that the state

court's decision conflicts with [the Supreme] Court's precedents." *Nevada v. Jackson*, 569 U.S. __, 133 S. Ct. 1990, 1992 (2013) (per curiam) (internal quotation marks omitted). Also, "circuit precedent does not constitute clearly established Federal law" under AEDPA. *Parker v. Matthews*, 567 U.S. 37, __ 132 S. Ct. 2148, 2155 (2012) (internal quotation marks omitted). In sum, "federal judges are required to afford state courts due respect by overturning their decisions only when there could be no reasonable dispute that they were wrong." *Woods v. Donald*, 575 U.S. __, 135 S. Ct. 1372, 1376 (2015).

When it comes to ineffective assistance of counsel claims, the "pivotal question" under AEDPA review "is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland*'s standard." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). Both *Strickland* and § 2254(d) are "'highly deferential' and when the two apply in tandem, review is 'doubly [deferential].'". *Id.* at 105 (citations omitted). Under § 2254(d), "the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.* Also, because the *Strickland* standard is a "general" standard, "the range of reasonable applications is substantial." *Id.*

III. ANALYSIS

For the reasons detailed below, the Court reaches the following conclusions regarding Thomas's eleven grounds for relief:

- Ground One, a claim that due process was violated at trial, is defaulted and unexhausted because it was never raised in state court. It also has no merit.

1 @ trial but abandoned at appeal level one IAAC

- RAISE IAAC claim - & DID waive

- Ground Two, an IATC claim, is defaulted and unexhausted because, although Thomas raised it in his initial post-conviction motion, it was not included in the subsequent appeal. The claim also implicates no federal right. -IAPC -Jones v. Bagg
- Ground Three, an IAAC claim, is defaulted and fails on the merits because the underlying lesser-included-offense issue implicates no federal right. (
- Ground Four, an IAAC claim, is defaulted and the underlying trial issue, essentially the same as that raised in Ground One, is meritless.
- Ground Five, which alleges a conflict of interest by trial counsel, is defaulted and unexhausted because it was never raised in state court. It also has no merit.
- Ground Six, an IATC claim, is defaulted and unexhausted because, although Thomas raised it in his initial post-conviction motion, it was not included in the subsequent appeal. It also lacks merit. NO WAY TO CHALLENGE VOLUNTARINESS OF GUILTY PLEA BY COUNSEL. JONES V. BAGG.
- Ground Seven, an IAAC claim, is defaulted and the underlying trial issue is meritless.
- Ground Eight, a *Brady* claim that was not raised until Thomas's second post-conviction motion, was rejected as meritless by the Kentucky Court of Appeals. Given the deference due the state courts, Thomas is not entitled to relief.
- Ground Nine, an IATC claim alleging trial counsel failed to object to improper arguments by the Commonwealth, is defaulted for failure to raise it on appeal in the initial post-conviction proceedings.
- Ground Ten, an IAAC claim drawing on the same facts as Ground Nine, is both defaulted and meritless, as determined by the state courts.
- Ground Eleven, which concerns Thomas's indictment, is both defaulted and meritless, as determined by the state courts.

A. Ground One

Ground One is a due process argument concerning the sufficiency of the evidence. Trial counsel moved for a directed verdict and argued there was insufficient evidence, so this issue was preserved. D.E. 88 at 23; D.E. 94 at 33. But it was never raised on appeal or in Thomas's state post-conviction motions, so it is procedurally defaulted. Bowman He asserts that his appellate counsel was ineffective for failing to raise it. D.E. 88 at 24; D.E. 97 at 6. He explains that post-conviction counsel never raised this issue of ineffective assistance of appellate counsel ("IAAC") because such claims were not cognizable in Kentucky until the 2011 decision of *Hollon v. Com.*, 334 S.W.3d 431, 433 (Ky. 2010), *as modified on denial of reh'g* (Apr. 21, 2011). D.E. 8 at 23. He recognizes that *Hollon* does not apply retroactively. *Id.* Setting aside the issue of whether this procedural default can be hurdled, the claim itself lacks merit.

The claimed trial error has two layers. One layer concerns the indictment and the jury instructions as they pertain to the murder charge. Kentucky's murder statute contains two alternative mental states. Subsection (1)(a) of Kentucky Revised Statutes ("KRS") § 507.020 describes intentional murder—causing death "[w]ith intent to cause the death of another person." Subsection (1)(b) describes wanton murder—"wantonly engag[ing] in conduct which creates a grave risk of death to another person and thereby causes the death of another person."[2] Kentucky law thus "designates two ways an accused may be convicted of murder . . . [it]

[2] The Kentucky Code also defines "wantonly:"

> A person acts wantonly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts wantonly with respect thereto.

KRS § 501.020(3).

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recognizes two mental states connecting the caused-death of another to murder: intent and wantonness." *Craft v. Com.*, 483 S.W.3d 837, 841 (Ky. 2016).

Thomas's jury instructions included these mental states in the alternative.[3] D.E. 94-2 at 23. Such instructions are appropriate, if supported by the evidence:

> [A]lternative theories of criminal liability may properly be presented in a single instruction when the evidence supports both interpretations of the case and proof of either beyond a reasonable doubt constitutes the same offense. For example, the alternative theories of intentional and wanton murder may be presented in a single instruction, if supported by the evidence, because both constitute the same crime of murder under KRS 507.020.

