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Appendix A

23-5655

Mr. William Lee Boyer
#260673
Luther Luckett Correctional Complex
P.O. Box 6
LaGrange, KY 40031

No. 23-5655

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM LEE BOYER,

Petitioner-Appellant,

v.

AMY ROBEY, Warden; DANIEL J. CAMERON, Attorney General,

Respondents-Appellees.

ORDER

Before: BOGGS, Circuit Judge.

William Lee Boyer, a Kentucky prisoner proceeding pro se, appeals the district court's order dismissing his petition for a writ of habeas corpus under 28 U.S.C. § 2254 as untimely. Boyer moves this court for a certificate of appealability and for leave to proceed in forma pauperis on appeal. *See* Fed. R. App. P. 22(b), 24(a)(5).

After shooting and killing his ex-wife, Boyer pleaded guilty to murder in exchange for the dismissal of other charges. On April 30, 2013, the Warren Circuit Court entered its judgment sentencing Boyer to life imprisonment with the possibility of parole after 20 years. In accordance with his plea agreement, Boyer did not file a direct appeal.

Three years later, in May 2016, Boyer filed a motion to vacate, set aside, or correct his sentence under Kentucky Rule of Criminal Procedure 11.42, claiming ineffective assistance of counsel. After an evidentiary hearing, the trial court denied Boyer's Rule 11.42 motion. Boyer appealed, and the Kentucky Court of Appeals affirmed, concluding that his Rule 11.42 motion was untimely and was otherwise properly denied. *Boyer v. Commonwealth*, No. 2019-CA-0331-MR, 2021 WL 298405 (Ky. Ct. App. Jan. 29, 2021), *disc. rev. denied*, No. 2021-SC-0081-D (Ky. June 9, 2021).

Boyer filed a § 2254 habeas petition in May 2022. In the court-provided form, Boyer raised the same ineffective-assistance claims that he raised in his Rule 11.42 motion: (1) his trial counsel failed to fully investigate evidence of his extreme emotional disturbance (EED) at the time of the offense and failed to inform him of this evidence before he entered into the plea agreement, (2) his trial counsel failed to pursue suppression of his confession, and (3) his trial counsel failed to fully investigate the ballistics evidence. Boyer's memorandum of law in support of his habeas petition addressed different issues about his post-conviction counsel's ineffectiveness and other alleged errors in the Rule 11.42 proceeding.

The district court ordered Boyer to show cause why his habeas petition should not be dismissed as untimely. In response, Boyer asserted that his post-conviction counsel's ineffectiveness served as "cause" for his procedural default. The district court directed service and allowed the respondent to limit her answer to the timeliness issue. In the meantime, Boyer filed multiple motions for leave to amend and supplement his habeas petition, which the magistrate judge granted. The magistrate judge recommended that the district court dismiss Boyer's habeas petition as time-barred and decline to issue a certificate of appealability. Over Boyer's objections, the district court adopted the magistrate judge's findings of fact, conclusions of law, and recommendation and dismissed the habeas petition. This timely appeal followed.

Boyer moves this court for a certificate of appealability. To obtain a certificate of appealability, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where, as here, the district court dismisses a habeas petition on procedural grounds without addressing the underlying constitutional claims, a certificate of appealability should issue if the petitioner "shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right *and* that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (emphasis added). In his motion for a certificate of appealability, Boyer acknowledges that his petition was dismissed on "procedural grounds," but

he does not address the timeliness issue. In any event, reasonable jurists could not debate the district court's conclusion that Boyer's habeas petition was untimely.

The Antiterrorism and Effective Death Penalty Act (AEDPA) establishes a one-year limitations period for habeas petitions challenging state-court judgments. 28 U.S.C. § 2244(d)(1). The one-year period typically runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." *Id.* § 2244(d)(1)(A). Because Boyer did not file a direct appeal, the Warren Circuit Court's judgment became final 30 days after its entry—on May 30, 2013. *See* Ky. R. Crim. P. 12.04(3); Ky. R. App. P. 3(A)(1). The one-year period for filing a habeas petition therefore expired on May 30, 2014. AEDPA's limitations period is tolled for "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). But Boyer's Rule 11.42 motion filed in May 2016 did not revive the already expired limitations period. *See Vroman v. Brigano*, 346 F.3d 598, 602 (6th Cir. 2003).

AEDPA's one-year limitations period also runs from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D). Boyer argued that new evidence supported his claim that his trial counsel failed to fully investigate and advise him about an EED defense. Boyer asserted that, after nearly two years of reviewing the trial record and conducting research, he wrote Dr. Eric Drogin, the clinical and forensic psychologist who evaluated him during the trial proceeding, to request the report from his evaluation. According to Boyer, Dr. Drogin's letters in response confirmed that "he was indeed suffering from EED" at the time of the offense and that his trial counsel "failed to communicate" this fact to him and failed to request the preparation of an evaluation report. Boyer asserted that Dr. Drogin's letters constituted new evidence proving that, once he was found to have suffered from EED, his trial counsel failed to fully investigate EED as a defense and failed to provide him with the results of the evaluation.

But Boyer was aware of the facts supporting his ineffective-assistance claim before he received Dr. Drogin's letters: he admittedly "knew his rights were violated long before he could prove" it. Dr. Drogin evaluated Boyer at the request of his trial counsel, who subsequently filed a notice of intent to introduce Dr. Drogin's expert testimony that Boyer was suffering from EED at the time of the offense. According to his Rule 11.42 motion, Boyer took a plea deal because his trial counsel advised him that a jury would not understand his EED defense, leading Boyer to believe that the presentation of an EED defense at trial would be unsuccessful. Even if Boyer did not learn about his trial counsel's failure to request the preparation of an evaluation report until he received Dr. Drogin's letters, he was aware of the facts supporting his ineffective-assistance claim—the availability of an EED defense and his trial counsel's advice about that defense—at the time of his guilty plea. Furthermore, Boyer failed to exercise due diligence given that he waited nearly three years after his conviction to contact Dr. Drogin. Boyer therefore failed to satisfy § 2244(d)(1)(D).

AEDPA's limitations period "is subject to equitable tolling in appropriate cases." *Holland v. Florida*, 560 U.S. 631, 645 (2010). "Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. Diguglielmo*, 544 U.S. 408, 418 (2005). "Equitable tolling is granted sparingly and is evaluated on a case-by-case basis, with the petitioner retaining the 'ultimate burden of persuading the court that he or she is entitled to equitable tolling.'" *Keeling v. Warden, Lebanon Corr. Inst.*, 673 F.3d 452, 462 (6th Cir. 2012) (quoting *Ata v. Scutt*, 662 F.3d 736, 741 (6th Cir. 2011)).

