Nos. 18-5747/19-5179

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 26, 2019
DEBORAH S. HUNT, Clerk

KEVIN HENDERSON,

Petitioner-Appellant,

v.

DON BOTTOM,

Respondent-Appellee.

ORDER

Before: ROGERS, WHITE, and STRANCH, Circuit Judges.

Kevin Henderson petitions for rehearing en banc of this court's order entered June 28, 2019, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

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ORDER

In this consolidated appeal, Kevin Henderson, a pro se Kentucky prisoner, appeals (1) the district court's judgment denying his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 and (2) the district court's order denying his Federal Rule of Civil Procedure 59(e) motion to alter or amend the judgment denying his petition. Henderson moves this court for a certificate of appealability ("COA"), for leave to proceed in forma pauperis on appeal, and for the appointment of counsel.

In 1998, a jury convicted Henderson of first-degree robbery and wanton murder. He was convicted along with his co-defendant, Cedric O'Neal, following the shooting death of the fifteen-year-old victim. The prosecution's theory at trial was that Henderson gave a handgun to O'Neal, who shot the victim in order to take his shoes. Henderson was sentenced to life in prison. The Kentucky Supreme Court affirmed on direct appeal. *Henderson v. Commonwealth*, No. 1998-SC-0624-MR (Ky. Dec. 20, 2001).

Henderson then filed a motion for relief from judgment pursuant to Kentucky Rule of Civil Procedure 60.02, which the trial court denied. The Kentucky Court of Appeals affirmed, *Henderson v. Commonwealth*, No. 2004-CA-001988-MR, 2006 WL 1046316 (Ky. Ct. App. Mar. 31, 2006), and the Kentucky Supreme Court denied Henderson's motion for discretionary review.

Meanwhile, Henderson had filed a motion to vacate pursuant to Kentucky Rule of Criminal Procedure 11.42, which the trial court denied. The Kentucky Court of Appeals affirmed, *Henderson v. Commonwealth*, No. 2010-CA-002295-MR (Ky. Ct. App. Oct. 26, 2012), and the Kentucky Supreme Court denied Henderson's motion for discretionary review.

While the appeal from the denial of his Rule 11.42 motion was pending, Henderson filed a motion to vacate his conviction nunc pro tunc. The trial court denied the motion. Henderson then filed a motion for relief; the trial court construed the motion as a Rule 60.02 motion and denied it. The Kentucky Court of Appeals affirmed the trial court's denial of these motions, *Henderson v. Commonwealth*, No. 2014-CA-001059-MR, 2015 WL 1433301 (Ky. Ct. App. Mar. 27, 2015), and the Kentucky Supreme Court denied Henderson's motion for discretionary review.

In 2016, Henderson filed the present § 2254 petition, which a magistrate judge construed as raising ten claims for relief. The magistrate judge recommended that the petition be denied on the ground that Henderson's claims were procedurally defaulted, were reasonably adjudicated on the merits by the state courts, or lacked merit.

The district court overruled Henderson's objections to the magistrate judge's report and recommendation, denied the petition, and declined to issue a COA. Thereafter, the district court denied Henderson's motion to alter or amend the judgment, filed pursuant to Federal Rule of Civil Procedure 59(e) and declined to issue a COA.

This court may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). When the district court denies relief on procedural grounds without reaching the underlying constitutional claims, the petitioner can satisfy § 2253(c)(2) by showing 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). If a state court previously adjudicated the petitioner's claims on the merits, the district court may not grant habeas relief unless the state court's adjudication resulted in "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *see Harrington v. Richter*, 562 U.S. 86, 100 (2011).

Claim One—Denial of Separate Trials

Henderson's first claim is that the denial of separate trials denied him due process. Specifically, he argues that a separate trial was required because: (1) he was previously represented by an attorney who had also represented O'Neal and who was disqualified by the trial court; (2) his and O'Neal's defenses were "antagonistic"; and (3) prejudice arose through the improper introduction of certain prior bad acts evidence through O'Neal.

The Kentucky Supreme Court rejected this claim on direct appeal. With respect to Henderson's first argument, the court concluded that Henderson's "broad allegations of prejudice" concerning his former attorney's prior representation of O'Neal were "based on 'pure[] speculation' that O'Neal's trial strategy was shaped by information given to him by his former attorney regarding [Henderson's] trial strategy." *Henderson*, No. 1998-SC-0624-MR (first alteration in original) (quoting *Dishman v. Commonwealth*, 906 S.W.2d 335, 340 (Ky. 1995); *Skinner v. Commonwealth*, 864 S.W.2d 290, 294 (Ky. 1993)). In regard to Henderson's second argument, the court found that he failed to show that the jury was misled or confused by the allegedly antagonistic defenses. *Id.* Indeed, the jury rejected O'Neal's defense—namely, that Henderson was the one who shot the victim—insofar as it did not find beyond a reasonable doubt that Henderson had shot the victim. *See id.* The jury did, however, find beyond a reasonable doubt that Henderson participated in the robbery that resulted in the victim's death, *see id.*, which was sufficient to find him guilty of wanton murder, *see Bennett v. Commonwealth*, 978 S.W.2d 322, 327 (Ky. 1998). Finally, the Kentucky Supreme Court declined to address Henderson's third argument because he failed to raise it prior to trial. *Henderson*, No. 1998-SC-0624-MR.

Reasonable jurists could not debate the district court's conclusion that the Kentucky Supreme Court's rejection of Henderson's first claim was not contrary to or an unreasonable application of clearly established federal law or based on an unreasonable determination of the facts. There is a preference for joint trials for defendants who are jointly charged in the same proceeding, *Zafiro v. United States*, 506 U.S. 534, 537 (1993), and "[c]ourts should grant a severance 'only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence,'" *Stanford v. Parker*, 266 F.3d 442, 458-59 (6th Cir. 2001) (quoting *Zafiro*, 506 U.S. at 539). "A defendant is not entitled to severance merely because he might have had a better chance of acquittal in a separate trial," or because a co-defendant will present an antagonistic defense. *Id.* In view of this authority and Henderson's failure either to identify a specific trial right that was violated by the joint trial or to show that the joint trial prevented the jury from making a reliable judgment about his guilt or innocence, reasonable jurists would agree that he has not met his "heavy burden" for establishing that he is entitled to habeas relief on this claim. *United States v. Horton*, 847 F.2d 313, 316 (6th Cir. 1988).

Claim Two—Prior Bad Acts

Next, Henderson claims that the trial court erred in admitting certain prior bad acts evidence, in violation of Kentucky Rule of Evidence 404(b). The evidence was introduced through O'Neal, who testified about Henderson's prior efforts to get O'Neal to deal drugs, break into cars, handle guns, and rob others. The Kentucky Supreme Court determined that the trial court did not abuse its discretion in admitting this evidence, which was "introduced not for the inadmissible purpose of proving [Henderson's] criminal predisposition, but rather for the purpose of demonstrating the relationship between the two co-defendants." *Henderson*, No. 1998-SC-0624-MR.

"There is no clearly established Supreme Court precedent which holds that a state violates due process by permitting propensity evidence in the form of other bad acts evidence." *Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003). Thus, the trial court's decision to admit the prior bad

acts evidence could not have been "contrary to" federal law as determined by the Supreme Court. *See* 28 U.S.C. § 2254(d)(1). Because the trial court's admission of the "prior acts" evidence did not "so perniciously affect the prosecution of [Henderson's] criminal case as to deny [him] the fundamental right to a fair trial," *Kelly v. Withrow*, 25 F.3d 363, 370 (6th Cir. 1994), jurists of reason could not debate the district court's rejection of this claim.

Claim Three—Actual Innocence

Henderson's next claim is that he is actually innocent. According to Henderson, O'Neal provided false testimony at trial, and because there was "no [other] evidence or eye witness testimony presented at trial, . . . it is highly doubtful that [Henderson] would have been convicted of any offense beyond a reasonable doubt" absent O'Neal's false testimony. No reasonable jurist could debate the district court's rejection of this claim because actual innocence has not been recognized as an independent ground for habeas relief in a non-capital case. *See Herrera v. Collins*, 506 U.S. 390, 400 (1993); *Hodgson v. Warren*, 622 F.3d 591, 601 (6th Cir. 2010).

Claim Nine—False Testimony

Henderson also claims that he was denied his right to a fair trial through the introduction of false testimony. The district court (1) viewed this claim as a variation of Henderson's claim that he is actually innocent in view of O'Neal's allegedly false testimony and (2) denied habeas relief on the claim. It concluded that the state courts reasonably rejected Henderson's false-testimony claim in view of his failure to establish the knowing use of false testimony or that the result of his trial would have been different had the allegedly false testimony been omitted. Reasonable jurists could not disagree.

Claim Four—Bail Pending Appeal

Next, Henderson claims that he should have been released on bail pending appeal and pending his habeas proceedings pursuant to the Bail Reform Act in view of his actual innocence. Because "the Bail Reform Act . . . is applicable only to federal prisoners," *Bloss v. Michigan*, 421 F.2d 903, 905 (6th Cir. 1970), reasonable jurists could not debate the district court's rejection of this claim.

Claims Five and Six—Ineffective Assistance of Trial Counsel

Henderson's next two claims are that his trial counsel was ineffective. To establish ineffective assistance of counsel, a defendant must show deficient performance and resulting prejudice. *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009); *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "The standards created by *Strickland* and § 2254(d) are both 'highly deferential' and when the two apply in tandem, review is 'doubly' so." *Richter*, 562 U.S. at 105 (citing *Strickland*, 466 U.S. at 689; *Knowles*, 556 U.S. at 123). Thus, on habeas review, "[w]hen § 2254(d) applies, 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.*

Claim Five

Henderson's first ineffective-assistance claim is that his attorney failed to discover and investigate the lead detective's (Detective Eastham's) grand jury testimony concerning an event that occurred the day before the crimes. Detective Eastham testified to the grand jury "that he would describe how one of [the] police's suspects had seen [a pair of shoes worn by the victim the day before the crimes] and [that the suspect had] decided that he was going to get [those shoes]." According to Henderson, this testimony "shows that 'something happened the day before [the crimes]' that had attracted the killers/robbers to the victim's shoes and . . . 'raised questions that demanded answers, answers which could have exonerated'" him.

The Kentucky Court of Appeals rejected this claim, reasoning that Henderson's argument "that further investigation of this matter 'might have' revealed exculpatory information" was "speculati[ve]." *Henderson*, No. 2010-CA-002295-MR. The court added that Henderson "fail[ed] to specify who, if anyone, had additional information regarding interest in the victim's shoes on the day before his murder beyond those witnesses . . . who testified at trial, or how that information would have been exculpatory." *Id.* Finally, to the extent that Henderson claimed that investigation into Detective Eastham's testimony would show that another person, Billy McAtee, was involved in the crimes, the Kentucky Court of Appeals noted that Henderson's attorney "actually spent time at trial exploring the possibility that McAtee—not [Henderson]—was involved in the subject

crimes." *Id.* In doing so, Henderson's attorney was able to elicit several statements that "failed to implicate [Henderson] as a participant" in the crimes and one statement in which McAtee "admitted to being at the crime scene with O'Neil [sic] when the victim was shot." *Id.*

The district court found that the Kentucky Court of Appeals' decision was reasonable, echoing the state court's finding that Henderson failed to show that an investigation into Detective Eastham's testimony would have led to exculpatory evidence. Indeed, Henderson's assertion that such an investigation would yield "answers" that "could have exonerated" him is wholly speculative, and "speculative argument[s] [are] insufficient to support an ineffective-assistance claim." *Fautenberry v. Mitchell*, 515 F.3d 614, 634 (6th Cir. 2008). Jurists of reason therefore could not debate the district court's conclusion that the state court's rejection of this ineffective-assistance claim was not contrary to or an unreasonable application of *Strickland* and was not based on an unreasonable determination of the facts.

Claim Six

Henderson also claims that his attorney was ineffective because he failed to discover and raise objections to false, misleading, or perjured grand jury testimony. In particular, Henderson claims that his attorney should have raised a challenge to Detective Eastham's testimony that Henderson had prior drug and weapons arrests because Henderson in fact had no such arrests.

In rejecting this claim, the Kentucky Court of Appeals reasoned that, even assuming that Detective Eastham's testimony was false, Henderson failed to show that the indictment would not have issued against him in view of the "ample evidence [that] was presented to the grand jury implicating [him] in the subject murder and robbery." *Henderson*, No. 2010-CA-002295-MR. And even if counsel had successfully moved to dismiss the indictment on the basis of this allegedly false testimony, "the Commonwealth would still have been able to re-indict [Henderson], [thereby] negat[ing] any claim of actual prejudice." *Id.*

The district court concluded that the Kentucky Court of Appeals' rejection of this ineffective-assistance claim was not contrary to or an unreasonable application of *Strickland* and was not based on an unreasonable determination of the facts. Even if Henderson could prove that

Detective Eastham testified falsely about Henderson's prior arrests—which he did not—he could not show prejudice (i.e., that the result of his trial would have been different) in view of the fact that the Commonwealth was entitled to re-indict him without consideration of the purportedly false testimony. Under these circumstances, reasonable jurists could not disagree with the district court's resolution of this claim.

Claim Seven—Evidentiary Hearing

Henderson also claims that the trial court erred in failing to hold an evidentiary hearing on his Rule 11.42 motion to vacate. Such a claim is not cognizable on federal habeas review. *See Cress v. Palmer*, 484 F.3d 844, 853 (6th Cir. 2007) (noting that there is no federal constitutional right to state post-conviction proceedings and that any errors in state post-conviction proceedings are an attack on matters collateral to the petitioner's detention and thus are not cognizable on federal habeas review (citing *Kirby v. Dutton*, 794 F.2d 245, 246-47 (6th Cir. 1986))).

Claims Eight and Ten—Procedural Default

The district court determined that Henderson's remaining claims (claims eight and ten) are procedurally defaulted. Henderson's eighth claim is that his trial counsel was ineffective for failing to object to the allegedly erroneous jury instructions, and his tenth claim is that his trial counsel was ineffective "at all junctures," that his appellate counsel was ineffective for failing to raise certain issues on appeal, and that his post-conviction counsel was ineffective for failing to raise certain issues during his collateral proceedings.

> [Where] a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice . . . or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991). For the procedural default rule to apply, the petitioner must not only have violated a state procedural rule, "but the state court must also have based its decision on the procedural default." *Simpson v. Jones*, 238 F.3d 399, 407 (6th Cir. 2000).

That is precisely what happened here. In its 2015 order affirming the district court's denial of Henderson's motion to vacate his conviction nunc pro tunc and motion for relief (construed as

a Rule 60.02 motion), the Kentucky Court of Appeals agreed with the Commonwealth that "Henderson's motions"—including the claims raised therein, e.g., the present eighth and tenth claims—"were procedurally barred because they were successive attempts to raise claims that either were, could have been, or should have been raised in the direct appeal, the first [Rule] 60.02 motion or the prior [Rule] 11.42 motion." *Henderson*, 2015 WL 1433301, at *1. The Kentucky Court of Appeals, in the "last explained state court judgment" to address these claims, therefore invoked an independent and adequate state procedural ground to deny relief. *Howard v. Bouchard*, 405 F.3d 459, 475-76 (6th Cir. 2005); *see McDaniel v. Commonwealth*, 495 S.W.3d 115, 121 (Ky. 2016) (noting that, generally, under Rule 11.42(3), successive Rule 11.42 motions are not allowed); *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983) (providing that a movant may not raise arguments in a Rule 60.02 motion that should have been raised in a prior Rule 11.42 motion). And at this point, no state remedies remain. *See McDaniel*, 495 S.W.3d at 121; *Gross*, 648 S.W.2d at 856; *see also Cardwell v. Commonwealth*, 354 S.W.3d 582, 585 (Ky. Ct. App. 2011) ("Our case law has long held that we will not consider successive motions to vacate a conviction when those motions recite grounds for relief that have been or should have been raised earlier."). Reasonable jurists therefore would agree that these ineffective-assistance claims are procedurally defaulted.

Procedural Default—Cause and Prejudice: Ineffective Assistance of Counsel

Henderson argues that, pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), which apply in Kentucky, *see Woolbright v. Crews*, 791 F.3d 628, 636 (6th Cir. 2015), his post-conviction attorneys' ineffectiveness in failing to pursue these claims excuses the procedural default. The district court rejected this argument for two reasons.

First, the district court explained that the alleged ineffectiveness of Henderson's post-conviction counsel cannot constitute cause to overcome the procedural default of his ineffective-assistance-of-*appellate*-counsel claims because *Martinez* and *Trevino* can be invoked only to excuse ineffective-assistance-of-*trial*-counsel claims. Reasonable jurists could not disagree. *See Davila v. Davis*, 137 S. Ct. 2058, 2063 (2017).

Second, the district court concluded that the alleged ineffectiveness of Henderson's post-conviction counsel cannot constitute cause to overcome the procedural default of his ineffective-assistance-of-trial-counsel claims because his ineffective-assistance-of-post-conviction-counsel claims were themselves procedurally defaulted.

Reasonable jurists could debate this conclusion. Although the Supreme Court held in *Edwards v. Carpenter* that a procedurally defaulted ineffective-assistance-of-counsel claim cannot serve as cause to excuse the procedural default of another claim (unless the petitioner satisfies the cause-and-prejudice standard with respect to the defaulted ineffective-assistance-of-counsel claim), 529 U.S. 446, 453 (2000), "neither *Martinez* nor *Trevino* . . . explicitly requires the exhaustion discussed in *Edwards*." *Alonzo v. Parris*, No. 14-6261, slip op. at 3 (6th Cir. June 1, 2015) (order); *see also Dickens v. Ryans*, 740 F.3d 1302, 1322 n.17 (9th Cir. 2014) ("[W]here *Martinez* applies, there seems to be no requirement that the claim of ineffective assistance of [post-conviction] counsel as cause for an ineffective-assistance-of-[trial]-counsel claim be presented to the state courts."). Absent any clear, published authority expressly holding that procedurally defaulted ineffective-assistance-of-*post-conviction*-counsel claims cannot be asserted as cause to excuse procedurally defaulted ineffective-assistance-of-trial-counsel claims, the district court's conclusion that Henderson failed to establish cause to excuse his procedural default, insofar as it relies on this proposition, therefore is debatable.

But that is not the end of the inquiry. To obtain a COA, Henderson must also demonstrate "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." *Slack*, 529 U.S. at 484. To meet this standard, "it is not enough for a petitioner to allege claims that are arguably *constitutional*; those claims must also be arguably *valid or meritorious*." *Dufresne v. Palmer*, 876 F.3d 248, 254 (6th Cir. 2017) (per curiam). Similarly, and pertinent here, the Supreme Court has explained that, for the ineffectiveness of post-conviction counsel to serve as cause to excuse the procedural default of an ineffective-assistance-of-trial-counsel claim, the petitioner must show that the ineffective-assistance-of-trial-counsel claim is "substantial"—i.e., that it "has some merit." *Martinez*, 566 U.S. at 14. To the best that

can be deciphered, Henderson's petition appears to raise seven ineffective-assistance-of-trial-counsel claims (in addition to the ones that were denied on the merits, as set forth above). For the reasons explained below, none of Henderson's ineffective-assistance-of-trial-counsel claims have sufficient merit to satisfy the cause-and-prejudice standard under *Martinez* or to satisfy the "valid claim" component of *Slack*'s COA standard.

Ineffective Assistance: Jury Instructions

Henderson first claims that his counsel failed to object to the wanton murder jury instructions on the ground that (1) there was a "fatal variance" between the indictment and the instructions insofar as he was charged with intentional murder but was convicted of wanton murder; (2) the instructions erroneously permitted the jury to convict him on alternative theories, which resulted in an inconsistent verdict; and (3) the instructions did not contain a complicity instruction despite that he was indicted for complicity. None of these claims are valid or meritorious.

First, Henderson's claim that there was a fatal variance between the indictment and the jury instructions is factually erroneous: he was indicted for both "intentionally" and "wantonly" causing the death of the victim; thus, the jury's finding that Henderson was guilty of wanton murder is consistent with the indictment. Because counsel cannot be ineffective for failing to raise arguments that lack merit, *Greer v. Mitchell*, 264 F.3d 663, 676 (6th Cir. 2001), his claim that his counsel should have objected to the jury instructions for a purported fatal variance does not deserve encouragement to proceed further.

Second, counsel had no basis on which to object to the instructions on the ground that they allowed the jury to convict Henderson under alternative theories. *See id.* The instructions provided that the jury could find Henderson guilty of wanton murder if it found beyond a reasonable doubt that Henderson either "killed [the victim] by shooting him" or if he "voluntarily participated or assisted in a robbery during which someone else killed [the victim]." "[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." *Evans v. Commonwealth*, 45 S.W.3d 445, 447 (Ky. 2001). Here, as explained by the Kentucky Court of Appeals, the evidence permitted the jury to choose from different scenarios of liability—including one in which Henderson shot the victim and one in which Henderson was present during the robbery but did not shoot the victim. *See Henderson*, 2006 WL 1046316, at *3. Because the evidence supported both principal and accomplice liability, Henderson's claim that his counsel should have challenged the jury instructions for having alternative theories of liability does not deserve encouragement to proceed further.

Third, even if counsel performed deficiently by failing to object to the jury instructions on the ground that they omitted a complicity instruction insofar as Henderson was indicted for committing robbery and murder "alone or in complicity," and the evidence supported a complicity theory, Henderson cannot show that it affected the outcome of his trial. The Kentucky Supreme Court has explained that "one who is found guilty of complicity to a crime occupies the same status as one being guilty of the principal offense." *Wilson v. Commonwealth*, 601 S.W.2d 280, 286 (Ky. 1980); *see* Ky. Rev. Stat. § 502.020(1). In other words, a defendant who is found guilty of an offense by complicity is subject to the same penalties as if he were found guilty of the offense as a principal. *Commonwealth v. Caswell*, 614 S.W.2d 253, 254 (Ky. Ct. App. 1981). Thus, here, even if the jury had found Henderson guilty of first-degree robbery and wanton murder on a complicity theory, he still would have been subject to the same penalty—i.e., life in prison—that he received. *Id.*; *see also United States v. Jensen*, 278 F. App'x 548, 552 (6th Cir. 2008) ("Kentucky courts are clear that complicity to commit an offense makes the defendant guilty of the subsequent offense and subject to the same penalties."). Because Henderson cannot show that he was prejudiced by his counsel's failure to object to the jury instructions' omission of a complicity instruction, this ineffective-assistance claim does not deserve encouragement to proceed further.

Ineffective Assistance: Sufficiency of the Evidence

Henderson also claims that his counsel failed to object to the fact that the Commonwealth did not prove all of the elements of the crimes charged—i.e., that the evidence was insufficient to

convict him. When reviewing the sufficiency of the evidence, a federal habeas court must view "the evidence in the light most favorable to the prosecution" and determine whether "*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). Under Kentucky law, one is guilty of wanton murder when "he wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person." Ky. Rev. Stat. § 507.020(1)(b). And one is guilty of first-degree robbery in Kentucky 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 either "[c]auses physical injury to any person who is not a participant in the crime," "[is] armed with a deadly weapon," or "[u]ses 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).

Here, the evidence showed that, before the crimes, Henderson gave a handgun to O'Neal and told him to "[t]ake it, do your business, but be careful." *Henderson*, 2006 WL 1046316, at *1. A witness testified that, during the morning of the crimes, O'Neal told him that "[h]e was trying to rob a boy for his shoes, boy wouldn't give it up, shot the boy and himself in the arm." *Id.* Several other witnesses gave testimony that corroborated the Commonwealth's theory that Henderson planned and participated as an accomplice in the crimes. *See id.* For instance, O'Neal's sister testified that, during the morning of the crimes, she saw Henderson and O'Neal whispering in the living room and that they were wearing masks when they left the house. *Id.* O'Neal also testified and implicated Henderson in the crimes. *See id.* at *2.

While this evidence is not overwhelming, when viewing it and all other evidence most favorably to the prosecution, *see Jackson*, 443 U.S. at 319, a rational trier of fact could have found Henderson guilty of first-degree robbery and wanton murder as O'Neal's accomplice. In other words, the record shows that the evidence was sufficient to convict Henderson of these crimes. Henderson therefore has no valid or meritorious claim that his counsel should have challenged the sufficiency of the evidence. *See Greer*, 264 F.3d at 676.