Evans v. Com., 45 S.W.3d 445, 447 (Ky. 2001). "[W]hen the evidence will support either mental state beyond a reasonable doubt, a combination murder instruction is certainly proper." *Benjamin v. Com.*, 266 S.W.3d 775, 784 (Ky. 2008).[4]

Thomas argues that this "combination instruction" created a "mandatory conclusive presumption as prohibited by *Francis v. Franklin*." D.E. 97 at 1-4. He explores this concept more fully in Ground Four. *See* D.E. 88 at 29-33. But the Court will address it here. The Warden does not address this "mandatory conclusive presumption" argument at all. *See* D.E. 94.

The sort of "presumption" held unconstitutional in *Francis* is not in play here. In *Francis*, the jury instructions in a murder case stated:

> The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted.

Francis v. Franklin, 471 U.S. 307, 311 (1985). The problem was that, by creating this rebuttable presumption, the jury instructions shouldered the defendant with the burden of persuasion. *Id.* at

[3] His indictment, D.E. 94-2 at 4, merely cites KRS § 507.020 and states, "On or about the 29th day of December, 2002, in Fayette County, Kentucky, [Thomas] killed Dionte Burdette."

[4] The *Benjamin* opinion, released four years after Thomas's trial, strongly urged trial courts to use separate verdict forms for intentional and wanton murder, but stopped short of holding "combination" instructions unconstitutional. *Benjamin*, 266 S.W.3d at 785.

317-18. The Due Process Clause of the Fourteenth Amendment prohibits states from relieving the prosecution of its burden of persuasion beyond a reasonable doubt of every essential element of a crime. *Id.* at 313. Thomas has not pointed to any such presumption that was included in the jury instructions here. So *Francis* does not apply.

Thomas also argues that the Commonwealth created an improper presumption in its closing arguments. He includes his own transcription of the challenged language:

> Prosecutor: If you believe . . . this defendant did not want to kill [D.B], you have the one shot in the leg, where is your shit? BOOM . . . hits him in the leg, [D.B.] won't give the defendant what he wants . . . if you believe based on that information that this defendant didn't mean to kill, you can still find that was wantonly engaging in conduct by putting a .45 in front of [D.B.], aimed down, pulling the trigger three more times . . . for the injuries [D.B.] suffered and fifth and final time for bullet that went through door our Tates Creek Road' . . . YOU CAN FIND INTENTIONAL OR WANTON MURDER . . .

D.E. 97 at 4. This language does not include a presumption that shifts the burden of proof. The prosecutor is merely stating that the Kentucky murder statute contains two alternative mental states, and that members of the jury may convict if they find either one. This is a correct statement of the law. *See Craft*, 483 S.W.3d at 841-42; *Evans*, 45 S.W.3d at 447.

The other layer of Ground One is more evidence-based. Thomas argues there was no evidence to support a finding of wanton murder. D.E. 97 at 1 ("[N]o rational trier of fact could have found the essential elements of wantonness beyond a reasonable doubt[.]") Instead, he argues, all evidence pointed to intentional murder. D.E. 97 at 8. Thomas argues his rights were violated because some jurors could have found him guilty under the wanton murder prong of KRS § 507.020(1)(b)—a mental state unsupported by any trial evidence. However, there was evidence to support a wanton murder conviction.

The standard for constitutional insufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have

found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

Briefly putting aside the intentionality/wantonness issue, the trial evidence that Thomas murdered the victim clears this hurdle easily. The jury heard testimony from an eyewitness (Greg Baltimore) that Thomas shot the victim multiple times and then hid the murder weapon. *See Thomas*, 2008 WL 682521, at *2. The jury also heard testimony from the victim's mother, Donna Brooks, that Thomas had confessed to shooting the victim. *Id.* So the evidence is ample for *Jackson* purposes that Thomas killed the victim. But does the evidence support a finding that he did so wantonly?

As the Kentucky Supreme Court recently explained, a jury is free to infer intentionality or wantonness based on the circumstances of the killing. In *Craft*, although there was no eyewitness, the jury heard evidence that the defendant killed the victim with a six-inch blade. (*Craft*, 483 S.W.3d at 838, 842.) Regarding intentionality, the Court held that intent to kill can be properly "inferred from the extent and character of the victim's injuries." *Id.* at 842 (quoting *Hudson v. Com.*, 979 S.W.2d 106, 110 (Ky. 1998)). And, based on the deed's injuries and result, a jury could infer either intentionality or wantonness. As the Court explained, "The wound was six inches deep. This wound is more than enough for a jury reasonably to conclude that [the defendant] was acting in a manner that created the grave risk of death to [the victim] and that the conduct amounted to an extreme indifference to human life." *Id.*

The same holds true here. Thomas shot the victim in the leg and chest, and he died from those wounds. *See Thomas*, 2008 WL 682521, at *2. The wounds alone support an inference of wanton conduct. Additionally, the evidence showed that the victim died during a drug deal gone awry. *Id.* at *1. These circumstances also support a finding of wanton murder..

