No. 18-6300

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LASHAWN JOHNSON,

Petitioner-Appellant,

v.

RANDY L. WHITE, Warden,

Respondent-Appellee.

ORDER

Lashawn Johnson, a pro se Kentucky prisoner, appeals the judgment of the district court denying his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Johnson has filed an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b)(1). He also moves to proceed in forma pauperis on appeal. *See* Fed. R. App. P. 24(a)(5).

Johnson was convicted of first-degree robbery, first-degree burglary, and being a first-degree persistent felony offender. Johnson was alleged to have intruded into the victim's home, pointed a gun at the victim, demanded money, and fought with the victim before the victim was able to flee from his home. The trial court sentenced Johnson to a term of imprisonment of twenty-five years. Johnson appealed. The Kentucky Supreme Court found no error and affirmed Johnson's convictions. *Johnson v. Commonwealth*, 327 S.W.3d 501 (Ky. 2010).

In 2011, Johnson moved to vacate his conviction pursuant to Kentucky Rule of Criminal Procedure 11.42, arguing that counsel was ineffective. The trial court denied the motion, and the Kentucky Court of Appeals affirmed. *Johnson v. Commonwealth*, No. 2012-CA-000320-MR,

2013 WL 1776029 (Ky. Ct. App. Apr. 26, 2013). The Kentucky Supreme Court denied his petition for discretionary review.

Johnson then filed this habeas petition, raising the following claims: (1) the trial court erred by failing to instruct the jury that they could not find him guilty unless they determined that the weapon he used during the crime was a deadly weapon; (2) his DNA evidence was illegally obtained and admitted into evidence; (3) counsel was ineffective for failing to inform the trial court that Johnson wanted to represent himself; (4) counsel was ineffective for failing to present a complete defense by asking the victim certain questions; and (5) counsel was ineffective during sentencing for failing to investigate the sentencing laws and to object to false testimony.

A magistrate judge concluded that the state courts' adjudication of Johnson's first and fourth claims was not contrary to or an unreasonable application of clearly established federal law, his second claim was not cognizable on habeas review, and his third and fifth claims were procedurally defaulted. Over objections, the district court adopted the magistrate judge's report and recommendation as to Johnson's first and fourth claims and determined that, even if Johnson could establish cause for his default of his third and fifth claims, he could not establish prejudice. The district court subsequently denied Johnson's petition and denied a COA.

In his application for a COA in this court, Johnson challenges the district court's rulings as to his first, third, fourth, and fifth claims. Because he does not challenge the lower court's ruling on his DNA claim, he has forfeited a challenge to that claim on appeal. *Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002) (per curiam).

To obtain a COA, a petitioner must show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Where the district court denies an issue on procedural grounds without evaluating the merits of the underlying constitutional claim, courts should grant a COA only if two requirements are satisfied: first, the court must determine that reasonable jurists would find the district court's procedural assessment debatable or wrong; and, second, the court must determine that reasonable jurists would find it

debatable or obvious that the petition states a valid underlying constitutional claim. *See Slack*, 529 U.S. at 484-85. "[A] COA does not require a showing that the appeal will succeed," *Miller-El*, 537 U.S. at 337; it is sufficient for a petitioner to demonstrate that "the issues presented are adequate to deserve encouragement to proceed further," *id.* at 327 (citing *Slack*, 529 U.S. at 484).

In Johnson's first claim, he alleged that the trial court erred by failing to submit to the jury the factual question of whether the intruder carried a deadly weapon. A habeas petitioner bears a heavy burden when seeking habeas relief on the basis of allegedly improper jury instructions. *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977). Generally, the question of whether a jury instruction is a violation of state law is not a proper subject for federal habeas relief. *See Estelle v. McGuire*, 502 U.S. 62, 68, 71-72 (1991). The petitioner will be entitled to habeas relief only if he can establish that the instruction "by itself so infected the entire trial that the resulting conviction violates due process." *Id.* at 72 (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)).

Reasonable jurists would not debate the district court's denial of this claim, primarily because the record does not support Johnson's assertion. As the Kentucky Supreme Court explained on direct appeal, the trial court did not declare as a matter of law that the pellet or BB gun that the intruder was alleged to have carried constituted a deadly weapon. *Johnson*, 327 S.W.3d at 507 n.14. Rather, in its instructions on the elements of first-degree robbery and first-degree burglary, the trial court gave the jury definitions of certain terms to aid it in determining whether the elements of each crime were met; one of those definitions was of the term "deadly weapon." *Id.* That definition followed statutory language and instructed the jury that a deadly weapon was "[a]ny weapon from which a shot, readily capable of producing death or serious physical injury, may be discharged." Ky. Rev. Stat. Ann. § 500.080(4)(b).

Even if the jury had reasonable doubt as to whether the intruder carried a deadly weapon, it could have found Johnson guilty of first-degree robbery or first-degree burglary under different theories, as the Kentucky Supreme Court explained. *Johnson*, 327 S.W.3d at 507. In particular,

the jury could have found him guilty if it determined either that the intruder actually used or threatened the use of a dangerous instrument or caused physical injury to the victim in the course of robbing and burglarizing the victim. *Id.* at 506. And, as the state court observed, all of the theories of conviction had evidentiary support. *Id.* Because Johnson has not made a substantial showing that the trial court's instructions resulted in a violation of his right to due process, this claim does not deserve encouragement to proceed further.

The district court also denied Johnson's fourth habeas claim on the merits. In this claim, Johnson argued that counsel was ineffective for failing to present a complete defense when counsel ignored Johnson's requests to ask certain questions about the victim's injuries and failed to obtain the victim's medical records, which he believes would have shown that the victim was not actually injured. To show that counsel was ineffective, a habeas petitioner must establish that (1) counsel performed deficiently and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel's performance is considered deficient when "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* To establish prejudice, a petitioner must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Reasonable jurists would not debate the district court's denial of this ineffective-assistance claim. The victim claimed that he was struck in the head by the intruder, hurt his ankle as he was running away, and was treated for a sprained ankle and given crutches at the hospital; a witness stated that the victim was bleeding from his face and feet; and a detective testified that the victim had an open wound on the side of his head. *Johnson*, 2013 WL 1776029, at *3. Even if counsel had obtained the victim's medical records or further cross-examined the victim about his injuries, it is unlikely that the result of the trial would have been different. Johnson has failed to make a substantial showing of either deficient performance or prejudice. This claim does not deserve encouragement to proceed further.

The district court denied Johnson's third and fifth claims—alleging that counsel was not ineffective for protecting Johnson's right to self-representation and for failing to investigate the sentencing laws—as procedurally defaulted. A claim is procedurally defaulted when "a petitioner has failed to present a legal issue to the state courts and no state remedy remains available." *Jones v. Bagley*, 696 F.3d 475, 483 (6th Cir. 2012). The petitioner may avoid procedural default only if "there was cause for the default and prejudice resulting from the default," or if he can prove "that a miscarriage of justice will result from enforcing the procedural default in the petitioner's case." *Lundgren v. Mitchell*, 440 F.3d 754, 763 (6th Cir. 2006).

Johnson did not dispute that these claims were defaulted, but he asserted that he could demonstrate cause to excuse the default because he lacked the effective assistance of counsel in his post-conviction proceedings. *See Woolbright v. Crews*, 791 F.3d 628, 635-36 (6th Cir. 2015). Even if Johnson could demonstrate cause to excuse his default, *see Martinez v. Ryan*, 566 U.S. 1, 17 (2012), reasonable jurists would not debate that he also failed to demonstrate prejudice resulting from the default.