Ineffective Assistance: Actual Innocence

Next, Henderson claims that his counsel never objected to the fact that he is actually innocent. As set forth in detail below, however, Henderson has not established a meritorious actual-innocence claim. This ineffective-assistance claim therefore does not deserve encouragement to proceed further. *See id.*

Ineffective Assistance: False Testimony

Henderson's next claim—that his counsel "should have raised the fact [that] the Commonwealth has . . . knowledge of Mr. O'Neal's false evidence and presented the testimony" during the grand jury proceedings also does not deserve encouragement to proceed further. As set forth above, no reasonable jurist could debate the district court's conclusion that the state courts reasonably rejected Henderson's false-testimony claim on the ground that he failed to show that the Commonwealth knew that O'Neal's testimony was false or that his trial would have been different had O'Neal's allegedly false testimony been omitted. Because Henderson has not shown that the Commonwealth had knowledge that O'Neal's testimony was false, he has no valid or meritorious claim that his counsel should have raised this issue. *See id.*

Ineffective Assistance: Miscellaneous Claims

Henderson has not shown that his three remaining ineffective-assistance claims are valid or meritorious. The claims are that his trial counsel failed to (1) "impeach Michael Brown with the fact he had lied about his knowledge," (2) argue that "the Commonwealth's 'surprise witness' was in violation of [a local court rule and state law] and was psychiatrically evaluated . . . to determine his own criminal responsibility," and (3) present his "laceration evidence that prevented [him] from traveling almost 8 blocks." But Henderson does not support these claims with any facts or developed argument that counsel's alleged inactions were deficient or that they prejudiced him. Because conclusory and perfunctory ineffective-assistance claims like these ones are insufficient to warrant habeas relief, *see Wogenstahl v. Mitchell*, 668 F.3d 307, 355-56 (6th Cir. 2012), these claims do not deserve encouragement to proceed further.

Procedural Default—Cause and Prejudice: *Brady* Violation

Henderson also claims that "[t]he state courts suppression of [*Brady v. Maryland*, 373 U.S. 83 (1963),] evidence constitutes cause for [the] alleged procedural default." But he does not identify what the allegedly suppressed evidence is, much less does he describe the exculpatory nature of the evidence. To the extent that Henderson relies upon O'Neal's allegedly false and perjured testimony in an attempt to support his assertion that a *Brady* violation occurred—and to the extent that Henderson asserts that O'Neal's purportedly truthful testimony, as stated in his 2001 affidavit, constitutes the suppressed evidence—Henderson cannot demonstrate the three elements of a *Brady* claim: that the evidence is favorable to him because it is exculpatory or impeaching, that the Commonwealth suppressed the evidence, and that prejudice ensued. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). As set forth above, reasonable jurists could not debate the district court's conclusion that the state courts reasonably found that Henderson failed to show that the result of his trial would have been different had O'Neal not presented the allegedly false and perjured testimony at trial. Moreover, Henderson had an opportunity to present this claim to the state courts, as demonstrated by the inclusion of this claim in his Rule 60.02 motion filed in 2002. Henderson's assertion that his procedurally defaulted claims are excused by an alleged *Brady* violation therefore does not deserve encouragement to proceed further.

Procedural Default—Actual Innocence

In addition, Henderson argues that the procedural default of his claims is excused by his actual innocence. He first asserts that he is actually innocent because O'Neal provided false testimony at trial; he relies upon an affidavit, dated December 13, 2001, in which O'Neal asserts the following:

> I hereby state that the reason for this affidavit is [to] make clear that my testimony during the trial in which I was convicted is very false and untrue concerning Kevin Henderson's involvement in the demise of [the victim], in which he (Kevin Henderson) was not involved and the a [sic] reason being to project my proportion of th[e] blame towards him in an attempt to protect myself from my responsibility in the demise of [the victim].

The district court rejected Henderson's claim that this affidavit shows that he is actually innocent. It explained that "[r]ecantation testimony is . . . viewed with great suspicion" insofar as it "is very often unreliable . . . and most often serves merely to impeach cumulative evidence rather than to undermine confidence in the accuracy of the conviction." *Carter v. Mitchell*, 443 F.3d 517, 539 (6th Cir. 2006). Here, the district court found that O'Neal's affidavit was "vague, conclusory[,] . . . [and] entirely devoid of any meaningful details that would substantiate his recantation." Moreover, and contrary to Henderson's assertion, numerous witnesses other than O'Neal presented testimony that directly implicated Henderson in the offenses. *See Henderson*, 2006 WL 1046316, at *1. Because O'Neal's affidavit does not constitute "new reliable evidence [such as] exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence" showing "that it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt," *Schlup v. Delo*, 513 U.S. 298, 324, 327 (1995), reasonable jurists could not debate the district court's conclusion that the affidavit does not establish Henderson's actual innocence.

Henderson also asserts that certain evidence that was not produced at trial—namely, hospital records that purportedly show a "serious laceration injury"—shows that he is actually innocent. According to Henderson, he could not have arranged or participated in the shooting in light of the laceration. But he offers no new reliable evidence to support this conclusory assertion of actual innocence. *Cf. id.* Henderson's purported actual innocence therefore is insufficient to overcome the procedural default of his eighth and tenth claims.

Denial of Rule 59(e) Motion

Finally, Henderson is not entitled to a COA regarding the denial of his Rule 59(e) motion. In order to justify the alteration or amendment of a judgment under Rule 59(e), the movant must demonstrate: "(1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice." *Betts v. Costco Wholesale Corp.*, 558 F.3d 461, 474 (6th Cir. 2009) (quoting *Henderson v. Walled Lake Consol. Sch.*, 469 F.3d 479, 496 (6th Cir. 2006)). As explained by the district court in its detailed, well-reasoned opinion

denying Henderson's Rule 59(e) motion, Henderson did not demonstrate any of these four factors. Indeed, nearly all of the arguments asserted in Henderson's Rule 59(e) were either raised previously or could have been raised previously. Such arguments are insufficient to obtain Rule 59(e) relief. *See Gulley v. County of Oakland*, 496 F. App'x 603, 612 (6th Cir. 2012) ("A Rule 59(e) motion is not properly used as a vehicle to re-hash old arguments or to advance positions that could have been argued earlier, but were not."); *Howard v. United States*, 533 F.3d 472, 475 (6th Cir. 2008) (explaining that Rule 59(e) "does not permit parties to effectively 're-argue a case'" (quoting *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998))). Reasonable jurists therefore could not disagree with the district court's denial of Henderson's Rule 59(e) motion.

Accordingly, this court **DENIES** the motion for a COA and the motion for the appointment of counsel and **DENIES** as moot the motions for leave to proceed in forma pauperis.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

KEVIN HENDERSON — Petitioner

v. — Civil Action No. 3:16-cv-00567-RGJ

BRAD ADAMS, WARDEN — Respondent

* * * * *

ORDER

This matter is before the Court on three motions filed by *pro se* Petitioner Kevin Henderson—a motion for leave to appeal *in forma pauperis* (DN 47), a motion for a certificate of appealability (DN 49), and a motion to alter or amend the Court's March 11, 2019 order pursuant to Federal Rules of Civil Procedure 52(b) and 59(e)(DN 52). For the reasons below, the Court will DENY Petitioner's motions.

On February 11, 2019, the Court denied Petitioner's motion to alter or amend the judgment pursuant to Fed. R. Civ. P. Rule 59(e) and transferred Petitioner's Rule 60(b)(6) and "motion for adjudication" to the Sixth Circuit Court of Appeals for a determination of whether Petitioner will be granted authorization to file a second or successive habeas petition (DN 42).[1] Petitioner filed a notice of appeal of this Order on February 25, 2019 (DN 46). On March 11, 2019, the Court denied Petitioner's motion requesting a transfer under Fed. R. App. P. 23(a) and substituted Brad Adams, Warden of Northpoint Training Center, as the respondent (DN 51).

[1] The Sixth Circuit docketed Petitioner's appeal of the Court's denial of the Rule 59(e) motion as No. 19-5179 and docketed the transferred Rule 60(b) motion and "motion for adjudication" as No. 19-5127.

A. Motion for Certificate of Appealability

A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a court denies relief on the merits, a petitioner meets the substantial showing threshold if the petitioner demonstrates that reasonable jurists would find the court's assessment of the claim debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). When a court denies relief on procedural grounds without addressing the merits, a certificate of appealability should issue if jurists of reason would find it debatable whether (1) the petitioner states a valid claim of the denial of a constitutional right, and (2) the court was correct in its procedural ruling. *Id.*

Here, none of the grounds addressed on the merits in Henderson's previously denied Rule 59(e) motion satisfy the standard for a certificate of appealability. Reasonable jurists would not find the Court's assessment of those claims debatable. Henderson also raised an ineffective assistance of counsel argument in his Rule 59(e) motion that was addressed on procedural grounds. Henderson argued that his counsel failed to object to the lack of complicity jury instruction at trial. This claim was denied by the Kentucky Court of Appeals in 2015 as barred under Kentucky's procedural rules. The Court found that the Kentucky Court of Appeals relied on well-established procedural rules and that Henderson failed to show prejudice, or manifest injustice. Reasonable jurists would not find the Court's assessment of this claim debatable as to whether Henderson states a valid claim of the denial of a constitutional right, and whether the court was correct in its procedural ruling. Accordingly, the Court will deny Petitioner's request for a certificate of appealability on the denial of Petitioner's Rule 59(e) motion.

In its February 11, 2019, Order, this Court transferred Henderson's Rule 60(b)(6) and "motion for adjudication" to the Sixth Circuit to determine whether Henderson will be granted

authorization to file a second or successive habeas petition. Generally, a post-judgment order is appealable only if it completely disposes of the post-judgment issue or motion. *Wadlington v. Smith*, No. 17-6336, 2017 U.S. App. LEXIS 26806, at *2 (6th Cir. Dec. 27, 2017) (citing *United States v. One 1985 Chevrolet Corvette*, 914 F.2d 804, 807 (6th Cir. 1990)). Because the Court did not deny Petitioner's Rule 60(b) motion or his "motion for adjudication," but transferred these motions to the Sixth Circuit for consideration as a second or successive § 2254 petition, the portion of the Court's Order that pertains to these motions is not appealable. *Murphy v. Reid*, 332 F.3d 82, 83-85 (2d Cir. 2003) (per curiam); *Howard v. United States*, 533 F.3d 472, 474 (6th Cir. 2008); *see also Wadlington v. Smith*, 2017 U.S. App. LEXIS 26806 (holding that the portion of an order on a Rule 60(b) motion that denied certain claims was appealable but portion of order that transferred the motion to Sixth Circuit for consideration as a second or successive habeas petition was not appealable). To the extent that Petitioner seeks to argue that this Court incorrectly transferred these two motions to the Court of Appeals, such arguments should be raised in that appellate action. Accordingly, the Court will deny the motion for a certificate of appealability as it relates to Petitioner's Rule 60(b) and "motion for adjudication."

B. Motion for Leave to Appeal *In Forma Pauperis*

To appeal *in forma pauperis* in a § 2254 case, and thereby avoid the appellate filing fee, an appellant must seek permission from the district court under Federal Rule of Appellate Procedure 24(a). *Kincade v. Sparkman*, 117 F.3d 949, 952 (6th Cir. 1997). Rule 24(a) provides that a party seeking pauper status on appeal must first file a motion in the district court, along with a supporting affidavit. Fed. R. App. P. 24(a)(1). However, Rule 24(a) also provides that if the district court certifies that an appeal would not be taken in good faith, or otherwise denies leave to appeal *in*

forma pauperis, the appellant must move to proceed *in forma pauperis* in the appellate court. *See* Fed. R. App. P. 24(a)(4)-(5).

For the same reasons the Court previously denied Henderson's Fed. R. Civ. P. 59(e) motion and denies here a certificate of appealability, the Court certifies that an appeal is not taken in good faith. *See Coppedge v. United States*, 369 U.S. 438, 445 (1962) (explaining that good faith is demonstrated when a petitioner "seeks appellate review of any issue not frivolous"). The Court will therefore deny the application to proceed on appeal *in forma pauperis* (DN 47).

If Petitioner wishes to pursue this appeal, **he must either pay the $505.00 appellate filing fee** to the Clerk of the District Court within 30 days of entry of this Order or **file a motion to proceed *in forma pauperis*** in the Sixth Circuit Court of Appeals within **30 days** after service of this Order in accordance with Fed. R. App. P. 24(a)(5). *Kincade v. Sparkman*, 117 F.3d at 952. Should Petitioner choose to pay the full $505.00 appellate filing fee rather than file a motion to proceed on appeal *in forma pauperis* in the Court of Appeals, payment must be made payable to Clerk, U.S. District Court and sent to the following address:

United States District Court
Western District of Kentucky
106 Gene Snyder Courthouse
601 West Broadway
Louisville, KY 40202

Failure to pay the $505.00 filing fee or to file an application to proceed on appeal *in forma pauperis* with the Sixth Circuit within 30 days **may result in dismissal of the appeal.**

C. Motion to Alter or Amend March 11, 2019 Order Denying Request for Transfer

Petitioner asks the Court to alter or amend its order denying his motion to transfer his custody to the Kentucky State Reformatory. Rule 52(b) provides that the court may "amend its findings–or make additional findings–and may amend the judgment accordingly. The motion may

accompany a motion for a new trial under rule 59." The underlying purpose of Rule 52(b) "is to permit the correction of any manifest errors of law or fact that are discovered, upon reconsideration, by the trial court." *Nat'l Metal Finishing Co. v. BarclaysAmerican / Commercial, Inc.*, 899 F.2d 119, 123 (1st Cir. 1990). It is "not intended to allow parties to rehash old arguments already considered and rejected by the trial court." *Id.* (citing *American Train Dispatchers Ass'n v. Norfolk & Western Ry. Co.*, 627 F.Supp. 941, 947 (N.D. Ind. 1985)). "[A] party who failed to prove his strongest case is not entitled to a second opportunity to litigate a point" under Rule 52(b). 9C Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 2582 (3d ed. 2017).

Rule 59(e) is intended to permit a court to "rectify its own mistakes in the period following the entry of judgment." *White v. N.H. Dep't of Employment Sec.*, 455 U.S. 445, 450 (1982). A court may alter or amend a prior judgment under Rule 59(e) based only on (1) "a clear error of law," (2) "newly discovered evidence," (3) "an intervening change in controlling law," or (4) "a need to prevent manifest injustice." *Leisure Caviar, LLC v. United States Fish & Wildlife Serv.*, 616 F.3d 612, 615 (6th Cir. 2010) (quoting *Intera Corp. v. Henderson*, 428 F.3d 605, 620 (6th Cir. 2005)). As with a Rule 52(b) motion, a Rule 59(e) motion is not "an opportunity to reargue a case" or raise arguments that could or should have been raised before the court issued the judgment. *Whitehead v. Bowen*, 301 Fed. App'x 484, 489 (6th Cir. 2008); *see Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998). Rule 59(e) motions are "extraordinary and sparingly granted." *Marshall v. Johnson*, No. 3:07-CV-171-H, 2007 WL 1175046 (W.D. Ky. Apr. 19, 2007); *Huff v. Metropolitan Life Ins. Co.*, 675 F.2d 119, 122 n. 5 (6th Cir. 1982). Where a party simply disagrees with a district court's conclusions, the appropriate

vehicle for relief is appeal, not a motion to alter or amend a judgment. *Graham ex rel. Estate of Graham v. County of Washtenaw*, 358 F.3d 377, 385 (6th Cir. 2004).

In his motion, Petitioner raises for the first time the argument that moving him from the Kentucky State Reformatory to Northpoint Training Center ("Northpoint") is impeding his ability to pursue this action because Northpoint does not sell typewriter ribbons or materials needed. Petitioner states Northpoint is recovering from a riot and arson and has not maintained the materials needed to prosecute his case (DN 52).

Fed. R. App. P. 23(a) prohibits the transfer of custody of a prisoner pending review of a decision in a habeas corpus proceeding filed by that prisoner in federal court except by order of the court rendering the decision. The rule was designed to prevent prison officials from impeding a prisoner's attempt to obtain habeas corpus relief by physically removing the prisoner from the territorial jurisdiction of the court in which a habeas petition is pending. *Jago v. U.S. Dist. Court,* 570 F.2d 618, 626 (6th Cir. 1978). A habeas petitioner who opposes a prison transfer must establish that "the transfer would deprive the court of jurisdiction or substantially complicate the conduct of the litigation." *See Strachan v. Army Clemency Parole Bd.*, 151 F.3d 1308, 1313 (10th Cir.1998) (*quoting Ward v. United States Parole Comm'n*, 804 F.2d 64, 66 (7th Cir.1986)). Relief for a violation of Fed. R. App. P. 23(a) is available only if a habeas petitioner establishes that a transfer resulted in prejudice to the prosecution of a pending habeas action. *See Shabazz v. Carroll*, 814 F.2d 1321, 1324 (9th Cir.1987), *vacated in part on other grounds*, 833 F.2d 149 (9th Cir.1987); *Hammer v. Meachum*, 691 F.2d 958, 961 (10th Cir.1982).

As stated in the Court's March 11, 2019 Order, the transfer did not deprive the court of jurisdiction. *See* 28 U.S.C. § 2241(d) (establishing concurrent jurisdiction in district court where prisoner is in custody and district court for the district in which petitioner was convicted and

sentenced). Further, Petitioner has not shown that the transfer is prejudicing his ability to prosecute the litigation as he was able to file the present motion with the Court. Accordingly, this argument does not require alteration or amendment of the Court's March 11, 2019 Order and Petitioner's motion to alter or amend same will be denied.

D. CONCLUSION

Accordingly, for the reasons set forth above, **IT IS HEREBY ORDERED** as follows:

1. The Court CERTIFIES that an appeal is not taken in good faith and Petitioner Kevin Henderson's motion for leave to appeal *in forma pauperis* (DN 47) is thus DENIED;
2. Petitioner Kevin Henderson's motion for a certificate of appealability (DN 49) is DENIED;
3. Petitioner Kevin Henderson's motion to alter or amend judgment pursuant to Federal Rules of Civil Procedure 52(b) and 59(e)(DN 52) is DENIED.

IT IS SO ORDERED.

Rebecca Grady Jennings, District Judge
United States District Court

April 15, 2019

cc: Petitioner/Appellant, *pro se*
Counsel of Record
Clerk, Sixth Circuit Court of Appeals
A961.011

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

KEVIN HENDERSON — Petitioner

v. — Civil Action No. 3:16-cv-00567-RGJ

BRAD ADAMS, WARDEN — Respondent

* * * * *

MEMORANDUM AND ORDER

This matter is before the Court on a *pro se* motion by Petitioner Kevin Henderson titled "Requesting an Initial Order Governing Petitioner Custody and Transfer" under Fed. R. App. P. 23(a).[1] (DN 40).

Petitioner filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 in September 2016. At the time of filing, Petitioner was incarcerated at Kentucky State Reformatory (KSR), a prison in the Western District of Kentucky. The Court denied the habeas petition (DN 30). Petitioner then filed a notice of appeal, a motion for a certificate of appealability, a motion for leave to proceed on appeal *in forma pauperis*, a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e), and a motion for relief from judgment under Fed. R. Civ. P. 60(b)(6). The Court first denied Petitioner's motion for leave to proceed *in forma pauperis* and transferred

[1] Federal Rule of Appellate Procedure 23(a) states:

> Transfer of Custody Pending Review. Pending review of a decision in a habeas corpus proceeding commenced before a court, justice, or judge of the United States for the release of a prisoner, the person having custody of the prisoner must not transfer custody to another unless a transfer is directed in accordance with this rule. When, upon application, a custodian shows the need for a transfer, the court, justice, or judge rendering the decision under review may authorize the transfer and substitute the successor custodian as a party.

his motion for a certificate of appealability to the Sixth Circuit. (DN 39). Petitioner then filed the current motion under Fed. R. App. P. 23(a) and a "motion for adjudication." The Court denied in part and transfered in part to the Sixth Circuit Petitioner's motions brought under Rules 59(e) and 60(b)(6) and transferred Petitioner's "motion for adjudication" to the Sixth Circuit. (DN 42). The Court now considers Petitioner's instant motion.

The Sixth Circuit has stated that "[a]s a general rule the filing of a notice of appeal divests the district court of jurisdiction and transfers jurisdiction to the court of appeals." *Cochran v. Birkel*, 651 F.2d 1219, 1221 (6th Cir. 1981). That said, the general rule is not inflexible, and there are exceptions that allow a district court to proceed with its adjudication of the action. *Id.* (citing *Jago v. U.S. Dist. Court*, 570 F.2d 618, 619-20 (6th Cir. 1978)). Indeed, in *Jago*, the Sixth Circuit held that a district court retains jurisdiction to rule on a motion brought pursuant to Fed. R. App. P. 23 even though a notice of appeal has been filed. In so holding, it stated that Rule 23(a) "was designed in part to preserve the district judge's power over the physical custody of the petitioner by prohibiting the custodian from transferring custody of the prisoner to another, without the authorization of the 'court, justice or judge rendering the decision.'" *Jago*, 570 F. 2d at 626. Given this jurisprudence, the Court has jurisdiction to consider this motion.

In his motion, Petitioner indicates that he has been transferred to Northpoint Training Center (NTC), a prison in the Eastern District of Kentucky. He argues for transfer back to KSR "due to judicial efficiency and pendency of habeas corpus proceedings . . . [p]ursuant to Fed. R. App. P. 23 the fairness to the litigants and in the regard to the federal courts ability to adjudicate the case and enforce the judgment with regard to Petitioners custody." He states that his transfer "threatens the courts jurisdiction, venue and at the least adversely affected the efficiency, fairness, and remedial capacity of the proceedings."

Relief for a violation of Fed. R. App. P. 23(a) is available only if a habeas petitioner establishes that a transfer caused prejudice to the prosecution of a pending habeas action. *See Shabazz v. Carroll*, 814 F. 2d 1321, 1324 (9th Cir. 1987), *vacated in part on other grounds*, 833 F. 2d 149 (9th Cir. 1987); *Hammer v. Meachum*, 691 F. 2d 958, 961 (10th Cir. 1982). In addition, a habeas petitioner who opposes transfer must establish that "the transfer would deprive the court of jurisdiction or substantially complicate the conduct of the litigation." *Strachan v. Army Clemency Parole Bd.*, 151 F.3d 1308, 1313 (10th Cir. 1998) (quoting *Ward v. U.S. Parole Comm'n*, 804 F.2d 64, 66 (7th Cir. 1986)).

Petitioner fails to show how his transfer to another facility has in any way impeded his ability to prosecute this action. *See, e.g.*, *Ward v. Wolfenbarger*, No. 03-CV-72701, 2016 U.S. Dist. LEXIS 122071 (E.D. Mich. Sept. 9, 2016) (denying habeas petitioner's Fed. R. App. 23(a) request to be transferred to prior prison for these reasons). In addition, Petitioner's placement at a facility in the Eastern District of Kentucky does not divest this Court of jurisdiction over his habeas petition. *See* 28 U.S.C. § 2241(d) (establishing concurrent jurisdiction in district court where prisoner is in custody and district court for the district in which petitioner was convicted and sentenced).

Finally, Petitioner's transfer requires the Court to substitute the respondent in this action. The proper respondent in a habeas corpus action is the person who holds the petitioner in custody, here, the warden at NTC in the Eastern District of Kentucky. *See* 28 U.S.C. §§ 2242 ¶ 2 and 2243 ¶ 2; Rule 2(a) of the Rules Governing Section 2254 Cases in the United States District Courts. The

Federal Rules of Civil Procedure[2] permit a court to substitute the name of the warden of the facility where a habeas petitioner has been transferred. *See* Fed. R. Civ. P. 25(d)[3]; *see e.g.*, *Waples v. Phelps*, 2008 WL 1743400, n.1 (D. Del. 2008) ("Waples was transferred from the Sussex Correctional Institution to the Delaware Correctional Center. Therefore, the court has substituted Warden Perry Phelps for Warden Richard Kearney, an original respondent. *See* Fed. R. Civ. P. 25(d)(1).")

Accordingly, **IT IS HEREBY ORDERED** that this motion (DN 40) is **DENIED**.

IT IS FURTHER ORDERED that The Clerk of Court **SUBSTITUTE** Brad Adams, Warden of Northpoint Training Center, as the Respondent.

Rebecca Grady Jennings, District Judge
United States District Court

March 11, 2019

cc: Petitioner, *pro se*
Counsel of Record
NTC Warden
Sixth Circuit Court of Appeals (No. 18-5747)
A961.011

[2] Rule 12 of the Rules Governing Section 2254 Cases In The United States District Courts provides that the Federal Rules of Civil Procedure can be applied to habeas actions so long as the civil rules "are not inconsistent" with the habeas statutes or other habeas rules.

[3] Fed. R. Civ. P. 25(d) states:

> An action does not abate when a public officer who is a party in an official capacity . . . otherwise ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party. Later proceedings should be in the substituted party's name, but any misnomer not affecting the parties' substantial rights must be disregarded. The court may order substitution at any time, but the absence of such an order does not affect the substitution.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

KEVIN HENDERSON — Petitioner

v. — Civil Action No. 3:16-cv-00567-RGJ

AARON SMITH, WARDEN — Respondent

* * * * *

ORDER

This matter is before the Court on Petitioner Kevin Henderson's Motion to Alter or Amend Judgment pursuant to Federal Rules of Civil Procedure 52(a)(6) and 59(e)[DE 35], Motion for Relief from Judgement pursuant to Fed. R. of Civ. Proc. 60(b)(6)[DE 36], and Motion for Adjudication Pursuant to 28 U.S.C.A 2254(d)(1) and 18 U.S.C. 242 [DE 41]. The Respondent, Aaron Smith, the Warden of the Kentucky State Reformatory ("the Warden") did not file responses to any of these motions and the time for doing so has passed. Henderson's motions seek to alter and amend, and relief from, this Court's July 6, 2018 Order [DE 30] denying his Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 and denying a certificate of appealability. For the reasons set forth below, the Court will DENY Henderson's motions.