Boyer failed to establish diligence given his three-year delay in filing a Rule 11.42 motion, even though he "knew his rights were violated long before." Nor did Boyer identify any extraordinary circumstance standing in his way. Nothing prevented Boyer from contacting Dr. Drogin earlier. And Boyer's pro se status and lack of legal knowledge did not constitute extraordinary circumstances. *See id.* at 464.

A credible claim of actual innocence may overcome AEDPA's one-year limitations period. *McQuiggin v. Perkins*, 569 U.S. 383, 386, 392 (2013). "'[A]ctual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998). Although Boyer cited *Perkins*, he did not assert his factual innocence.

Boyer argued that his post-conviction counsel's ineffectiveness established cause for his procedural default, citing *Martinez v. Ryan*, 566 U.S. 1, 9 (2012), and *Trevino v. Thaler*, 569 U.S. 413, 429 (2013). But those cases involved the procedural default of a habeas claim by failing to raise it in state court—not a habeas petition barred by AEDPA's one-year limitations period. In any event, Boyer cannot blame his untimely filing on his post-conviction counsel, who was appointed long after the deadline for filing his habeas petition had passed.

Reasonable jurists could not debate the district court's conclusion that Boyer's habeas petition was untimely. Accordingly, we **DENY** Boyer's motion for a certificate of appealability and **DENY** as moot his motion for leave to proceed in forma pauperis on appeal.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

United States Court of Appeals for the Sixth Circuit

U.S. Mail Notice of Docket Activity

The following transaction was filed on 01/09/2024.

Case Name: William Boyer v. Amy Robey, et al
Case Number: 23-5655

Docket Text:
ORDER filed: Accordingly, we DENY Boyer's motion for a certificate of appealability and DENY as moot his motion for leave to proceed in forma pauperis on appeal [7082650-2] [7039678-2]. Danny J. Boggs, Circuit Judge.

The following documents(s) are associated with this transaction:
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Luther Luckett Correctional Complex
P.O. Box 6
LaGrange, KY 40031

A copy of this notice will be issued to:

Mr. Joseph Andrew Beckett
Mr. James J. Vilt Jr.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 23-5655

WILLIAM LEE BOYER,

Petitioner-Appellant,

v.

AMY ROBEY, Warden; DANIEL J. CAMERON,
Attorney General,

Respondents-Appellees.

Before: BOGGS, Circuit Judge.

JUDGMENT

THIS MATTER came before the court upon the application by William Lee Boyer for a certificate of appealability.

UPON FULL REVIEW of the record and any submissions by the parties,

IT IS ORDERED that the application for a certificate of appealability is DENIED.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

Appendix B

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
BOWLING GREEN DIVISION
CIVIL ACTION NO. 1:22-CV-00061-JHM-HBB

WILLIAM L. BOYER — PETITIONER

VS.

AMY ROBEY, WARDEN, et al. — RESPONDENTS

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION

Before the Court is Petitioner William L. Boyer's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (DN 1). Respondent Amy Robey filed a response limited to the issue of whether the petition is time barred (DN 18). Boyer has filed a reply (DN 19). The District Judge referred this matter to the undersigned magistrate judge for findings of fact and recommendations (DN 8). For the reasons that follow, the undersigned **RECOMMENDS** that the Court **DISMISS** Boyer's petition as time barred.

FINDINGS OF FACT & CONCLUSIONS OF LAW

Statute of Limitations

A one-year statute of limitations applies to the § 2254 petition filed by Boyer (DN 1). 28 U.S.C. § 2244(d)(1). The statute of limitations reads as follows:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of —
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d). Boyer's one-year period of limitation for filing his § 2254 petition began to run on the date his judgment became final by the expiration of the time for seeking direct review. *See* 28 U.S.C. § 2244(d)(1)(A); Gonzalez v. Thaler, 565 U.S. 134, 150 (2012); Keeling v. Warden, Lebanon Corr. Inst., 673 F.3d 452, 460-61 (2012).

Boyer entered a plea of guilty to the murder of his wife on March 20, 2012. Boyer v. Commonwealth, No. 2019-CA-0331-MR, 2021 Ky. App. Unpub. LEXIS 65, at *2-3 (Ky. Ct. App. Jan. 29, 2021). Boyer was sentenced to serve life in prison with the eligibility for parole after twenty years. Id. at *3. The trial court's judgment and sentence were entered on April 30, 2013. Following RCr 12.04, Boyer had thirty days from the entry of the judgment to file his appeal. However, Boyer did not file an appeal to the Supreme Court of Kentucky, as he waived any state-court direct appeal from his conviction as a condition of his plea agreement (DN 18 PageID # 362). Therefore, the start of Boyer's one-year period of limitations began to run on Thursday, May 30, 2013. Boyer's one-year limitations period expired on Friday, May 30, 2014.

Certain post-conviction proceedings in the state court can toll the one-year limitation period. *See* McClendon v. Sherman, 329 F.3d 490, 493 (6th Cir. 2003). "The time during which a properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation[.]" 42 U.S.C. § 2244(d)(2). Critically, the tolling provision of § 2244(d)(2) does not serve to resuscitate

the "the limitations period (i.e., restart the clock at zero); it can only serve to pause a clock that has not yet fully run." Vroman v. Brigano, 346 F.3d 598, 602 (6th Cir. 2003) (citation omitted).

Boyer filed his RCr 11.42 motion on May 4, 2016, almost two years after his one-year limitations period under § 2244(d)(1)(A) expired on Friday, May 30, 2014. Boyer, 2021 Ky. App. Unpub. LEXIS 65, at *3. Thus, Boyer's RCr 11.42 motion does not provide any relief as to his one-year period of limitation as it already had expired. This means that when Boyer filed his habeas petition on May 25, 2022 (DN 1), it was time barred because he filed it 2917 days after the one-year limitations period under § 2244(d)(1)(A) expired on May 30, 2014. As discussed in a later section, Boyer's statute of limitations did not begin to run following the discovery of new evidence under § 2244(d)(1)(D).

I. ARGUMENTS OF THE PARTIES

Boyer argues equitable tolling should apply to his petition despite filing his federal petition outside the one-year statute of limitations. Within his petition, Boyer argues his petition is not time barred due to his claim of ineffective assistance counsel during the "initial-review collateral proceedings," citing Martinez v. Ryan, 566 U.S. 1 (2012) (DN 1 PageID # 13-14). The standard under Martinez, however, controls a petitioner's ability to raise a claim that was not exhausted before the state court post-conviction proceedings, an equitable exemption to a procedural default standard, not an equitable tolling standard. Within his Petition and his memorandum in support, Boyer does not articulate how he was pursuing his rights diligently or the presence of extraordinary circumstances, but instead alleges that his trial counsel failed to develop his extreme emotional disturbance ("EED") defense and focuses on his post-conviction counsel's refusal to raise an EED defense by calling an expert witness and other evidence (DN 1, DN 1-1). Robey argues in her

Response that as Boyer's federal petition was filed eight years after the limitations period expired it is time barred and not saved by equitable tolling (DN 18 PageID # 364-65).