"The prejudice analysis for . . . procedural default and the prejudice analysis for [an] ineffective assistance of counsel argument are sufficiently similar to treat as the same." *Hall v. Vasbinder*, 563 F.3d 222, 237 (6th Cir. 2009). "[E]stablishing *Strickland* prejudice likewise establishes prejudice for purposes of cause and prejudice." *Joseph v. Coyle*, 469 F.3d 441, 462-63 (6th Cir. 2006). Johnson cannot establish that the outcome of his trial or sentencing would have been different absent counsel's alleged errors. Even if Johnson had represented himself and asked additional or different questions about the victim's injuries, there was "overwhelming and uncontradicted evidence" that the victim was injured. *Johnson*, 327 S.W.3d at 505, 508. Even if counsel had corrected the misinformation given by a probation and parole officer that Johnson would be eligible for work credit while in prison, there was nothing in the record to suggest that the jury relied on the officer's testimony to determine Johnson's punishment. Johnson's allegation that the jury would have sentenced him to the minimum term of twenty years if it had

known he was ineligible for the credit is merely speculative. "[P]ure speculation on whether the outcome of the . . . penalty phase could have been any different[] [is] an insufficient basis for a successful claim of prejudice." *Baze v. Parker*, 371 F.3d 310, 322 (6th Cir. 2004). Therefore, these claims do not deserve encouragement to proceed further.

Johnson's application for a COA is **DENIED**. His motion to proceed in forma pauperis on appeal is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

LASHAWN JOHNSON, Petitioner,

v. Civil Action No. 3:14-cv-514-DJH-CHL

RANDY WHITE, Respondent.

* * * * *

MEMORANDUM OPINION AND ORDER

LaShawn Johnson filed a petition for writ of habeas corpus under 28 U.S.C. § 2254. (Docket No. 1) Respondent Randy White opposes Johnson's petition. (D.N. 15) The Court referred the matter to Magistrate Judge Colin Lindsay, who submitted Findings of Fact, Conclusions of Law, and Recommendation. (D.N. 29) Judge Lindsay recommended that the Court deny Johnson's petition with prejudice and deny a certificate of appealability. (*Id.*, PageID # 358) White and Johnson timely filed objections to Judge Lindsay's report and recommendation. (D.N. 30; D.N. 31) While Johnson objects to Judge Lindsay's recommendation that his petition be denied (D.N. 31), White took "the unusual position" of objecting to the favorable report to correct an oversight in failing to bring a Sixth Circuit case to Judge Lindsay's attention (D.N. 30). For the reasons set forth below, White's objection will be sustained, and Johnson's objection will be overruled. The Court will adopt in part Judge Lindsay's Findings of Fact, Conclusions of Law, and Recommendation and deny Johnson's habeas petition.

I. BACKGROUND

A jury found Johnson guilty of first-degree robbery and first-degree burglary and sentenced him to twenty-five years' imprisonment. *Johnson v. Commonwealth*, 327 S.W.3d 501,

505 (Ky. 2010). Johnson appealed to the Kentucky Supreme Court, which hears direct appeals from circuit-court judgments imposing prison sentences of twenty years or more. *See* Ky. Const. § 110(2)(b); *Johnson*, 327 S.W.3d at 503. In his direct appeal, Johnson argued that the trial court erred in refusing to instruct the jury on second-degree robbery and second-degree burglary and in failing to hold an evidentiary hearing on his motion to suppress DNA evidence. *Johnson*, 327 S.W.3d at 503. The Kentucky Supreme Court rejected Johnson's arguments and affirmed the trial court's judgment. *Id.*

Johnson then filed a motion to vacate, set aside, or correct the judgment against him pursuant to Kentucky Rule of Criminal Procedure 11.42. *Johnson v. Commonwealth*, No. 2012-CA-000320-MR, 2013 WL 1776029, at *1 (Ky. Ct. App. Apr. 26, 2013). As grounds for the motion, Johnson asserted that his trial counsel was ineffective for failing to conduct an adequate pretrial investigation, failing to prepare for trial, permitting unlawful DNA evidence to be admitted at trial, and failing to ensure that the jury was properly instructed. *Id.* at *2. The trial court denied the motion without an evidentiary hearing, and the Kentucky Court of Appeals affirmed. *Id.* at *1, *5. Johnson filed a motion for discretionary review, which the Kentucky Supreme Court denied. (D.N. 15-11, PageID # 277)

Johnson, who remains in state custody, has filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (D.N. 1) As grounds for his petition, Johnson alleges that the state trial court refused to let the jury decide whether the weapon used in this case was a "deadly weapon"; the court allowed illegally obtained DNA evidence to be submitted to the jury; trial counsel refused to allow him to represent himself; counsel refused to ask certain questions of the victim at trial; and counsel failed to object to perjury during the sentencing phase of his trial. (*Id.*, PageID # 5, 7-8, 10, 12)

This matter was referred to United States Magistrate Judge Colin Lindsay for Findings of Fact, Conclusions of Law, and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). (D.N. 10, PageID # 40; D.N. 23) Both White and Johnson filed objections to the report and recommendation. (D.N. 30; D.N. 31) The Court reviews de novo the portions of the report and recommendation to which objections are filed. *See Walkup v. United States*, No. 1:09-CR-00026-TBR-HBB, 2016 WL 6780332, at *1 (W.D. Ky. Nov. 15, 2016).

II. DISCUSSION

A. Legal Standards

A district court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

> An application for a writ of habeas corpus . . . shall not be granted unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

§ 2254(b)(1). "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented." § 2254(c). "In order to exhaust a claim, the petitioner 'must "fairly present" his claim in each appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting that court to the federal nature of the claim.'" *Woolbright v. Crews*, 791 F.3d 628, 631 (6th Cir. 2015)

(quoting *Baldwin v. Reese*, 541 U.S. 27, 29 (2004)). "When a petitioner has failed to fairly present his claims to the state courts and no state remedy remains, his claims are considered to be procedurally defaulted." *Id.* "If a petitioner's claims are procedurally defaulted, they may not be reviewed by a habeas court unless he can demonstrate 'cause' and 'prejudice.'" *Id.* (quoting *McMeans v. Brigano*, 228 F.3d 674, 680 (6th Cir. 2000)).

The Antiterrorism and Effective Death Penalty Act (AEDPA), which amended Section 2254(d), "requires 'heightened respect' for legal and factual determinations made by state courts." *Chatman v. Litteral*, No. 5:16-cv-00177-GNS-LLK, 2017 WL 4330370, at *3 (W.D. Ky. Sept. 29, 2017) (quoting *Herbert v. Billy*, 160 F.3d 1131, 1134 (6th Cir. 1998)). The AEDPA provides that

> [a]n 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.

§ 2254(d). "Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by th[e] [Supreme] Court on a question of law or if the state court decides a case differently than th[e] [Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from th[e] [Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413.

B. White's Objection

Judge Lindsay concluded that Johnson procedurally defaulted two of his claims related to ineffective assistance of counsel because he did not present them to the state courts or show good cause for his failure to do so. (D.N. 29, PageID # 355, 358) White objected to Judge Lindsay's conclusion that Johnson failed to show good cause, on the basis of a recent Sixth Circuit decision holding that there may be good cause to excuse procedural default of an ineffective-assistance claim if the prisoner was unrepresented by counsel during the initial collateral-review proceeding in state court.[1] (D.N. 30, PageID # 359-60) That case, *Woolbright*, *supra*, reiterated prior Supreme Court holdings that cause to excuse procedural default of a substantial ineffective-assistance claim may be established where (1) state law bars or denies a petitioner the meaningful opportunity to raise ineffective-assistance claims on direct appeal; and (2) the petitioner was unrepresented (or lacked effective assistance of counsel) at his initial collateral-review proceeding. 791 F.3d at 631 (citing *Trevino v. Thaler*, 569 U.S. 413, 429 (2013) and *Martinez v. Ryan*, 566 U.S. 1, 17 (2012)). While White asserts that *Woolbright* represents a change in the law on procedural default (D.N. 30, PageID # 359), the court in that case simply held that the *Martinez/Trevino* rule applied in Kentucky to ensure that defendants in this state receive a meaningful opportunity to have their ineffective-assistance claims adjudicated on direct appeal. 791 F.3d at 635-36.