I. BACKGROUND

The facts of this case are recounted at length in the Findings of Fact, Conclusions of Law and Recommendation ("R&R") issued on June 29, 2017 by the United States Magistrate Judge. [DE 25, at 1365-1380[1]]. The Court will set forth only a brief summary here and incorporate by reference the facts set forth in the R&R. Henderson is a state prisoner, bringing this habeas corpus action under 28 U.S.C. § 2254. [DE 1, Pet.]. In 1998, Henderson and co-defendant Cedric O'Neal

[1] The Court will cite the PageID #s from the record, where available, throughout this Opinion.

were convicted in Jefferson Circuit Court of first-degree robbery and wanton murder of fifteen-year-old Quintin Hammond. [DE 19, Warden's Resp. at 351-53]. Henderson received life sentence for the wanton murder conviction and a concurrent 20-year sentence for the first-degree robbery conviction. *Id.*

The Honorable Dave Whalin, United States Magistrate Judge, issued a comprehensive Findings of Fact, Conclusions of Law and Recommendation ("R&R") reflecting an examination of the case's background and a careful consideration of the issues. [DE 25]. The R&R recommended that Henderson's Petition for Writ of Habeas Corpus be denied and dismissed with prejudice. [*Id.* at 1421.]

Henderson filed objections to the R&R Report. [DE 26]. This Court thoroughly reviewed the Petition, R&R, Henderson's objections, and all other relevant materials, and found the objections lacked merit, merely reiterating previously made arguments, asserting general disagreement with various aspects of the R&R, and asserting vague objections that provided no valid basis for Henderson's claims. [DE 30]. The Court concluded the R&R's factual review and legal analyses were appropriate, properly resolving all issues in this action. Accordingly, On July 6, 2018, this Court issued an order overruling Henderson's objections to the R&R, approving and adopting the R&R, denying and dismissing Henderson's habeas petition with prejudice, and denying a certificate of appealability.[2] [DE 30].

On July 19, 2018, Henderson filed a Notice of Appeal to the Sixth Circuit. [DE 31]. That same day, Henderson also filed a Rule 59(e) Motion. [DE 35]. On July 20, 2019, Henderson filed

[2] Where a habeas petition has been referred to a magistrate judge for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B), this Court reviews *de novo* "those portions of the report or specified proposed findings or recommendations to which objection is made." *Id.* at § 636(b)(1)(C). After conducting such a review, the Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." *Id.*

a Rule 60(b)(6) Motion. [DE 36]. On July 23, 2018, the Sixth Circuit docketed Henderson's case as case number 18-5747, but held his appeal in abeyance pursuant to Federal Rule of Appellate Procedure 4(a)(4) pending this Court's resolution of his Rule 59(e) and Rule 60(b)(6) Motions. [DE 38]. On November 1, 2018, Henderson filed a Motion for Adjudication. [DE 41].

II. JURISDICTION

This Court has jurisdiction to "entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court" under 28 U.S.C. § 2254(a). As a threshold matter, before examining Henderson's arguments under Rule 60(b), the Court must determine whether the Rule 60(b) motion is truly a Rule 60(b) motion for relief from judgment or, effectively, a second or successive petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. If the Court concludes the motion is a Rule 60(b) motion, the Court will rule on it as it would any other Rule 60(b) motion. § 11:63 *Rule 60(b) motions*, FEDERAL HABEAS MANUAL. If, on the other hand, the Court determines the motion is in substance a second or successive petition, it will either dismiss the case or transfer the matter to the court of appeals for authorization under § 2244(b)(3). *Id.*

In *Gonzalez v. Crosby,* 545 U.S. 524 (2005), the Supreme Court addressed the issue of whether Rule 60(b) motions filed in habeas proceedings under 28 U.S.C. § 2254 are subject to the additional restrictions that apply to second or successive petitions under the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), codified at 28 U.S.C. § 2244(b). The Supreme Court explained that a critical factor in determining whether a Rule 60(b) motion is actually an unauthorized second or successive habeas petition is whether the motion presents a "claim." *Gonzalez,* 545 U.S. at 530. A claim "is an asserted federal basis for relief from a state court's judgment of conviction." *Id.* "When no 'claim' is presented, there is no basis for

contending that the Rule 60(b) motion should be treated like a habeas corpus application." *Id.* at 533.

> In most cases, determining whether a Rule 60(b) motion advances one or more 'claims' will be relatively simple. A motion that seeks to add a new ground for relief, ... will of course qualify. A motion can also be said to bring a "claim" if it attacks the federal court's previous resolution of a claim *on the merits* ... since alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief. That is not the case, however, when a Rule 60(b) motion attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings.

Id. at 532. The Supreme Court explained that the term "on the merits" referred "to a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d)." *Id.* at 532 n. 4.

In the second or successive analysis, whether the federal court actually determined the substantive merits of the underlying claims in the initial petition is not determinative. *Graham v. Costello*, 299 F.3d 129, 133 (2d Cir. 2002); *In re Cook*, 215 F.3d 606, 608 (6th Cir. 2000). Instead, it is whether the federal court, in denying the initial petition, conclusively determined that the claims presented could not establish a ground for federal habeas relief. § 11:48 *Initial petition adjudicated on the merits*, FEDERAL HABEAS MANUAL. If so, the petition is deemed to have been "decided on the merits" for purposes of analyzing whether a claim is a second or successive petition. *Id.*

For instance, when a habeas petition is dismissed "without prejudice" for failure to exhaust state remedies, it is not considered to have been denied on the merits for purposes of determining whether a subsequent petition is "second or successive" because there is a possibility of curing the defect, making the claim available for review if properly presented in a federal habeas petition. *Graham*, 299 F.3d at 133, *In re Cook*, 215 F.3d at 608. On the other hand, "when a prior petition

is denied because the claim raised is procedurally defaulted (*i.e.*, the petitioner failed to raise the claim on direct appeal and has not made a showing of cause and prejudice for that failure), the denial is 'on the merits,' rendering a subsequently filed petition 'second or successive.'" *Graham*, 299 F.3d at 133, citing *Carter v. United States,* 150 F.3d 202, 205-06 (2d Cir.1998).

As to Henderson's Rule 59(e) motions, the Sixth Circuit has explained that the holding of *Gonzales* regarding "second or successive" claims does not apply as the purpose of Rule 59(e) is "'to allow the district court to correct its own errors, sparing the parties and appellate courts the burden of unnecessary appellate proceedings.'" *Howard v. United States*, 533 F.3d 472, 475 (6th Cir. 2008), citing *York v. Tate,* 858 F.2d 322, 326 (6th Cir.1988) (quoting *Charles v. Daley,* 799 F.2d 343, 348 (7th Cir.1986)). As explained in *Howard*, if *Gonzalez* applied to Rule 59(e) motions, a district court could not correct flaws in its reasoning without permission from the court of appeals, which could only be granted in the extremely limited circumstances provided by 28 U.S.C. § 2255(h). *Id.* The Sixth Circuit's decision in *Howard* expressly took no position on whether *Gonzales* should apply to a motion that is labeled as Rule 59(e) motion, but is in fact a Rule 60(b) motion. *Id.* at 474.

III. STANDARD OF REVIEW AND ANALYSIS[3]

The Federal Rules of Civil Procedure permit litigants subject to an adverse judgment to file a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e), or to file a motion seeking relief from the judgment pursuant to Rule 60(b). *Harvey v. United States*, No. 1:11-CR-24-TBR, 2017 WL 89492, at *1 (W.D. Ky. Jan. 9, 2017). Neither rule permits a party to reargue a case. *Ayers v. Anderson*, No. 3:16-CV-00572-CRS, 2018 WL 3244410, at *2 (W.D. Ky. July 3, 2018) (citing *Whitehead v. Bowen*, 301 F. App'x 484, 489 (6th Cir. 2008)). Further, Rule 60(b) does not "allow a defeated litigant a second chance to present new explanations, legal theories, or proof." *Id.* (quoting *Tyler v. Anderson*, 749 F.3d 499, 509 (6th Cir. 2014)). For both Rule 59(e) and Rule 60(b), the burden of showing entitlement to relief is on the moving party. *See id.* at *1 (citation omitted). The Court will address the standards of Rule 59(e) and Rule 60(b) in more detail below.

A. STANDARD - RULE 59(e) MOTION

Rule 59(e) is intended to permit a court to "rectify its own mistakes in the period following the entry of judgment." *White v. N.H. Dep't of Employment Sec.*, 455 U.S. 445, 450 (1982). A court may alter or amend a prior judgment under Rule 59(e) based only on (1) "a clear error of law," (2) "newly discovered evidence," (3) "an intervening change in controlling law," or (4) "a need to

[3]Henderson's Motion to Alter or Amend Judgment cites in part Fed. R. Civ. P 52(a)(6). This rule is inapplicable. Under Federal Rule of Civil Procedure 52(a)(6), "[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Rule 52(a)(6) prohibits reviewing courts, like courts of appeals, from setting aside a district court's factual findings unless they are clearly erroneous. Fed. R. Civ. P. 52(a)(6); *Estrada–Martinez v. Lynch*, 809 F.3d 886, 895 (7th Cir. 2015). "The text of Rule 52(a)(6) limits the rule to instances in which a 'reviewing court' is considering the findings of a 'trial court.'" *Stoffels ex rel. SBC Tel. Concession Plan v. SBC Commc'ns, Inc.*, 677 F.3d 720, 727 (5th Cir.2012). Thus, Rule 52(a)(6) is not the appropriate vehicle for Henderson's challenges to the Court's July 6, 2018 Order [DE 30] denying his Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 and denying a certificate of appealability.

prevent manifest injustice." *Leisure Caviar, LLC v. United States Fish & Wildlife Serv.*, 616 F.3d 612, 615 (6th Cir. 2010) (quoting *Intera Corp. v. Henderson*, 428 F.3d 605, 620 (6th Cir. 2005)). A Rule 59(e) motion is not "an opportunity to reargue a case" or raise arguments that could or should have been raised before the court issued the judgment. *Whitehead v. Bowen*, 301 Fed. App'x 484, 489 (6th Cir. 2008); *see Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998). Rule 59(e) motions are "extraordinary and sparingly granted." *Marshall v. Johnson*, No. 3:07-CV-171-H, 2007 WL 1175046 (W.D. Ky. Apr. 19, 2007); *Huff v. Metropolitan Life Ins. Co.*, 675 F.2d 119, 122 n. 5 (6th Cir. 1982). Where a party simply disagrees with a district court's conclusions, the appropriate vehicle for relief is appeal, not a motion to alter or amend a judgment. *Graham ex rel. Estate of Graham v. County of Washtenaw*, 358 F.3d 377, 385 (6th Cir. 2004).

B. ANALYSIS - RULE 59(e)

In his Rule 59(e) motion to alter or amend, Henderson essentially raises five arguments which the Court addresses in turn below. Henderson's Rule 59(e) Motion is also sprinkled with a number of other statements that are conclusory, vague, and reiterate previously made arguments. Because these additional statements provide no valid basis for altering or amending this Court's judgment pursuant to Rule 59(e), they will not be addressed in further detail here. [DE 35, at 1488-90].

1. Actual Innocence and the O'Neal Affidavit.

Henderson's first Rule 59(e) argument relates to his claim that he is actually innocent of the charge of murder and has submitted sufficient proof of innocence to warrant a new trial. [DE 1-1, at 34]. Henderson argues that the R&R incorrectly concluded that the December 13, 2001 Affidavit of O'Neal, which Henderson tendered as proof of actual innocence, is devoid of

meaningful details that would substantiate O'Neal recanting his trial testimony. [DE 35, at 1485]. Henderson further objects that the R&R failed to mention that Henderson "filed a criminal complaint against O'Neal and was denied that right." [*Id.*] Henderson failed to raise these two specific objections in his previously filed Objection [DE 26] to the R&R, which this Court adopted. Thus, Henderson waived these two arguments as a Rule 59(e) motion is not an opportunity to raise arguments that could or should have been raised before the court issued the judgment. *Whitehead*, 301 Fed. App'x at 489; *see Sault Ste. Marie Tribe of Chippewa Indians*, 146 F.3d at 374; *Gulley v. County of Oakland*, 496 F. App'x 603, 612 (6th Cir. 2012) ("A Rule 59(e) motion is not properly used as a vehicle to re-hash old arguments or to advance positions that could have been argued earlier, but were not.").

Even assuming Henderson did not waive his right to file a Rule 59(e) motion on the basis of these two objections, these objections fail to justify the alteration or amendment of the judgment under Rule 59(e). Actual innocence may excuse a petitioner's procedural default in order to prevent a "manifest injustice." *See Coleman v. Thompson,* 501 U.S. 722, 749–50 (1991). In order to prove actual innocence, conclusory statements are not enough—a petitioner must "support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence-that was not presented at trial." *Schlup v. Delo,* 513 U.S. 298, 324 (1995). Further, federal courts view recanting testimony with extreme skepticism. *Byrd v. Collins,* 209 F.3d 486, 508 n. 16 (6th Cir. 2000) ("'[r]ecanting affidavits and witnesses are viewed with extreme suspicion by the courts.'" (quoting *Spence v. Johnson,* 80 F.3d 989, 997 (5th Cir. 1996))).

Here, the December 13, 2001 Affidavit of O'Neal consisted of the following statement:

> I hereby state that the reason for this affidavit is [to] make clear that my testimony during the trial in which I was convicted is very false and untrue concerning Kevin Henderson's involvement in the demise of Quinton Hammond, in which he (Kevin Henderson) was not involved and the a [sic] reason being to project my proportion of th[e] blame towards him in an attempt to protect myself from my responsibility in the demise of Quinton Hammond

[DE 19, Warden's Resp. at 499-500, April 25, 2003 Opinion and Order Denying CR 60.02 Motion]. The Court agrees with the Magistrate Judge's finding in the R&R that the O'Neal affidavit is too vague and conclusory, without something more, to rise to the requisite level of reliable proof of actual innocence. Thus, this objection does not require the alteration or amendment of this Court's judgment under Rule 59(e).

2. State Court's Admission of 404(b) Evidence.

Second, Henderson argues the state court's admission of evidence was an error of law and resulted in a denial of fundamental fairness. [DE 35, at 1486]. This argument appears to be in relation to Henderson's claim for habeas relief on the basis that O'Neal, in his defense at trial, improperly introduced evidence of Henderson's "bad acts" under Kentucky Rule of Evidence ("KRE") 404(b). O'Neal testified at trial that Henderson was a criminal influence on him, including evidence that Henderson tried to get O'Neal to deal drugs for him, break into cars, handle guns, and rob others. [DE 19-2, Warden's Resp., App. 107-10, at 455-58]. The Kentucky Supreme Court affirmed the Jefferson Circuit Court on this point, holding that it did not abuse its discretion under KRE 404(b) in permitting this testimony from O'Neal because it was relevant to "illustrat[e] the relationship between [Henderson] and O'Neal and demonstrate[] a pattern of conduct which

identified [Henderson] as an instigator or planner of criminal schemes and O'Neal as a somewhat reluctant participant." [DE 19-2, Warden's Resp., App. 107-10, at 455-58].[4]

Henderson is re-arguing points already made in his original Petition for Writ of Habeas Corpus [DE 1-1, at 33] and in his Objection to the R&R [DE 26, at 1429-30], which is not appropriate under Rule 59(e). *Howard,* 533 F.3d at 475. Even still, the Court is confident there has not been a clear error of law requiring the Court to alter or amend the judgment pursuant to Rule 59(e). This Court may only examine the Kentucky Supreme Court's ruling on the admission of KRE 404(b) evidence to the extent it is inconsistent with due process, not as a matter of state evidentiary error. *Bey v. Bagley*, 500 F.3d 514, 519 (6th Cir. 2007). This Court's review of compliance with due process as to a state evidentiary ruling is extremely narrow:

> A due process claim premised on a mistaken state court evidentiary ruling faces a steep climb. The kind of foundational unfairness and arbitrariness needed to show that a flawed state court evidentiary ruling rises to the level of a due process violation is not a broad category, and the Supreme Court to our knowledge ... has never identified an improper-character-evidence case that falls into it.

Burger v. Woods, 515 Fed. App'x 507, 509-10 (6th Cir. 2013).

Federally, "the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial." *Spencer v. Texas*, 87 S. Ct. 648, 653 (1967). The relevant inquiry is whether "the introduction and identification of the [evidence] so infused the trial with unfairness as to deny due process of law." *Lisenba v. California*, 62 S. Ct. 280, 286 (1941). Even if the evidence "is shocking to the sensibilities of those in the courtroom," that alone does not "render its reception a violation of due process." *Id.* When the evidence is "relevant to an issue in the case," a defendant's "due process rights [a]re not violated by [its] admission[.]" *Estelle v. McGuire,* 112 S. Ct. 481 (1991)(citing *Spencer*, 87 S. Ct. at 653-54). Additionally, in order "[t]o show a due process

[4] Chief Justice Lambert of the Kentucky Supreme Court issued a dissent on this point, which was joined by Justices Cooper and Stumbo. [DE 19-2, Warden's Resp., App. 112-15, at 460-63].

violation under AEDPA rooted in an evidentiary ruling," the Sixth Circuit "has typically required a Supreme Court case establishing a due process right with regard to that specific kind of evidence." *Moreland v. Bradshaw*, 699 F.3d 908, 923 (6th Cir. 2012) (citing *Collier v. Lafler*, 419 Fed. App'x 555, 558 (6th Cir. 2011).

As previously noted in the R&R, which was adopted by this Court, Henderson failed to state any Supreme Court authority holding that the admission of prior bad acts evidence violates due process. The Sixth Circuit has stated that "[t]here is no clearly established Supreme Court precedent which holds that a state violates due process by permitting propensity evidence in the form of other bad acts evidence." *Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003); *see also Bey*, 500 F.3d at 520; *Martin v. Beckstrom*, No. 12-83-KSFL, 2013 WL 3192895, at *1 (E.D. Ky. June 21, 2013) (holding admission of "testimony of two additional alleged victims regarding other uncharged criminal acts" was not a basis for a federal due process claim where petitioner "failed to point to any Supreme Court authority holding that the admission of prior bad acts evidence violates due process or that the prior bad acts evidence admitted was so unfairly prejudicial that it rendered his trial fundamentally unfair or flawed"). Further, the Kentucky Supreme Court determined that is was proper to admit the evidence to prove the nature of Henderson's relationship with O'Neal. [DE 19-2, Warden's Resp., App. 107-10, at 455-58]. Proper admission of evidence does not violate due process. *Estelle*, 112 S. Ct. at 481 (Defendant's "due process rights were not violated by the admission of the evidence."); *Bey*, 500 F.3d at 519-20. Accordingly, Henderson has not demonstrated that this Court's judgment is based on a clear error of law. Nor has Henderson presented newly discovered evidence, an intervening change in controlling law, or a need to prevent manifest injustice.

3. Ineffective Assistance of Counsel – Failure to Object to Lack of Complicity Instruction.

Third, Henderson argues that he had "no complicity instructions." [DE 35, at 1487]. This argument relates to one of several of Henderson's claims of ineffective assistance of counsel, and specifically that his counsel should have objected to the jury instructions for wanton murder not containing a complicity instruction. [DE 1-1, Pet., at 46; DE 26, Pet.'s Obj., at 1426]. The R&R recommended these claims be dismissed as procedurally defaulted, which this Court agreed with and adopted. [DE 30, July 7, 2018 Order]. As stated above, a Rule 59(e) motion is not appropriate to simply re-hash previously presented arguments, nonetheless, the Court does not find this argument presents a basis to justify amending its judgment under Rule 59(e).

This particular claim of ineffective assistance of counsel was denied by the Kentucky Court of Appeals in 2015 as barred under Kentucky's procedural rules against successive claims that were previously raised, or should have been raised, on direct appeal. [DE 19, Warden's Resp. at App. 602, 652-54], *Henderson v. Commonwealth*, 2015 WL 1433301 (Ky. App. Mar. 27, 2015). Discretionary review was denied by the Kentucky Court of Appeals. [DE 19, Warden's Resp. at App. 635].

For purposes of habeas corpus, this claim fell into the category of procedural default for failure to comply with state procedural rules in presenting the claim to the appropriate state court, as opposed to procedural default for failing to raise a claim in the state court in the first place. *See Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006)(explaining that a federal habeas corpus petition may be procedurally defaulted in two ways.

Under the first category of procedural default, the claim for habeas relief is procedurally barred if "the state court declines to reach the merits of the issue, and the state procedural rule is an independent and adequate grounds for precluding relief." *Anderson*, 460 F.3d at 806. Then, the

federal court will not reach the merits of the procedurally defaulted claim rejected on independent and adequate state law grounds unless the petitioner demonstrates cause for the default and prejudice resulting therefrom, or alternatively, that a fundamental miscarriage of justice will result from the conviction of one who is factually innocent if the claim is not addressed. *Id.* at 805-06; see also *Sutton v. Carpenter*, 745 F.3d 787, 790-91 (6th Cir. 2014); *Henderson v Palmer*,730 F.3d 554, 559 (6th Cir. 2013).

Under the "cause" and "prejudice" test, "cause" must be something external to the petitioner that impeded his efforts to comply with the state's procedural rules. *See Coleman*, 501 U.S. at 753 (1991). Attorney error, when it rises to the level of ineffective assistance of counsel in violation of the Sixth Amendment, may also satisfy the cause requirement. *See Murray v. Carrier*, 477 U.S. at 488-89 (1986). To satisfy the "prejudice" requirement, Henderson must demonstrate the claimed constitutional error is so substantial that it undermined the integrity of the entire trial. *See United States v. Frady*, 456 U.S. 152, 169-70 (1981).

Under the "miscarriage of justice" test, for the most part, 'victims of a fundamental miscarriage of justice' will meet the cause-and-prejudice standard." *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986)(quoting *Engle v. Isaac*, 456 U.S. 107, 135 (1982)). However, the Supreme Court does "not pretend that this will always be true." *Id.* at 496. Therefore, the Supreme Court has indicated that "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Id.*; *see also Bousley v. United States*, 523 U.S. 614, 623 (1998); *Schlup,* 513 U.S. at 327-31; *Coleman*, 501 U.S. at 750.

Here, the Magistrate concluded in the R&R [DE 25, at 1415-18], which this Court agreed with and adopted [DE 30], that the Kentucky Court of Appeals relied upon well-established state

procedural rules to refuse to address the merits of Henderson's ineffective assistance of counsel claim for failure to object to the jury instructions. Specifically, the Kentucky Court of Appeals relied on the Kentucky procedural rule that prohibits the raising of issues in a successive RC4 11.42 or CR 60.02 motion that could have been previously raised on direct appeal or in a prior post-conviction motion. Further, Henderson failed to demonstrate cause and prejudice, or manifest injustice. As explained previously, the conclusory Affidavit of O'Neal was not enough to establish sufficient proof of actual innocence. Further, Henderson has not presented a change in the law or newly discovered evidence that would warrant altering or amending this Court's previous judgment pursuant to Rule 59(e).

4. Ineffective Assistance of Counsel –Alleged Ethics Violations Relating to Grand Jury.

Henderson states that his counsel violated the Rules of Professional Conduct. [DE 35 at 1489]. This objection appears to be in relation to Henderson's claim of ineffective assistance of counsel for alleged ethic violations relating to his counsel's alleged failures to discover and investigate certain testimony in the grand jury proceedings. This argument is an attempt to simply restate and argument that was already presented to this Court and is not an appropriate Rule 59(e) motion. Even so, the Court does not find this argument presents a valid basis to justify amending its judgment under Rule 59(e).

This claim was addressed by the Kentucky Court of Appeals on the merits. [DE 19, Warden's Resp. at App. 429-37]. The Magistrate found in the R&R that Henderson failed to show that the Kentucky Court of Appeals' decision to deny Henderson's claim on this point was contrary to or an unreasonable application of the controlling federal standard on ineffective assistance of counsel set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). The R&R, which this Court adopted, is exhaustive on this point and need not be restated here. [DE 25, at 1406-13]. No error

of law has occurred on this issue, and Henderson raises no other appropriate ground for altering or amending the judgment under Rule 59(e).