In both his Petition and Reply, Boyer relies on Martinez and asserts that he was diligent by making the argument the Kentucky Court of Appeals erred by finding his RCr. 11.42 was time barred and that his counsel provided inadequate legal assistance (DN 19 PageID #448-49). To the issue of timeliness, Boyer's Reply argues that he received ineffective assistance of counsel regarding his EED defense by his post-conviction proceeding counsel with:

> Petitioner had no "evidence" to base his claim, in tandem with no starting point to research until finally receiving his records which he was diligently pursuing from the moment he became truly aware of the violation. Therefore, Petitioner[']s inexperience and the state of the situation proves he could not have procured evidence by the exercise of "reasonable diligence" any faster or in any other way, then how circumstances occurred organically in this current state of succession. . . . While at this point petitioner was in no way proficient in addressing the court or record keeping and application of the law; Petitioner did submit several letters to the Court Clerk's office to obtain records, and several letters were written to his Court appointed "*Trial Counsel*" and finally letters were written to the Doctor who performed the examination to obtain the records from the Doctor which did not exist. This all coincides with the pursuit of Petitioner[']s rights once he discovered the denial of his *Sixth Amendment* rights.
>
> After nearly two (2) years of diligent study and review of over one-thousand pages of discovery and an impressively if not equally large amount of legal literature, including case law, Rules of Court, legal journals, and several books on the topic of political science. Did the Petitioner begin to form proper study habits and comprehend how to formulate arguments; only after this diligent effort could a person with a simple G.E.D. who has never studied the law begin to comprehend and develop the ability of proper retention of the law with its many legal principles and standards. This was a necessary lapse of diligence for the Petitioner to formulate the proper state of mind to direct arguments properly. Which was the conclusion that there was a missing piece and required writing Dr. Eric Drogin, the forensic pathologist who examined the Petitioner and request the missing piece of evidence which was "*a report from the evaluations conducted by Drogin*" missing from the mountain of discovery he'd repeatedly combed over. Only upon this response from Dr. Drogin did the Petitioner confirm this foundational piece of the evidence confirming he was indeed suffering from EED and this was a fact "*Trail Counsel*" [sic] failed to communicate. . . .

> Once Petitioner received two letters from Dr. Drogin dated March 23, 2016 and April 9, 2016 his theories were confirmed. The Petitioner was now in possession of evidence which would be required by the Court. . . . In summary these letters are new evidence which prove two basic factors (1) Once Petitioner was found to be suffering from EED "*Trial Counsel*" did not make an informed reasonable strategic decision not to fully investigate EED as a defense. (2) "*Trial Counsel*" testified to during the evidentiary hearing . . . .

(DN 19 PageID # 458-60). Boyer continues his timeliness argument by asserting under McQuiggin v. Perkins, 569 U.S. 383 (2013) (citing 28 U.S.C. § 2244(d)(1)(D)), a habeas petitioner has one year of the time in which "new evidence could have been discovered through the exercise of due diligence." He argues that he was diligent despite being transferred to different prison institutions within a short span of time (DN 19 PageID # 462).

II. EQUITABLE TOLLING

A petitioner's time-barred petition may be considered if he can establish that he is entitled to equitable tolling. Equitable tolling exists in two forms—traditional equitable tolling and actual innocence equitable tolling. The burden is on the movant to demonstrate they are entitled to equitable tolling. McClendon, 329 F.3d at 494 (citation omitted)).

A. Traditional Equitable Tolling

Under traditional equitable tolling, a petitioner "is 'entitled to equitable tolling' only if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." Holland v. Florida, 560 U.S. 631, 649 (2010) (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)).

The diligence prong examines whether the petitioner "covers those affairs within the litigant's control." Menominee Indian Tribe v. United States, 577 U.S. 250, 257 (2016). Boyer's argument in his Petition and Reply are insufficient to show that he acted diligently in pursuing his rights. In Holland, the petitioner, upon independently discovering that the statute of limitations

had expired, immediately wrote out his own *pro se* federal habeas petition and mailed it to the federal court the next day. 560 U.S. at 639. Here, Boyer's argument is that he was unaware of this claim until he received the trial record and examined it at length, and therefore, he was diligent. When compared to the *pro se* litigant in Holland, Boyer does not meet the requisite level of diligence to satisfy the first prong. Though the undersigned understands it took Boyer two years to parse through the legal documents of his trial record, "petitioner could have timely submitted a 'bare bones' habeas petition listing his claims and later supplementing his pleadings as necessary," therefore, the undersigned cannot deem Boyer acted with diligence to grant tolling. Stennis v. Place, No. 16-CV-14262, 018 U.S. Dist. LEXIS 116003, at *11 (E.D. Mich. July 12, 2018).

Similarly, Boyer does not argue adequate extraordinary circumstances under Holland's second prong. A movant's *pro se* status and his lack of knowledge of the law are not sufficient reasons to constitute an extraordinary circumstance and to excuse his late filing of the petition. *See* Keeling v. Warden, Lebanon Corr. Inst., 673 F.3d 452, 464 (6th Cir. 2012). Further, to Boyer's claim that his multiple prison transfers prevented him from timely filing his petition, this judicial district, in addition to many others across the country, have stated that "[g]eneral allegations of transfers and lack of access to legal materials are not exceptional circumstances warranting equitable tolling, especially where a petitioner does not sufficiently explain or present evidence demonstrating why the circumstances he describes prevented him from timely filing a habeas petition." Ramey v. Mazza, No. 5:19CV-P161-TBR, 2020 U.S. Dist. LEXIS 89730, at *6 (W.D. Ky. May 20, 2020); *see also* Andrews v. United States, No. 17-1693, 2017 U.S. App. LEXIS 28295, at *6 (6th Cir. Dec. 12, 2017); United States v. Fredette, 191 F. App'x 711, 713 (10th Cir. 2006) (finding that petitioner was not entitled to equitable tolling of his § 2255 petition, despite his transfer to as many as six different facilities, because even if petitioner was denied access to

legal materials in violation of his constitutional right of access to the courts, he failed to show how the transfers affected his ability to timely file); Dodd v. United States, 365 F.3d 1273, 1282-83 (11th Cir. 2004); Akins v. United States, 204 F.3d 1086, 1089-90 (11th Cir. 2000); *but see* Jones v. United States, 689 F.3d 621 (6th Cir. 2012) (granting equitable tolling due to a combination of a series of prison transfers, illiteracy, and a variety of medical conditions).