Johnson was not represented by counsel during his initial collateral-review proceeding in state court. *See Johnson*, 2013 WL 1776029, at *2. The Court will therefore sustain White's narrow objection to the extent it seeks to clarify that Johnson may be able to show cause under

[1] White did not concede that his procedural-default defenses failed, however. Instead, he asserted that, although Johnson could show cause for his procedural default on these two claims, he could not show prejudice. (D.N. 30, PageID # 360)

Martinez and *Trevino* for his procedural default, as he did not receive a meaningful opportunity to raise his ineffective-assistance claims on direct appeal and lacked representation at his initial collateral-review proceeding. *See Blincoe v. White*, No. 3:13-CV-00846-GNS-DW, 2015 WL 7571844, at *5 (W.D. Ky. Nov. 24, 2015) (acknowledging that the defendant was correct in arguing that *Martinez* and *Trevino* applied to Kentucky's post-conviction relief procedures so he was able to show cause to excuse his procedural default). The Court notes, however, that its conclusion here regarding cause does not change the outcome of this case for the reasons that follow.

C. Johnson's Objection

Johnson sought habeas relief on five separate grounds. (*See* D.N. 1) The Court will discuss each ground for habeas relief in turn.

1. Ground One: Jury Instructions

First, Johnson argues that the trial court refused to let the jury decide whether the weapon used in this case was a "deadly weapon." (D.N. 1, PageID # 5) Judge Lindsay found that Johnson sufficiently raised this argument to the trial court and the Kentucky Supreme Court, exhausting his available state-court remedies. (D.N. 29, PageID # 350) However, Judge Lindsay concluded that Johnson had not shown that the Kentucky Supreme Court's decision affirming the trial court's jury instructions was contrary to, or an unreasonable application of, clearly established federal law. (*Id.*, PageID # 352) Johnson objects to the report and recommendation, arguing that the trial judge's instructions were contrary to *Apprendi v. New Jersey*, 530 U.S. 466 (2000), as applied in *Thacker v. Commonwealth*, 194 S.W.3d 287 (Ky. 2006). (D.N. 31, PageID # 363)

A criminal defendant is entitled to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Apprendi*, 530 U.S. at 477. The Kentucky Supreme Court in *Thacker* applied *Apprendi* and concluded that the jury must be allowed to determine whether a weapon is a "deadly weapon" where one of the charged crime's essential elements is being armed with a deadly weapon. 194 S.W.3d at 289-90.

In this case, the jury convicted Johnson of first-degree robbery and first-degree burglary. *Johnson*, 327 S.W.3d at 505. Under Kentucky law,

> [a] person is guilty of robbery in the first degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft and when he:
>
> (a) Causes physical injury to any person who is not a participant in the crime; or
>
> (b) Is armed with a deadly weapon; or
>
> (c) Uses or threatens the immediate use of a dangerous instrument upon any person who is not a participant in the crime.

Ky. Rev. Stat. § 515.020(1). Kentucky statutes further provide that

> [a] person is guilty of burglary in the first degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a building, and when in effecting entry or while in the building or in the immediate flight therefrom, he or another participant in the crime:
>
> (a) Is armed with explosives or a deadly weapon; or
>
> (b) Causes physical injury to any person who is not a participant in the crime; or
>
> (c) Uses or threatens the use of a dangerous instrument against any person who is not a participant in the crime.

§ 511.020(1). Thus, use of a deadly weapon is one of three alternative elements for first-degree robbery and burglary. The trial court submitted to the jury the question of whether the weapon was deadly. *See Johnson*, 327 S.W.3d at 507. Indeed, it instructed the jury on the elements of first-degree robbery and burglary and issued an instruction defining "deadly weapon" using the

language of the statute that defines that term. *Id.* at 507 n.14; *see* Ky. Rev. Stat. § 500.080(4). The Kentucky Supreme Court affirmed the trial court's judgment. *Johnson*, 327 S.W.3d at 512.

Johnson is correct that, in accordance with *Apprendi* and *Thacker*, the jury was required to determine whether he used a deadly weapon. However, the trial court here allowed the jury to make that determination. The Court therefore agrees with Judge Lindsay's conclusion that Johnson has failed to show that the Kentucky Supreme Court's decision affirming the trial court on this issue was either contrary to, or an unreasonable application of, clearly established federal law.

2. Ground Two: DNA Evidence

Second, Johnson argues that his constitutional rights were violated because DNA evidence was illegally obtained and admitted against him at trial. (D.N. 1, PageID # 7) Specifically, Johnson argues that his blood was drawn without his consent and used to generate a DNA profile that was entered into the Combined DNA Index System (CODIS) and later used to link him to a drinking straw found at the scene of the crime. (*Id.*) Judge Lindsay concluded that this claim was not cognizable in a federal habeas petition because Johnson already had an opportunity for full and fair litigation of his Fourth Amendment claim, which the Kentucky Supreme Court addressed on the merits. (D.N. 29, PageID # 353) Judge Lindsay therefore recommended that the Court deny the habeas petition with respect to ground two. (*Id.*)

Johnson's objection does not mention this ground for relief, so the Court assumes that he does not object to this portion of the report and recommendation. The Court need not review a magistrate judge's factual or legal conclusions when no objection is made. *See Thomas v. Arn*, 474 U.S. 140, 150-52 (1985). Nevertheless, the Court has reviewed the record and agrees with Judge Lindsay's recommendation. The Supreme Court has held that "where the State has

provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Stone v. Powell*, 428 U.S. 465, 481-82 (1976). The Kentucky Supreme Court's decision affirming the trial court in this case contains a lengthy discussion of Johnson's motion to suppress the DNA evidence. *See Johnson*, 327 S.W.3d at 508-12. Johnson has not shown that he did not have an opportunity for full and fair litigation of his Fourth Amendment claim in state court. Thus, the Court agrees with Judge Lindsay's conclusion that federal habeas corpus relief is not appropriate on this ground.

3. Ground Three: Self-Representation

The remaining three grounds for relief in this case involve ineffective assistance of counsel. Johnson first argues that his trial counsel was ineffective because he refused to inform the court that Johnson wanted to represent himself and failed to request a hearing pursuant to *Faretta v. California*, 422 U.S. 806 (1975), in order to determine whether Johnson knowingly waived his right to counsel. (D.N. 1, PageID # 8) Judge Lindsay concluded that Johnson procedurally defaulted this claim because he failed to exhaust his state-court remedies and could not show cause for his failure to exhaust. (D.N. 29, PageID # 354-55) In his objection, Johnson relies on *Martinez* and argues that he can show prejudice because his ineffective-assistance claim is "substantial." (D.N. 31, PageID # 363-64)

But Johnson did not raise this particular ineffective-assistance claim in state court. (*See* D.N. 1, PageID # 9-10) He therefore failed to exhaust his state-court remedies with respect to this claim. *See Woolbright*, 791 F.3d at 631. No state remedy remains because Kentucky's rules for post-conviction relief would not allow Johnson to bring another motion to assert this claim.

See Ky. R. Crim. P. 11.42(3) ("Final disposition of the [Rule 11.42] motion shall conclude all issues that could reasonably have been presented in the same proceeding."); *Johnson*, 2013 WL 1776029, at *1-2 (affirming lower court's denial of Johnson's first Rule 11.42 motion, which raised multiple ineffective-assistance issues); *see also* Ky. R. Civ. P. 60.02 (providing relief from a final judgment in certain circumstances); *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997) ("Civil Rule 60.02 is not intended merely as an additional opportunity to relitigate the same issues which could 'reasonably have been presented' by direct appeal or RCr 11.42 proceedings."). Hence, the Court agrees with Judge Lindsay that Johnson has procedurally defaulted this claim. *See Woolbright*, 791 F.3d at 631.

To overcome procedural default, Johnson must demonstrate "cause" and "prejudice." *See id.* As explained above, Johnson may be able to demonstrate cause for his default. *See supra* Section III.B. But "[h]abeas petitioners must additionally show 'actual prejudice' to excuse their default." *Jones v. Bell*, 801 F.3d 556, 563 (6th Cir. 2015) (quoting *Ambrose v. Booker*, 684 F.3d 638, 649 (6th Cir. 2012)). To determine prejudice, the Court "look[s] to the record to determine if the outcome of the trial would have been different" absent counsel's errors. *Id.* "The 'most important aspect to the inquiry is the strength of the case against the defendant' and whether a trial without errors would still have resulted in conviction." *Id.* (quoting *Ambrose*, 684 F.3d at 652).