5. Basis for Adopting R&R.

Finally, Henderson appears to argue that this Court stated no valid basis to adopt and accept the R&R. [*Id.*, at 1490]. This argument is made in conjunction with Henderson's citation to Rule 52(b), which provides that "[o]n a party's motion ... the court may amend its findings—or make additional findings—and may amend the judgment accordingly..." [DE 35 at 1483]. Essentially, Henderson asserts that this Court failed, by adopting the R&R, to make a proper review of the R&R. However, the Court, made a *de novo* determination of those portions of the R&R to which Henderson objected, in accordance with 28 U.S.C. § 636(b)(1).[5] In the July 7, 2018 Order, the Court made stated that it fully considered Henderson's objections:

> Having thoroughly reviewed the Petition, Magistrate Judge Whalin's Report, Mr. Henderson's objections, and all other relevant materials, the Court finds that the objections lack merit. The objections merely reiterate previously made arguments, assert general disagreement with various aspects of the Report, and assert vague objections that provide no valid basis for Mr. Henderson's claims. Mr. Henderson repeatedly claims that Magistrate Judge Whalin failed to consider certain facts in the Report that Magistrate Judge Whalin did, in fact, consider at length. The Report exhaustively describes the applicable standards of review at each stage in Mr. Henderson's case—both at the state and federal levels—and Magistrate Judge Whalin's findings and conclusions are consistent the Antiterrorism and Effective Death Penalty Act's limitations...[t]he Court concludes that Magistrate Judge Whalin's factual review and legal analyses were appropriate, and that he properly resolved all issues in this action.

[DE 30]; *see also Baidas v. Jenifer,* 123 Fed. App'x 663, 668 (6th Cir. 2005) ("Although this court 'strongly recommend[s] that district courts put on the record at least brief statements in support of

[5] Section 636(b)(1) provides, in pertinent part, that "A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge."

their decisions to overrule objections to a magistrate judge's report and recommendation,' this is not a per se requirement.") (quoting *Senter v. Sullivan,* No. 91–6222, 1992 WL 238268, at *2 (6th Cir. Sept. 25, 1992)); *Douglas v. Maxwell*, 357 F.2d 320, 322 (6th Cir. 1966). "Without persuasive indication otherwise, the district court's statement that it had reviewed the objections sufficiently establishes that the review conducted was de novo." *Baidas,* 123 Fed. App'x at 668. "Simply because [Petitioner] is unsatisfied with the outcome does not mean that the district court failed to review the entire record." *McCombs v. Meijer, Inc.,* 395 F.3d 346, 360 (6th Cir. 2005) (concluding that district court conducted proper review of magistrate judge's report and recommendation, where court's order indicated that "it 'considered de novo all of the filings'"). Accordingly, the Court will deny Henderson's Rule 59(e) motion on this basis as well.

C. RULE 60(b) – STANDARD

Rule 60(b) grants power to courts to "reopen cases well after final judgment has been entered." *Howard*, 533 F.3d at 475 (citation omitted). This rule provides that a court "may relieve a party or its legal representative from final judgment, order, or proceeding" for numerous reasons. Fed. R. Civ. P. 60(b). Subpart (6) of Rule 60(b), the particular provision under which Henderson brought his motion, is a catch-all provision that provides relief from a final judgment when the movant shows "any other reason that justifies relief." *Gonzales v. Crosby,* 545 U.S. 524, 528 (2005).

The Sixth Circuit applies "[e]ven stricter standards ... to motions under subsection (6) of Rule 60(b) than to motions made under other provisions of the rule." *Stokes v. Williams,* 475 F.3d 732, 735 (6th Cir. 2007). The Sixth Circuit has instructed that relief under Rule 60(b) "is circumscribed by public policy favoring finality of judgments in termination of litigation." *McGuire v. Warden, Chillicothe Corr. Inst.*, 738 F.3d 741, 750 (6th Cir. 2013) (citations omitted).

This is especially true in an application of subsection (6) of Rule 60(b), which applies only in extraordinary circumstances which are not addressed by the first five numbered clauses of the rule. *Gonzalez,* 545 U.S. at 535; *McGuire*, 738 F.3d at 750 (relief under subsection (6) is limited to "unusual and extreme situations where principles of equity *mandate* relief") (citations omitted).The Supreme Court has explained in the context of Rule 60(b) that "[s]uch circumstances will rarely occur in the habeas context." *Gonzalez,* 545 U.S. at 535.

The Supreme Court has instructed that courts may consider a wide range of factors in determining whether extraordinary circumstances are present. *Buck v. Davis*, 137 S.Ct. 759, 778 (2017). "The decision to grant Rule 60(b)(6) relief is a case-by-case inquiry that requires the trial court to intensively balance numerous factors, including the competing policies of the finality of judgments and the incessant command of the court's conscience that justice be done in light of all the facts." *McGuire*, 738 F.3d at 750 (citations omitted). Additionally, it is well settled in the Sixth Circuit that "Rule 60(b) does not allow a defeated litigant a second chance to convince the court to rule in his or her favor by presenting new explanations, legal theories, or proof." *Tyler*, 749 F.3d at 509.

As discussed above, Rule 60(b) may0 be a viable avenue for relief from a final judgment in a habeas corpus case, under 28 U.S.C. § 2254, to the extent that it is not inconsistent with the statutory provisions governing the filing of second or successive habeas corpus petitions found at 28 U.S.C. § 2244(b)(1)-(3). *Gonzales*, 545 U.S. at 528-29, 534. Thus, whenever a Rule 60(b) motion is filed in the context of a § 2254 case, courts must consider whether the motion is in substance a second or successive habeas corpus petition. *Id.*

D. ANALYSIS - RULE 60(b) MOTION

In his Rule 60(b) motion, Henderson states five grounds for relief. The Court will address below each argument raised by Henderson, first determining whether it is a second or successive petition for habeas relief, and if not, addressing the merits.

1. Claim That Essential Elements of Wanton Murder and Robbery in the First Degree Not Proven.

First, Henderson argues that his conviction for wanton murder was obtained in violation of the due process clause of the Fourteenth Amendment of the United States Constitution because the prosecution failed to sufficiently prove the essential elements of wanton murder and robbery in the first degree. [DE 36, at 1504]. Henderson asserts the prosecution "failed to introduce any relevant or competent evidence at this trial which proved beyond a reasonable doubt that he is guilty of actually committing the alleged murder." [DE 36, at 1509]. Henderson argues, as a result, the conviction is void *ab initio* in violation of the Due Process clause of the Fourteenth Amendment. [DE 36, at 1504].

This argument appears to be either a new claim, or, a reformulation of Henderson's claim for habeas relief for ineffective assistance of counsel for failure "to object to the fact the Commonwealth did not prove all the elements of a crime" and failure to object to the Jefferson Circuit Court's jury instructions [DE 1-1, Pet. at 11, 42-43, 46-47; DE 26, Pet.'s Obj. at 1426-27], which was dismissed by this Court with prejudice as procedurally defaulted. [DE 25, R&R at 1415-19; DE 30, July 6, 2018 Order]. Because this argument either seeks to add a new ground for relief or attacks this Court's previous resolution of Henderson's claim of ineffective assistance of counsel for failure to object to the jury instructions a claim on the merits, under *Gonzalez,* this aspect of Henderson's Rule 60(b) Motion is a second or successive habeas claim.

Under 28 U.S.C. § 2244(b)(3)(A), before a second or successive § 2254 petition is filed in the district court, a petitioner must seek authorization from the appropriate court of appeals for the district court to consider the petition. In the instant case, Henderson failed to obtain authorization from the Sixth Circuit prior to filing the instant motion. The Court, therefore, will transfer this aspect of the Rule 60(b) Motion [DE 36, at 1504-19] to the Sixth Circuit Court of Appeals pursuant to 28 U.S.C. § 1631. *See In re Sims,* 111 F.3d 45, 47 (6th Cir. 1997) ("[W]e hold that when a prisoner has sought § 2244(b)(3) permission from the district court, or when a second or successive petition for habeas corpus relief or § 2255 motion is filed in the district court without § 2244(b)(3) authorization from this court, the district court shall transfer the document to this court pursuant to 28 U.S.C. § 1631.").

2. Claim that Jury Instructions Were Unsupported by Evidence.

Henderson next argues in his Rule 60(b) Motion that the jury instructions presented alternative theories that were unsupported by the evidence and violated Section Seven of the Kentucky Constitution. [DE 36, at 1520, 1524]. Thus, Henderson argues "because the Commonwealth did not demonstrate it met its burden of proof under each of the theories in the instructions, thus causing the instructions to be void *ab initio* denying Petitioner a unanimous verdict...Petitioner is entitled to immediate release." [*Id.* at 1524]. As with Henderson's first argument in his Rule 60(b) Motion, this argument likewise appears to be either a new claim, or a repackaging of his claim for habeas relief for ineffective assistance of counsel for failure "to object to the fact the Commonwealth did not prove all the elements of a crime" and failure to object to the Jefferson Circuit Court's jury instructions [DE 1-1, Pet. at 11, 42-43, 46-47; DE 26, Pet.'s Obj. at 1426-27], which was dismissed by this Court with prejudice as procedurally defaulted. [DE 25, R&R at 1415-19; DE 30, July 6, 2018]. Under *Gonzalez,* this second aspect of Henderson's Rule

60(b) Motion is a second or successive habeas claim because it either seeks to add a new ground for relief or attacks this Court's previous resolution of Henderson's claim on the merits. Accordingly, the Court, will transfer this aspect of the Rule 60(b) Motion [DE 36, at 1520-24] to the Sixth Circuit Court of Appeals pursuant to 28 U.S.C. § 1631, *see In re Sims,* 111 F.3d at 47.

3. Alleged Deprivation of Right to Notice of Alleged Charge.

Third, Henderson argues that he was deprived of his right to notice of the charge to provide him reasonable time to prepare a defense in violation of the Sixth and Fourteenth Amendment of the United States Constitution. [DE 36, at 1525]. This argument relates to his claim that his trial counsel was ineffective. Specifically, the alleged failures of Henderson's counsel to discover and investigate certain testimony in the grand jury proceedings that Henderson claims should have resulted in dismissal of the indictment, and Henderson's argument that trial counsel was ineffective for failure to object to jury instructions that were at variance with the indictment. [DE 1-1, Pet. at 9-11, 39-40, 42-43, 46-47; DE 26, Pet.'s Obj. at 1426]. Both of these claims were dismissed by the Court with prejudice on the merits, one upon a merit review and the other as procedurally defaulted. [DE 25, R&R at 1406-13, 1415-19; DE 30, July 6, 2018]. As with his previous two arguments for Rule 60(b) relief, this third aspect of Henderson's Rule 60(b) Motion [DE 36, at 1525-34] appears to be an unauthorized second or successive claim for habeas relief, and will thus be transferred to the Sixth Circuit Court of Appeals pursuant to 28 U.S.C. § 1631, *see In re Sims,* 111 F.3d at 47.

4. Sentence for Wanton Murder Under Charges Occurring in a Single Course of Conduct.

Fourth, Henderson argues that the trial court abused its discretion and denied him due process of law when it sentenced him for wanton murder under charges that occurred in a single course of conduct. [*Id.*, at 1535]. Again, this argument appears to be a new claim for relief or

rehashing of his previous claim for ineffective assistance of counsel for not objecting to aspects of the Jefferson Circuit Court's jury instructions. [DE 1-1, Pet.; at 11, 42-43, 46-47; DE 26, Pet.'s Obj. at 1426-27]. This claim for habeas relief was dismissed by this Court with prejudice as procedurally defaulted, thus is was considered on the merits for purposes of second or successive claim analysis. [DE 25, R&R at 1415-19; DE 30, July 6, 2018 Order]. Under *Gonzalez,* this aspect of Henderson's Rule 60(b) Motion is an unauthorized second or successive habeas claim [DE 36, at 1535-36] and will be transferred to the Sixth Circuit Court of Appeals pursuant to 28 U.S.C. § 1631, *see In re Sims,* 111 F.3d at 47.

5. Ineffective Assistance of Counsel.

Finally, Henderson argues that he was denied effective assistance of counsel for his defense in violation of the Sixth and Fourteenth Amendments to the United States Constitution. [DE 36, Rule 60(b) Mot. at 1537]. Henderson argues his counsel was ineffective for various reasons, including, but not limited to, failing to object to the indictment, failing to object to be being denied a unanimous verdict, and failing to object to Henderson's sentence. [*Id.* at 1537-45]. As with Henderson's other Rule 60(b) arguments, this argument presents new claims and/or relates to his claim that his trial counsel was ineffective for alleged failures to discover certain testimony in the grand jury proceedings that he claims should have resulted in dismissal of the indictment, and his argument that trial counsel was ineffective for failure to object to jury instructions that were at variance with the indictment. [DE 1-1, Pet. at 9-11, 39-40, 42-43, 46-47; DE 26, Pet.'s Obj. at 1426]. These claims were dismissed by the Court with prejudice on the merits, one upon a merit review and the other as procedurally defaulted. [DE 25, R&R at 1406-13, 1415-19; DE 30, July 6, 2018 Order]. This final aspect of Henderson's Rule 60(b) Motion [DE 36, at 1525-34] thus

appears to be an unauthorized second or successive claim for habeas relief, and will be transferred to the Sixth Circuit Court of Appeals pursuant to 28 U.S.C. § 1631, *see In re Sims,* 111 F.3d at 47.

E. MOTION FOR ADJUDICATION

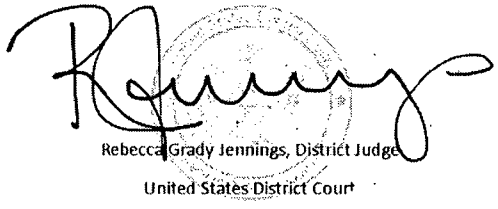
Finally, Henderson filed a Motion for Adjudication Pursuant to 28 U.S.C.A 2254(d)(1) and 18 U.S.C. 242 ("Motion for Adjudication"). [DE 41]. He makes two arguments in the Motion for Adjudication. First, Henderson argues his fundamental rights were denied with certain content was contained within his Presentence Investigation Report in violation of the Sixth and Fourteenth Amendments of the United States Constitution. [DE 41, at 1593]. This claim was not presented in his original Petition [DE 1], thus pursuant to *Gonzales*, it presents an unauthorized second or successive claim for habeas relief. Second, Henderson argues his counsel was ineffective in violation of the Sixth Amendment and Fourteenth Amendment and various provisions of the Constitution of Commonwealth of Kentucky. [*Id.* at 1596]. As with Henderson's Rule 60(b) arguments relating to his ineffective assistance of counsel claims, the argument in this motion appears to present either a new claim and/or relates to his previous ineffective assistance of counsel claims, which were dismissed with prejudice by this Court on the merits. [DE 1-1, Pet. at 9-11, 39-40, 42-43, 46-47; DE 26, Pet.'s Obj. at 1426; DE 25, R&R at 1406-13, 1415-19; DE 30, July 6, 2018 Order]. Thus, this argument likewise appears to be an unauthorized second or successive claim for habeas relief. The Court will transfer the Motion for Adjudication to the Sixth Circuit Court of Appeals pursuant to 28 U.S.C. § 1631, *see In re Sims,* 111 F.3d at 47.

F. Conclusion

For the reasons set forth above, and the Court being otherwise sufficiently advised, it **is HEREBY ORDERED AS FOLLOWS:**

(1) Henderson's Motion to Alter or Amend Judgment [DE 35] is **DENIED.**

(2) Henderson's Motion for Relief from Judgement pursuant to Federal Rule of Civil Procedure 60(b)(6)[DE 36], and Motion for Adjudication [DE 41], are construed as Petitions for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, and are **TRANSFERRED** to the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1631 for a determination of whether Petitioner, Kevin Henderson, will be granted authorization to file a second or successive habeas petition.



February 11, 2019

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

KEVIN HENDERSON — Petitioner

v. — Civil Action No. 3:16-cv-00567-RGJ

AARON SMITH, WARDEN — Respondent

* * * * *

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

Kevin Henderson brings this habeas corpus action under 28 U.S.C. § 2254. [DE 1, Def.'s Pet.]. The Honorable Dave Whalin, United States Magistrate Judge, has filed a comprehensive Report reflecting an examination of the case's background and a thoughtful consideration of the issues. [DE 25, Find. Fact, Concl. Law and Rec. ("Report")]. The Report recommends that Mr. Henderson's Petition for Writ of Habeas Corpus be denied. *Id.*

Mr. Henderson has filed objections to Magistrate Judge Whalin's Report. [DE 26, Def.'s Obj.]. Where a habeas petition has been referred to a magistrate judge for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B), this Court reviews *de novo* "those portions of the report or specified proposed findings or recommendations to which objection is made." *Id.* at § 636(b)(1)(C). After conducting such a review, the Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." *Id.*

Having thoroughly reviewed the Petition, Magistrate Judge Whalin's Report, Mr. Henderson's objections, and all other relevant materials, the Court finds that the objections lack merit. The objections merely reiterate previously made arguments, assert general disagreement with various aspects of the Report, and assert vague objections that provide no valid basis for Mr. Henderson's claims. Mr. Henderson repeatedly claims that Magistrate Judge Whalin failed to

consider certain facts in the Report that Magistrate Judge Whalin did, in fact, consider at length. The Report exhaustively describes the applicable standards of review at each stage in Mr. Henderson's case—both at the state and federal levels—and Magistrate Judge Whalin's findings and conclusions are consistent the Antiterrorism and Effective Death Penalty Act's limitations. [*See* DE 25, Report at 2-23]. The Court concludes that Magistrate Judge Whalin's factual review and legal analyses were appropriate, and that he properly resolved all issues in this action.

For the reasons set forth above, and the Court being otherwise sufficiently advised, it **HEREBY ORDERS AS FOLLOWS**:

(1) Mr. Henderson's objections [DE 26] are **OVERRULED**.

(2) The Findings of Fact, Conclusions of Law and Recommendation [DE 25] of Magistrate Judge Whalin are **APPROVED** and **ADOPTED**.

(3) The Petition for Writ of Habeas Corpus [DE 1] is **DISMISSED WITH PREJUDICE** and the relief requested therein is **DENIED**.

(4) There is *no* basis for the issuance of a certificate of appealability.[1]

(5) The Clerk of the Court shall mark this case **CLOSED** for all purposes.

Rebecca Grady Jennings, District Judge
United States District Court

July 6, 2018

[1] A certificate of appealability may issue only upon "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Buck v. Davis*, ___ U.S. ___, 137 S. Ct. 759, 773 (Feb. 22, 2017); *Ajan v. United States*, 731 F.3d 629, 630 (6th Cir. 2013). A petitioner must demonstrate "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Dufresne v. Palmer*, 876 F.3d 248, 252-53 (6th Cir. 2017). The Court concludes, for the reasons provided in Magistrate Judge Whalin's Report, that there is no probable cause to issue a certificate of appealability in this case. [DE 25, Report at 56-58].

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

KEVIN HENDERSON PETITIONER

v. CIV. ACTION NO. 3:16-CV-00567-CRS

AARON SMITH, WARDEN RESPONDENT

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION

Kevin Henderson is a Kentucky state prisoner. On May 27, 1998, a jury seated in Jefferson County, Kentucky convicted Henderson and his juvenile codefendant, Cedric O'Neal, for the first-degree robbery and wanton murder of Quinton Hammond, a 15-year-old Louisville resident, who was found dying in a vacant lot on the morning of November 20, 1997 after being shot three times in the chest and back. Henderson and O'Neil each received a life sentence for the murder and a concurrent 20 year sentence for the robbery. Henderson now raises 10 grounds for relief in the memorandum of law that accompanies his habeas corpus petition.[1] Because none of the many grounds raised by Henderson entitles him to relief pursuant to 28 U.S.C. § 2254, the Court shall recommend that his petition be dismissed with prejudice and that he be denied a certificate of appealability, as well.

[1] His petition itself lists some 15 claims and his "traverse" identifies 14 grounds for relief. We limit ourselves to those grounds that are substantively argued.

FINDINGS OF FACT

On October 2, 1997, a grand jury seated in the Jefferson County returned a three-count indictment against Kevin Henderson and Cedric O'Neal.[2] Count one charged Henderson and O'Neal, acting alone or in complicity, with the offense of intentional or wanton murder in the death of Hammond. Count two charged both men with the first-degree robbery of Hammond. Count three charged Henderson with unlawfully providing a handgun to a juvenile.[3] The Commonwealth filed a notice of aggravating circumstances and stated its intention to seek the death penalty for Henderson, who moved repeatedly without success, for a separate trial from O'Neal, a juvenile who was ineligible for the death penalty. Their joint trial in Jefferson Circuit Court commenced before Judge John Potter on May 18, 1998.

A.

The Commonwealth presented the following evidence at trial as described by the both the Kentucky Supreme Court in its 1998 opinion on direct appeal and the Kentucky Court of Appeals in its 2006 opinion that affirmed the denial of CR 60.02[4] relief:

> The Commonwealth's theory of the case was that O'Neal fired the shot that killed Hammond, but that [Henderson] was liable as an accomplice because of his active

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[2] (DN 19, Response, Appendix (App.) p. 1-3, Indictment).

[3] Henderson was acquitted of this charge following his joint trial with O'Neal.

[4] CR 60.02 provides that:

> On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this rule does not affect the finality of a judgment or suspend its operation.

Ky. R. Civ. P. 60.02

participation in the planning, preparation, and commission of both offenses. During its case-in-chief, the Commonwealth connected [Henderson] to the crimes through the testimony of: (1) Odessa Booker, who heard the shots from her home and observed two (2) black males running eastward from the scene; (2) Officer Anne Duncan, who was dispatched to the residence where both [Henderson] and O'Neal lived on the morning of the shooting in reference to another alleged shooting and found O'Neal with a gunshot wound to the elbow area of his left arm. According to Officer Duncan, she found suspicious O'Neal's explanation that he had been shot approximately two (2) hours earlier by an unknown person who had attempted to rob him; (3) Billy McAtee, a friend of O'Neal's, who testified that he observed [Henderson] and O'Neal together on the morning of the shooting, later saw them run inside the O'Neal house, and, after following them inside noticed O'Neal had been shot. McAtee testified that O'Neal stated that, "He was trying to rob a boy for his shoes, boy wouldn't give it up, shot the boy and himself in the arm." McAtee also testified that he had been present on an earlier occasion when Henderson had given O'Neal a handgun with the instruction, "Take it, do your business, but be careful," and that he had also been present at O'Neal's residence the day before the shooting and witnessed O'Neal loading a handgun and making efforts to disguise the identity of the ammunition by "chopping" bullets. The Commonwealth also introduced a transcript of a telephone call McAtee had made to a relative incarcerated in state prison in which McAtee verified many of the above-described facts and stated that [Henderson] had given the handgun to O'Neal and that O'Neal returned it to Henderson following the shooting; (5) Kathy O'Neal, Cedric O'Neal's younger sister, who testified that, on the morning of the shooting, she observed [Henderson] and O'Neal whispering together in the living room. Kathy O'Neal also admitted that she had previously told the investigating officers that she observed [Henderson] and O'Neal donning masks as they left the house; (6) Joquita Sanders, O'Neal's first cousin who also lived in the house, who admitted telling the investigating officers that she also saw [Henderson] and O'Neal run inside the house, but testified at trial that the statement was a lie; (7) Angela Bailey, O'Neal's sister, who testified that she observed [Henderson] hurriedly placing guns and a rifle in a duffle bag that morning; and (8) Victoria O'Neal, [Henderson's] girlfriend, who testified at trial that [Henderson] was in bed asleep with her when O'Neal knocked on her door and asked for a rag to stop his arm from bleeding. Victoria O'Neal acknowledged, however, that in a previous statement to the investigating officers, she had stated that [Henderson] was not in bed when she was awakened by O'Neal.

*2 The Commonwealth also introduced O'Neal's tape-recorded statement in which O'Neal told numerous contradictory statements attempting to substantiate his claim of being a robbery victim before stating that: (1) while attempting to "jack" Hammond, he killed Hammond and shot himself accidentally, (2) no one else was present during the shooting; (3) he disposed of the .38 handgun by throwing it into the sewer; and (4) he then ran home, got a cloth from his sister and laid in his bed until later reporting his shooting as a "robbery." One of the detectives present during O'Neal's confession testified that, after giving his tape-recorded

"confession," O'Neal admitted his involvement in the crimes to his mother and her live-in boyfriend.

At trial, however, O'Neal testified in his own defense and, notwithstanding his tape-recorded statements, denied involvement in the shooting and testified that [Henderson] had killed Hammond. During his testimony, O'Neal: (1) admitted that he had been with [Henderson] on the morning of the shooting, but claimed ignorance of any planned robbery; (2) testified at length concerning a pattern of criminal conduct in which [Henderson] played the role of O'Neal's instructor and superior while O'Neal himself reluctantly "played along" under duress and, once out of [Henderson's] sight, refused to participate in [Henderson's] criminal schemes and invented explanations for his failures; (3) explained that, on the day in question, [Henderson] gave him a toboggan to put on, gave him a gun, and told O'Neal that he wanted him to do some "licks" (robberies) by himself; (4) testified that [Henderson] became angry after O'Neal allowed two (2) would-be victims to escape, and O'Neal eventually returned the handgun to [Henderson] and told him, "Robbing nobody ain't gonna make me no man."; (5) testified that [Henderson] then bumped into a young man (Hammond) walking towards them and that gunfire erupted immediately after [Henderson] confronted the young man regarding the collision, but that he never saw [Henderson] produce the firearm, that he could not recall how many shots were fired, and that he did not even discover his own gunshot wound until later; (6) explained that he began running as soon as he heard the shots and that [Henderson] joined him after the gunfire stopped; (7) testified that he and [Henderson] ran to the O'Neal house on 34th Street and that [Henderson] stated to him that, "If you was doing what you were supposed to be doing, none of this shit would have never happened."; (8) explained that, once he and [Henderson] arrived at the house, his sister Victoria suggested that O'Neal claim that he received his wound when someone attempted to rob him; and (9) testified that he did not implicate [Henderson] in the offense because [Henderson] warned him not to mention [Henderson]'s name so that "he [Henderson] didn't have to hurt anybody," a statement O'Neal testified that he interpreted as a threat against the O'Neal family, and because there was no reason for them to "both go down" when O'Neal, a juvenile, would receive only a light punishment even if caught.