B. Actual Innocence Equitable Tolling

If a petitioner successfully raises "actual innocence," it can serve as a gateway through which he may pass if the statute of limitations has expired. McQuiggin v. Perkins, 569 U.S. 383, 386 (2013). But this "gateway should open only when a petition presents '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." Id. at 401 (quoting Schlup v. Delo, 513 U.S. 298, 316 (1995)). "[T]he vast majority of cases, claims of actual innocence are rarely successful." Schulp, 513 U.S. at 324. In order to be successful under this type of tolling, petitioners must present "*new* reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." Id. at 324 (emphasis added); Bell v. Howes, 703 F.3d 848, 855 (6th Cir. 2012); Burton v. Braman, No. 20-1648, 2021 U.S. App. LEXIS 3228, at *8 (6th Cir. Feb. 4, 2021). This reliable new evidence must establish "'it is more likely than not that no reasonable juror would have convicted [the petitioner]'" and must demonstrate "factual innocence, not mere legal insufficiency." Burton, 2021 U.S. App. LEXIS 3228, at *8-9 (quoting McQuiggin, 569 U.S. at 395, 399); Bousley v. United States, 523 U.S. 614, 624 (1998).

Here, Boyer presents the letters from Eric Drogin, J.D., Ph.D., ABPB, Licensed Clinical Psychologist (DN 1-26, DN 1-27, DN 1-28). Dr. Drogin's earliest letter to Boyer is dated March

23, 2016, in which Dr. Drogin stated "[i]t does not appear that a report of your evaluation was ever requested by trial counsel" (DN 1-27 PageID # 221). In Dr. Drogin's subsequent letter, dated April 9, 2016, Drogin discussed his first and second examination with Boyer and went over his observations from those meetings (DN 1-28 PageID # 222-23). Boyer relies on the March 2016 letter in his petition to show he received ineffective assistance of counsel as his trial counsel did not request a report of Boyer's evaluation from Dr. Drogin, and later during his post-conviction proceedings as his counsel did not find it necessary to call Dr. Drogin as a witness, which in Boyer's opinion created a conflict of interest.

Boyer's argument hinges on his understanding the March 2016 letter alerted him that his counsel did not request Dr. Drogin's report regarding the examinations Dr. Drogin conducted, and this correspondence and its implications constitutes new evidence that, if presented at trial, a reasonable juror would not have convicted him.

The undersigned cannot find that the correspondence constitutes new evidence to grant equitable tolling. First, this evidence is not new. Though Dr. Drogin did not prepare a report of his evaluation at the behest of Boyer's trial counsel, his opinions regarding Boyer's mental state were available at the time Boyer plead guilty (DN 1-27 PageID # 221). Second, for the actual innocence gateway to be open the new "evidence must demonstrate factual innocence, not mere legal insufficiency." Patterson v. Lafler, 455 F. App'x 606, 609 (6th Cir. 2012) (citing Bousely, 523 U.S. at 623). Importantly, Dr. Drogin's report would not prove that Boyer was factually innocent for the murder of his wife. The report could only serve as a mitigating factor to lower the criminal responsibility of the degree of homicide from murder to manslaughter as Boyer does not dispute that he shot his wife, thus Dr. Drogin's report would only go towards a legal defense that might have mitigated his sentence. Morris v. Meko, No. 6:12-cv-04-GFVT-HAI, 2015 U.S.

Dist. LEXIS 132506, at *9-10 (E.D. Ky. Sep. 30, 2015) (stating that when the petitioner does not argue they are factually innocent of murder, but instead asserts a potential EED claim that at best "would have *legally* lowered the level of the offense of which he could have been convicted[,]" the petitioner has not satisfied the actual innocence equitable tolling standard); Underwood v. Morgan, No. 4:06-CV-P41-M, 2007 U.S. Dist. LEXIS 29906, at *21-22 (W.D. Ky. Apr. 23, 2007); Lowery v. Bryant, 760 F. App'x 617, 619 (10th Cir. 2019); Beavers v. Saffle, 216 F.3d 918, 923 (10th Cir. 2000) (stating that when the petitioner's arguments of intoxication and self-defense "go to legal innocence, as opposed to factual innocence"). Lastly, the undersigned is not persuaded that a reasonable juror would have voted to find Boyer not guilty beyond a reasonable doubt if Dr. Drogin's report had been made available at the time of trial. Padgett v. Litteral, No. 2:17-CV-00033-DLB-EBA, 2018 U.S. Dist. LEXIS 141708, at *12 (E.D. Ky. May 30, 2018) (quoting McQuiggin, 569 U.S. at 386).

Accordingly, for the reasons discussed above, the undersigned concludes that Boyer is not entitled to tolling under either traditional or actual innocence equitable tolling.

III. § 2244(d)(1)(D)

Boyer makes the brief assertion that the statute of limitations began to run on the discovery of new evidence. 28 U.S.C. § 2244(d)(1)(D) provides that the one-year period of limitation "shall run from . . . the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." When addressing this triggering mechanism, under § 2244(d)(1), the focus should be on "when a duly diligent person in petitioner's circumstances would have discovered" the factual predicate for his claim. *See* DiCenzi v. Rose, 452 F.3d 465, 470 (6th Cir. 2006) (quoting Wims v. United States, 225 F.3d 186, 190 (2d Cir. 2000)). Thus, the operative question under this triggering mechanism is when the petitioner

became aware of the "'important facts for his claims, *not when the petitioner recognizes the legal significance of the facts.*'" Webb v. United States, 679 F. App'x 443, 448 (6th Cir. 2017) (a petitioner's ignorance of a legal claim does not toll the deadline) (emphasis added) (citations omitted).

Here, Boyer does not satisfy § 2244(d)(1)(D), and therefore his statute of limitations did not begin to run on the discovery of "new" evidence, as the section above discussed that the evidence of Dr. Drogin's opinion was not new. Additionally, Boyer's argument focuses on when he understood the legal significance of the evidence, as opposed to his being aware of the evidence from Dr. Drogin's examinations.

Certificate of Appealability

In Slack v. McDaniel, the Supreme Court established a two-pronged test that is used to determine whether a Certificate of Appealability should be issued on a habeas claim denied on procedural grounds. 529 U.S. 473, 484-85 (2000). To satisfy the first prong of the Slack test, a petitioner must demonstrate "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." Id. at 484. To satisfy the second prong, a petitioner must show "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id. Notably, the Court need not conduct the two-pronged inquiry in the order identified or even address both parts if a petitioner makes an insufficient showing on one part. Id. at 485. For example, if the Court determines a petitioner failed to satisfy the procedural prong, it need not determine whether the other prong is satisfied. Id.