Thomas insists that the Commonwealth failed to prove an essential element of wanton murder, *i.e.*, "accident." D.E. 88 at 30; D.E. 97 at 4. But "accident" is not an element of wanton murder, and Thomas provides no authority suggesting such.

Because Thomas's underlying insufficient-evidence claim lacks merit, his appellate counsel could not have been ineffective for failing to raise it. The four arguments she did raise are stronger. *See* Part II.B, *supra*. Consequently, Thomas also possessed no potentially meritorious IAAC claim to raise on post-conviction. Ground One is both defaulted and meritless.

B. Ground Two

Thomas argues in his second ground that trial counsel was ineffective for failing to request a lesser-included-offense instruction for first-degree manslaughter. D.E. 88 at 7, 24. He argues that witness Donna Brooks provided testimony "supporting a defense and instruction for voluntary manslaughter and [Extreme Emotional Disturbance ("EED")]." *Id.* at 25.

Thomas states that he asked his appellate counsel to raise this issue, but she refused on the basis that the issue was unpreserved because there was no objection at trial. D.E. 88 at 27; D.E. 97 at 9. This is an admission that the claim is procedurally defaulted.

Waiver is a reasonable ground for declining to raise an issue on appeal. *Hoffner v. Bradshaw*, 622 F.3d 487, 506 (6th Cir. 2010) (finding that "appellate counsel's decision not to raise a waived issue was reasonable [under *Strickland* and *Robbins*]").) Because the issue was unpreserved, it would not have been "clearly stronger" than the issues that were raised on appeal. *Id.* Because he cannot establish IAAC, Thomas has no cause to excuse procedural default at the initial appeal level.

Thomas raised this manslaughter/EED claim in his original *pro se* post-conviction motion. D.E. 9-9 at 2 ¶ 8(F); D.E. 9-10 at 8. *Id.* Post-conviction counsel did not include this claim in his supplemental briefing at this stage. *See* D.E. 9-11. After the claim was denied, Thomas states that, against his wishes, his post-conviction counsel refused to raise this issue on the appeal of the denial of post-conviction relief. D.E. 88 at 28. There is no legal right to counsel on an appeal from a denial of post-conviction relief. *Martinez*, 566 U.S. at 16. Thus, Thomas cannot overcome the procedural default of this post-conviction claim.

Thomas further argues that he is challenging post-conviction counsel's failure to supplement this claim after Thomas included it in his *pro se* petition. D.E. 97 at 11. He says that the claim was therefore "not properly raised to the trial court." *Id.* Neither side provides case law that clearly indicates whether a post-conviction counsel's failure to *supplement* a claim already raised *pro se* in a post-conviction motion is subject to analysis under the *Martinez/Trevino* exception.

Thomas's argument in his *pro se* motion was that his trial counsel was ineffective for requesting instructions on only three out of five lesser included offenses to murder. D.E. 9-10 at 8. Thomas did not mention first-degree manslaughter or EED specifically. *See id.*; D.E. 9-9 at 2. However, the Commonwealth did address first-degree manslaughter as a potential lesser-included offense in its response brief. D.E. 9-12 at 6-7. And, although post-conviction counsel only provided additional briefing on two of Thomas's issues, he alluded to "all of the issues [Thomas] raised in his initial *pro se* post-conviction motion" as bases for relief. D.E. 9-11 at 7-8. Thomas argues that the trial court misunderstood his argument as one pertaining to involuntary intoxication. D.E. 97 at 10. But the trial court did address lesser included offenses. The court first opined that the lesser-included-offense issue was barred because it was raised

before the Supreme Court and denied. D.E. 9-13 at 7. Regardless of whether the claim was barred, the trial court also addressed the merits:

> On the issue of lesser included offenses, the Commonwealth argued that the case involved only Guilty or Not Guilty verdicts on the murder charge. Trial counsel was effective in arguing and getting the trial court to give lesser included offenses as part of the Instructions in this case. . . . [C]onsidering [this argument] on the merits at this stage of the proceedings, [it is] without merit.

Id. at 7-8.[5]

Assuming without deciding that a federal habeas court may consider a claim of ineffective assistance of post-conviction based on failure to *supplement*, this claim fails on the merits. Under *Strickland*, the Court must presume that post-conviction counsel performed reasonably in how he chose to supplement Thomas's petition. As previously discussed, "Kentucky prisoners can, under certain circumstances, establish cause for a procedural default of their IATC 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). To invoke this *Martinez/Trevino* exception, the petitioner must establish that (1) his post-conviction counsel was ineffective, and (2) his underlying claims alleging ineffective assistance of trial counsel are "substantial," which is to say that they have "some merit." *Brizendine v. Parker*, 644 F. App'x 588, 592 (6th Cir. 2016) (quoting *Martinez*, 566 U.S. at 13).