Johnson asserts that the result of the proceeding would have been different absent counsel's errors because he would have been entitled to a new trial if the judge knew that he had requested to represent himself both before trial and at trial. (D.N. 20, PageID # 321) Johnson has not shown, however, that the outcome of the trial would have been different had he represented himself. *See Jones*, 801 F.3d at 563-64; *see also Kennedy v. Mackie*, 639 F. App'x

285, 295 (6th Cir. 2016) ("[T]he fact that the trial court's denial of a defendant's right to self-representation . . . creates an automatic right to a new trial . . . does not mean that the 'actual and eventual outcome of the trial' would be different."). Nor is there any basis here to believe that Johnson would have defended himself better than his attorney. *See Kennedy*, 639 F. App'x at 295. Johnson asserts that he would have asked questions of the victim (D.N. 1, PageID # 8; D.N. 20, PageID # 317), but the record showed "overwhelming and uncontradicted evidence" of an intruder causing physical injury to the victim. *Johnson*, 327 S.W.3d at 505, 508. Because Johnson has failed to show actual prejudice resulting from his trial counsel's alleged errors, this ineffective-assistance claim is barred by the procedural-default doctrine. *See Kennedy*, 639 F. App'x at 294-95; *Jones*, 801 F.3d at 564.

4. Ground Four: Questioning the Victim

Johnson also argues that his trial counsel was ineffective in denying Johnson his right to present a complete defense, to participate in his own defense, and to cross-examine his accusers. (D.N. 1, PageID # 10) Specifically, Johnson asserts that he noted inconsistencies in the victim's testimony and wrote them down, along with questions that would perjure the victim, but counsel refused to ask the questions. (*Id.*) Judge Lindsay concluded that Johnson had exhausted his state-court remedies as to this issue but had not shown that the Kentucky Court of Appeals decision affirming the trial court's denial of this claim was contrary to, or an unreasonable application of, clearly established federal law. (D.N. 29, PageID # 355-56) In his objection, Johnson argues that his attorney had an obligation to investigate every piece of evidence. (D.N. 31, PageID # 364)

Although Johnson asserts in his petition that he did not exhaust his state-court remedies with respect to this claim (D.N. 1, PageID # 10), the record shows that Johnson indeed raised this

ineffective-assistance argument in the Kentucky trial court and court of appeals (*see* D.N. 15-6, PageID # 202; D.N. 15-7, PageID # 226). After the court of appeals ruled against him (D.N. 15-10, PageID # 276), Johnson unsuccessfully sought discretionary review in the Kentucky Supreme Court (D.N. 15-11). The Court thus agrees with Judge Lindsay that Johnson exhausted his state-court remedies with respect to this claim.

To obtain relief, Johnson must also show that the decision of the Kentucky courts was contrary to, or involved an unreasonable application of, clearly established federal law according to the Supreme Court. *See* 28 U.S.C. § 2254(d). In his brief to the Kentucky Court of Appeals, Johnson argued that his trial counsel was ineffective for failing to secure medical records that would have showed that the victim was not injured and failing to properly cross-examine the Commonwealth's witnesses (including the victim) who testified as to the victim's injuries. (D.N. 15-7, PageID # 225-26) The Kentucky Court of Appeals applied the correct legal principle from *Strickland v. Washington*, 466 U.S. 668 (1984), to Johnson's claim. (D.N. 15-10, PageID # 270-71) The court determined that trial counsel's performance was not deficient in light of the fact that three individuals testified that the victim was injured. (*Id.*, PageID # 271-72) One witness observed the victim bleeding from the face; a detective said that the victim had an open wound on his head; and the victim claimed that he was provided crutches for a sprained ankle. (*Id.*, PageID # 272) The court concluded that, under *Strickland*, Johnson had not shown that counsel's pretrial investigation or trial defense fell below "an objective standard of reasonableness." (*Id.*, PageID # 273)

In sum, the Court agrees with Judge Lindsay that Johnson has not shown that the Kentucky Court of Appeals "arrive[d] at a [legal] conclusion opposite to that reached by th[e] [Supreme] Court," "decide[d] a case differently than th[e] [Supreme] Court" on similar facts, or

"identifie[d] the correct governing legal principle from th[e] [Supreme] Court's decisions but unreasonably applie[d] [it] to the facts." *See Williams*, 529 U.S. at 412-13. The Court will therefore deny habeas relief on this ground.

5. Ground Five: Sentencing

Johnson finally argues that his trial counsel was ineffective for failing to investigate the sentencing laws in relation to his case and failing to object to perjury on the part of the probation and parole officer during the sentencing phase of his trial. (D.N. 1, PageID # 12) Judge Lindsay concluded that this claim was barred by the procedural-default doctrine because Johnson failed to raise it in state court and did not show good cause to excuse that failure. (D.N. 29, PageID # 358) In his objection, Johnson argues that he in effect had no representation during the penalty phase because his trial counsel led the jury to believe lies from the prosecution as well as from probation and parole. (D.N. 31, PageID # 364-65)

Johnson did not raise this ineffective-assistance claim in state court. (*See* D.N. 1, PageID # 13) He therefore failed to exhaust his state-court remedies with respect to this claim. *See Woolbright*, 791 F.3d at 631. Again, no state remedy remains because Kentucky rules disallow another motion to assert this claim. *See* Ky. R. Crim. P. 11.42(3) ("Final disposition of the [Rule 11.42] motion shall conclude all issues that could reasonably have been presented in the same proceeding."); *Johnson*, 2013 WL 1776029, at *1-2 (affirming lower court's denial of Johnson's first Rule 11.42 motion, which raised multiple ineffective-assistance issues); *see also* Ky. R. Civ. P. 60.02 (providing relief from a final judgment in certain circumstances); *McQueen*, 948 S.W.2d at 416 ("Civil Rule 60.02 is not intended merely as an additional opportunity to relitigate the same issues which could 'reasonably have been presented' by direct appeal or RCr 11.42

proceedings."). The Court agrees that Johnson has procedurally defaulted this claim. *See Woolbright*, 791 F.3d at 631.

Johnson must demonstrate "cause" and "prejudice" to overcome procedural default. *See id.* As explained above, Johnson may be able to demonstrate cause for his default. But Johnson must also show actual prejudice. *See Jones*, 801 F.3d at 563; *Edmonds v. Smith*, No. 3:15-cv-00859-CRS, 2017 WL 3431970, at *30 (W.D. Ky. Apr. 21, 2017). Johnson must show more than a mere possibility of prejudice; he must establish "a reasonable probability that the outcome of the [sentencing] would have been different" absent counsel's ineffective assistance. *Edmonds*, 2017 WL 3431970, at *30; *see Jamison v. Collins*, 291 F.3d 380, 386 (6th Cir. 2002).

Johnson asserts that he was prejudiced because the jury decided his sentence based on lies from his own counsel, the prosecution, and the probation and parole officer. (D.N. 20, PageID # 322) Specifically, Johnson asserts that there is a reasonable probability that the jury would have given him the minimum possible sentence had counsel not allowed it to believe that he could receive "work for time" credit. (*Id.*, PageID # 323) He further asserts that this is plausible because the jury did not recommend the maximum sentence for his robbery and burglary convictions. (*Id.*)

The jury sentenced Johnson to twenty-five years' imprisonment on each charge, to be served concurrently. *See Johnson*, 327 S.W.3d at 505. As discussed above, Johnson was convicted of first-degree robbery and first-degree burglary. Both crimes are Class B felonies under Kentucky law that carry a statutory minimum penalty of ten years each. *See* Ky. Rev. Stat. §§ 515.020(2), 511.020(2), 532.060(2)(b). The jury in this case, however, found Johnson to be a first-degree persistent felony offender. *See Johnson*, 327 S.W.3d at 505. When a defendant is found to be a first-degree persistent felony offender in Kentucky, the jury must fix a sentence as

authorized under Ky. Rev. Stat. §§ 532.080(1) and 532.080(6). The relevant statute provides that if the offense for which the defendant presently stands convicted is a Class B felony, he shall be sentenced to a term of imprisonment not less than twenty years nor more than fifty years or life imprisonment. Ky. Rev. Stat. § 532.080(6)(a). The jury sentenced Johnson to twenty-five years, just five years over the statutory minimum. *See Johnson*, 327 S.W.3d at 505.