For the reasons set forth above, jurists of reason would not find it debatable that Boyer's § 2254 petition must be dismissed because it is time barred and he has not demonstrated entitlement

to traditional or actual innocence equitable tolling. Therefore, the undersigned does not recommend issuance of a Certificate of Appealability.

RECOMMENDATION

For the foregoing reasons, the undersigned **RECOMMENDS** that Boyer's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (DN 1) be **DISMISSED** as time barred. Additionally, the undersigned **DOES NOT RECOMMEND** issuance of a Certificate of Appealability.

May 15, 2023

H. Brent Brennenstuhl

H. Brent Brennenstuhl
United States Magistrate Judge

NOTICE

Under the provisions of 28 U.S.C. §§ 636(b)(1)(B) and (C) and Fed. R. Civ. P. 72(b)(1), the undersigned magistrate judge files these findings and recommendations with the Court and a copy shall forthwith be electronically transmitted or mailed to all parties. Within fourteen (14) days after being served with a copy, any party may serve and file written objections to such findings and recommendations as provided by the Court. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b)(2). If a party has objections, such objections must be timely filed, or further appeal is waived. Thomas v. Arn, 728 F.2d 813 (6th Cir. 1984), aff'd, 474 U.S. 140 (1985).

May 15, 2023

H. Brent Brennenstuhl

H. Brent Brennenstuhl
United States Magistrate Judge

Copies to: William L. Boyer, *pro se*
Counsel of Record

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
BOWLING GREEN DIVISION
CIVIL ACTION NO. 1:22-CV-00061-JHM-HBB

WILLIAM L. BOYER — PETITIONER

VS.

AMY ROBEY, WARDEN, et al. — RESPONDENTS

ORDER

The above matter having been referred to the United States Magistrate Judge, who has filed his Findings of Fact, Conclusions of Law, and Recommendation, no objections having been filed thereto, and the Court having considered the same:

IT IS HEREBY ORDERED that the Court adopts the Findings of Fact, Conclusions of Law, and Recommendation as set forth in the report submitted by the United States Magistrate Judge.

IT IS FURTHER ORDERED that Petitioner's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (DN 1) is **DISMISSED**.

Copies to: William L. Boyer, *pro se*
Counsel of Record

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
BOWLING GREEN DIVISION
CIVIL ACTION NO. 1:22-CV-00061-JHM-HBB

WILLIAM L. BOYER **PETITIONER**

VS.

AMY ROBEY, WARDEN, et al. **RESPONDENTS**

ORDER

The above matter having been referred to the United States Magistrate Judge, who has filed his Findings of Fact, Conclusions of Law, and Recommendation, objections having been filed thereto, and the Court having considered the same:

IT IS HEREBY ORDERED that the Petitioner's objections are overruled, and the Court adopts the Findings of Fact, Conclusions of Law, and Recommendation as set forth in the report submitted by the United States Magistrate Judge.

IT IS FURTHER ORDERED that Petitioner's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (DN 1) is **DISMISSED**.

Copies to: William L. Boyer, *pro se*
Counsel of Record

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
BOWLING GREEN DIVISION
CIVIL ACTION NO. 1:22-CV-00061-JHM-HBB

WILLIAM L. BOYER **PETITIONER**

VS.

AMY ROBEY, WARDEN, et al. **RESPONDENTS**

ORDER

In accordance with the Order of the Court, it is **HEREBY ORDERED AND ADJUDGED** as follows:

(1) Petitioner's petition is dismissed.

(2) This is a **FINAL** judgment, and the matter is **STRICKEN** from the active docket of the Court.

Copies to: William L. Boyer, *pro se*
Counsel of Record

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT BOWLING GREEN
Electronically Filed
Civil Action No. 1:22-CV-P61-GNS

WILLIAM L. BOYER PETITIONER

v.

AMY ROBEY, WARDEN RESPONDENT

ORDER

** ** **

Petitioner, William Boyer, having petitioned this Court for a writ of habeas corpus, the Warden having filed a limited answer to the petition, and the Court being otherwise sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED that the petition is untimely, and is **DENIED** and is **DISMISSED** with prejudice.

DATED: _____

OFFICE OF THE CLERK
UNITED STATES DISTRICT COURT
Room 126 Federal Building
423 Frederica Street
Owensboro, KY 42301-3013

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William L. Boyer
260673
LUTHER LUCKETT CORRECTIONAL COMPLEX
Dawkins Road, Box 6
LaGrange, KY 40031
1-22-cv-61-JHM-HBB DN 24 and 25

40031-000606

Appendix B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
BOWLING GREEN DIVISION
CIVIL ACTION NO. 1:22-CV-00061-JHM-HBB

WILLIAM L. BOYER **PETITIONER**

VS.

AMY ROBEY, WARDEN, et al. **RESPONDENTS**

ORDER

The above matter having been referred to the United States Magistrate Judge, who has filed his Findings of Fact, Conclusions of Law, and Recommendation, objections having been filed thereto, and the Court having considered the same:

IT IS HEREBY ORDERED that the Petitioner's objections are overruled, and the Court adopts the Findings of Fact, Conclusions of Law, and Recommendation as set forth in the report submitted by the United States Magistrate Judge.

IT IS FURTHER ORDERED that Petitioner's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (DN 1) is **DISMISSED**.

Joseph H. McKinley Jr., Senior Judge
United States District Court

July 6, 2023

Copies to: William L. Boyer, *pro se*
Counsel of Record

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
BOWLING GREEN DIVISION
CIVIL ACTION NO. 1:22-CV-00061-JHM-HBB

WILLIAM L. BOYER **PETITIONER**

VS.

AMY ROBEY, WARDEN, et al. **RESPONDENTS**

ORDER

In accordance with the Order of the Court, it is **HEREBY ORDERED AND ADJUDGED** as follows:

(1) Petitioner's petition is dismissed.

(2) The Court certifies that an appeal would be frivolous and therefore not taken in good faith. *See* 28 U.S.C. § 1915(a)(3).

(3) This is a **FINAL** judgment, and the matter is **STRICKEN** from the active docket of the Court.

Joseph H. McKinley Jr., Senior Judge
United States District Court

July 6, 2023

Copies to: William L. Boyer, *pro se*
Counsel of Record

RENDERED: JANUARY 29, 2021; 10:00 A.M.
NOT TO BE PUBLISHED

260673
LCC

FINAL

Commonwealth of Kentucky
Court of Appeals

DATE JUN 11 2021

NO. 2019-CA-0331-MR

WILLIAM BOYER — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
ACTION NO. 11-CR-00328

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CALDWELL, COMBS, AND L. THOMPSON, JUDGES.