Here, as the trial court observed (D.E. 9-13 at 7-8), trial counsel successfully argued against the government for inclusion of lesser-included offense instructions. Nevertheless, the jury convicted Thomas of murder beyond a reasonable doubt. Furthermore, the first-degree manslaughter issue was unpreserved. Additionally, there is no federal constitutional right to a lesser-included offense instruction in a trial like Thomas's in which the death penalty is not

[5] The jury instructions included the lesser included offenses of second-degree manslaughter and reckless homicide. D.E. 94-2 at 21, 24-25.

being sought. "[T]he Constitution does not require a lesser-included offense instruction in non-capital cases." *McMullan v. Booker*, 761 F.3d 662, 667 (6th Cir. 2014) (quoting *Campbell v. Coyle*, 260 F.3d 531, 541 (6th Cir. 2001)); *see also Bagby v. Sowders*, 894 F.2d 792, 797 (6th Cir. 1990) (holding that failure to provide a lesser-included offense instruction in a noncapital case "is not an error of such character and magnitude to be cognizable in federal habeas corpus review").

Under these circumstances, Thomas's underlying IATC claim is not "substantial." Accordingly, post-conviction counsel did not perform ineffectively by failing to elaborate on this particular claim in his supplemental brief. Thomas thus meets neither prong of the *Martinez/Trevino* test to overcome this procedural default.

In sum, this claim was unpreserved at trial. Yet the post-conviction trial court found it to have no merit anyway. Accordingly, the claim was not clearly stronger than the issues that were raised on appeal. And, assuming without deciding that the *Martinez/Trevino* exception could apply to failure to *supplement* a *pro se* post-conviction petition, the underlying claim is not substantial. So the exception provides no relief to Thomas on this claim.

C. Ground Three

Thomas's third ground also concerns his desire for a first-degree manslaughter instruction. D.E. 88 at 8, 24-29. Unlike Ground Two, it is a direct claim of IAAC. *Id.* He faults appellate counsel for failing to raise a "palpable error claim" based on the trial court's failure to include the first-degree manslaughter instruction. *Id.* at 8. Thomas raised this IAAC issue in his third post-conviction motion and his appeal thereof. *Id.* at 9-10. In ruling on this post-conviction motion, the trial court found:

> There is absolutely no showing by Thomas that any of his several Counsel, including specifically his appellate Counsel, fell below the standard of care in any

> aspect of his representation. It is also beyond dispute that there was no showing any Counsel prejudiced Thomas which resulted in his conviction or the denial of any appeal or post-conviction proceedings.

D.E. 33-5 at 2.

The Court of Appeals did not reach the merits, but found that Thomas's petition was barred on the bases that Kentucky did not recognize IAAC claims before 2010 and that Thomas could only raise such an issue in a Rule 11.42 motion, which this was not. D.E. 33-11. Accordingly, the claim is procedurally defaulted. Thomas could only have raised it in his initial post-conviction motion. Further, Thomas cannot rely on the *Martinez/Trevino* exception to overcome the default because he makes no "substantial" showing of an IATC claim underlying his IAAC claim. As discussed in relation to Ground Two, there is no federal right to lesser-included offense instructions in a case in which the death penalty is not sought. *McMullan*, 761 F.3d at 667; *Bagby*, 894 F.2d at 797. The underlying claim emanating from the trial is not cognizable in federal habeas proceedings. Thus, Thomas is not entitled to relief on this claim.

D. Ground Four

Thomas's fourth ground is also an IAAC claim. D.E. 88 at 10. Like Ground Three, Thomas raised it in his third post-conviction motion. *Id.* at 10-11. It concerns an alleged "fatal variance" in his indictment.[6] *Id.* He claims that because he was "conjunctively indicted" with both intentional and wanton murder, the trial court gave the jury an improper "combination instruction" that created an impermissible "mandatory presumption." *Id.* Thus, the verdict was "defective" and the judgment was "void." *Id.* Ground Four alleges that Thomas's appellate counsel was ineffective for failing to raise this issue. *Id.* He tries to overcome procedural

[6] As previously noted, the indictment, D.E. 94-2 at 4, merely cites KRS § 507.020 and states, "On or about the 29th day of December, 2002, in Fayette County, Kentucky, [Thomas] killed Dionte Burdette."

default by alleging his post-conviction counsel was ineffective for failing to raise the IAAC claim. *Id.* Thomas did not object at trial. *Id.* at 33.

The Court has already discussed the legal issues underlying Ground Four in relation to Ground One. Each of his arguments concerning the alternative mental element in the Kentucky murder statute is meritless. The issue is defaulted and, in light of the feebleness of the underlying trial claim, Thomas cannot show ineffective assistance of appellate counsel or of post-conviction counsel so as to overcome the procedural default.