Johnson argues that but for his attorney's mistake, the jury would have sentenced him to the minimum twenty years instead of twenty-five years. (D.N. 20, PageID # 323) Johnson asserts that the probation and parole officer testified that he could get seven days per month in "work for time" credit toward his sentence. (D.N. 1, PageID # 12) White asserts that the officer testified that Johnson could get only four days per month off of his sentence. (D.N. 15, PageID # 75) Either way, the testimony was incorrect, as the statute that provides for work credit expressly excludes prisoners serving sentences for violent offenses, and first-degree robbery qualifies as a violent offense. *See* Ky. Rev. Stat. §§ 197.047(6)(b), 439.3401(1)(m). The Commonwealth appears to concede that counsel did not correct this error but argues that counsel "is not the guarantor of accurate testimony." (*See* D.N. 15, PageID # 76-77)

The Court is not convinced that had Johnson's trial counsel corrected the probation and parole officer, there is a "reasonable probability" that the jury would have sentenced him to twenty instead of twenty-five years. *See Edmonds*, 2017 WL 3431970, at *30. Johnson has not shown that the officer's testimony affected the jury's determination. Absent such a showing, it is mere speculation to say that the jury would have recommended a lesser sentence. The Court therefore concludes that Johnson is unable to show prejudice, and as a result, his ineffective-assistance claim is barred by procedural default. *See Jones*, 801 F.3d at 562-63.

D. Certificate of Appealability

"Under the AEDPA, a decision of this Court may not be appealed to the Sixth Circuit absent a certificate of appealability." *Haight v. White*, No. 3:02-CV-00206-GNS-DW, 2017 WL 3584218, at *4 (W.D. Ky. Aug. 18, 2017); *see also* 28 U.S.C. § 2253(c)(1)(A). "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." § 2253(c)(2). This showing requires "a demonstration that . . . includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Haight*, 2017 WL 3584218, at *4 (quoting *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000)). "Where a court has rejected a petitioner's constitutional claim on the merits, the petitioner must demonstrate 'that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong' to satisfy Section 2253(c)." *Id.* (quoting *Slack*, 529 U.S. at 484). Meanwhile,

> [a] certificate of appealability should be issued when a writ of habeas corpus is denied on procedural grounds and the petitioner can demonstrate that: (1) "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right" and (2) "jurists of reason would find it debatable whether the district court was correct in its procedural ruling."

Id. (quoting *Slack*, 529 U.S. at 484).

Because the Court is satisfied that reasonable jurists would not find its rulings in this case debatable, a certificate of appealability must be denied. *See Smith v. Bolton*, No. 3:16-cv-P528-DJH, 2017 WL 319232, at *3 (W.D. Ky. Jan. 20, 2017).

III. CONCLUSION

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

ORDERED as follows:

(1) The Findings of Fact, Conclusions of Law, and Recommendation of Magistrate Judge Colin Lindsay (D.N. 29) are **ADOPTED** in part and **INCORPORATED** by reference herein to the extent set forth above.

(2) White's objection (D.N. 30) to Judge Lindsay's report and recommendation is **SUSTAINED**. While the Court sustains this narrow objection, it does so without changing Judge Lindsay's conclusion that Johnson's petition should be denied.

(3) Johnson's objection (D.N. 31) to Judge Lindsay's report and recommendation is **OVERRULED**.

(4) A separate judgment will be issued this date.

March 12, 2018

David J. Hale, Judge
United States District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

LaSHAWN JOHNSON, **Petitioner**

v. **Case No. 3:14-cv-514-DJH-CHL**

RANDY WHITE **Respondent**

Findings of Fact, Conclusions of Law, and Recommendation

I. Introduction

LaShawn Johnson filed a petition for writ of habeas corpus. Pet. (DN 1). The Respondent, Randy White, responded to the petition. Resp. (DN 15). Johnson amended his petition, which the Court construed as a reply. Reply (DN 20). District Judge David J. Hale referred this matter to the undersigned for findings of fact, conclusions of law, and a recommendation. Order (DN 10).

For the reasons below, the undersigned recommends that the Court **DENY** Johnson's petition for writ of habeas corpus.

II. Findings of fact

A. The underlying crime

The Kentucky Supreme Court outlined the facts in the light most favorable to the verdict:

> Around midnight, the victim woke up in his apartment and discovered that an intruder was in his kitchen. The intruder pointed a gun at the victim and ordered him to lie on the floor. The intruder then ordered the victim to give him money. Once the victim remembered that he had lost his wallet, the victim offered the intruder his car keys instead. Fearing that the intruder would not be satisfied with car keys and would not leave, the victim then grabbed the intruder and the two wrestled. The victim knocked the gun under the couch, and pulled the intruder toward the door, which the victim unlocked with a key. The victim later recalled the intruder saying, "I just want my piece then I'll leave" and assumed that "piece" meant the gun. After opening the door, the victim fled, spraining his ankle on the stairs.

> Shortly after the victim escaped the apartment, another man saw him dressed only in boxer shorts, standing on a nearby street corner, acting erratically, and waving at cars before collapsing. The man also recalled that the victim appeared to have been "pummeled by a blunt object" and that the victim's face and feet were bleeding. After the victim told the man what happened, the man called police and offered to get some clothing for the victim to wear. The victim refused the offer of clothing until police arrived because he feared the intruder would return. The man stated that the victim looked terrified and started vomiting, possibly from fear or pain.
>
> Police arrived and spoke briefly with the victim. One police detective later testified that the victim appeared to be "in shock," bewildered, and obviously beaten. Although the victim was too shaken at that point to talk at length, he told police that the crime happed at his home and gave a general description of the intruder as a dark-skinned African American male with a narrow face, wearing dark clothes and an unusual hat and carrying a gun. The victim later described the gun in his trial testimony as a black gun with a square handle and square barrel and characterized it as a handgun.

Johnson v. Commonwealth, 327 S.W.3d 501, 503 (Ky. 2010). After the victim spoke with police officers at the scene, an ambulance transported him to the hospital where he was treated for a sprained ankle and given crutches. *Id.*

B. The investigation

A couple of days after the incident, the victim turned a gun "clip" over to police. *Id.* at 504. The victim said he found it under his couch. *Id.*

The police determined that the intruder had likely entered through a kitchen window. *Id.* Outside the window, they found a soft drink cup with a straw. *Id.* The detective determined that the straw and cup had come from a nearby gas station or convenience store. *Id.* The surveillance tape at the gas station revealed that a man whose appearance was similar to the victim's description of the intruder had bought a soft drink shortly before the incident. *Id.* The detective used a still from that surveillance footage and showed the still to fellow officers. *Id.* One of the officers recognized the person in the surveillance video as Johnson. *Id.* The victim later saw this photo and said the person in the video was the intruder. *Id.*

The police sent the cup, lid, and straw to the laboratory for DNA analysis. *Id.* An analyst tested the straw and found a match in the Combined DNA Index System database ("CODIS"). *Id.* The police obtained a search warrant for Johnson's DNA, which matched the DNA on the straw. *Id.*

C. Jury trial and direct appeal

A Kentucky grand jury indicted Johnson on charges of first-degree burglary and first-degree robbery. *Id.* at 505. The case proceeded to trial.