COMBS, JUDGE: William Boyer, *pro se*, appeals from an order of the Warren Circuit Court denying a motion to vacate his criminal conviction. Boyer contends that his attorney failed to provide him with adequate legal assistance through the pre-trial process. After our review of the record, the parties' briefs, and the applicable law, we affirm.

Appendix C

William Boyer and Brooke Boyer divorced in 2008. On March 4, 2011, William did not show up for work. Instead, he went to Brooke's home where he overheard a telephone conversation. William returned to his home, retrieved a bolt-action carbine rifle, hid it in a laundry basket, and re-entered Brooke's home. William confronted Brooke in the basement and asked her to give their relationship another chance. She declined and began to climb the stairs. William retrieved the rifle and fired. He reloaded and fired again; reloaded and fired yet again. Brooke was struck by each bullet and fell dead. Outside Brooke's home, William left a telephone and a note to his seven-year-old daughter advising her not to go inside the house but to call 911 instead. William retreated to his home. After a standoff with police, he eventually surrendered. Once in custody, William confessed that he had shot and killed Brooke in her home. He was indicted for murder and first-degree burglary on April 27, 2011.

Thereafter, Boyer submitted to a psychiatric evaluation. The psychiatric report indicated that Boyer was competent to stand trial and capable of appreciating the criminality of his conduct when he shot and killed Brooke. The trial court conducted a competency hearing on July 14, 2011. It concluded that Boyer was competent to proceed.

Defense counsel retained Dr. Eric Drogin, a psychologist, to evaluate Boyer further. On January 3, 2013, counsel filed notice of an intent to present

expert evidence to show that Boyer was suffering from an extreme emotional disturbance at the time of the shooting. Counsel expected that the evidence would be introduced through the testimony of Dr. Drogin.

On March 20, 2012, following extensive negotiations with the Commonwealth, Boyer appeared with counsel before the Warren Circuit Court. He entered a plea of guilty to the murder charge. In exchange for the guilty plea, the Commonwealth agreed to dismiss the first-degree burglary charge and unrelated offenses contained in two other indictments. The Commonwealth agreed to recommend to the court that Boyer be sentenced to serve life in prison but that he be eligible for parole after twenty (20) years. The court's judgment and sentence were entered on April 30, 2013.

On May 4, 2016, Boyer filed a motion to vacate his conviction under the provisions of RCr[1] 11.42. Boyer alleged that trial counsel was ineffective by: failing to investigate the defense of extreme emotional disturbance; failing to obtain a written report from Dr. Drogin; failing to advise him properly as to the defense's likelihood of success; failing to follow-up with a firearms expert to show that the rifle he used to kill Brooke could have misfired; failing to pursue suppression of his confession to police; and guaranteeing him that he would be paroled in twenty (20) years.

[1] Kentucky Rules of Criminal Procedure.

On September 14, 2017, Boyer's appointed counsel filed a motion requesting an evidentiary hearing. The trial court granted the motion and set the matter for hearing to be conducted on June 5, 2018. Boyer and his former counsel, Attorney Lowe and Attorney Downs, testified at the hearing. The circuit court ordered the parties to submit post-hearing briefs.

After considering the evidence and the extensive arguments of counsel, the trial court denied Boyer's motion for post-conviction relief in a comprehensive order entered February 13, 2019. Boyer was permitted to proceed on appeal *in forma pauperis*. On February 27, 2019, the circuit court appointed appellate counsel to represent him.

On June 27, 2019, the Department of Public Advocacy filed an *Anders*[2] motion with this Court to withdraw as Boyer's counsel. In the motion, counsel indicated that the post-conviction proceeding was not one "that a reasonable person with adequate means would be willing to bring at his own expense." Boyer did not respond to the motion. By order entered August 6, 2019, we granted counsel's motion to withdraw and ordered that Boyer submit a brief, *pro se*, within sixty (60) days.

[2] *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L.E.d.2d 493 (1967), provided a procedural framework for safeguarding the constitutional rights of an indigent criminal defendant when appointed counsel determined that there were no legitimate grounds for appeal.

On appeal, Boyer contends that the circuit court erred by denying his motion for post-conviction relief. The Commonwealth disagrees on each substantive ground presented. It also argues that Boyer failed to file a timely motion for post-conviction relief. We agree that Boyer's motion for relief was untimely.

The provisions of RCr 11.42(10) contain a three-year time limitation:

> Any motion under this rule shall be filed within three years after the judgment becomes final, unless the motion alleges and the movant proves either:
>
> (a) that the facts upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence; or
>
> (b) that the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.
>
> . . . If the motion qualifies under one of the foregoing exceptions to the three-year time limit, the motion shall be filed within three years after the event establishing the exception occurred. Nothing in this section shall preclude the Commonwealth from relying upon the defense of laches to bar a motion upon the ground of unreasonable delay in filing when the delay has prejudiced the Commonwealth's opportunity to present relevant evidence to contradict or impeach the movant's evidence.

Untimeliness under the rule operates as a procedural bar to the motion. *Moorman v. Commonwealth*, 484 S.W.3d 751, 757 (Ky. App. 2016). The circuit court's

order denying Boyer's motion for post-conviction relief can be affirmed upon this basis alone.

In *Robertson v. Commonwealth*, 177 S.W.3d 789 (Ky. 2005), *overruled by Hallum v. Commonwealth*, 347 S.W.3d 55 (Ky. 2011), the Supreme Court of Kentucky considered whether an inmate's untimely filing of an RCr 11.42 motion due to a delay in mailing by prison officials could be deemed timely through adoption of the prison mail box rule or the doctrine of equitable tolling. The court rejected the prison mail box rule in favor of equitable tolling, a doctrine that provides that an express limitations period will not bar an untimely claim if, despite the claimant's diligent efforts, extraordinary circumstances prevented a timely filing.

In 2011, RCr 12.04 was amended to adopt the prison mail box rule. RCr 12.04(5) now provides that a "notice [of appeal] shall be considered filed if its envelope is officially marked as having been deposited in the institution's internal mail system on or before the last day for filing with sufficient First Class postage prepaid."