E. Ground Five

Thomas argues in Ground Five that his trial counsel had an "actual conflict." D.E. 88 at 16. He argues that, after he threw a notepad at his attorney at trial, the trial court should have conducted an inquiry into the conflict. *Id.* at 16, 34-36. In his memorandum, Thomas alleges that his trial attorney, who became a prosecutor "immediately after" his trial, "intentionally" sabotaged his defense. *Id.* at 35. He faults his counsel for "laughing with Commonwealth Attorney about [Thomas's] guilt and the futility in defending him." *Id.* He complains that trial counsel argued an alternative perpetrator defense against his wishes. *Id.*

Thomas admits that this ground is unexhausted—he has not raised it until now. *Id.* at 16. He argues his appellate and post-conviction counsel were ineffective for failing to raise the issue. He also argues that the actual conflict amounted to "no counsel at all," thus creating a "jurisdictional" (which the Court construes to mean "structural") error that is "challengeable at any time." *Id.* at 36. what about trial judge failing to delve into conflict

Again, because Thomas was represented on appeal, to overcome default he must show that this ground was clearly stronger than the four grounds raised on appeal. *Hoffner v. Bradshaw*, 622 F.3d 487, 506 (6th Cir. 2010). It is not. Thomas threw the notepad at his counsel

because he was upset at the testimony by two witnesses. D.E. 94 at 47-48. He states in his reply brief, "What upset me was the fact that my attorney did not cross-examine the witness[es] with readily available evidence and all the prior inconsistent statements that should have been used to impeach them." D.E. 97 at 18.

Counsel's failure to impeach a key witness does not indicate a conflict of interest. Nor does the fact that Thomas objected to counsel's trial strategy or that his counsel later went to work for the Commonwealth. Failing to win a case, particularly one in which the evidence against the defendant was so strong, is not indicative of a conflict of interest. In light of the weakness of this claim, there is no basis for finding that appellate or post-conviction counsel was ineffective for failing to raise it. It is neither a substantial claim nor one that is clearly stronger than the claims raised on appeal. As discussed throughout this Recommended Disposition, the Kentucky courts have repeatedly found that Thomas's trial counsel performed competently. Thomas provides no adequate basis for disregarding these findings. Ground Five is defaulted.

F. Ground Six

Thomas argues in Ground Six that his trial counsel failed to adequately investigate, prepare, and present his "best defense." D.E. 88 at 17. Thomas raised this issue in his initial *pro se* post-conviction motion, but his post-conviction counsel did not supplement this claim and did not raise it on the appeal of the denial of that motion. *Id.* at 17, 40.

Thomas states that, before trial, he and counsel discussed "an involuntary manslaughter defense." *Id.* at 37. The Court assumes this is what Thomas alleges to have been his "best defense." Thomas argues that, at trial, counsel went "haywire" and raised two inconsistent other defenses—that there was an alternative perpetrator, and that Thomas shot the victim during a struggle. *Id.* at 36-37.

The claim is procedurally defaulted, but Thomas may not avail himself of the *Martinez/Trevino* exception. *See Brizendine v. Parker*, 644 F. App'x 588, 592 (6th Cir. 2016). Thomas raised the claim himself in his initial post-conviction motion, so the issue is not technically defaulted at the post-conviction trial court level, where the *Martinez/Trevino* exception applies. Instead, the applicable rule seems to be the principle that there is no right to counsel on appeal from the denial of a post-conviction motion. *Martinez v. Ryan*, 566 U.S. 1, 16 (2012). Without any federal right to effective assistance on a post-conviction appeal, Thomas cannot overcome the default.

Even if the claim was defaulted at the post-conviction trial court level, Thomas could not satisfy the *Martinez/Trevino* standard. To overcome the procedural default caused by the failure to appeal the claim, Thomas must establish that (1) his post-conviction counsel was ineffective, and (2) his underlying claims alleging ineffective assistance of trial counsel are "substantial," which is to say that they have "some merit." *Brizendine v. Parker*, 644 F. App'x 588, 592 (6th Cir. 2016) (quoting *Martinez*, 566 U.S. at 13).

Thomas cannot meet this substantiality standard. First, he raised this IATC issue in his own post-conviction motion and the post-conviction court rejected it. Thomas stated in his motion that he "received ineffective assistance of counsel when defense counsel failed to investigate, adequately prepare for nor in fact present a viable defense." D.E. 9-9 at 2. He provided no factual elaboration in his accompanying memorandum. D.E. 9-10 at 3-4. Nor did his appointed counsel elaborate further on this issue. D.E. 9-11. The trial court found the claim "frivolous." D.E. 9-13 at 7. The court found that trial counsel "effectively presented to the jury evidence which would directly call into question whether [Thomas] shot the victim, or whether the shooter was the third person in the vehicle . . . or [an] unknown white male who was first

identified by a defense witness." *Id.* Further, the court found that "trial counsel engaged in rigorous and thorough cross-examination of all of the Commonwealth witnesses." *Id.* The fact that the trial court found this inadequate preparation claim to be "frivolous" means that the claim cannot be "substantial." *Martinez*, 566 U.S. at 13. This claim is defaulted.[7] MOVE SAW EVIDENCE PRESENTED NOT THE CT ALLUDES 2

G. Ground Seven

This is a claim of IAAC. Thomas argues that appellate counsel was ineffective for failing to raise a claim of prosecutorial misconduct. D.E. 88 at 18. Thomas alleges that, without giving prior notice, the Commonwealth presented evidence of robbery—a crime that was not charged on the indictment. *Id.* at 18, 42. Thomas argues that Kentucky Rule of Evidence 404 was thereby violated. D.E. 97 at 25. According to Thomas, there was no objection at trial, and the issue was not raised on direct appeal. D.E. 88 at 18. Thomas says he "requested that his direct appeal attorney address this issue," but she "stated the claim was not cognizable under existing law." *Id.* at 44. He also states he asked his post-conviction attorney to raise it, but he refused "due to it not being cognizable in 11.42 proceedings." *Id.* Thus, Ground Seven is an IAAC claim that was defaulted by failure to raise it in the initial post-conviction proceeding.