*3 In his defense, O'Neal also called Michael Brown, an inmate and former bunkmate of [Henderson]. Brown testified that [Henderson] spoke of the crime and admitted that he had shot the victim but intended to deny involvement and blame O'Neal in order to avoid the death penalty.

Although [Henderson] himself did not testify at trial, he called in his defense the detective to whom O'Neal had made the prior taped confession and attempted to cast doubt upon O'Neal's in-court version of the events.

Henderson v. Commonweath, No.1998-SC-0624-MR, at *2-4 (Ky. Dec. 20, 2001)(unpublished disposition); *Henderson v. Commonweath*, No. 2004-CA-001988-MR, 2006 WL 1046316, at *1–3 (Ky. Ct. App. Mar. 31, 2006). Following the presentation of the evidence, the jury found both men guilty of murder and first-degree robbery. On July 24, 1998, Judge Potter entered a judgment of conviction that sentenced Henderson to concurrent terms of imprisonment for life and 20 years, respectively.

Henderson took a direct appeal to the Supreme Court of Kentucky. On appeal, he argued that the trial court abused its discretion and violated his constitutional rights under the 5th, 6th and 14th Amendments when it overruled his repeated requests for a separate trial from O'Neal. He also argued that the trial court again abused its discretion to his substantial prejudice when it erroneously allowed at trial evidence of his alleged prior crimes and bad acts pursuant to Kentucky Rule of Evidence (KRE) 404(b).[5] The Kentucky Supreme Court rejected both arguments in an unpublished decision rendered on December 20, 2001.

Citing RCr 9.16, it first concluded that the trial court had not abused its discretion when it denied Henderson a separate trial. According to the Supreme Court, nothing more than "pure speculation" supported Henderson's "broad allegations of prejudice" due to the former representation of co-defendant O'Neal by an attorney, Keith Kamenish, who had briefly represented Henderson at the start of the case before switching to represent O'Neal and being soon thereafter disqualified from further representation of O'Neal. To quote the Kentucky Supreme Court:

> We find Appellant's 'broad allegations of prejudice' concerning Kamenish's prior representation of O'Neal insufficient to demonstrate that the trial court abused its discretion when it denied Appellant's motion for a separate trial. Appellant's assertions of prejudice, both before the trial court and upon appeal are based on 'pure speculation' that O'Neal's trial strategy was shaped by information given to

[5] (DN 19, App. 6-49, Appellants' Brief on Direct Appeal at pp. i-ii).

> him by his former attorney regarding Appellant's trial strategy. Naked allegations of possible prejudice are not sufficient for us to override a trial court's discretion, and 'a defendant must *prove* that joinder would have been so prejudicial as to be 'unfair' or 'unnecessarily or unreasonably hurtful.' Even after the trial court gave Appellants an opportunity to demonstrate such proof, he declined to do so. Accordingly, 'in the absence of a showing, we must presume the party making the motion for a separate trial failed to meet the burden and that the trial court did not abuse its discretion in overruling the motion for separate trials.

Henderson v. Commonweath, No.1998-SC-0624-MR, at *12-13 (Ky. Dec. 20, 2001)(unpublished disposition) (footnote case citations omitted).

The Kentucky Supreme Court likewise rejected Henderson's argument that the possibility of prejudice due to antagonistic defenses also required that he be tried separately from O'Neal. In this respect, the Supreme Court concluded that Henderson had failed to show that the potential antagonism between the two codefendants would substantially mislead or confuse the jury at trial.[6] As the Kentucky Supreme Court explained:

> We find no indication that the jury was misled or confused by O'Neal's defense. In fact, the jury's penalty phase verdict as to Appellant clearly establishes that it found Appellant guilty of wanton murder on the basis of his participation in the crime of robbery and its finding that it did not believe beyond a reasonable doubt that Appellant himself shot and killed Hammond constitutes a specific rejection of O'Neal's antagonistic trial defense. Here, 'we believe the jury was able to separate the evidence,' and as was the case in *Commonwealth v. Rogers* [698 SW2d 839, 840 (1985)], 'we see nothing in the joinder of the two defendants for trial which was unreasonably hurtful to appellant. It must follow that we find no abuse of discretion by the trial court in its failure to grant separate trials.'

Id. at *14-15(footnote case citation omitted).

The Kentucky Supreme Court also addressed the extensive trial testimony by O'Neal concerning Henderson's prior bad acts. At trial, the juvenile O'Neal attempted to persuade the jury that Henderson, an adult, acted as an undue criminal influence on him. O'Neal testified that Henderson tried to persuade O'Neal to break into automobiles, handle weapons, commit robberies, and work for him as a drug dealer. O'Neal consequently argued that he would not

[6] Henderson v. Commonweath, No.1998-SC-0624-MR, at *14 (Ky. Dec. 20, 2001)(unpublished disposition).

have participated in the robbery and murder of Hammond, but for the influence of Henderson. Henderson argued on appeal that the trial court abused its discretion in permitting O'Neal to so testify. The Kentucky Supreme Court likewise rejected this argument holding that the KRE 404(b) evidence was not introduced for the improper purpose of showing Henderson's criminal disposition, but rather to "demonstrate the relationship between the two codefendants."[7] According to the Court:

> The evidence O'Neal introduced in his defense illustrated the relationship between Appellant and O'Neal and demonstrated a pattern of conduct which identified Appellant as the [sic] an instigator or planner of criminal schemes and O'Neal as a somewhat reluctant participant. The jury was free to accept or reject either in whole or in part this testimony. As KRE 404(b) prohibits only the introduction of evidence of previous criminal conduct when that evidence is admitted for the purpose of proving someone's criminal predisposed character, the trial court has no basis for excluding evidence which was probative of the nature of the relationship between the codefendants.

Id. at pp. 17-18.[8] The Kentucky Supreme Court subsequently denied Henderson's petition for rehearing on March 21, 2002.[9]

B.

Henderson then set out on extensive, post-conviction efforts to upend his conviction. First, on July 29, 2002, he filed the aforementioned CR 60.02 motion based on the post-trial December 13, 2001 affidavit of O'Neal in which O'Neal swore that:

> I hereby state that the reason for this affidavit is [to] make clear that my testimony during the trial in which I was convicted is very false and untrue concerning Kevin Henderson's involvement in the demise of Quinton Hammond, in which he (Kevin Henderson) was not involved and the a [sic] reason being to project my proportion of th[e] blame towards him in an attempt to protect myself from my responsibility in the demise of Quinton Hammond

(DN 19, App. 151-152, Opinion and Order Denying CR 60.02 Motion).

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[7] *Henderson v. Commonweath*, No.1998-SC-0624-MR, at *16.

[8] Judges Lambert, Cooper and Stumbo dissented from this portion of the opinion. Judges Graves, Johnstone, Keller and Wintersheimer formed the majority on this issue.

[9] (DN 19, App. 200, Order Denying Petition for Rehearing).

Henderson argued that the recanted testimony of O'Neal entitled him to the reversal of his conviction and a new trial. The trial court, Judge Denise Clayton, initially rejected this argument in an opinion and order entered on April 25, 2003.[10] In her opinion, Judge Clayton held that Henderson had failed to show via O'Neal's affidavit an extraordinary case involving "a colossal miscarriage of justice."[11] The jury, according to Judge Clayton, had the opportunity to directly observe O'Neal's testimony and decide whether they thought he was truthful. Additionally, she noted that, beyond O'Neal, other trial witnesses had implicated Henderson in the murder.

Following appointment of counsel to assist Henderson with his CR 60.02 motion, and two hearings, a second order was entered by the trial court in January 2004 again rejecting Henderson's arguments. In this instance, the trial court ruled that:

> After reviewing the trial tapes, it is the opinion of this Court that the verdict would most probably have been the same even if Mr. O'Neal had not testified against Mr. Henderson. Many of the witnesses relied upon by the defense had told different versions of what happened. The jury could have chosen from three different scenarios in rendering their verdict. Two of the scenarios involved Mr. Henderson being there. One was with Mr. Henderson being the "shooter" and the other one was as the Jury found: Mr. Henderson present with Mr. O'Neal, with the latter pulling the trigger. The final scenario would have been with Mr. Henderson not present, but instead, with Billy McAtee present. It is apparent to this Court when reviewing the tapes, that the jury had differing accounts throughout the trial as to who was involved in the incident and they chose to believe Mr. Henderson was.Consequently, this Court cannot say that the jury would most probably have found differently had Mr. O'Neal not testified as he did against Mr. Henderson.

Henderson v. Commonwealth, No. 2004-CA-001988-MR, 2006 WL 1046316, at *3 (Ky. Ct. App. Mar. 31, 2006)

Henderson took a pro se appeal to the Kentucky Court of Appeals from the final order that denied his CR 60.02 motion. On appeal, the Court of Appeals applied the two-part test set

[10] (DN 19, App. 151-152, Opinion and Order Denying CR 60.02 Motion).
[11] Id at p. 2.

forth in *Commonwealth v. Spaulding*, 991 SW2d 651, 654 (Ky. 1999) wherein the Kentucky Supreme Court held that to be entitled to a new trial based on perjured testimony under CR 60.02 a defendant must show to a reasonable certainty, first, that perjured testimony was introduced against him at trial, and second, that the use of the perjured testimony changed the verdict or would probably change the result if a new trial have been granted.

The Kentucky Court of Appeals concluded in its March 31, 2006 opinion that O'Neal's affidavit failed both parts of the *Spaulding* test. He had not shown to a reasonable certainty that the trial testimony of O'Neal was perjured merely by the subsequent introduction of an affidavit that contained contradictory statements.[12] Second, the trial court properly found based on its review of the trial testimony that the guilty verdict most probably would have been the same even if O'Neal had not testified against Henderson.[13] To quote from the opinion, "based on the evidence presented against Henderson, as summarized above, we agree that Henderson failed to demonstrate that a change in O'Neal's testimony 'would, with a reasonable certainty, have changed the verdict, or that it would probably change the result if a new trial should be granted.'"[14] The Supreme Court of Kentucky denied Henderson subsequent motion for discretionary review by order entered on August 17, 2006.[15]

While this appeal was pending, Henderson filed a pro se RCr 11.42 motion to vacate on February 1, 2005. Three weeks later he filed a motion to amend and supplement it on February 25, 2005, which included claims ineffective assistance of counsel based on the alleged failure of his trial counsel to: object to improper jury instructions; preserve certain issues on direct appeal,

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[12] *Henderson v. Commonwealth*, No. 2004-CA-001988-MR, 2006 WL 1046316, at *3.
[13] *Id.*
[14] *Id.* at *3 (quoting *Spalding* at 654).
[15] (DN 19, App. 293, Order Denying Discretionary Review).

conduct an adequate pre-trial investigation; and, seek dismissal of the indictment due to grand jury proceeding irregularities.

The trial court entered an order on March 11, 2005 that denied Henderson's motion to supplement his RCr 11.42 motion, reasoning that "he has already filed prior motions as well as having them supplemented by counsel which this Court appointed earlier."[16] On December 4, 2007 Henderson took a belated pro se appeal to the Kentucky Court of Appeals from this order apparently on the mistaken belief that it denied his RCr 11.42 motion in its entirety, rather than merely his efforts to supplement it. The Court of Appeals, after observing that "the record here is convoluted at best," held that the March 11, 2005 opinion of the trial court "did not rule on the merits of the RCr 11.42 motion," but instead merely "denied only the motion to supplement Appellants' prior RCr 11.42 pleading" and therefore was interlocutory and nonappealable.[17]

Henderson consequently returned to the trial court, and on July 13, 2010, more than five years after he filed his original RCr 11.42 motion, moved for an evidentiary hearing on his motion to vacate, to which he filed a second supplement. The trial court, Judge Charles Cunningham, Jr., on November 18, 2010 entered an order denying Henderson's pro se RCr 11.42 motion, along with his request for an evidentiary hearing.[18] In so doing, Judge Cunningham initially ruled that an evidentiary hearing was unnecessary as "there is no reason to conclude a hearing would change the outcome of the motion as the present record is sufficient to demonstrate how the Court must rule."[19]

He then addressed two claims of ineffective assistance of trial counsel pursuant to the test announced in *Strickland v. Washington*, 466 U.S. 688, 691 (1984). First, the trial court

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[16] *Henderson v. Commonwealth*, No 2007-CA-002496-MR, 2010 WL 1814831 at*1 (Ky. App. May 7, 2010).
[17] *Id.* at*1.
[18] (DN 19, App. 370-372, Order Denying Pro Se RCr 11.42 Motion).
[19] Id. at p 2.

concluded that Henderson's trial counsel was not ineffective "for failing to investigate some undefined 'event' the day before the shooting involving the victim." On this point, the trial court concluded that "the record simply does not support any plausible basis for presuming that investigation of any such event (assuming it occurred), what have led to evidence which would have substantially altered the outcome at trial."[20]

The trial court then continued in its November 18 order to reject the second ineffective assistance of trial counsel claim in which Henderson argued that his trial attorney was ineffective for failing to seek the dismissal of the indictment, where grand jury transcripts of the testimony of LMPD Detective Eastham reflected that the detective inaccurately testified that Henderson had prior arrests for drug and gun charges when in fact he did not. On this issue, the trial court concluded that no basis existed to believe that Detective Eastham's grand jury testimony, even if false, was prejudicial to Henderson where the admissible evidence at trial supported the jury's guilty verdict on both the murder and first-degree robbery charges. The trial court additionally noted that, even if the indictment had been dismissed based on the detective's testimony, "the Commonwealth could have gone back to a new grand jury without the tainted comments, [so that] Mr. Henderson's trial counsel were not ineffective for not wasting time on such a maneuver."[21]

Once again, Henderson took appeal to the Kentucky Court of Appeals. On October 26, 2012, the Court of Appeals entered an unpublished opinion that affirmed the denial of Henderson's RCr 11.42 motion for post-conviction relief.[22] In doing so, the Court rejected Henderson's two primary claims of ineffective assistance of trial counsel. Henderson argued that his trial attorney failed to properly investigate the facts behind the grand jury testimony of

[20] Id.
[21] Id at pp 2-3.
[22] (DN, 19 App. 477-488, *Henderson v. Commonwealth*, No 2010-CA-002295-MR (Ky. App. Oct. 26, 2012)).

LMPD Detective Eastham, who testified before the grand jury that one of the suspects had supposedly seen the victim, Quinton Hammond, wearing new Reebok tennis shoes to school on the day before the fatal shooting and had decided to take them the following day when Hammond was killed. Henderson also argued that his trial attorney failed to seek the dismissal of the indictment due to false, misleading or perjured testimony Eastham presented to the grand jury.

As before, the state appellate court set out the *Strickland* standard for claims of ineffective assistance of counsel along with related Kentucky case law.[23] The Kentucky Court of Appeals initially concluded that Henderson's claims were "too vague and non-specific to have necessitated an evidentiary hearing."[24] It also held that his ineffective assistance arguments amounted merely:

> to speculation that further investigation of this matter 'might have' revealed exculpatory information helpful to his case. However, Appellant fails to specify who, if anyone, had additional information regarding interest in the victim's shoes on the day before his murder beyond those witnesses – – including McAtee– – who testified at trial or how this information would've been exculpatory.

(DN 19, App. 433, Henerson, No 2010-CA-002295-MR at p. 8).[25]

The Court of Appeals continued to note that Henderson's defense counsel at trial cross-examined potential suspect McAtee on his possible involvement in the murder and robbery of Hammond based on McAtee's own conflicting statements to the police, some of which did not implicate Henderson in the crimes and others which placed McAtee himself at the scene of the

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[23] *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001), *overruled on other grounds*, Leonard vs. Commonwealth 279 SW 3d 151 (Ky. 2009); *McQueen v. Commonwealth*, 949 S.W.2d 270, 271 (Ky. 1997); *Gall v. Commonwealth*, 702 S.W.2d 237, 39-40 (Ky. 1985).

[24] *Henderson v. Commonwealth*, No 2010-CA-002295-MR at p. 7.

[25] The Court also noted that Henderson did not make this ineffective assistance claim in his original RCr 11.42 motion and supplement filed in 2005, but rather in his second supplement filed in 2010 so that the issue was arguably time barred for not being raised within three years of his judgment of conviction as required by RCr 11.42(10). *Henderson*, No 2010-CA-002295-MR at p. 7.

crime. Consequently, defense counsel adequately presented to the jury, according to the Court of Appeals, sufficient reason to possibly conclude that McAtee was involved in the crimes, not Henderson. Because Henderson did not inform the Court of Appeals what more his trial attorney should have done, or what other material facts might have been obtained from a post-conviction evidentiary hearing, the Court rejected Henderson's arguments concerning his first claim of ineffective assistance. It then continued to reject his second ineffective assistance claim.

Henderson argued to the Court of Appeals in his second claim that absent the false testimony of Detective Eastham concerning Henderson's nonexistent prior weapons and drug convictions, Henderson would never have been indicted by the grand jury. Because his trial attorney failed to challenge the indictment on this basis, Henderson argued that he received ineffective assistance of trial counsel. The Kentucky Court of Appeals, however, observed first that Henderson had not directly cited any record of the grand jury proceedings to support his argument.[26] Only because the trial court had addressed the argument on its merits, did the Court of Appeals likewise do so.

Citing *United States v. Roth,* 777 F.2d 1200, 1204 (7th Cir. 1985), the Court of Appeals explained that Henderson must show, first, that the government knowingly used perjured testimony before the grand jury; and second, that but for the knowing reliance on perjured testimony, the indictment would not have been issued against him.[27] The Court concluded that he could not meet the *Roth* test. Even if it assumed that false, misleading or perjured testimony was presented to the grand jury, Henderson still had failed to show that the indictment would not have been issued absent this testimony, as "ample evidence was presented to the grand jury

[26] *Henderson*, No 2010-CA-002295-MR at p. 9.
[27] *Id.* at p. 10.

implicating Appellant in the subject murder and robbery."[28] According to the Kentucky Court of Appeals:

> Detective Eastham's testimony reflected that Appellants co-defendant had implicated Appellant in the robbery and murder and other witnesses had placed Appellant with O'Neal on the morning of the murder. Accordingly, even absent the testimony complained of by Appellant, the other testimony presented to the grand jury was plainly sufficient to support an indictment, and Appellant could not have shown actual prejudice supporting dismissal.

(DN 19, App. 436, *Henderson v. Commonwealth*, No 2010-CA-002295-MR at p. 11).

Additionally, the Court pointed out that even had the indictment been dismissed, the Commonwealth remained able to re-indict Henderson, a circumstance that negated any claim of actual prejudice under *Strickland.*, As for the remaining claims presented by Henderson in his RCr 11.42 post-conviction appeal, the Kentucky Court of Appeals held that he had not presented them to the circuit court at any point during the lengthy RCr 11.42 proceedings and as such "they are unpreserved and will not be considered herein since this Court 'is without authority to review issues not raised in our decided by the trial court.'"[29] The Kentucky Supreme Court on February 12, 2014 subsequently denied Henderson's motion for discretionary review.[30]

While these events were occurring on appeal, Henderson was busy in the trial court. Henderson filed a motion styled as a "Motion for Relief and Sentence *Nunc Pro Tunc*" pursuant to CR 60.02 and RCr 11.42. Henderson argued in his latest motion that his trial attorneys rendered ineffective assistance by their failure to object to the trial court's instruction on wanton murder on the basis that it was not supported by the evidence. The trial court on February 19, 2012 entered an order that denied the motion. Henderson then filed yet another motion in the trial court pursuant to CR 59.05 and CR 52 on May 25, 2012 in which he requested the trial court

[28] *Id.* at p. 10.
[29] *Id.* at p. 12(citing *Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989) and *Dever v. Commonwealth,* 300 S.W.3d 198, 200 (Ky. App. 2009)).
[30] (DN 19, App. 489, Order Denying motion for Discretionary Review).

to alter or amend or vacate the order of February 19. The trial court denied this motion by another order entered on May 31, 2012. These events led Henderson on May 6, 2013 to file a "Motion for Judgment and Final Facts and Conclusions of Law" pursuant to RCr 10.26 and the Due Process Clause of the 14th Amendment. The trial court on February 10, 2014 entered an order that construed this latest motion as being brought pursuant to CR 60.02(e) and denied it on the basis that Henderson sought to re-litigate matters that could have, and should have, been raised on direct appeal.

Henderson returned to the Kentucky Court of Appeals for a fourth time to obtain review of the February 19, 2012 order that denied his *nunc pro tunc* motion for lack of jurisdiction, successiveness, and the absence of a valid basis on which to vacate the final judgment entered well over a decade earlier in February of 1998. Henderson also took appeal from the second trial court order of February 10, 2014 that denied his "Motion for Relief." The trial court in that particular order rejected Henderson's claims of actual innocence, along with, his allegations of flawed discovery and insufficient notice as being procedurally defaulted due to his failure to raise them on direct appeal.

On appeal, the Commonwealth argued that both of Henderson's motions were procedurally barred "because they were successive attempts to raise claims that either were, could have been, or should have been raised in the direct appeal, the first CR 60.02 motion or the prior RCr 11.42 motion."[31] The Kentucky Court of Appeals agreed with the Commonwealth. It concluded that Henderson had already availed himself of a direct appeal, a prior RCr 11.42 motion and a CR 60.02 motion "and is now attempting to rehash and recycle previously

[31] (DN 19, App. 651, *Henderson v. Commonwealth*, No 2014-CA-001059-MR at p. 3 (Ky. App. Mar. 27, 2015)

unsuccessful claims."[32] Accordingly the Court of Appeals declined to afford Henderson "a second bite at the apple."[33]

The Court of Appeals noted on this final point that "Henderson's most recent cry for relief is nothing new" and was "redundant."[34] More specifically, the Kentucky Court of Appeals concluded that it had already rejected in its prior opinion of 2012 Henderson's claim that he received ineffective assistance of counsel due to the failure of his trial attorney to object to the wanton murder instruction, as well as the claim that his defense team had rendered ineffective assistance by tendering a jury instruction on facilitation.

As for Henderson's third claim, that he was denied a fair trial because O'Neal testified that Henderson pulled the trigger, the Court of Appeals pointed out that "a panel of this Court rejected this claim in affirming the trial court's denial of CR 60.02 relief in 2006."[35] The Court of Appeals likewise concluded that the following claims "either were, could have been or should of been addressed on direct appeal or collateral attack" such as, Henderson's claims that: (1) the Commonwealth withheld exculpatory evidence; (2) appellate counsel did not argue all preserved issues on appeal (denial of a mistrial and a directed verdict; and, a death-qualified jury decided his fate); (3) counsel who represented Henderson in his pro se RCr 11.42 motion did not supplement the motion and failed to keep Henderson updated on the status of the case; and (4) the attorney who represented Henderson on his belated RCr 11.42 motion briefed only the issues of the prior an attorney had included in her supplemental brief, rather than pursuing all of the claims that Henderson had raised in his pro se motion. All of these enumerated, additional

[32] *Id.* at p. 4.
[33] *Id* (citing Alvey v. Commonwealth, 648 SW2d 858, 860 (Ky. 1983).
[34] *Id.*
[35] *Id.* at p. 5.

claims were found to be procedurally barred so that "further review is unavailable."[36] Henderson again filed a motion for discretionary review by the Kentucky Supreme Court, which was denied by order entered on December 10, 2015.[37] Henderson then brought his present petition for habeas corpus relief pursuant to 28 USC 2254 on September 1, 2016.[38]

CONCLUSIONS OF LAW

A.
Standard of Review

Because Henderson's petition was filed after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), its provisions apply in full to the consideration of his case. *Woodford v. Garceau*, 538 U.S. 202, 210, 123 S.Ct. 1398, 155 L.Ed.2d 363 (2003); *Barker v. Yukins*, 199 F.3d 867, 871 (6th Cir.1999).

Under the AEDPA, a federal court shall not grant a writ of habeas corpus to a person in custody pursuant to a state court judgment unless the adjudication of the prisoner's claims in state court: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as defined 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 proceedings. See 28 U.S.C. § 2254(d)(1)-(2)(2004); *Pouncy v. Palmer*, 846 F.3d 144, 158-59 (6th Cir. 2017) (discussing the standard of 28 U.S.C. § 2254(d)(1)-(2)).

The Supreme Court first elaborated on the meaning of this statutory language in *Terry Williams v. Taylor*, 529 U.S. 362, 405-13 (2000). In so doing, the Court noted that § 2254(d)

[36] Id. at p. 5(citing *Gross vs. Commonwealth*, 648 S.W.2d 853, 857 (Ky. 1983).
[37] (DN 19, App. 635, Order Denying Discretionary Review).
[38] (DN 1, Petition).