In *Hallum*, the Supreme Court of Kentucky considered the effect of RCr 12.04(5) with respect to an inmate's notice of appeal. The court determined that RCr 12.04(5) should be applied retroactively and addressed the continued applicability of the equitable tolling doctrine. The court concluded that the

equitable tolling doctrine was now "duplicative and superfluous, with its utility marginalized." *Hallum*, 347 S.W.3d at 59. It observed that the "prison mail box rule was crafted to remedy the procedural deficiency our rules posed to *pro se* inmates seeking to appeal; thus, there is no longer a need for *Robertson's* equitable tolling provision." *Id.*

Nevertheless, in *Roach v. Commonwealth*, 384 S.W.3d 131 (Ky. 2012), the Supreme Court of Kentucky again discussed the application of equitable tolling in relation to inmate actions -- this time in relation to an inmate's RCr 11.42 motion. The Court declined to hold that a belated amendment to an inmate's timely filed RCr 11.42 motion could be saved by the doctrine of equitable tolling. The inmate had not presented the issue to either the trial court or to this Court on appeal. Consequently, the Supreme Court concluded that it need not decide whether equitable tolling could ever apply to an untimely RCr 11.42 motion. However, it observed that even if the doctrine of equitable tolling could apply to such proceedings, the doctrine would not apply to the facts before it because the inmate could not show both that he had been pursuing his rights diligently and that some extraordinary circumstance stood in his way and prevented a timely filing.

Thereafter, in *Moorman*, this Court observed that the Supreme Court of Kentucky had not given a definitive answer as to whether the doctrine applies in the context of RCr 11.42 motions. Nevertheless, relying upon precedent of the

Supreme Court of the United States, we held that in order to invoke equitable tolling, an inmate must establish that he had been pursuing his rights diligently and that some extraordinary circumstance stood in his way. *Moorman*, 484 S.W.3d at 757 (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S.Ct. 1807, 1814, 161 L.Ed.2d 669 (2005)). In that case, we concluded that the inmate failed to carry her burden to establish these factors and that equitable tolling did not apply to save the claims asserted in an untimely supplement to her RCr 11.42 motion.

Boyer began to pursue post-conviction relief shortly after his conviction in April 2013. In December 2013, he indicated to the circuit clerk that he believed counsel had failed to provide him with adequate assistance, and he requested a copy of the record compiled in his case so that he could finish preparing his RCr 11.42 petition. Nearly two years later, Boyer began filing a series of motions requesting the Warren Circuit Court to order that he be provided certified copies of records, many of which were not in the court's possession. In an order entered November 25, 2015, the court directed the Warren Circuit Clerk to provide to Boyer the documents in its possession. Boyer's petition for relief was eventually filed on May 4, 2016.

Because Boyer waived his right to appeal when he entered a guilty plea, the court's judgment of conviction and sentence became final when it was entered on April 30, 2013. *See Palmer v. Commonwealth*, 3 S.W.3d 763 (Ky. App.

1999). Boyer's petition for post-conviction relief was not filed within the three-year period provided for by RCr 11.42. Accordingly, the petition was untimely unless the circumstances warranted application of the equitable tolling doctrine. The record before us, as summarized above, does not indicate that Boyer diligently pursued his rights. All the facts upon which his claim is predicated were known to him; he even personally corresponded with Dr. Drogin. Nothing prevented Boyer from filing a timely claim. Consequently, the doctrine of equitable tolling is inapplicable. His petition for relief was untimely.

Even if Boyer's petition were not procedurally barred by its untimeliness, we would affirm the order of the Warren Circuit Court denying his request for relief. Boyer's allegations of ineffective assistance of counsel are evaluated under the standard promulgated by the Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), *as modified by Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), where the defendant pleaded guilty rather than going to trial.

Where a movant has pled guilty, he must later demonstrate on appeal that: (1) defense counsel's performance fell outside the wide range of professionally competent assistance; and (2) a reasonable probability exists that, but for the deficient performance of counsel, the movant would not have pled

guilty -- but would have insisted on going to trial. *Commonwealth v. Rank*, 494 S.W.3d 476 (Ky. 2016).

Courts considering a collateral attack on a judgment of conviction must presume that counsel's performance was reasonable. *Commonwealth v. McGorman*, 489 S.W.3d 731, 736 (Ky. 2016) (citing *Commonwealth v. Bussell*, 226 S.W.3d 96, 103 (Ky. 2007)). We must

> consider the totality of the circumstances surrounding the guilty plea and juxtapose the presumption of voluntariness inherent in a proper plea colloquy with a *Strickland v. Washington* inquiry into the performance of counsel[.]

Rank, 494 S.W.3d at 481 (quoting *Bronk v. Commonwealth*, 58 S.W.3d 482, 486 (Ky. 2001)). The circuit court's factual findings are reviewed only for clear error; the application of legal standards is reviewed *de novo*. *Commonwealth v. Thompson*, 548 S.W.3d 881, 887 (Ky. 2018).

Boyer contends that the circuit court erred by concluding that counsel provided adequate legal assistance because he fully investigated an extreme emotional disturbance defense and advised Boyer of Dr. Drogin's opinion and potential testimony regarding the defense. We disagree.

The circuit court was persuaded by counsel's testimony indicating that he consulted with Dr. Drogin regarding his opinion that Boyer had acted under extreme emotional disturbance. The court found that counsel shared this

information with Boyer and that counsel was not required under the circumstances to request that Dr. Drogin generate a written report. The circuit court noted that there was countervailing evidence indicating that Boyer had not acted under extreme emotional disturbance and that there was no assurance that a jury would be persuaded by Drogin's anticipated testimony given the circumstances. The court accepted counsel's assessment of the risks of trial and the benefit of pleading guilty. It is not ineffective assistance of counsel for an attorney, after investigating the case, to advise his client to plead guilty in anticipation of a lighter sentence. *Osborne v. Commonwealth*, 992 S.W.2d 860 (Ky. App. 1998). The circuit court's factual findings were supported by substantial evidence. There was no error.

Next, Boyer contends that the circuit court erred by failing to conclude that he was deprived of adequate legal assistance because counsel did not file a motion to suppress Boyer's confession and did not consult with a ballistics expert. Again, we disagree.

With respect to the ballistics expert, the circuit court accepted counsel's testimony indicating that he had retained and consulted with John Nixon, a forensic firearms and ballistics expert. Nixon's expert opinion foreclosed a defense that Boyer had accidentally discharged the rifle. The circuit court's findings were supported by substantial evidence. There was no error.

With respect to counsel's decision not to pursue suppression of Boyer's confession, the circuit court found that counsel had considered filing a motion to suppress but concluded that there was no legal basis upon which to challenge the voluntariness of Boyer's statement to police. It found that Boyer failed to provide a sufficient basis upon which to question the admissibility of this statement to police. The circuit court also found: that Boyer was properly advised about his constitutional rights; that he understood them; and that the police interview was not unfairly coercive. Finally, the circuit court found that if the confession had been subject to suppression, there is no basis upon which to conclude that Boyer was unfairly prejudiced by a failure to file the motion because other evidence of his guilt was overwhelming. The circuit court was not persuaded that Boyer would have insisted on going to trial in light of the compelling evidence against him. The circuit court's factual findings were supported by substantial evidence. There was no error.