Thomas unsuccessfully presented this IAAC claim in his third post-conviction motion and the subsequent appeal. D.E. 88 at 18; *see also* D.E. 33-1 (state post-conviction motion). The Court of Appeals noted that the trial court denied the motion on the grounds that *Hollon* did not apply retroactively and that the motion "was meritless as there was no proof any of his many attorneys had caused his conviction, provided subpar representation, or caused the denial of his requests for post-conviction relief." D.E. 33-11 at 2. The Court of Appeals affirmed, finding

[7] Thomas notes that his trial counsel waived opening statement. D.E. 88 at 37; D.E. 97 at 19. But an attorney's decision not to make an opening statement is "ordinarily a mere matter of trial tactics" and "will not constitute" ineffective assistance. *Millender v. Adams*, 376 F.3d 520, 525 (6th Cir. 2004) (quoting *United States v. Rodriguez-Ramirez*, 777 F.2d 454, 458 (9th Cir. 1985)); *see also Lott v. MacLaren*, 569 F. App'x 392, 401 (6th Cir. 2014) (finding no Supreme Court precedent holding that waiving an opening statement could constitute ineffective assistance). And Kentucky Criminal Rule 9.42 specifically permits attorneys to forego giving an opening statement.

both that *Hollon* did not apply and that the claims could only be raised in a Rule 11.42 motion, not a Rule 60.02 motion like the one at issue. *Id.* at 3. Thus, although the trial court considered the merits (in the alternative), the Court of Appeals found the case procedurally barred.

Regardless of any procedural default, the trial issue underlying the IAAC claim lacks merit. The claim may warrant deference under 28 U.S.C. § 2254(d) to the trial court's merits determination. Even under *de novo* review, however, the claim flounders. There was no objection at trial to any evidence or argument concerning whether Thomas was trying to rob the victim. *See* D.E. 88 at 18; D.E. 94 at 51. And for good reason—this evidence was admissible evidence of either motive or intent under Rule 404(b)(1) or evidence supporting the wanton conduct element of Kentucky murder, which would be admissible under Rule 404(b)(2). The Kentucky Supreme Court has noted, "The facts proving the element of endangerment necessary to convict of first-degree robbery may be the same facts which prove the element of aggravated wantonness necessary to convict of wanton murder." *Meredith v. Com.*, 164 S.W.3d 500, 505 (Ky. 2005) (quoting *Bennett v. Com.*, 978 S.W.2d 322, 327 (Ky. 1998)). The disputed evidence was admissible. There was no prosecutorial misconduct. Trial counsel could not have been ineffective for failing to challenge the evidence.

Thus, even without procedural default or (alternatively) extreme deference to the state trial court's comment on the merits, the underlying claim has no merit. As a result, the weakness of the claim indicates there is no basis to overcome any procedural default.

H. Ground Eight

Ground Eight concerns a piece of evidence Thomas claims was suppressed. D.E. 88 at 19. He claims that "newly discovered evidence" proves the Commonwealth violated his due

process rights under *Brady v. Maryland*, 373 U.S. 83 (1963). *Id.* He presents the claim as both a *Brady* claim and an IATC claim based on failure to discover the evidence. D.E. 97 at 28.

Thomas does not develop this Ground in the memorandum accompanying his § 2254 motion, but he did argue it in the form of an IATC claim in his second state post-conviction motion. D.E. 88 at 19; D.E. 9-21 at 4 (motion); D.E. 9-22 at 10 (memorandum in support of motion). And he elaborates in his reply brief. D.E. 97 at 28-29. The claim was not raised prior to his second post-conviction motion.

The evidence is a funeral program (Thomas calls it an obituary) that Thomas says proves that Devin Neal was a pallbearer at the victim's funeral. D.E. 9-22 at 14. Devin Neal did not testify at Thomas's trial, although he had been subpoenaed. *Id.* at 12. Thomas argues that Neal is relevant because when the victim's mother testified at the November 19, 2003 suppression hearing, she testified she did not know what friend of her daughter's had told her Thomas's name. *Id.* at 11-12. Thomas argues that, had he possessed the funeral program, he could have proven that the victim's mother knew Neal, and could thereby have impeached her testimony. *Id.* at 13.

The post-conviction court considered this argument and stated:

> Assuming for sake of argument that Neal was a friend of Baltimore and the decedent, the Court absolutely make[s] a Finding of Fact and Conclusion of Law that this information, even if brought out at the trial of this case, would not establish, by any stretch of the imagination, a reasonable probability that the result of the trial would have been different.
>
> . . . .
>
> It is absolutely crystal-clear that Thomas has not established anything remotely close to a showing that would justify the relief sought in this case based upon the "newly discovered evidence" that a person that was not even a witness at the trial purportedly acted as a pallbearer at the funeral for the man Thomas shot and killed.

D.E. 9-25 at 6, 8.