"places a new constraint on the power of the federal courts to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court." *Williams*, 529 U.S. at 412. A state court decision that resolves a constitutional claim on its merits will be "contrary to" the precedent of the Supreme Court only if the "state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law" or "the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at [the opposite] result." *Id.* at 405. *See also*, *Metrish v. Lancaster*, ___ U.S. ___, 133 S.Ct.1781, 1786 n.2 (2013)(quoting *Williams* 529 U.S. at 412-13). *See Treesh v. Bagley,* 612 F.3d 424, 428-29 (6th Cir. 2010)(discussing *Williams*).

A state court opinion will violate the "unreasonable application" clause of § 2254(d)(1) when "the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts." *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011)(quoting *Williams*, 529 U.S. at 413). *See also, Bell v. Cone*, 535 U.S. 685, 694-95 (2002); *Hodges v. Colson*, 727 F.3d 517, 525-26 (6th Cir. 2013); *Phillips v. Bradshaw,* 607 F.3d 199, 205 (6th Cir. 2010)(same). A state court opinion will not be an "unreasonable application" of Supreme Court precedent merely because it does not extend or refuses to extend a legal principle from Supreme Court precedent to a new context. *White v. Woodall*, ___U.S. ___, 134 S.Ct. 1697, 1706 (2014); *Keys v. Booker*, 798 F.3d 442, 456 (6th Cir. 2015)(same).

The Supreme Court in *Williams* explained that "a federal court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Williams*, 529 U.S. at 409. The term "objectively unreasonable" means that "[a] federal court may not issue the writ simply because the court concludes in its independent judgment that the relevant state court decision applied clearly

established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411. *See also, Lockyer v. Andrade*, 538 U.S. 63, 75 (2003); *Price v. Vincent*, 538 U.S. 634, 638-39 (2003); *Owens v. Guida*, 549 F.3d 399, 404-05 (6th Cir. 2008) ("Ultimately, the AEDPA's highly deferential standard requires that this court give the state-court decision 'the benefit of the doubt.'") (quoting *Slagle v. Bagley*, 457 F.3d 501, 514 (6th Cir 2006)). *See also, Uttecht v. Brown,* 551 U.S. 1, 10 (2007)(The requirements of the AEDPA "create an independent, high standard to be met before a federal court may issue a writ of habeas corpus to set aside state-court rulings.")

As the Supreme Court explained in *Harrington v. Richter*, 562 U.S. 86, (2011), "A state court's determination that a [constitutional] claim lacks merit precludes federal habeas relief so long as "fair-minded jurists could disagree" on the correctness of the state court's decision." *Id.* at 102 (citing *Lockyer v Andrade*, 538 U.S. 63 (2003)). The question in this regard is not whether the habeas court would have reached the same conclusion as the state court on *de novo* review, but rather whether reasonable jurists could debate the existence of arguments, based on existing Supreme Court precedent, that would support the outcome below. *Id.* If so-- if the challenged result was at least reasonably debatable-- even in those instances in which the state court does not reveal the reasoning for its outcome, then the habeas court must uphold the decision of the state court. *Id.(Renico v. Lett,* 559 U.S. 766, 772 (2011)). *See O'Neal v. Bagley,* 728 F.3d 552, 557 (6th Cir. 2013)("In other words, ...[petitioner] must show that the challenged decision rested on "an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement.") (quoting, *Harrington,* 131 S. Ct. At 786-87).

This standard of review is intentionally a difficult one to satisfy and "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.(*citing

Lockyer v. Andrade, 533 U.S. 68, 71 (2003)); *Renico,* 559 U.S. at 773(the "AEDPA thus imposes a 'highly deferential standard for evaluating state-court rulings,' and 'demands that state-court decisions be given the benefit of the doubt.'")(quoting *Lindh v. Murphy,* 521 U.S. 320, 333 n. 7 (1997)); *Miller-El v. Cockrell,* 537 U.S. 322, 340 (2003)("[a] federal court's collateral review of a state-court decision must be consistent with the respect due state courts in our federal system.").

In essence, § 2254(d), as amended by the AEDPA, only "preserves authority to issue the writ in cases where there is no possibility fair-minded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no farther." *Harrington,* 562 U.S. at 102. Habeas corpus relief consequently stands as a guard against only "'extreme malfunctions in the state criminal justice systems'" rather than a means to correct ordinary errors. *Id.* at 103 (*Jackson v Virginia*, 443 U.S. 307, 332 n. 5(1979)). *Montgomery v. Bobby*, 654 F.3d 668, 676-77 (6th Cir. 2011) ("The Supreme Court has made clear that § 2254(d), as amend by the AEDPA is a purposefully demanding standard.")(citing *Harrington*). It is "a substantially higher threshold" for obtaining relief that *de novo* review. *Schriro v. Landrigan,* 550 U.S. 465, 473 (2007).

When determining the "clearly established federal law," the courts may look only to the holdings of decisions of the Supreme Court of the United States at the time the petitioner's state conviction became final. *Williams*, 529 U.S. at 380; *Abella v. Martin*, 380 F.3d 915, 924 (6th Cir. 2004). It is error for the federal courts to rely solely on authority other than the Supreme Court of the United States in their analysis under § 2254(d). *Harris v. Stovall*, 212 F.3d 940, 944 (6th Cir. 2000), *cert. denied*, 532 U.S. 947 (2001). The decisions of lower federal courts may be

considered, however, as being informative of whether a legal principle or right has been clearly established by the Supreme Court. *Smith v. Stegall*, 385 F.3d 993, 997-98 (6th Cir. 2004).

Additionally, the AEDPA standard of review will only apply to those claims that were "'adjudicated on the merits in the state court proceedings.'" *Harrington,* 562 U.S. at 98; *Nali v. Phillips,* 681 F.3d 837, 841 (6th Cir.), *cert denied,* 133 S.Ct. 525 (2012); *Phillips,* 607 F.3d at 205 (*quoting Hartman v. Bagley,* 492 F.3d 347, 356 (6th Cir. 2007)). *See also, Montes v. Trombley,* 599 F.3d 490, 494 (6th Cir. 2010)("if a claim is fairly presented to the state courts, but those courts fail to adjudicate the claim on the merits, then the pre-AEDPA standards of review apply"). Claims that the state court resolves without deciding the federal constitutional issues, for example when they are held to be procedurally barred, are reviewed under the law that predates the AEDPA. *Coley v. Bagley,* 706 F.3d 741, 749 (6th Cir.), *cert denied,* 134 S. Ct. 513 (2013). *See also, Cone v. Bell*, 556 U.S. 449, 129 S.Ct. 1769, 1784, 173 L.Ed.2d 701 (2009).

Under such review, questions of law, including mixed questions of law and fact, are reviewed de novo, and questions of fact are reviewed under the clear-error standard. *Nichols v. Heidle,* 725 F.3d 516, 557 (6th Cir. 2013)("'Claims that were not adjudicated on the merits in [s]tate court proceedings receive the pre-AEDPA standard of review: de novo for questions of law (including mixed questions of law and fact), and clear error for questions of fact.'"); *Brown v. Smith*, 551 F.3d 424, 430 (6th Cir.2008); *Sowell v Anderson,* 663 F.3d 783, 789 (6th Cir. 2011)(discussing the pre-AEDPA standard of review). *See gen Johnson v. Beckstrom,* 2011 WL 1808334 at *12, 26 (E.D. Ky. May 12, 2011)(describing *de novo* review as being a "narrow sliver" in which review of a habeas corpus claim is otherwise appropriate).

Merely because a state court does not provide an explicit rationale for its ultimate result, however, does not mean that its judicial decision is not an "adjudication on the merits" for the

purposes of § 2254(d). *Harrington,* 562 U.S. at 98 ("[D]etermining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning."). Even in those instances in which the state court decision does not include any explanation for the adverse outcome of petitioner's properly raised constitutional claims, petitioner must still show that no reasonable basis existed for the state court to deny relief. *Id.* Indeed, according to *Harrington*, the state court need not even be aware of or cite to the published decisions of the U.S. Supreme Court so long as it does not run afoul of them. *Id.* (pursuant to § 2254(d) "a habeas court must determine what arguments or theories supported or ... could have supported, the state court's decision; and then it must ask whether it is possible fair minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of the Supreme Court.").

When the petitioner's constitutional claim is fully and fairly presented to the state courts, a presumption arises that the state courts adjudicated the disputed claim on its merits absent any indication to the contrary such as a determination based on state procedural law. *Id.* at 99 (citing *Harris v Reed,* 489 U.S. 255, 265 (1989)(presumption of a merits determination when it is unclear whether a decision appearing to rest on federal grounds was decided on another basis). *See, Brown v. Bobby*, 656 F.3d 325, 329 (6th Cir. 2011), *cert. denied,* 133 S.Ct. 1452 (2013). Petitioner may overcome such presumption if reason exists to believe that "some other explanation for the state court's decision is more likely." *Id.*

The AEDPA also affords deferential treatment to the findings of fact made by the state court during the proceedings at trial and on appeal. Specifically, 28 U.S.C. § 2254(e)(1) provides that, "[a] determination of a factual issue made by state court shall be presumed to be correct." *Id. See Thompson v. Bell,* 580 F.3d 423, 434 (6th Cir. 2009)("A habeas court must

presume the state court's factual findings are correct.") Further, '[t]he applicant [for § 2254 relief] shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." *Mahdi v. Bagley*, 522 F.3d 631, 636-37 (6th Cir. 2008). The factual findings of the state courts are reversed only if the petitioner establishes that they are clearly erroneous. *See Williams v. Bagley*, 380 F.3d 932, 941-42 (6th Cir. 2004); *Brumley v. Wingard*, 269 F.3d 629, 637 (6th Cir. 2001) (presumption of correctness applies to fact findings made by a state appellate court based on the state trial record). *See also, Sumner v. Mata*, 449 U.S. 539, 546 (1981) (holding that § 2254 makes no distinction between the factual determination of a state trial court and those of the state appellate court). A clear factual error constitutes an unreasonable determination of the facts in light of the evidence presented if the state court's determination of facts is in conflict with clear and convincing evidence to the contrary. *See Wiggins v. Smith,* 539 U.S. 510, 528-29 (2003).

Finally, "review under § 2254(d)(1) 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, 182-83 (2011). *See, Fitzpatrick v. Robinson,* 723 F.3d 624, 633 (6th Cir. 2013)("In addition to limiting the scope of our review, AEDPA encompasses an evidentiary limitation on federal habeas review. "[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits.")(citing, *Pinholster,* 131 S. Ct. at 1398); *Ballinger v. Prelesnik,* 709 F.3d 558, 561 (6th Cir.) ,*cert. denied,* 133 S. Ct. 2866 (2013) (same).

B.
Procedural Default

The Warden in the present case insists that many of the claims of ineffective assistance of counsel and various other claims raised by Henderson simply cannot be addressed on their merits due to his procedural default, sometimes multiple defaults, during the state court proceedings.

The doctrine of procedural default rests on considerations of comity and federalism. *See, Brewer v. Marshall*, 119 F.3d 993, 999 (1st Cir. 1997) (citing *Lambrix v. Singletary*, 520 U.S. 518, 522-23 (1997)). It provides in essence that the federal courts "will not reach a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Beard v. Kindler,* 558 U.S. 53, 55 (2009)(citing *Coleman v. Thompson*, 501 U.S. 722, 729 (1991); *Peoples v. Lafler,* 734 F.3d 502, 510 (6th Cir. 2013)("When a state prisoner "procedurally defaults" a claim for habeas relief, meaning the prisoner lost the claim in state court by failing to raise it at the correct time, we defer to the state's procedural ruling and refuse to consider the claim on the merits")(citing *Wainwright v. Sykes,* 433 U.S. at 86-87) . An "independent and adequate state ground" will bar consideration of those federal claims in a federal habeas corpus proceeding that have been defaulted under state law, unless the default is excused. *Coleman*, 501 U.S. at 729-30; *Brown v. Allen*, 344 U.S. 443, 486-87 (1953). *See*; *Ake v. Oklahoma,* 470 U.S. 68, 74-75 (1985)(discussing whether a state procedural default ruling is 'independent."); *Lee v. Kemna,* 534 U.S. 362, 376-377 (2002))(discussing whether a state procedural ruling is "adequate."). *Johnson v. Mississippi,* 486 U.S. 578, 587 (1988)(same).

A federal claim brought by a state prisoner in a habeas action may become procedurally defaulted in state court in several different ways. *See, Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006). A prisoner first may procedurally default a given claim by failing to comply with an established state procedural rule when presenting his claim at trial or on appeal in the state courts. *See, Wainwright v. Sykes*, 433 U.S. 72, 87 (1977) (Florida petitioner who failed to timely challenge his confession at trial as required by Florida rules of criminal procedure procedurally defaulted his *Miranda* claim absent a showing of "cause" and "prejudice.").

If the state courts unambiguously rely on the prisoner's procedural failure as a basis to refuse to address the merits of the same prisoner's constitutional issue, which admittedly may be sometimes difficult to determine; *and*, the state procedural rule involved is an adequate and independent ground on which to preclude relief, then the federal courts will hold the prisoner's habeas claim to be procedurally defaulted. *See, Harris v. Reed,* 489 U.S. 255, 261 (1989)(if "'it fairly appears that the state court rested its decisions primarily on federal law' this Court may reach the federal question on review unless the state court's opinion contains a 'plain statement' that [its] decision rests upon adequate and independent state grounds.")(quoting *Michigan v. Long,* 463 U.S. 1032, 1042 (1983); *Williams*, 460 F.3d at 806 (*citing Maupin v. Smith,* 785 F.2d 135, 138 (6th Cir. 1986). This "plain statement" rule, reduced to its essence, provides that "a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." *Harris,* 489 U.S. at 263(citing *Caldwell v. Mississippi,* 472 U.S. 320, 327 (1985)).

In applying this rule, we look to the last reasoned state judgment to determine its basis. *Ylst v. Nunnemaker,* 501 U.S. 797, 803-04 (1991)(If "the last reasoned opinion on the claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits."). Merely because such a reasoned state court decision goes on to discuss, in the alternative, the merits of a claim that it otherwise has held to be barred based on an adequate and independent procedural ground, however, does not remove the procedural default. *See Baze,* 371 F.3d at 319(citing *Clifford v. Chandler,* 333 F.3d 724, 728-29 (6th Cir. 2003) *overruled in part on other grounds, Wiggins v. Smith*, 539 U.S. 510 (2003)).

The federal courts consequently will not reach the merits of the procedurally defaulted claim rejected on adequate and independent state law grounds, unless the Petitioner is able to demonstrate cause for the default and prejudice resulting therefrom, or alternatively, that manifest injustice will result from the conviction of one who is factually innocent if the claim is not addressed. *Sutton v. Carpenter,* 745 F.3d 787, 790-91 (6th Cir. 2014); *Henderson v Palmer,* 730 F.3d 554, 559 (6th Cir. 2013)(""[a] petitioner may avoid this procedural default [ ] by showing that there was cause for the default and prejudice resulting from the default, or that a miscarriage of justice will result from enforcing the procedural default in the petitioner's case.")(citing *Seymour v. Walker,* 224 F.3d 542, 550 (6th Cir. 2000)) *See gen, House v. Bell,* 547 U.S. 518, 536-37 (2006)(discussing innocence as a gateway to defaulted claims).

The Sixth Circuit will apply the 4-prong test first announced in *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986) to determine when a procedurally defaulted claim may receive federal review. The Sixth Circuit in *Greer v. Mitchell*, 264 F.3d 663, 672 (6th Cir. 2001) explained the *Maupin* test as follows:

> This court's *Maupin* decision sets out four inquiries that a district court should make when the state argues that a habeas claim has been defaulted by petitioner's failure to observe a state procedural rule. First, the court must determine whether there is such a procedural rule that is applicable to the claim at issue and whether the petitioner did, in fact, fail to follow it. *Maupin*, 785 F.2d at 138. Second, the court must decide whether the state courts actually enforced its procedural sanction. *Id.* Third, the court must decide whether the state's procedural forfeiture is an "adequate and independent" ground on which the state can rely to foreclose review of a federal constitutional claim. "This question will usually involve an examination of the legitimate state interests behind the procedural rule in light of the federal interest in considering federal claims." *Id.* And, fourth, the petitioner must demonstrate, consistent with *Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), that there was "cause" for him to neglect the procedural rule and that he was actually prejudiced by the alleged constitutional error. *Id.*; see also *Scott v. Mitchell*, 209 F.3d 854, 864 (6th Cir.), cert. denied, 531 U.S. 1021, 121 S.Ct. 588, 148 L.Ed.2d 503 (2000).

Id. See also, Peoples v. Lafler, 734 F.3d 502, 510-11 (6th Cir. 2013)(discussing the four elements of the procedural default doctrine)(citing *Guilmette v. Howes,* 624 F.3d 286, 290 (6th Cir. 2010)(en banc). *See gen, Bowling v. Parker*, 344 F.3d 487, 498-99 (6th Cir. 2003), *cert denied,* 543 U.S. 842 (2004) (discussing *Maupin*).

The second manner in which a state prisoner may procedurally default a claim is by failing to raise the claim in the state court, or to pursue the same claim through the state's "ordinary appellate review procedures." *Id.* (citing *O'Sullivan v. Boerckel*, 526 U.S. 838, 848-49 (1999)). Any such claim will be held to be procedurally defaulted if, at the time the prisoner's habeas petition is filed, state law does not permit the prisoner to further pursue the claim. *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991); *Engle v. Issac*, 456 U.S. 107, 125 n. 28 (1982). In such instances, the problem with the claim is one of procedural default, not failure to exhaust available state remedies. *See gen, Gráy v. Netherland,* 518 U.S. 152, 162-63 (1996)(discussing the full and fair presentation requirements of the exhaustion doctrine); *Castille v. Peoples*, 489 U.S. 346, 351(1989)(same); *Engle v. Isaac,* 456 U.S. 107, 125 (1982); *Picard v. Connor,* 404 U.S. 270 (1971)(claim must include reference to specific federal constitutional right and statement of facts entitling petitioner to relief).

As *Williams* explains, the two concepts, exhaustion and procedural default, are frequently confused, yet are distinct concepts. *Williams*, 460 F.3d at 806. The requirement of exhaustion relates only to those state remedies that remain available at the time the federal habeas petition is filed. *Engle*, 456 U.S. at 125 n. 28. If no state remedies remain available because a state prisoner failed to pursue them within the time allotted by state law, then procedural default will bar federal court review-- not a failure to exhaust available remedies since none remain available. *Id.*

Several important qualifications must be added when one discusses procedural default in either of its variations. First, neither the exhaustion doctrine nor procedural default are jurisdictional limitations on the federal courts. *See Pudelski v. Wilson,* 576 F.3d 595, 605-606 (6th Cir. 2009)(citing *Cain v. Redman,* 947 F.2d 817, 820 (6th cir. 1991)). In other words, exhaustion and procedural default may be waived, *Baze v. Parker,* 371 F.3d 310, 320 (6th Cir. 2004), *cert denied,* 544 U.S. 391 (2005)("The state may waive the defense by not asserting it.")(citing *Scott v. Collins,* 286 F.3d 923, 927-28(6th Cir. 2002)), or even in the case of procedural default, simply be ignored by the federal courts when to do so would not affect the resolution of the outcome and would simplify the analysis of a petitioner's § 2254 claims. *See Babick v. Berghuis,* 620 F.3d 571, 576 (6th Cir. 2010)("We cut to the merits here, since the cause-and-prejudice analysis adds nothing but complexity to the case.")(citing *Hudson v. Jones,* 351 F.3d 292 215 (6th Cir. 2003)).

Second, the state procedural default, whether it occurs in either fashion discussed above, may be avoided by the petitioner only if he or she is able to make the aforementioned showing of cause and prejudice, or more rarely, manifest injustice. *See, Edwards v. Carpenter,* 529 U.S. 446, 451 (2000)(cause and prejudice standard apply "whether the default in question occurred at trial, on appeal or on state collateral attack."). The first requirement, "cause" originates from *Davis v. United States,* 411 U.S. 233, 236 (1973) and was applied to § 2254 petitioners in *Francis v. Henderson,* 425 U.S. 536 (1976). *Reed v. Ross*, 468 U.S. 1, 14 (1984).

A showing of cause ordinarily requires that the petitioner demonstrate that some event external to the defense prevented the state prisoner from complying with the affected state procedure. *See Maples v. Thomas,* 565 U.S. 266, 280 (2012)(""Cause for a procedural default exists where 'something external to the petitioner, something that cannot fairly be attributed to

him ...'impeded [his] efforts to comply with the State's procedural rule.'")(quoting *Coleman v. Thompson,* 501 U.S. 722,753 (1991)). *See gen., Wogenstahl v. Mitchell*, 668 F.3d 307, 321 (6th Cir. 2012), *cert. denied*, 133 S.Ct. 311 (2012)(discussing the external factors that may constitute cause).

Attorney error, when it rises to the level of ineffective assistance of counsel in violation of the Sixth Amendment, may also satisfy the cause requirement. *See Murray v. Carrier*, 477 U.S. at 488-89("So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington,*[466 U.S. 668...(1984)], we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default."). Mere ignorance or inadvertent attorney error of itself will not be sufficient to establish cause unless constitutionally inadequate. *Murray v. Carrier,* 477 U.S. at 486-87(citing *Engle,* 456 U.S. at 133-34). *See gen., Jones v. Bagley*, 696 F.3d 475, 484 (6th Cir. 2012), *cert. den'd*, 134 S.Ct. 62 (2013) (Ineffective assistance of counsel is considered to be "the legal theory most commonly used to attempt to circumvent the procedural default rule.").

An attorney's abandonment of his client, as evidenced by a near total failure to communicate or to respond to the petitioner's inquiries over a period of years, also may constitute cause for a procedural default where the attorney has severed the principal-agent relationship. *Maples,* 132 S.Ct. at 922-23 ("We agree that, under agency principles, a client cannot be charged with the acts of omissions of an attorney who has abandoned him."). *See, Holland v. Florida,* 560 U.S. 631, 659 (2010)("Common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense.")(Alito, J., concurring).

Further, a claim of ineffective assistance of counsel that a petitioner hopes to rely on to establish cause must itself be exhausted by full and fair presentation at all applicable levels of the state courts before the petitioner may rely on it in his habeas corpus proceeding in an effort to avoid the procedural default. *Murray v Carrier,* 477 U.S. at 489("[W]e think that the exhaustion doctrine, which is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings... generally requires that a claim of ineffective assistance be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default."). *See also, Edwards v. Carpenter*, 529 U.S. 446, 451-52 (2000)(ineffective assistance to establish cause is itself an independent constitutional claim that like all others must be raised and exhausted in state court)(citing *Stewart v. LaGrand,* 526 U.S. 115, 120 (1999)).

Prejudice, the second half of the cause and prejudice test, requires that a petitioner who has procedurally defaulted a potential federal claim show actual prejudice. *Francis v. Henderson,* 425 U.S. 536 (1976)(citing *Davis,* 411 U.S. at 245)(discussing the *Henderson-Davis* rule). Actual prejudice in this context is such prejudice as to establish a reasonable probability that the outcome of the judicial proceedings would have been different. *See, Jamison v. Collins,* 291 F.3d 380, 388 (6th Cir. 2002)("Prejudice, for purposes of procedural default analysis, requires a showing that the default of the claim not merely created a possibility of prejudice to the defendant, but that it worked to his actual and substantial disadvantage, infecting his entire trial with errors of constitutional dimensions.")(quoting *United States v. Frady,* 456 U.S. 152, 170-71 (1982).*See Harbison v. Bell*, 408 F.3d 823, 834 (6th Cir. 2005)(actual prejudice sufficient to excuse procedural default requires " a reasonable probability that the result of the trial would have been different."); *Mason v. Mitchell,* 320 F.3d 604, 629 (6th Cir. 2003)(" To obtain relief,

Mason "must convince us that 'there is a reasonable probability' that the result of the trial would have been different....").

Until recently, the alleged ineffective assistance of counsel in an initial state post-conviction proceeding could not serve to establish cause for a procedural default because no federal constitutional right to the assistance of counsel exists in such a proceeding. *See, Coleman,* 501 U.S. at 755; *Wallace v. Sexton,* 2014 WL 2782009 at *10-12 (6th Cir. June 2014) ("Generally, an attorney's ineffective assistance in post-conviction proceedings does not qualify as "cause" to excuse procedural default of his constitutional claims."). In 2012, however, the U.S. Supreme Court carved out a limited, equitable exception for claims of ineffective assistance of trial counsel that could be raised for the first time only in an initial state post-conviction proceeding. *See Martinez v. Ryan,* 566 U.S. 1, 9 (2012)(" "[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.").