Johnson tendered proposed jury instructions on the lesser-included offenses of second-degree burglary and second-degree robbery. *Id.* The trial court denied this request and instructed the jury on the elements of first-degree burglary and first-degree robbery. *Id.*

On February 20, 2009, the jury convicted Johnson of first-degree burglary and first-degree robbery. *Id.* The jury also found that Johnson was a persistent felony offender in the first degree. *Id.* The trial court sentenced Johnson to twenty-five years. *Id.*

Johnson appealed to the Kentucky Supreme Court.[1] First, he argued that the trial court erred in denying his request to instruct the jury on the lesser-included offenses of second-degree burglary and second-degree robbery. *Id.* Second, he argued that his case must be remanded for an evidentiary hearing on his motion to suppress the DNA evidence. *Id.*

On December 16, 2010, the Kentucky Supreme Court affirmed Johnson's conviction. *Id.* at 512. The court rejected Johnson's argument that the trial court erred in refusing to instruct the jury on second-degree burglary and second-degree robbery. *Id.* at 505 – 08 ("We believe that the trial court properly denied instructions on these lesser-included offenses because these requested instructions were not warranted by the evidence, especially the overwhelming and

[1] The Kentucky Supreme Court hears direct appeals from circuit court judgments imposing sentences of twenty years or more. Ky. Const. § 110(2)(b).

uncontradicted evidence that the intruder caused the victim physical injury."). The court also rejected Johnson's argument that the trial court erred in admitting DNA evidence that he argued was illegally obtained. *Id.* at 511 – 12.

D. State court collateral attack

On November 17, 2011, Johnson moved the trial court to vacate his conviction and sentence. Mot. Vacate (DN 15-6). He also sought an evidentiary hearing. *Id.* at 3. Johnson alleged ineffective assistance of trial counsel.

1. Defense counsel was ineffective in his representation of the movant throughout the trial of this case.
2. Counsel failed to adequately investigate victim testimonies as to their credibility and justified [motivations] thereof.
3. Counsel failed to [adequately] prepare an effective trial strategy in this case.
4. Counsel committed "numerous" errors in this case and the cumulative effect of these errors resulted in prejudicing the [jury's] opinion of guilty in this case.
5. Judicial misconduct occurred in this case thereby prejudicing the outcome of this trial.
6. Prosecutorial misconduct occurred in this case thereby prejudicing the outcome of this trial.
7. DNA evidence was unlawfully admitted in this case.
8. Counsel failed to [ensure] that jury instructions included second degree offenses in Burglary and Robbery. (Lesser included offenses)
9. [Alleged] weapon in this case was not per statute a "dangerous weapon" capable of causing "serious bodily harm or death[.]"

Id. at 2 (brackets added).[2]

The trial court denied Johnson's motion to vacate in its entirety. *Johnson v. Commonwealth*, No. 2012-CA-000320-MR at 4 (Ky. Ct. App. 2013) (unpublished) (DN 15-10). Johnson appealed the trial court's denial of his post-conviction motion. Appellant's Br. (DN 15-7).

[2] The Kentucky Court of Appeals discussed Johnson's post-conviction motion as raising the following ineffective assistance of trial counsel arguments: (i) failed to adequately conduct a pre-trial investigation; (ii) failed to prepare for trial; (iii) permitted unlawful DNA evidence to be admitted at trial; and (iv) failed to ensure the jury was properly instructed. Ky. Ct. App. Op. 4 (DN 15-10). The court also said that Johnson claimed judicial misconduct, prosecutorial misconduct, insufficiency of the evidence, and cumulative error. *Id.*

The Kentucky Court of Appeals affirmed the trial court's denial of his post-conviction motion. Ky. Ct. App. Op. 1. The court rejected Johnson's ineffective assistance of counsel claim. *Id.* at 7. Johnson had not shown that his trial counsel's performance was deficient for failure to obtain the victim's medical records. *Id.* at 6. Johnson had also not shown that his trial counsel's failure to obtain a second-degree robbery instruction was deficient. *Id.* at 9.

The court rejected Johnson's other ineffective assistance of counsel claims because those claims lacked sufficient supporting facts. *Id.* at 6 – 7. The court rejected Johnson's directed verdict argument because he improperly raised a claim of error related to a trial court ruling in his post-conviction collateral attack. *Id.* at 8. Finally, the court of appeals held that the trial court did not err in refusing to conduct an evidentiary hearing or appointing counsel. *Id.* at 10.

On April 9, 2014, the Kentucky Supreme Court denied Johnson's petition for discretionary review. Ky. Order Apr. 9, 2014 (DN 15-11).

On July 18, 2014, Johnson filed this petition for writ of habeas corpus.

III. Standard of Review

A. Applicable statutes

The Antiterrorism and Effective Death Penalty Act governs the Court's review of a state court prisoner's petition for writ of habeas corpus. 28 U.S.C. § 2254. The Court presumes that a factual issue determined by the state court is correct. *Id.* § 2254(e)(1).

The statute's structure and design "confirm that state courts are the principal forum for asserting constitutional challenges to state convictions." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). With this design in mind, the Court may only grant a writ "in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents." *Id.* at 102.

As for claims that the state court reviewed on the merits, the Court shall not grant a petition unless the state court's 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.

22 U.S.C. § 2254(d).

Under the "contrary to" clause, "a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts." *Adams v. Bradshaw*, 826 F.3d 306, 310 (6th Cir. Jun. 13, 2016) (internal quotation marks and brackets omitted). "Under the unreasonable application clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the petitioner's case." *Id.* (internal quotation marks and brackets omitted).

B. Exhaustion and procedural default

Under the exhaustion doctrine, the Court shall not grant the writ if the petitioner has not exhausted the remedies available in the state court. 28 U.S.C. § 2254(b)(1)(A). A petitioner has not exhausted the remedies available in state court when the petitioner has the right under the state's law to raise the issue. *Id.* § 2254(c). A petitioner must "give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition." *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). Comity "dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief." *Id.* at 844.

A related, but separate, doctrine is the procedural default doctrine. Under the first type of procedural default, a petitioner procedurally defaults a claim by failing to comply with the state's procedural rules. *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000); *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). "Proper exhaustion requires that a petitioner present every claim in the federal petition to each level of the state courts, including the highest court to which the petitioner is entitled to appeal." *Rayner v. Mills*, 685 F.3d 631, 643 (6th Cir. 2012). If a petitioner procedurally defaults, the petitioner must demonstrate cause and prejudice for the state-court default. *Edwards*, 529 U.S. at 451; *Coleman*, 501 U.S. at 750.

"If a petitioner has not exhausted his claims, but is now procedurally barred from doing so, he must show 'cause for the noncompliance' and 'actual prejudice resulting from the alleged constitutional violation.'" *Rayner*, 685 F.3d at 643 (quoting *Wainwright v. Sykes*, 433 U.S. 72, 84 (1977)). The exhaustion requirement applies only "refers to remedies still available at the time of the federal petition." *Engle v. Isaac*, 456 U.S. 107, 125 n.28 (1982).

C. Kentucky procedures for collateral attacks

Kentucky provides two potential mechanisms for a post-conviction collateral attack. The first is Kentucky Rule of Criminal Procedure 11.42, which says in part:

> (1) A prisoner in custody under sentence ... who claims a right to be release on the ground that the sentence is subject to collateral attack may at any time proceed directly by motion in the court that imposed the sentence to vacate, set aside or correct it....
> (3) The motion shall 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. Final "disposition of a movant's RCr 11.42 motion shall conclude all issues which could reasonably have been presented in the same proceeding." *Foley v. Commonwealth*, 425 S.W.2d 880, 884 (Ky. 2014); *cf.*, *Thomas v. Meko*, 828 F.3d 435, 437 (6th Cir. Jul. 7, 2016) ("Unlike Rule 11.42, Rule 60.02(f) contains no bar on successive motions.").

The second mechanism is Kentucky Rule of Civil Procedure 60.02. Under 60.02(b), a defendant may move for relief from a judgment based on "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial." Ky. R. Civ. P. 60.02(b). Under 60.02(f), a defendant may move for relief by presenting "any other reason of an extraordinary nature justifying relief." Ky. R. Civ. P. 60.02(f).

Rule 60.02 "is for relief that is not available by direct appeal and not available under RCr 11.42." *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). Rule 60.02 "is not intended merely as an additional opportunity to relitigate the same issues which could reasonably have been presented by direct appeal or RCr 11.42 proceedings." *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997) (internal quotation marks omitted).

Kentucky does not allow a party to raise an issue in a post-conviction proceeding that the party raised on direct appeal. *Bowling v. Commonwealth*, 981 S.W.2d 545, 549 (Ky. 1998). Similarly, Kentucky does not allow a party to raise an issue in a post-conviction proceeding that the party should have raised on direct appeal. *Brown v. Commonwealth,* 788 S.W.2d 500, 501 (Ky. 1990) (for 11.42 motions); *McQueen*, 948 S.W.2d at 416 (for 60.02 motions).

IV. Conclusions of Law

Johnson's petition raises four grounds for relief.

A. Ground one: the BB gun

1. Whether Johnson procedurally defaulted his argument regarding the jury instructions

Ground one of Johnson's petition alleges that the trial court erred in refusing to submit the factual question of whether the BB gun[3] was a deadly weapon to the jury. Pet. at 5.

[3] The Kentucky Supreme Court referred to the weapon used by the intruder as either a "BB or pellet gun." *See, e.g.*, 327 S.W.3d at 506. The Court refers to the weapon as a BB gun because Johnson calls it a BB gun in his petition. *See, e.g.*, Pet. 5.

As an alternative to its merits argument, the respondent argues that Johnson failed to adequately raise this argument before the Kentucky Supreme Court, and now he has procedurally defaulted that claim. Resp. 20 (DN 15).

As described below in Part IV(A)(2), the Kentucky Supreme Court extensively analyzed the trial court's jury instructions. *See* 327 S.W.3d at 505 – 07. That extensive analysis included a citation to the Kentucky case requiring a jury to find whether a person was armed with a deadly weapon. *See id.* at 507 n.14 (citing *Thacker v. Commonwealth*, 194 S.W.3d 287, 290 – 91 (Ky. 2006)). The court noted that upon Johnson's successful motion, the trial court's instructions complied with *Thacker* in leaving the deadly weapon finding to the jury. *See id.*

The undersigned finds that Johnson sufficiently raised the argument regarding requiring whether the BB gun was a deadly weapon to the trial court and the Kentucky Supreme Court. Accordingly, the undersigned concludes that Johnson exhausted his available state court remedies regarding the jury instructions on the BB gun. *See* 28 U.S.C. § 2254(b)(1)(A).

2. Whether Johnson has shown that the jury instructions were contrary to, or an unreasonable application of, federal law

Johnson argues that the trial court erred in withholding from the jury the question of whether the BB gun was a deadly weapon. Reply 2. Johnson argues that the Kentucky Supreme Court's decision affirming the jury instructions was "contrary to" clearly established federal precedent. Reply 2. Johnson points to the Kentucky Supreme Court's acknowledgement that whether the BB gun was a deadly weapon was a question of fact for the jury to decide. *Id.* at 5.[4]

[4] Johnson does not raise an argument regarding whether the BB gun was a dangerous instrument. Accordingly, the undersigned only addresses the dangerous instrument element as it relates to the rest of the jury instructions.

The respondent argues that the Kentucky Supreme Court's decision to affirm the trial court's jury instructions is entitled to deference under the Anti-Terrorism and Effective Death Penalty Act. Resp. 20. The undersigned agrees.

Contrary to Johnson's assertion in his petition, the trial court did not refuse to submit to the jury the question of whether the BB gun was a deadly weapon. Instead, after a successful defense motion, the trial court left the question of whether the BB gun was a deadly weapon to the jury. *See* 327 S.W.3d at 507.

Specifically, the trial court instructed the jury that it should find Johnson guilty of first-degree burglary[5] if it found, among the other elements, one of the following: (1) that Johnson was armed with a deadly weapon; (2) that Johnson caused physical injury to any person who was not a participant in the crime; (3) or that Johnson used or threatened the use of a dangerous instrument against a person who was not a participant in the crime. *See id.* at 506 – 07. Then, the trial court instructed the jury that it should find Johnson guilty of first-degree robbery[6] if it

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[5] Kentucky law defines first-degree burglary as:

(1) A person is guilty of burglary in the first degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a building, and when in effecting entry or while in the building or in the immediate flight therefrom, he or another participant in the crime:
   (a) Is armed with explosives or a deadly weapon; *or*
   (b) Causes physical injury to any person who is not a participant in the crime; *or*
   (c) Uses or threatens the use of a dangerous instrument against any person who is not a participant in the crime.

Ky. Rev. Stat. § 511.020 (emphasis added).

[6] Kentucky law defines first-degree robbery as:

(1) A person is guilty of robbery in the first degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft and when he:
   (a) Causes physical injury to any person who is not a participant in the crime; *or*
   (b) Is armed with a deadly weapon; *or*
   (c) Uses or threatens the immediate use of a dangerous instrument upon any person who is not a participant in the crime.

Ky. Rev. Stat. § 515.020 (emphasis added).

found, among the other elements, one of the following: (1) that Johnson was armed with a deadly weapon; (2) that Johnson caused physical injury to any person who was not a participant in the crime; or (3) that Johnson used or threatened the use of a dangerous instrument against a person who was not a participant in the crime. *See id.* at 506 – 07.

The trial court issued a separate jury instruction defining deadly weapon[7] and dangerous instrument.[8] *Id.* at 507 n.14. The Kentucky Supreme Court noted that even if the jury had a reasonable doubt as to whether Johnson was armed with a deadly weapon, there was evidence to support convictions for first-degree robbery and first-degree burglary under two alternate theories: that Johnson was armed with a dangerous instrument, or that Johnson caused physical injury to the victim. *Id.* at 507.

The Kentucky Supreme Court held that the trial court properly instructed the jury on the elements of first-degree robbery and first-degree burglary, and that the trial court properly declined to instruct the jury on the elements of second-degree robbery and second-degree burglary. This decision to affirm the jury instructions was consistent with U.S. Supreme Court precedent that requires a jury to find each element of an offense beyond a reasonable doubt. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

The undersigned concludes that Johnson has not shown that the Kentucky Supreme Court's decision affirming the trial court's jury instructions was contrary to, or an unreasonable application of, clearly established federal law.

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[7] A "deadly weapon" is, among other things, "any weapon from which a shot, readily capable of producing death or serious physical injury, may be discharged." Ky. Rev. Stat. § 500.080(4)(b).

[8] A "dangerous instrument" is any instrument, including the body, which is "readily capable of causing death or serious physical injury." Ky. Rev. Stat. § 500.080(3).

Accordingly, the undersigned recommends that the Court deny Johnson's petition with respect to ground one.

B. Ground two: the DNA evidence

Johnson argues that the DNA evidence admitted at trial violated his constitutional rights as the result of an illegal search and seizure. Pet. 7. He argues that his DNA sample had been improperly entered into CODIS in a case where he was not formally charged with a crime. *Id.*

Johnson raised this argument before the Kentucky Supreme Court. The Kentucky Supreme Court rejected it, holding: "the trial court properly denied the motion to suppress because (1) the alleged improper entry into CODIS would only involve a statutory violation and not a constitutional violation and (2) the DNA evidence actually presented at trial was properly gathered in a manner not depending on any improper CODIS entry." 327 S.W.3d at 508.

Under *Stone v. Powell*, "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that the evidence obtained in an unconstitutional search or seizure was introduced at his trial." 428 U.S. 465, 494 (1976).

The undersigned finds that Johnson had an opportunity for full and fair litigation of his Fourth Amendment claim, which the Kentucky Supreme Court addressed on the merits. Therefore, the undersigned concludes that Johnson's ground two claim regarding admission of the DNA evidence is not cognizable in a federal habeas petition.

Accordingly, the undersigned recommends that the Court deny Johnson's habeas petition with regard to ground two.

C. Ground three: ineffective assistance of counsel relating to self-representation

Johnson argues that his trial counsel was constitutionally ineffective for refusing to inform the trial court of his desire to represent himself or to request a hearing under *Faretta v.*

*California,*422 U.S. 806, 836 (1975). Pet. 9. Johnson did not raise this claim to the Kentucky Supreme Court on direct appeal, to the trial court in his post-conviction collateral attack, or to the Kentucky Court of Appeals in his post-conviction appeal.