The Kentucky Court of Appeals upheld the rejection of the *Brady* claim on the basis that Thomas "was actually aware the the funeral program prior to his November 2004 trial," as the Commonwealth argued. *Thomas v. Com.*, No. 2010-CA-227-MR, 2011 WL 2553519, at *3 (Ky. Ct. App. June 10, 2011). The appellate court further upheld the trial court's rejection of the accompanying IATC claim on the merits. *Id.* at *3-4. Thus, the Kentucky Courts found that this ground failed as a *Brady* claim and as an IATC claim. The Sixth Circuit described this Court of Appeals opinion as one that "adjudicated [this aspect of Thomas's second post-conviction] motion on the merits." *Thomas v. Meko*, 828 F.3d 435, 438 (6th Cir. 2016). This claim is therefore exhausted. Given the considerable deference granted to state court merits determinations under 28 U.S.C. § 2254(d), Thomas cannot obtain relief on this claim.

The Supreme Court in *Brady* held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S., at 87. The elements of a *Brady* prosecutorial misconduct claim are that "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Banks v. Dretke*, 540 U.S. 668, 691 (2004) (quoting *Strickler v. Greene*, 527 U.S. 263, 282 (1999)). Embedded in these elements is a "materiality" standard which requires "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler v. Greene*, 527 U.S. at 280 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). A

"reasonable probability" is one that is "sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682 (quoting *Strickland*, 466 U.S. at 694).

Here, the state courts found quite plainly that the allegedly suppressed funeral program was not material, and would not have affected the result of the suppression hearing or trial. Applying due deference to an exhausted claim, this Court cannot find that this decision on the merits "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). Thomas has not meaningfully addressed either of these standards. The *Brady* claim lacks merit, as does the accompanying IATC claim.

I. Ground Nine

Thomas's ninth ground is an IATC claim that concerns the prosecutor's description during closing arguments of prior testimony by the medical examiner. D.E. 88 at 20. Thomas argues his trial counsel was ineffective for failing to object to the prosecutor "misquoting key expert testimonial evidence." *Id.* Thomas raised this issue in his original post-conviction motion (D.E. 9-9 at 2; D.E. 9-10 at 7), but his appointed counsel did not supplement it (D.E. 9-11). The trial court reached the merits of this claim and found:

> As to the claim that there was no objection raised when the Commonwealth misstated evidence in the closing argument, the trial record shows objections made by trial counsel during the prosecution's closing argument, including an objection to the demonstration using the injury diagram entered into evidence by the medical examiner. The claim that trial counsel made no objection in the Commonwealth's closing argument is simply untrue and thoroughly refuted by the trial record.

D.E. 9-13 at 8.

Thomas's post-conviction counsel did not raise this issue on post-conviction appeal. D.E. 88 at 20. Accordingly, it is defaulted.

Although the *Martinez/Trevino* exception permits Thomas to raise ineffective assistance of post-conviction counsel as excusable grounds for default, this exception does not apply to the *appeal* of a denial of a post-conviction motion. *Martinez v. Ryan*, 566 U.S. 1, 16 (2012). Because there is no right to counsel in the appeal of a post-conviction motion, *id.*, Thomas cannot overcome this default. Even if the *Martinez/Trevino* exception applied to post-conviction counsel's failure to *supplement* a claim raised *pro se* and addressed by the trial court, the exception would not excuse the default because the underlying IATC claim is not substantial. The state trial court, worthy of deference for its factual findings, found the claim to be unsupported by the facts. For these various reasons, Thomas cannot overcome this procedural default.

J. Ground Ten

Ground Ten draws on some of the same facts as Ground Nine, but alleges ineffective assistance of appellate counsel. D.E. 88 at 21. Thomas claims his appellate counsel should have challenged the Commonwealth's use of "false evidence and improper character bolstering" during closing arguments. *Id.*

Thomas did not raise this IAAC issue until his third post-conviction motion and its subsequent appeal. *Id.* at 21; *see also* D.E. 33-1 (third post-conviction motion). The trial court denied the motion because (1) IAAC claims were not recognized at the time of Thomas's initial appeal, and, alternatively (2) the motion was meritless because Thomas failed to show both IATC and IAAC. D.E. 33-5 at 2. The Kentucky Court of Appeals affirmed on the basis that

Hollon's recognition of IAAC claims did not apply retroactively. D.E. 33-11; *Thomas*, 2012 WL 5457648.

This claim is defaulted because Thomas failed to raise his IAAC argument in his initial post-conviction motion. The Kentucky Court of Appeals thus found it procedurally barred. Thomas cannot excuse this default at the initial post-conviction stage. As previously noted, the perceived futility in raising such arguments (when Kentucky did not recognize IAAC claims at the time) is not grounds for excusing default. *Franklin v. Bradshaw*, 695 F.3d 439, 455 (6th Cir. 2012). Alternatively, in terms of exhaustion, because the Court of Appeals refused to consider the merits of this Ground, the merits have not been subjected to a full review by the Kentucky courts, so they are unexhausted. *Williams v. Mitchell*, 792 F.3d 606, 613 (6th Cir. 2015).

Even if Thomas's claims in Ground Ten were not defaulted and unexhausted, they would not support an IAAC claim. To prove IAAC, Thomas must point to trial issues that are "clearly stronger" than the ones appellate counsel challenged. *Hutton v. Mitchell*, 839 F.3d 486, 501 (6th Cir. 2016); *Hoffner v. Bradshaw*, 622 F.3d 487, 505-06 (6th Cir. 2010). Thomas cannot make this showing when the post-conviction trial court, briefly considering the merits, found "absolutely no showing by Thomas that any of his several Counsel, including specifically his appellate Counsel, fell below the standard of care in any aspect of his representation. It is also beyond dispute that there was no showing any Counsel prejudiced Thomas which resulted in his conviction or the denial of any appeal or post-conviction proceedings." D.E. 33-5 at 2. In light of this merits determination by the post-conviction trial court, Thomas cannot show that his issues in Ground Ten are clearly stronger than the ones his appellate counsel raised on appeal.

K. Ground Eleven

In his amended "final ground," Thomas argues that his indictment was defective and failed to provide adequate notice of the charges against him. D.E. 89 at 3. He raised this issue in a state habeas action filed in 2016 and its appeal. *Id.* He claims his appellate counsel was ineffective for failing to raise the issue on direct appeal. *Id.*

The Warden argues this claim is untimely because it was filed beyond the one-year statute of limitations and does not relate back to the rest of his petition. D.E. 94 at 64-67 (citing 28 U.S.C. § 2244).

Regardless of whether the claim is untimely, it is defaulted and has no traction on the merits. Thomas provides no details regarding what the "defect in the indictment" might have been. D.E. 89 at 3. His argument in his state habeas petition was that the indictment was "void" because it "failed to state facts that constitute a public offense as to [murder]." D.E. 94-2 at 97. This count of the indictment cites KRS § 507.020 and states, "On or about the 29th day of December, 2002, in Fayette County, Kentucky, [Thomas] killed Dionte Burdette." *Id.* at 4. Thomas's state habeas petition contains arguments very similar to those previously explored in Counts One and Four, *i.e.*, that the indictment failed to adequately define the crime, particularly in light of the murder statute's alternative mental states. *Id.* at 97, 103-06.

The trial court dismissed Thomas's state habeas petition, finding that the indictment "charged an offense and was not fatally defective." D.E. 94-2 at 158. The Court of Appeals found that a habeas petition was not the proper forum for raising the claim, and also held that "Thomas has failed to demonstrate entitlement to a writ on the merits." D.E. 94-2 at 161. The appellate court found the indictment "sufficient because it lists the corresponding statute he is charged with violating as well as providing a short description of the factual allegation in support

of the charge." *Id.* at 162. Thus, the appellate court found that the motion was both procedurally barred and failed on the merits.

The state courts' ruling on the merits of this claim is entitled to great deference. 28 U.S.C. § 2254(d). Here, the Court has no basis for finding that this ruling was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* Because the claim itself is meritless, it also provides no basis for finding IAAC so as to overcome the procedural default. This claim was not clearly stronger than the ones Thomas's counsel raised on appeal. *Hutton v. Mitchell*, 839 F.3d 486, 501 (6th Cir. 2016). As with his other claims, this one entitles Thomas to no relief in federal court.

IV. CONCLUSION

For the reasons discussed above, the undersigned **RECOMMENDS** that Thomas's petition be dismissed. Each of his eleven claims is either meritless, procedurally defaulted, or both.

The Court further **RECOMMENDS** that no Certificate of Appealability ("COA") should issue. A COA 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). This standard requires a petitioner to demonstrate that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). In other words, the petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional

claims debatable or wrong." *Id.* Here, the state courts' resolution of any claims that may have been exhausted would be entitled to great deference under 28 U.S.C. § 2254(d)(1). Reasonable jurists would find no grounds to overturn those rulings. The Court finds no basis for encouraging Thomas to proceed further. And, when a case is dismissed on procedural grounds, a Certificate may only issue if the movant can show 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." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Here, Thomas's procedural defaults and failures to exhaust are clear, and he has shown no basis to surmount them.

The Court further **FINDS** that no hearing is warranted. *See* Rule 8(a), Rules Governing Section 2254 Proceedings. Review under § 2254 is "limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). Evidence introduced in federal court has "no bearing" on § 2254 review. *Id.* at 185. Thus, this Court would be barred from considering any additional evidence in addressing Thomas's claims.

The Court directs the parties to 28 U.S.C. § 636(b)(1) for appeal rights and mechanics concerning this Recommended Disposition, issued under subsection (B) of the statute. *See also* Rules Governing Section 2254 Proceedings, Rule 8(b). Within fourteen days after being served with a copy of this decision, any party may serve and file specific written objections to any or all findings or recommendations for determination, *de novo*, by the District Court. Failure to make a timely objection consistent with the statute and rule may, and normally will, result in waiver of further appeal to or review by the District Court and Court of Appeals. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947, 950 (6th Cir. 1981).

Finally, the Court **HEREBY ORDERS THAT** Thomas's pending motion to amend (D.E. 98) is **DENIED.**

This the 3rd day of May, 2017.

Signed By:
Hanly A. Ingram
United States Magistrate Judge

Additional material from this filing is available in the Clerk's Office.