This limited exception was subsequently expanded by the Supreme Court in *Trevino v. Thaler,* ——U.S. ——, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013). *See, McGuire v. Warden, Chillicothe Corr. Inst.*, 738 F.3d 741, 748-750 (6th Cir. 2013)(discussing the expansion of *Martinez* by *Trevino*), *cert. denied,* 134 S.Ct. 998 (2014); *Wallace,* 2014 WL 2782009 at * 12 ("In *Trevino*, the Supreme Court extended the *Martinez* rule to states whose procedural structure makes it "virtually impossible" for a defendant to present an ineffective-assistance claim on direct appeal, even if there is no outright requirement that a defendant refrain from doing so.");

Morris v. Parker, 2014 WL 2956422 at * 10-11 (W. D. Tenn. June 30 2014)(discussing *Martinez* and *Trevino*).

Ineffective assistance of counsel in an initial post-conviction proceeding, however, remains restricted to otherwise procedurally defaulted claims of ineffective assistance of *trial* counsel, not ineffective assistance of appellate counsel. *Abdur'Rahman v. Carpenter*, 805 F.3d 710, 713-715 (6th Cir. 2015)("the Supreme Court [in *Martinez*] limited its ruling to the default of substantial claims of ineffective assistance of trial counsel."); *Morris v. Parker*, 2014 WL 2956422 at *11("The holding of *Martinez* does not encompass claims that post-conviction appellate counsel was ineffective."). *See also, Hodges,* 727 F.3d at 521(same). *Martinez* likewise does not apply to claims fully adjudicated on their merits in state court. *Adbur'Rahman,* 805 F.3d at 715.

Further, *Martinez* did not announce a new rule of constitutional law, or any rule of constitutional law per se, that could be made applicable retroactively on collateral review to cases that became final prior to its rendition. *See, Chavez v. Secretary, Florida Dep't. of Corr.,* 742 F.3d 940, 945-46 (11th Cir. 2014)("*Martinez* did not announce a new rule of constitutional law. See 28 U.S.C. § 2244(d)(1)(C));*Arthur,* 739 F.3d at 629 ("The *Martinez* rule is not a constitutional rule but an equitable principle."). *See also Buenrostro v. United States*, 697 F.3d 1137, 1139 (9th Cir.2012) (holding that *Martinez* "did not announce a new rule of constitutional law").

Finally, as noted earlier, a petitioner also may avoid the consequences of a procedural default in those extraordinary situations where he is able to establish that refusal to reach the merits of the otherwise defaulted constitutional claim would be a "manifest injustice" due to his actual innocence. *See Coleman v. Thompson*, 501 U.S. 722, 749 (1991). In this regard, "actual

innocence means factual innocence, not mere legal insufficiency." *Souter v. Jones*, 395 F.3d 577, 590 (6th Cir. 2005) (quoting *Bousley v. United States*, 523 U.S. 614, 623 (1998)). A conclusory statement by a petitioner that he or she is "innocent" is not enough. *Enyart v. Coleman*, 29 F.Supp.3d 1059, 1081-82 (N.D. Ohio 2014).

Instead, the petitioner must support his allegations "with new and reliable evidence – – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – – that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324 (1995); *Jones v. Bradshaw*, 489 F. Supp2d 786, 807 (N.D. Ohio 2007). In other words, "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial, unless the court is also satisfied that the trial was free of nonharmless constitutional error." *Schlup*, 513 U.S. at 324. Indeed, this new evidence of factual innocence must be so compelling that "more likely than not that no reasonable juror would have convicted him" had the new evidence been presented at trial. *See, McQuiggin v. Perkins*, 133 S.Ct. 1924, 1935 (2013).

C.
The Substantive Issues

SEVERANCE

The first issue we address is Henderson's argument found at pages 8-10 of the memorandum of law that accompanies his § 2254 petition.[39] Henderson argues that the state trial court "abused its discretion" when it denied his repeated pre-trial motions for separate trial from O'Neal thereby violating his 5th, 6th and 14th Amendment rights.[40] Henderson raised this issue on

[39] Henderson in his memorandum of law identifies this first issue with a capital letter "A." Because the issues set forth in his Petition do not fully correspond to the issues contained in the memorandum of law, we decline to use this lettering system and instead merely identify the issues by their substance.
[40] (DN 1, Memorandum of law at pp. 8-10).

direct appeal to the Supreme Court of Kentucky where it appears as argument one of his brief on appeal.[41]

On appeal, Henderson continued his arguments that severance was required by the unfair prejudice resulting from (1) his prior representation by the subsequently disqualified attorney, Keith Kamenish, who also briefly represented his co-defendant O'Neal before his disqualification, (2) by the antagonistic defenses with his co-defendant O'Neal, and (3) by the improper introduction of evidence of prior bad acts against him through O'Neal's testimony at trial. As discussed above, the Kentucky Supreme Court rejected all of these arguments.[42]

It declined to consider the KRE 404(b) argument prior bad acts argument because it was not raised prior to trial.[43] It rejected Henderson's allegations of unfair prejudice from the involvement of attorney Kamenish as being "pure speculation" holding that "naked allegations of prejudice are not sufficient for us to override a trial court's discretion." Finally, as for the antagonistic defenses argument, the Court held that any antagonism was not sufficient to mislead of confuse the jury as shown by its verdict that Henderson was guilty of wanton murder by his participation in the robbery, despite its finding that it did not believe beyond a reasonable doubt that Henderson shot and killed Hammond himself thereby rejecting O'Neal's testimony on this point.[44]

For Henderson to obtain habeas corpus relief now, he must demonstrate that the decision of the Kentucky Supreme Court is either contrary to, or an unreasonable application of, the clearly established case law of the U.S. Supreme Court as it existed at the time of the state appellate court decision in 2001. Henderson does little to advance this goal in his memorandum

[41] (DN 19, App. 19-20, Appellants' Brief on Direct appeal at pp. 11-21).
[42] (DN 19, App. 93-115, *Henderson v Commonwealth*, 1998-SC-0624-MR (Ky. Dec. 20, 2001)).
[43] (DN 19, App. 103, *Henderson*, 1998-SC-0624-MR at p. 11).
[44] (DN 19, App. 107, *Henderson*, 1998-SC-0624-MR at p. 15).

of law or in his traverse. He acknowledges that state and federal courts favor the joint trial of criminal defendants whenever possible, citing *Richardson v. Marsh*, 481 U.S. 200 (1987) and *United States v. Blakeney*, 942 F.2d 1001 (6th Cir. 1991). He also agrees, based on *United States v. Breing*, 70 F.3d 850, 852-53 (6th Cir. 1995), that trial courts have discretion to determine whether to sever the trial of criminal co-defendants based on allegations of antagonistic defenses.

His argument appears to be that the decision of the Kentucky Supreme Court in this respect is contrary to *Zefiro v. United States*, 506 U.S. 534 (1993). Specifically, he claims that the jury was misled or confused by co-defendant O'Neal's defense and could not "compartmentalize" the evidence so as to treat the two men separately. His sole support for this claim, however, is the very verdict that the Kentucky Supreme Court relied on to prove the exact opposite – – that the jury was more than able to compartmentalize the involvement of each defendant. In other words, Henderson appears to believe that because the jury made a finding that he did not shoot Hammond himself, yet convicted him of wanton murder due to his involvement in the robbery, his right to a fundamentally fair trial was somehow violated.

This argument stands logic on its head and runs directly contrary to the fundamental principle that the mere existence of antagonistic defenses does not automatically entitle a criminal defendant to a separate trial. *Zafiro*, 506 U.S. at 538 ("mutually antagonistic defenses are not prejudicial per se."); *Stanford v. Parker*, 266 F3d 442, 458 (6th Cir. 2001) (the failure to sever co-defendants merely because they present antagonistic defenses does not warrant habeas corpus relief).

Joint trials, as the U.S. Supreme Court has explained, "play a vital role in the criminal justice system." *Richardson v. Marsh*, 481 U.S. at 209. Such trials ensure the efficiency of the criminal justice system and serve the interests of justice by avoiding the possibility of

inconsistent verdicts. *Id.* at 209-10. Consequently a defendant who alleges a constitutional violation of due process based on antagonistic defenses between jointly tried defendants in order to obtain relief must not only show an abuse of discretion by the trial court, but also "prejudice from denial of a severance motion." *Jenkins v. Bordenkircher*, 611 F.2d 162, 168 (6th Cir. 1979). When a claim of prejudice does not rest on an argument that a joint trial resulted in the deprivation of some specific constitutional guarantee, i.e., the right of confrontation, the federal court must conclude from a review of the entire trial record that the defendant's fundamental right to a fair trial under the 14th Amendment was violated. *Id. See also, Foster v. Withrow*, 159 F.Supp.2d 629, 641-42 (E.D. Mich. 2001), *aff'd*, 42 Fed. App'x. 701 (6th Cir. 2002).

Here, Henderson has failed to show that the Kentucky Supreme Court unreasonably applied *Marsh* or *Zafiro*. He instead appears merely to mistakenly equate his wanton murder conviction with unfair prejudice due to joinder apparently because the jury found that he was not the individual that shot the victim. Henderson misapprehends the fundamental nature of the charges in this respect. It was his involvement in securing, arranging and participating in the robbery of Hammond with O'Neal that led to Hammond's death and Henderson's murder conviction. Stated differently, the prosecution was not required to prove that Henderson was the "trigger man" in order to obtain his conviction for wanton murder as "participation in a dangerous felony may constitute wantonly engaging in conduct creating a grave risk of death to another under circumstances manifesting an extreme indifference to human life thus permitting a conviction not only of the dangerous felony but also wanton murder." *Bennett v. Commonwealth*, 978 S.W.2d 322, 327 (Ky. 1998). The fact that the jury rejected O'Neal's testimony that Henderson fired the fatal shots merely shows that the jury was able to distinguish between the defenses offered at trial and was not confused by the testimony offered in applying the jury

instructions. *See gen. Garrett v. Commonwealth*, No. 2008-SC-000471-MR, 2010 WL 5238638 at *3 (Ky. Dec. 16, 2010)(no due process violation merely because a defendant may be convicted of intentional killing or felony murder)(citing *Schad v. Arizona*, 501 U.S. 624 (1991)). Accordingly, Henderson is not entitled to relief on his first ground as he has not met the standard of § 2254(d)(1).

EVIDENCE OF PRIOR BAD ACTS

Henderson next argues in the second ground of his memorandum of law that his 6th and 14th Amendment rights were violated when the trial court permitted O'Neal to introduce into evidence at trial testimony concerning Henderson's alleged prior crimes and bad acts under KRE 404(b). Henderson insists that O'Neal's testimony in this regard had no probative value and was unfairly prejudicial so much so that the trial court abused its discretion in allowing such prior bad acts testimony. This issue was raised as the second ground of his appellants' brief on direct appeal at pages 22-26.[45]

The Kentucky Supreme Court addressed this issue on direct appeal at pages 15-18 of its 2001 opinion.[46] The majority of the Court, as discussed above, held that the trial court did not err in allowing co-defendant O'Neal to introduce evidence of Henderson's prior efforts to have O'Neal deal drugs, break into cars, handle guns and rob others in order to show the true nature of Henderson's relationship with O'Neal. Such evidence the majority concluded was properly introduced by O'Neal in his defense because it "illustrated the relationship between Appellant and O'Neal and demonstrated a pattern of conduct which identified Appellant as an instigator or

[45] (DN 19, App. 30-34, Appellants' Brief on Direct Appeal at pp. 22-26).
[46] (DN 19, App. 109-112, *Henderson*, 1998-SC-0624-MR at p. 15-18).

planner of criminal schemes and O'Neal as a somewhat reluctant participant."[47] Accordingly, the Kentucky Supreme Court held that the trial court did not abuse its discretion under KRE 404(b) in permitting O'Neal's testimony in this regard.

Henderson does nothing to show that this conclusion by the Kentucky Supreme Court was contrary to or an unreasonable application of any clearly established case law of the U.S. Supreme Court. In fact, Henderson does not cite any case law at page 11 of his memorandum of law where this argument appears. The Warden, on the other hand, cites an extensive number of Sixth Circuit decisions that uniformly prohibit federal habeas corpus courts from re-examining rulings of state evidentiary error such as the introduction of prior bad acts testimony under KRE 404(b) or its federal equivalent. *Bey v. Bagley*, 500 F3d 514, 519 (6th Cir. 2007) (collecting cases). We are compelled to agree with the Warden's view of the law in this respect.

The review that a federal habeas corpus court will afford a state court evidentiary ruling is highly limited. The federal courts will review such evidentiary decisions only for consistency with the due process clause. *Patterson v. New York*, 432 U.S. 197, 202 (1977). Further, the evidentiary rulings of the state court will not rise to the level of the due process violation unless they "offend. . . some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id. See also*, *Dowling v. United States*, 493 U.S. 342, 352-53 (1990)(" For the admission of evidence to violate constitutional due process, it must be shown that admitting the evidence violates "fundamental fairness," i.e., that it "violates those fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency."); *Coleman v. Mitchell*, 268 F3d 417, 439 (6th Cir. 2001), *cert. denied*, 535 U.S. 1031 (2002). Finally, as the Warden again correctly points out, "there is no clearly established Supreme Court precedent which holds that

[47] (Id., *Henderson*, 1998-SC-0624-MR at p. 15-16).

the state violates due process by permitting propensity evidence in the form of other bad acts evidence." *Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003). In the absence of such clearly established precedent of the U.S. Supreme Court, Henderson cannot hope to prevail on this issue of state law particularly here where he has not remotely shown even an abuse of discretion, much less a violation of due process. Because the decision of the Kentucky Supreme Court on this issue is not clearly contrary to nor an unreasonable application of any clearly established U.S. Supreme Court precedent, Henderson once again is not entitled to habeas corpus relief.

ACTUAL INNOCENCE

The third issue Henderson advances in his memorandum of law involves his claim of actual innocence based on the affidavit of O'Neal, who in 2001 entirely recanted his trial testimony as discussed above. Henderson unsuccessfully relied upon this affidavit as the basis for his motion for a new trial. Both the trial court, and the Kentucky Court of Appeals on appeal in 2006, concluded that the briefly-worded affidavit of O'Neal failed to meet the two-part test of *Commonwealth v. Spaulding*, 991 S.W.2d 651, 654-57 (Ky. 1999) in that Henderson had not shown to a reasonable certainty that the trial testimony of O'Neal in fact was perjured, or that absent O'Neal's testimony he probably would have been acquitted at trial.[48]

Henderson now argues at pages 12-14 of his memorandum of law that "his showing of innocence entitles him to a new trial, or at least a vacation of his sentence."[49] Citing *Murray v. Carrier*, 477 U.S. 478 (1986), Henderson claims that he has shown "a constitutional violation has probably resulted in the conviction of one who is actually innocent." He explains that absent the "false testimony" of O'Neal, no evidence placed him at the crime scene or directly implicated

[48] (DN 19, App 202-204, *Henderson v. Commonwealth*, No 2004-CA-001988-MR at pp. 6-8(Ky. App. Mar. 31, 2006)).
[49] (DN 1, Petition, Memo at pp. 12-14).

him" in the shooting of the 15-year old Hammond. Both the trial court and the Kentucky Court of Appeals in his view wrongfully applied legal standard set forth in the *Spalding* decision.

Henderson misapprehends the nature of a claim of actual innocence in the context of habeas corpus proceedings. A claim of actual innocence according to the U.S. Supreme Court may be raised "to avoid the procedural bar to the consideration of the merits of [a petitioner's] constitutional claims." *Schlup v. Delo*, 513 U.S. 298, 326-27 (1995). Only in the most extraordinary cases, where a constitutional violation has probably resulted in the conviction of one who is actually innocent may a federal habeas corpus court grant relief even in the absence of a showing of cause for a procedural default. *Murray*, 477 U.S. at 496; *Souder v. Jones*, 395 F.3d 577, 588-89 (6th Cir. 2005). In other words, when the petitioner makes a credible showing of actual innocence, he at best will be entitled to have the court reach the merits of an otherwise procedurally-barred constitutional claim. *Schlup*, 513 U.S. at 317. Actual innocence, however, is not itself a constitutional claim, but as *Schlup* explains a gateway through which a habeas petitioner passes in order to have an otherwise barred constitutional claim considered on its merits. *Id.* at 315 (citing *Herrera v. Collins*, 506 U.S. 390, 404 (1993)).

Further, Henderson should be aware that courts, both state and federal, view vague, conclusory affidavits such as that tendered by O'Neal with extreme skepticism for good reason. *See Haynes v. Bergh,* No. 13–10358, 2014 WL 6871263 at * 12 (E.D. Mich. Dec. 5, 2014)(discussing at length the skepticism with which the courts view similar post-trial affidavits of co-defendants who essentially recant their earlier position on their involvement in criminal offenses). *See also, Carter v. Mitchell*, 443 F.3d 517, 539 (6th Cir. 2006)("Recantation testimony is properly viewed with great suspicion [as it] upsets society's interest in the finality of convictions, is very often unreliable and given for suspect motives, and most often serves merely

to impeach cumulative evidence rather than undermine confidence in the accuracy of the conviction.") (quoting *Dobbert v. Wainwright*, 468 U.S. 1231, 1233-34 (1984). *See gen., Herrera v. Collins*, 506 U.S. 390, 423 (1993)(O'Connor, J., concurring)("new statements from witnesses years after the crime are inherently suspect" and "are to be viewed with a degree of skepticism"); *Harris v. Smith*, No. 2:12-cv-14210, 2013 WL 3873168, at *5 (E.D. Mich. July 25, 2013) ("Long delayed statements are viewed with extreme suspicion.").

A conclusory statement that a petitioner is "innocent" is not enough. *Enyart v. Coleman*, 29 F.Supp.3d 1059, 1081-82 (N.D. Ohio 2014). Instead, the petitioner must support his allegations "with new and reliable evidence – – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – – that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324 (1995); *Jones v. Bradshaw*, 489 F. Supp2d 786, 807 (N.D. Ohio 2007). In other words, "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial, unless the court is also satisfied that the trial was free of nonharmless constitutional error." *Schlup*, 513 U.S. at 324. Indeed, this new evidence of factual innocence must be so compelling that "more likely than not that no reasonable juror would have convicted him" had the new evidence been presented at trial. *See, McQuiggin v. Perkins*, 133 S.Ct. 1924, 1935 (2013).

Both the trial court and the Kentucky Court of Appeals concluded that the affidavit of O'Neal was not compelling evidence of Henderson's innocence, nor would Henderson have been acquitted even had O'Neal not testified at trial. These conclusions by both the trial and appellate state courts have not shown to be contrary to nor an unreasonable application of any of the above cited decisions of the U.S. Supreme Court such as *Schlup*, *Herrera*, *McQuiggin* or *Murray*. O'Neal's affidavit is entirely devoid of any meaningful details that would substantiate his

recantation; and just as importantly, numerous witnesses other than O'Neal testified to conduct by Henderson both before and after the shooting that directly implicated him in the offenses. Finally, whether either state court properly applied the *Spaulding* decision is irrelevant as it is only the precedent of the U.S. Supreme Court by which we measure the reasonableness of the state appellate court decisions and their application of federal constitutional law.

BAIL PENDING APPEAL

Henderson next turns to the Bail Reform Act as codified at 18 U.S.C. §§ 3142 and 3143 for his fourth argument raised at pages 15-16 of his memorandum of law.[50] He appears to argue that he is entitled to bail under the federal statute and the 8th Amendment because he has presented "exceptional reasons" for his release due to his actual innocence since no reasonable finder of fact would have convicted him but for the perjured testimony of O'Neal. The Warden in response argues that this federal statute simply does not apply to Henderson, a state prisoner, who is serving a life sentence imposed by a state court that he now collaterally challenges pursuant to 28 U.S.C. §.2254.

Once again, we are compelled to agree with the Warden. Neither § 3142 nor § 3143 affords Henderson any relief, and Henderson certainly has not argued, much less shown, that any state appellate court unreasonably applied these otherwise inapplicable federal statutes. Any right to bail that Henderson might remotely have would be found under the 8th Amendment to the U.S. Constitution, not the Bail Reform Act of 1966. *See Bloss v. People of State of Michigan*, 421 F.2d 903, 905 (6th Cir. 1970)("[T]he Bail Rerform Act of 1966, 18 USC 3146-3152.... is applicable only to federal prisoners.") (citing *Ballou vs. Massachusetts*, 382 F.2d 292 (1st Cir. 1967)). *See also, Woodcock v. Donnelly*, 470 F.2d 93, 94 (1st Cir. 1972)("Moreover, the

[50] (DN 1, Memo at pp, 15-16).

Bail Reform Act is inapplicable to state prisoner seeking collateral relief."); *Marino v. Vasquez*, 812 F2d 499, 507-08 (9th Cir. 1987) ("The release on bail of state prisoners seeking habeas corpus relief in federal court is, however, governed by Fed.R.App.P. 23, and not by the provisions of the Bail Reform Act, 18 U.S.C. 3142."). Even then, the 8th Amendment does not create an absolute federal constitutional right to bail following conviction. *Bloss*, 421 F.2d at 905 (citing *Sellers v. Georgia*, 374 F2d 84 (5th Cir. 1967)). We therefore reject this argument as well since Henderson once again has failed to meet the standard of 28 U.S.C. 2254(d).

INEFFECTIVE ASSISTANCE OF COUNSEL:
GRAND JURY

Henderson at page 17 of his memorandum of law raises two claims of ineffective assistance of trial counsel under the Sixth Amendment.[51] He argues first that the failure of his trial attorneys to discover and investigate the prior grand jury testimony of Detective Eastham, who testified before the grand jury that one of the police suspects had seen the victim Hammond wearing new Reebok tennis shoes to school on the day prior to his murder, constituted ineffective assistance of counsel. Second, Henderson maintains that his trial counsel again were ineffective based on their failure to challenge the materially false grand jury testimony of the same detective who inaccurately testified that Henderson had prior drug and weapons arrests, when that was not the case.

The Kentucky Court of Appeals in its opinion of October 26, 2012 directly addressed both of these 6th Amendment claims on their merits.[52] Citing the *Strickland* standard, the Court of Appeals concluded initially that these claims of ineffective assistance of trial counsel were

[51] (DN 1, Memo at pp. 17-18).
[52] (DN 19, App. 426-437, *Henderson v. Commonwealth*, 2010-CA-002295-MR (Ky. App. 2012)).

"too vague and non-specific to have necessitated an evidentiary hearing."[53] The Court of Appeals then continued to hold that Henderson's first claim of ineffective assistance amounted merely "to speculation that further investigation of this matter might have revealed exculpatory information helpful to his case."[54] Further, the Court of Appeals noted that trial counsel had cross-examined the potential suspect McAtee concerning his possible involvement in the charged offenses. As for the second claim of ineffective assistance of trial counsel, the Court of Appeals also rejected this claim because, even assuming that Detective Eastham, testified falsely concerning Henderson's prior arrests, ample evidence was put before the grand jury to indict Henderson regardless so that Henderson could not have satisfied the prejudice prong of *Strickland.*

To obtain relief, Henderson must now show that this 2012 decision by the Kentucky Court of Appeals was clearly contrary to or an unreasonable application of the precedent of the U.S. Supreme Court surrounding *Strickland.* The Sixth Amendment guarantees that in all criminal prosecutions the accused shall enjoy the right to assistance of counsel for his defense. U.S. Const. Amend VI. In *McMann v. Richardson*, 397 U.S. 759, 771 (1970), the Supreme Court set out the derivative principle that all "defendants facing felony charges are entitled to the effective assistance of competent counsel." *See McElrath v.Simpson*, 595 F.3d 624, 630 (6th Cir. 2010).

Subsequently, in *Strickland v. Washington*, 466 U.S. at 686, the Supreme Court established the often-cited, two-part, benchmark test for evaluating a claim of ineffective assistance of counsel. *Id.* First, the defendant, or petitioner in this case, must show that the performance of his or her attorney was deficient, or objectively unreasonable, in light of the then prevailing professional norms. *Hodges,* 727 F.3d at 545 ("The Supreme Court has explicitly

[53] Id. at App. 432, *Henderson,* 2010-CA-002295-MR at p. 7.
[54] Id.

approved using ABA Guidelines on attorney performance in effect at the time of a defendant's trial as "guides to determining what is reasonable" performance by counsel.")(citing *Padilla v. Kentucky*, 559 U.S. 356 (2010)). Put differently, an attorney's performance will be deficient if "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. *See Howard v. United States*, 743 F.3d 459, 464 (6th Cir. 2014)(discussing *Strickland*).

The second part of the two-part test of *Strickland* requires that the defendant establish that the deficient performance of his or her attorney prejudiced the defense. *Id.* When a claim of ineffective assistance is raised in the context of trial, this second part of the *Strickland* test requires the Petitioner to show that "a reasonable probability existed that but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. *See also, Wong v. Belmontes*, 558 U.S. 15, 27 (2009) (per curiam) ("But *Strickland* does not require the State to 'rule out' "a more favorable outcome to prevail. "Rather, *Strickland* places the burden on the defendant, not the State, to show a 'reasonable probability' that the result would have been different"), *reh'g. denied*, 130 S.Ct. 1122, 175 L.Ed.2d 931 (2010).

A reasonable probability in that context is defined by *Strickland* to be a probability sufficient to undermine the confidence of the court in the outcome of the proceedings. *Id.* In the words of *Strickland*, "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the [proceeding] cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686; *Bigelow v. Haviland*, 576 F.3d 284, 287 (6th Cir. 2009) ("To prevail on an ineffective-assistance claim under the Sixth Amendment, a plaintiff must show that his counsel's performance was

constitutionally deficient and that it prejudiced him 'render[ing] the trial unfair and the result unreliable.'") (citing *Hall v. Vasvinder*, 563 F.3d 222, 237 (6th Cir. 2009)).

Courts are directed by *Strickland* to be highly deferential in their scrutiny of the performance of counsel. *Strickland*, 466 U.S. at 689. In fact, *Strickland* cautions directly that "the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690; *Stumpf v. Robinson*, 722 F.3d 739, 753 (6th Cir. 2013), *cert. denied,* 134 S.Ct. 905 (2014)(discussing deference under *Strickland*). Review of an attorney's performance, therefore, should not be made from the perspective of hindsight, but instead should evaluate the objective reasonableness of the challenged attorney's performance in the circumstances as they existed at the time of the alleged error. *Hanna v. Ishee,* 694 F.3d 596, 612 (6th Cir. 2012)("Counsel's performance must be assessed according to the time of representation, rather than viewed with the benefit of hindsight."), *cert. denied,* 124 S.Ct. 101 (2013)(citing *Strickland*). The tactical decisions of a defendant's trial counsel are presumed to be part of sound trial strategy and therefore will not be subject to successful attack absent a defendant overcoming such presumption. *Varden v. Wainwright*, 477 U.S. 168, 185-87 (1986); *O'Hara v. Wigginton,* 24 F.3d 823, 828 (6th Cir. 2006)([T]he standard to which an attorney is held is not that of the most astute counsel, but rather that of "reasonably effective assistance.")(citing *Strickland*).

The same standard that governs a Sixth Amendment claim for ineffective assistance of counsel at trial under *Strickland* applies to determine the adequacy of counsel on direct appeal. *Mapes*, 388 F.3d 187, 191 (6th Cir. 2004)(citing *Strickland*, 466 U.S. at 687). To prevail, a defendant ordinarily must show that: (1) his appellate counsel was deficient in the performance

of his professional duties; and (2) the deficient performance prejudiced the defense so that a reasonable probability exists that but for counsel's errors, the result of the proceeding, in this case the appeal, would have been different. *Strickland*, 466 U.S. at 694; *Nichols*, 501 F.3d at 547 (citing *Strickland*).

Not every non-frivolous issue must be raised by counsel on direct appeal in order to avoid a claim of ineffective assistance. *Jones v. Barnes*, 463 U.S. 745 (1983); *Monzo v. Edwards*, 281 F.3d 568, 579 (6th Cir. 2002). Ordinarily, the presumption that counsel has rendered effective assistance on appeal will be overcome only if the ignored issue was clearly stronger than the issues presented. *Smith v. Robbins*, 528 U.S. 259, 288 (2000); *Hoffner v. Bradshaw,* 622 F.3d 487, 505 (6th Cir. 2010), *cert. denied,* 131 S.Ct.2117 (2011). The task of winnowing out less persuasive arguments on appeal is otherwise the hallmark of an effective appellate advocate. *Smith v. Murray*, 477 U.S. 527, 536 (1986) (quoting *Barnes*, 463 U.S. at 751-72).

The Sixth Circuit in *Mapes* identified a number of questions to be considered when a court attempts to determine under the deficient performance prong of *Strickland* whether an attorney has satisfied the objective standard of reasonableness on direct appeal. Such factors include whether: (1) the omitted issue was significant and obvious; (2) there existed contrary authority to the Defendant's position on the omitted issue; (3) the omitted issue was clearly stronger than the issues presented on direct appeal; (4) the omitted issue was raised at the trial level; (5) the ruling of the trial court, if any, on the omitted issue, was subject to deference on appeal; (6) appellate counsel testified in a collateral proceeding as to his appeal strategy; (7) appellate counsel's level of expertise and experience was sufficient; (8) appellate counsel and the petitioner conferred about possible issues for appeal; (9) evidence indicated that counsel

reviewed all of the material facts and issues; (10) the omitted issue dealt with another assignment of error; and (11) the decision to omit the issue was an unreasonable one that only an incompetent attorney would make. *Id.* at 427-28. *See gen Goff v. Bagley,* 601 F.3d 445, 472-73 (6th Cir. 2010)(discussing *Mapes*). A defendant who raises a claim of ineffective assistance pursuant to *Strickland* ordinarily must make a showing that a reasonable probability existed, sufficient to undermine the confidence in the outcome, that but for the errors of counsel on appeal, the result of the proceedings would have been different. *Nichols*, 501 F.3d at 547 (citing *Strickland*, 466 U.S. at 694).

In 2011, two important decisions the U.S. Supreme Court emphasized yet again the strict nature of the standard created under *Strickland. See, Premo v. Moore*, 562 U.S. 115 (2011) and *Harrington v. Richter*, 562 U.S. 86 (2011). Both of these cases express in plain terms the imposing challenge that *Strickland* creates for a defendant who hopes to upend his state conviction based on a claim of ineffective assistance of counsel. The following quote from *Premo* leaves little doubt about the high court's view on such matters.

> "'Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S.___, ___ (2010) (slip op., at 14). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial [or in pretrial proceedings], and so the *Strickland* standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversarial process the right to counsel is meant to serve. *Strickland*, 466 U.S. at 689-90. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.' *Id.* at 689; *see also, Bell v. Cone*, 535 U.S. 685, 702 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S. at 690.

> "Establishing that a state court's application of *Strickland* was unreasonable under § 2254(b) is all the more difficult. The standard created by *Strickland* and § 2254(b) are both 'highly deferential,' (*Id.* at 689; *Lindh v. Murphy*, 521 U.S. 320, 333 n. 7 (1997), and when the two apply in tandem, review is 'doubly' so. *Knowles* [*v. Mirzayance*], 556 U.S. at ___ 529 S.Ct. at 1420 [(2009)](slip op., at 11). *See also, Harrington*, 131 S. Ct. at 788 (same). The *Strickland* standard is a general one, so the range of reasonable applications is substantial. 556 at ____ (slip op. at 11). Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under 2254(d). When § 2254(d) applies, 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."

Premo,562 U.S. at 739-40. See *Bray v. Andrews,* 640 F.3d 731, 738 (6th Cir. 2011)(discussing *Harrington*'s double deference standard); *Day v. Beckstrom*, 2016 WL 1354952 at *4(E.D. Ky. Apr. 5, 2016) (double deferential standard for IAC claims after *Harrington* applies to decisions of the Kentucky Court of Appeals that apply the *Strickland* standard to such claims).

Once again, Henderson has failed to show that the decision of the state appellate court was contrary to or an unreasonable application of the controlling U.S. Supreme Court precedent announced in *Strickland* and set forth above. His memorandum contains only two paragraphs concerning the first claim of ineffective assistance. Neither paragraph explains how the Kentucky Court of Appeals decision was an unreasonable application of *Strickland.* Instead, he merely repeats this same conclusory allegation that his trial attorney "neglected to discover and investigate critical Grand Jury testimony from the lead detective on the case."[55] The "critical testimony," however, essentially was that one of the suspects, of which Henderson obviously was one, had observed the victim on the day prior to the robbery and murder wearing new tennis shoes. Nothing in this testimony is in any fashion exculpatory, or would even appear to lead to

[55] (DN 1, Memo at p. 17).

exculpatory evidence so that the failure of Henderson's attorney to investigate this "lead" could hardly be characterized as being a deficient performance under *Strickland* much less a prejudicial one.

The very same deficiencies appear with respect to Henderson's arguments concerning the second claim of ineffective assistance of trial counsel considered in the 2012 opinion of the Kentucky Court of Appeals. Henderson argues merely that his trial attorney might have been able to successfully obtain the dismissal of the 1997 indictment based on the supposedly false grand jury testimony of the detective concerning Henderson's prior arrests. As the Court of Appeals noted, however, such dismissal would have been without prejudice to the Commonwealth to seek to re-indict Henderson without the supposedly false testimony concerning his prior drug and weapons arrests. In other words, Henderson cannot show prejudice under *Strickland*, even if one assumes that false testimony was presented -- a claim that Henderson certainly did not factually prove below as the Court of Appeals noted.

For these reasons, Henderson is not entitled to § 2254 relief on either of the only two 6th Amendment claims of ineffective assistance of trial counsel that were considered on their merits in the state appellate courts, which declined to consider any other post-conviction claims, including claims of ineffective assistance of counsel, due to Henderson's procedural default arising from his misuse of the state post-conviction procedure process as discussed in the final 2015 decision of the Kentucky Court of Appeals.[56] Because Henderson has not shown that the 2012 opinion of the Kentucky Court of Appeals was contrary to or an unreasonable application of the Strickland standard he is not entitled to habeas corpus relief on either of the two grounds of ineffective assistance of counsel considered on their merits in state court.

POST-CONVICTION EVIDENTIARY HEARING

[56] (DN 19 App. 600-605, *Henderson v. Commonwealth*, 2014-CA-001059 (Ky. App. Mar. 27, 2015)).

Henderson at pages 18-19 of his memorandum of law argues that the state trial court violated his constitutional rights when it refused to hold an evidentiary hearing on the issues raised in his post-conviction motion to vacate filed pursuant to RCr 11.42.[57] As noted above, the Kentucky Court of Appeals in its 2012 opinion found that the trial court did not abuse its discretion in refusing to conduct an evidentiary hearing given the vague and conclusory nature of Henderson's claims of ineffective assistance of trial counsel. Henderson now argues in reliance on state case law, such as *Hopewell v. Commonwealth*, 687 S.W.2d 153 (Ky. 1985), that the trial court was required to conduct an evidentiary hearing on his RCr 11.42 motion because material issues of fact remained that could not be determined from the face of the state court record. This argument, however, is the very argument rejected on its merits by the Kentucky Court of Appeals in its 2012 opinion. Henderson does not explain what, if any, clearly established precedent of the U.S. Supreme Court was implicated by such ruling. The Warden maintains, correctly in the Court's view, that under *Kirby v. Dutton*, 794 F.2d 245, 247 (6th Cir. 1986) relief is not available to a state habeas corpus petitioner for a mere deficiency in the state's post-conviction procedures as such matters are inherently state issues of law and do not implicate the constitutionality of the petitioner's conviction per se. *See Roe v. Baker*, 316 F3d 557, 571 (6thCir. 2002).

We agree that habeas corpus relief may not be granted on such a ground. In *Kirby,* the Sixth Circuit explained that "the writ is not the proper means by which prisoners should challenge errors or deficiencies in state post-eviction proceedings such as Kirby claims here because the claims address collateral matters and not the underlying state conviction giving rise to the prisoner's incarceration." *Kirby*, 794 F.2d at 247. Further, the Sixth Circuit has regularly applied Kirby to summarily reject similar challenges to procedures used in state collateral

[57] DN 1, Memo at pp. 17-18).

proceedings. *See, Greer v. Mitchell*, 264 F.3d 663, 681 (6th Cir.2001) (rejecting claim that "Ohio's post-conviction scheme fails to provide defendants an adequate corrective process for reviewing claims of constitutional violations); *Sherley v. Parker,* 2000 WL 1141425, at *6, 229 F.3d 1153,(6th Cir.2000) (state court's denial of an evidentiary hearing on motion to vacate sentence); *Johnson v. Collins*, 1998 WL 228029, at *1, 145 F.3d 1331 (6th Cir.1998); *Buerger v. Mohr*, 1993 WL 72485, 989 F.2d 498 (6th Cir.1993); *Rembert v. Morris*, 1991 WL 21977, 925 F.2d 1465 (6th Cir.1991); *Bartley v. Sowders*, 1990 WL 29800, 898 F.2d 153 (6th Cir.1990); *Helmbright v. Baker*, 1990 WL 27400, at *1, 898 F.2d 154 (6th Cir.1990) (rejecting claim that "the fact-finding process employed by the trial court in denying his motion for post-conviction relief did not afford him a full and fair hearing"); *Smith v. Fletcher*, 1990 WL 25804, at *3-*4, 898 F.2d 154 (6th Cir.1990) (per curiam); *Mapson v. Russell*, 1989 WL 16211, 869 F.2d 1491 (6th Cir.1989); *Berry v. Lack*, 1987 WL 38650, at *1, 831 F.2d 293 (6th Cir.1987) (rejecting claim that petitioner "was denied a fair hearing in state court on his petition for post-conviction relief"); *Hudson v. Jago*, 1987 WL 37908, 822 F.2d 59 (6th Cir.1987) (per curiam); *Terrell v. Dutton,* 1987 WL 37374, 822 F.2d 1089 (6th Cir.1987). Because Kirby remains "good law in the Sixth Circuit", *Pudelski v. Wilson*, 576 F.3d 595, 608 (6th Cir. 2009), Henderson is not entitled to 2254 relief on this ground either.

PROCEDURAL DEFAULT

We now turn to Henderson's remaining claims of ineffective assistance of counsel, and various other claims, raised in his post-conviction Motion for Relief *Nunc Pro Tunc* and related Motion for Relief filed in 2014.[58] Both of these post-eviction motions are discussed by the

[58] (DN 19, App. 652-654, *Henderson v. Commonwealth*, No 2014-CA-001059-MR, 2015 WL 1433301 (Ky. App. Mar. 27, 2015)).

Kentucky Court of Appeals in its 2015 opinion.[59] As the Court of Appeals noted, the trial court denied the former motion for lack of jurisdiction and successiveness; it denied the latter motion on the basis that its claims should have been raised on direct appeal. In response to Henderson's appeal, the Commonwealth argued that "Henderson's motions were procedurally barred because they were successive attempts to raise claims that either were, could have been, or should have been raised in the direct appeal, the first CR 60.02 motion or the prior RCr 11.42 motion."[60]

The Kentucky Court of Appeals agreed, holding that:

> Kentucky's procedure for challenging criminal convictions is explained in *Gross v. Commonwealth*, 648 S.W.2d 853, 857 (Ky.1983). Each step in the process must be as complete as possible to ensure judicial time and resources are not squandered. The first step in the process is a direct appeal "stating every ground of error which it is reasonable to expect that he or his counsel is aware of when the appeal is taken." *Id.*
>
> *2 Next, we hold that a defendant is required to avail himself of RCr 11.42 while in custody under sentence or on probation, parole or conditional discharge, as to any ground of which he is aware, or should be aware, during the period when this remedy is available to him. Final disposition of that motion, or waiver of the opportunity to make it, shall conclude all issues that reasonably could have been presented in that proceeding. The language of RCr 11.42 forecloses the defendant from raising any questions under CR 60.02 which are "issues that could reasonably have been presented" by RCr 11.42 proceedings.
>
> Id. The third step—if appropriate—is the filing of a CR 60.02 motion, but as just noted above, CR 60.02 is not a vehicle for raising issues that could have been argued under RCr 11.42.
>
> Henderson has already availed himself of all three steps and is now attempting to rehash and recycle previously unsuccessful claims. As recognized in *Alvey v. Commonwealth,* 648 S.W.2d 858, 860 (Ky.1983), "we should not afford the defendant a second bite at the apple" and we will not.
>
> The bulk of Henderson's most recent cry for relief is nothing new. To use the trial court's word, it is "redundant." Henderson alleges counsel—at every juncture—was ineffective. Specifically, he alleges counsel failed to object to jury instructions allowing him to be convicted of wanton murder when he was indicted for intentional murder—a claim this Court rejected in affirming the trial court's

[59] Id.
[60] Id. at opin pp.2-3.

> denial of his RCr 11.42 motion in 2012; he later alleges his defense team provided ineffective legal assistance by tendering a facilitation instruction—but readily acknowledges this was a "strategic effort" to reduce a charge of capital murder to a Class D felony. Action taken as part of trial strategy will not be deemed ineffective assistance of counsel. *See Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 164, 100 L.Ed. 83 (1955). Henderson repeats the ineffective counsel argument again as the third issue in his brief.
>
> Henderson's other allegation is he was denied a fair trial because O'Neal testified Henderson pulled the trigger—testimony that contradicted other statements O'Neal had made. A panel of this Court rejected this claim in affirming the trial court's denial of CR 60.02 relief in 2006.
>
> Henderson also alleges the Commonwealth withheld exculpatory evidence; appellate counsel did not argue all preserved issues on appeal (denial of a mistrial and a directed verdict; and, a death-qualified jury decided his fate); counsel representing him on his pro se RCr 11.42 motion did not supplement the motion even though Henderson had alleged ineffectiveness of trial counsel and did not keep him updated on the status of his case. Finally, Henderson alleged the attorney who represented him on a belated RCr 11.42 motion briefed only the issues a prior attorney had included in her supplemental filing, rather than pursuing all the claims Henderson had raised in his pro se motion. These claims either were, could have been or should have been addressed on direct appeal or collateral attack. Thus, further review is unavailable. *Gross*.
>
> For the foregoing reasons, we affirm the orders entered by the Jefferson Circuit Court

Henderson v. Commonwealth, No. 2014-CA-001059-MR, 2015 WL 1433301, at *1–2 (Ky. Ct. App. Mar. 27, 2015).

As the above quotation confirms, the most recent decision of the Kentucky Court of Appeals plainly relied upon well-established state procedural rules to refuse to address the merits of Henderson's untimely, duplicative and/or previously-resolved 6th Amendment arguments. In the absence of cause and prejudice, or manifest injustice, we cannot reach the merits of any of his remaining claims of ineffective assistance of counsel, which include Henderson's claim that his trial counsel were ineffective for their failure to object to the erroneous jury instructions of the trial court. Henderson in essence argues that the instructions relieved the Commonwealth of

its burden of proof and inserted "an unauthorized alternative ground" on which the jury could find him guilty of murder merely by his voluntary participation or assistance in the robbery of the 15-year-old victim, Hammond.

Also procedurally barred are Henderson's many 6th Amendment claims of ineffective assistance of counsel raised at pages 23-29 of his memorandum of law whereat he attempts to assert various, conclusory claims of ineffective assistance of counsel at trial and on appeal, none of which were timely raised in the state post-eviction proceedings. To the extent that Henderson now attempts to rely upon *Martinez v. Ryan*, ___ U.S. ___, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012) and *Trevino v. Thaler*, ___U.S.___, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013) to excuse his post-conviction procedural default, he cannot do so for two reasons.

First, *Martinez* and *Trevino* simply do not apply to claims of ineffective assistance of appellate counsel as the U.S. Supreme Court most recently held in *Davila v. Davis*, ___S.Ct.___, 2017 WL 2722418 at *4 (June 26, 2017). *See also*, *Abdur'Rahman v. Carpenter*, 805 F.3d 710, 712-14 (6th Cir. 2015) (noting that while the ineffective assistance of post-conviction counsel can establish cause to excuse a defendant's procedural default of a substantive claim of ineffective assistance of trial, the U.S. Supreme Court "limited its ruling to the default of substantial claims of ineffective assistance of trial counsel."). Consequently, Henderson cannot salvage his procedurally defaulted claims of ineffective assistance of counsel on direct appeal via *Martinez* and *Trevino*. Second, such claims of ineffective assistance of counsel relied upon in an effort to excuse a procedural default must *themselves* be procedurally exhausted, which Henderson has not done, and no state court remedies remain available to him to pursue in this regard.

Finally, manifest injustice simply does not apply here. Henderson, as explained above, did not establish his actual innocence by the belated, briefly-worded affidavit of O'Neal

recanting his trial testimony without elaboration. The state trial and appellate courts properly rejected O'Neal's recantation, and as noted above, he has not satisfied the standard of *Schlup* so that the federal courts would excuse his post-conviction procedural defaults.[61]

CERTIFICATE OF APPEALABILITY

The final question is whether Henderson is entitled to a certificate of appealability (COA) pursuant to 28 U.S.C. § 2253(c)(1)(B) on any or all of the many grounds raised in his petition. A state prisoner who seeks to take an appeal from the dismissal of a habeas corpus petition must satisfy the COA requirements of 28 U.S.C. § 2253, which are jurisdictional in nature. *Gonzalez v. Thaler,* 565 U.S.134, 140-41 (2012); *Hill v. Mitchell,* 400 F.3d 308, 329 (6th Cir. 2005)(same). A COA will be issued only if reasonable jurists could debate whether the applicant has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). *Buck v. Davis,* ___ U.S. ___, 137 S.Ct. 759, 773 (Feb. 22, 2017)("The COA inquiry, we have emphasized, is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further."). *See gen., Meddellin v. Dretke,* 544 U.S. 660, 666 (2005)(" A certificate of appealability may be granted only where there is "a substantial showing of the denial of a constitutional right."); *Ajan v. United States,* 731 F.3d 629, 630 (6th Cir. 2013); *Johnson v. Bell,* 605 F.3d 333, 339 (6th Cir. 2010)(same).

[61] Henderson in his ninth argument at pages 21-23 of his memorandum of law appears to argue that his trial was rendered fundamentally unfair by the use of perjured testimony. We view this argument as merely a variation of his earlier presented argument based upon O'Neal's recantation, which we have previously discussed above. The state courts properly rejected this argument based on the failure of Henderson to satisfy the requirements to establish the knowing use of perjured testimony, or that the results of the trial would have been different had O'Neal's testimony been omitted. Accordingly, we need not address this claim again.

To do so, the prisoner must establish that reasonable jurists would find it debatable whether the District Court's assessment of the constitutional claims at issue was wrong, or could conclude that the constitutional issues raised are adequate to deserve further review. *Buck*, 137 S.Ct. at 773; *Johnson,* 605 F.3d at 339 ("an applicant must show that reasonable jurists could debate that the petition could have been resolved differently or that the claims raised deserved further review.")(citing *Miller-El v. Cockrell,* 537 U.S. 322, 336 (2003)); *Webb v. Mitchell,* 586 F.3d 383, 401 (6th Cir. 2009).

In the cases in which the issue at hand is resolved based upon a procedural ruling, without consideration of the merits of the constitutional claim, the question under the statute is whether reasonable jurists could find it debatable that the District Court was correct in its procedural ruling *and,* if so, that the petitioner stated a valid underlying constitutional claim. *See Gonzalez,* 132 S.Ct. at 647; *Porterfield v. Bell*, 258 F.3d 484, 485-86 (6th Cir. 2001). Review of a prisoner's habeas petition on appeal is limited to those issues specified in the certificate of appealability. *Harris v. Haeberlin,* 526 F.3d 903, 908 n.1 (6th Cir. 2008); *Powell v. Collins*, 332 F.3d 376, 398 (6th Cir. 2003).

The Court is required to make an individual assessment of the issues and to indicate which specific issue or issues satisfy or do not satisfy the standard of § 2253(c). *See Hill,* 400 F.3d at 329; *Frazier v. Huffman,* 343 F.3d 780, 788-89 (6th Cir. 2003)("It was therefore error for the district court to issue a blanket certificate of appealability without any analysis."); *Stanford v. Parker*, 266 F.3d 442, 450-51 (6th Cir. 2001), *cert. denied*, 537 U.S. 831 (2002)(same). *See also Slack v. McDaniel*, 529 U.S. 473, 483 (2000) (discussing 28 U.S.C. § 2253(c)). With the above principles in mind we begin our consideration of the grounds addressed in Henderson' petition.

Here, none of the grounds raised remotely satisfies the standard as set forth recently in *Buck*. The decisions of the Kentucky Supreme Court and the Kentucky Court of Appeals are all well in-line with the controlling legal precedent of the U.S. Supreme Court on all constitutional issues addressed on their merits. Henderson does not explain otherwise or cite to any decision that would remotely call into question this critical determination. Jurists of reason simply could not disagree with the decisions of the Kentucky Supreme Court or Kentucky Court of Appeals.

The many IAC and IAAC claims raised are, for the most part procedurally defaulted, except for the two 6th Amendment claims considered by the Kentucky Court of Appeals in its 2012 decision. Nowhere does Henderson explain, nor could he, how the state appellate court unreasonably applied the *Strickland* decision to those two IAC claims. His claim of manifest injustice is based only on a briefly worded affidavit of a co-defendant offered up years after trial and without any corroborative detail therein. The contents of the O'Neal's affidavit are so devoid of meaningful detail that fair minded jurists could not reasonably debate its many insufficiencies, all of which negate any claim of manifest injustice. For all of these reasons the Magistrate Judge shall also recommend that a certificate of appealability be denied as to all claims raised.

RECOMMENDATION

The Magistrate Judge having made findings of fact and conclusions of law recommends that the petition be dismissed with prejudice and that the Petitioner be denied a certificate of appealability as to all claims raised.

Dave Whalin, Magistrate Judge
United States District Court

June 28, 2017

NOTICE

Within fourteen (14) days after being served a copy of these proposed Findings and Recommendation, any party who wishes to object must file and serve written objections or further appeal is waived. *Thomas v. Arn,* 474 U.S. 140, 150-51 (1985); *United States v. Walters*, 638 F.3d 947, 949-50 (6th Cir. 1981); 28 U.S.C. § 636(b)(1)(c); Fed. R. Crim. P. 59(b)(2)

Copies to Defendant and Counsel of Record