The respondent argues that Johnson procedurally defaulted this claim because he did not raise it on direct appeal or in his state court collateral attack. Resp. 22. The respondent says state law would not permit Johnson to further pursue the claim because Johnson could not raise the claim via a successive state collateral attack under Kentucky Rule of Criminal Procedure 11.42 or Kentucky Rule of Civil Procedure 60.02. *Id.* at 24.

The undersigned agrees that Johnson cannot now raise this claim because he failed to exhaust his state court remedies. Johnson would be precluded from raising this ineffective assistance of counsel claim in a successive 11.42 collateral attack because it could have been raised in his first motion. *Foley*, 425 S.W.2d at 884. Similarly, Johnson would be precluded from raising this ineffective assistance of counsel claim in a 60.02 motion because it reasonably have been presented in his previous 11.42 motion which contained other allegations of ineffective assistance of counsel. *McQueen*, 948 S.W.2d at 416.

The undersigned concludes that Johnson has not exhausted the remedies available in state court on his ground three claim relating to self-representation because he failed to raise the issue to the Kentucky state courts.

In his reply, Johnson argues that he can show good cause for the failure because he did not have counsel during his state-court collateral attack, and the absence of the attorney caused the procedural default. Reply 13. He also argues that if he had known of his right to self-representation, he would have asserted that right before trial. *Id.* at 16.

Ineffective assistance of counsel can be cause for procedural default. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). However, a petitioner must present the claim of ineffective assistance to the state courts before using it as a cause for procedural default. *Id.* at 489.

Here, Johnson has not presented this ineffective assistance of counsel claim to the state court. Therefore, he cannot show cause for the failure to exhaust this claim.

The undersigned concludes that Johnson has not shown good cause for the failure to present this particular ineffective assistance of counsel claim—regarding his trial counsel's failure to assert Johnson's right to self-representation— to the state courts. Therefore, he has procedurally defaulted his claim of ineffective assistance of counsel raised in ground three.

Accordingly, the undersigned recommends that the Court deny Johnson's petition with regard to ground three.

D. Ground four: ineffective assistance of counsel for failing to ask the victim questions about his injury

In ground four, Johnson argues that his trial counsel ignored his requests to ask the victim questions about his injury.[9] In Johnson's brief in his post-conviction appeal, he argued that his trial counsel should have cross-examined the victim to shed light on the victim's injury. Appellant's Br. 4. Johnson also argued that his trial counsel was ineffective for failing to secure the victim's medical records. Ky. Ct. App. Op. 5.

The respondent argues that Johnson procedurally defaulted this claim because he did not raise it on direct appeal or in his state-court collateral attack. Resp. 24. The respondent says that state law would not permit Johnson to further pursue the claim because Johnson could not raise the claim via a successive state collateral attack under Kentucky Rule of Criminal Procedure 11.42 or Kentucky Rule of Civil Procedure 60.02. Resp. 24.

[9] Johnson included some of these allegations in ground three as well.

The undersigned concludes that Johnson exhausted his available state court remedies on his ineffective assistance of counsel claim for his counsel's alleged failure to ask the victim questions about his injury. The undersigned also concludes that Johnson exhausted his available state court remedies on his ineffective assistance of counsel claim for his trial counsel's alleged failure to secure the victim's medical records.

The Kentucky Court of Appeals discussed the three individuals who testified at Johnson's trial as to the victim's injury. Ky. Ct. App. Op. 5. The Kentucky Court of Appeals rejected Johnson's argument that his counsel should have obtained the victim's medical records: "In light of this evidence, it was not unreasonable for trial counsel not to obtain the victim's hospital records which, in all likelihood, would not have been exculpatory in nature but would have merely corroborated the statements of all three individuals." *Id.* at 6. The court held, "In sum, Johnson has not demonstrated that his trial counsel's pre-trial investigation or subsequent defense fell below an objective standard of reasonableness." *Id.* at 7.

The opinion of the Kentucky Court of Appeals on this ineffective assistance of counsel claim is entitled to deference. Johnson has not shown that the court's opinion was contrary to the ineffective assistance of counsel standard under *Strickland v. Washington*, nor has he shown that the opinion of the Kentucky Court of Appeals was an unreasonable application of that standard. *See* 466 U.S. 668, 687 (1984).

The undersigned concludes that Johnson has not shown that the opinion of the Kentucky Court of Appeals affirming the denial of his ineffective assistance of counsel claim was contrary to, or an unreasonable application of, clearly established federal law.

Accordingly, the undersigned recommends that the Court deny Johnson's petition with regard to ground four.

E. Ground five: ineffective assistance of counsel for failing to investigate sentencing laws

Johnson argues that his trial counsel was constitutionally ineffective for failing to investigate sentencing laws. Pet. 12. He argues that during the sentencing phase of his trial, his trial counsel failed to object to the testimony of a parole officer regarding Johnson's ability to earn work credit on his sentence. *Id.*

The respondent argues that Johnson procedurally defaulted this ineffective assistance of counsel claim because he did not raise it on direct appeal or in his state-court collateral attack. Resp. 26. The respondent says that state law would not permit Johnson to further pursue the claim because Johnson could not raise the claim via a successive state collateral attack under Kentucky Rule of Criminal Procedure 11.42 or Kentucky Rule of Civil Procedure 60.02. *Id.*

The undersigned agrees that Johnson cannot now raise this claim for his trial counsel's alleged failure to investigate sentencing laws because he failed to exhaust his state court remedies. Johnson would be precluded from raising this ineffective assistance of counsel claim in a successive 11.42 collateral attack because it could have been raised in his first motion. *Foley*, 425 S.W.2d at 884. Similarly, Johnson would be precluded from raising this ineffective assistance of counsel claim in a 60.02 motion because it could reasonably have been presented in his previous 11.42 motion which contained other allegations of ineffective assistance of counsel. *McQueen*, 948 S.W.2d at 416.

In his reply, Johnson argues that he can show good cause for the failure because he did not have counsel during his state-court collateral attack, and the absence of the attorney caused the procedural default. Reply 13. He also argues that if he had known of his right to self-representation, he would have asserted that right before trial. Reply 16. As discussed above in

Part IV(C), a petitioner must first present a claim of ineffective assistance of counsel to the state courts before it as cause for a procedural default. He has not done so.

The undersigned concludes that Johnson has not exhausted the remedies available in state court on ground five because he failed to raise the issue to the Kentucky state courts. The undersigned further concludes that Johnson has not shown good cause for the failure to present this particular ineffective assistance of counsel claim—regarding his trial counsel's alleged failure to investigate sentencing laws—to the state courts. Therefore, he has procedurally defaulted his claim of ineffective assistance of counsel relating to the probation officer's testimony at the sentencing phase of his trial.

Accordingly, the undersigned recommends that the Court deny Johnson's petition with regard to ground five.

V. Recommendation

For these reasons, the undersigned **RECOMMENDS** that the Court **DENY** Johnson's petition for writ of habeas corpus and **DISMISS** the petition, with prejudice. The undersigned also recommends that the Court **DENY** a Certificate of Appealability.

Notice

Pursuant to 28 U.S.C. § 636(b)(1)(B)-(C), the undersigned Magistrate Judge hereby files with the Court the instant findings and recommendations. A copy shall forthwith be electronically transmitted or mailed to all parties. 28 U.S.C. § 636(b)(1)(C). Within fourteen (14) days after being served, any party may serve and file specific written objections to these findings and recommendations. *Id.*; Fed. R. Civ. P. 72(b)(2). Failure to file and serve objections to these findings and recommendations constitutes a waiver of a party's right to appeal. *United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981); *see also Thomas v. Arn*, 474 U.S. 140 (1985). A party may respond to another party's objections within fourteen (14) days after being served with a copy of the objections. Fed. R. Civ. P. 72(b)(2).

cc: Counsel of record

Colin Lindsay, MagistrateJudge
United States District Court

December 15, 2016

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