In summary, Boyer did not file a timely motion for relief. But even if the motion had been timely, he failed to show that counsel's performance was deficient. Consequently, the circuit court did not err by denying the post-conviction motion for RCr 11.42 relief.

We AFFIRM the order of the Warren Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

William Boyer, *Pro Se*
Lagrange, Kentucky

BRIEF FOR APPELLEE:

Daniel Cameron
Attorney General of Kentucky

James Havey
Assistant Attorney General
Frankfort, Kentucky

KELLY STEPHENS
CLERK
SUPREME COURT OF KENTUCKY
STATE CAPITOL BUILDING
700 CAPITAL AVENUE, ROOM 209
FRANKFORT, KENTUCKY 40601

05/06/22

ED

2021-SC-0081-D
WILLIAM BOYER # 260673
LUTHER LUCKETT CORRECTIONAL COMPLEX
1612 DAWKINS RD, PO BOX 6
LAGRANGE KY 40031

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DSZ-SSB 40031

Appendix D

KELLY STEPHENS
Clerk

OFFICE OF THE CLERK
SUPREME COURT OF KENTUCKY
ROOM 209, STATE CAPITOL
700 CAPITAL AVE.
FRANKFORT, KENTUCKY 40601-3488

Telephone:
(502) 564-4720
FAX:
(502) 564-5491

5/5/2022

William Boyer #260673
Luther Luckett Correctional Complex
1612 Dawkins Rd. PO Box 6
LaGrange, KY 40031

RE: Request for Documents

Dear Mr. Boyer:

Please find enclosed the following: a copy of the Order denying the Motion for Discretionary Review in 2021-SC-0081-D

Kind Regards,

KELLY STEPHENS, CLERK

By: _____
Chief Deputy Clerk

Enclosures: Order denying the Motion for Discretionary Review in 2021-SC-0081-D

Supreme Court of Kentucky

2021-SC-0081-D
(2019-CA-0331)

WILLIAM BOYER — MOVANT

V.

WARREN CIRCUIT COURT
11-CR-00328

COMMONWEALTH OF KENTUCKY — RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion to supplement the motion for discretionary review is granted.

The motion for review of the decision of the Court of Appeals is denied.

ENTERED: June 9, 2021.

John D. Minton, Jr.
Chief Justice

Name: Boyer, William L.
IPTS020A

DOC #: 260673 PID #: 0022872
Friday March 29, 2024 08:25:29 AM

External Movements (1 - 27 of 27)

Date	Time	Reporting Location	Movement Type	Reason	Other Location
03/24/2021	04:28 PM	Luther Luckett Corr. Complex	Received at DOC Facility	Not Specified	Southeast State Corr. Complex
03/24/2021	11:58 AM	Southeast State Corr. Complex	Transferred to DOC Facility	Not Specified	Luther Luckett Corr. Complex
12/08/2020	01:24 PM	Southeast State Corr. Complex	Received at DOC Facility	Not Specified	Luther Luckett Corr. Complex
12/08/2020	07:23 AM	Luther Luckett Corr. Complex	Transferred to DOC Facility	Not Specified	Southeast State Corr. Complex
06/05/2018	07:20 PM	Luther Luckett Corr. Complex	Returned from Court Appearance	Not Specified	Warren County Jail
06/05/2018	11:09 AM	Luther Luckett Corr. Complex	Out To Court Appearance	Not Specified	Warren County Jail
08/03/2017	10:07 AM	Luther Luckett Corr. Complex	Returned from Medical	Completed Treatment	Kentucky State Reformatory
08/03/2017	08:21 AM	Luther Luckett Corr. Complex	Out on Medical	Medical Appointment	Kentucky State Reformatory
08/04/2016	10:00 AM	Luther Luckett Corr. Complex	Returned from Medical	Completed Treatment	Kentucky State Reformatory
08/04/2016	07:24 AM	Luther Luckett Corr. Complex	Out on Medical	Medical Appointment	Kentucky State Reformatory
10/01/2015	11:00 AM	Luther Luckett Corr. Complex	Returned from Medical	Completed Treatment	Kentucky State Reformatory
10/01/2015	08:10 AM	Luther Luckett Corr. Complex	Out on Medical	Medical Appointment	Kentucky State Reformatory
01/22/2015	12:47 PM	Luther Luckett Corr. Complex	Returned from Medical	Completed Treatment	Kentucky State Reformatory
01/22/2015	08:32 AM	Luther Luckett Corr. Complex	Out on Medical	Medical Appointment	Kentucky State Reformatory
11/20/2013	11:21 AM	Luther Luckett Corr. Complex	Returned from Medical	Completed Treatment	Kentucky State Reformatory
11/20/2013	08:16 AM	Luther Luckett Corr. Complex	Out on Medical	Medical Appointment	Kentucky State Reformatory
08/09/2013	08:33 AM	Luther Luckett Corr. Complex	Received at DOC Facility	Not Specified	Kentucky State Reformatory
08/09/2013	07:48 AM	Kentucky State Reformatory	Transferred to DOC Facility	Not Specified	Luther Luckett Corr. Complex
07/17/2013	01:14 AM	Kentucky State Reformatory	Received at DOC Facility	Hold Ticket	Roederer Assessment Cntr
07/16/2013	11:52 PM	Roederer Assessment Cntr	Transferred to DOC Facility	Hold Ticket	Kentucky State Reformatory
06/14/2013	11:31 AM	Roederer Assessment Cntr	Received at DOC Facility	Not Specified	Kentucky State Reformatory
06/14/2013	11:02 AM	Kentucky State Reformatory	Transferred to DOC Facility	Not Specified	Roederer Assessment Cntr
05/31/2013	11:56 AM	Kentucky State Reformatory	Received at DOC Facility	Hold Ticket	Roederer Assessment Cntr
05/31/2013	11:45 AM	Roederer Assessment Cntr	Transferred to DOC Facility	Hold Ticket	Kentucky State Reformatory

APPENDIX: F

Date	Time	Reporting Location	Movement Type	Reason	Other Location
05/23/2013	10:57 AM	Roederer Assessment Cntr	Received at DOC Facility	Controlled Intake	Warren County Jail
05/23/2013	10:09 AM	Warren County Jail	Transferred to DOC Facility	Controlled Intake	Roederer Assessment Cntr
04/29/2013	04:09 PM	Warren County Jail	New Commitment	Controlled Intake	Warren County Jail

Appendix F: